1997

Lawyers' Roles in Child Protection

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Publication Information & Recommended Citation

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THE BATTERED CHILD
FIFTH EDITION
Revised and Expanded

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THE UNIVERSITY OF CHICAGO PRESS
Chicago and London
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What roles and responsibilities do lawyers assume in civil child protection cases? As distinguished from other legal proceedings which may grow from a case of child maltreatment, civil child protection proceedings focus on the child and the child's needs. These civil cases are not concerned with punishing an offender, recovering money damages from a person or institution who may have harmed a child, or suspending someone from a professional license. The focus here is on the proper care and custody of the child.

Nearly all aspects of interdisciplinary intervention in families to assist children who may be maltreated is governed by some type of law—from rules guiding professional ethics to statutes governing confidentiality and reporting of suspected child abuse and neglect, from criminal penalties for child maltreatment to state and federal constitutional protections of the family relationship. Yet, despite the fact that legal issues related to child abuse and neglect may be raised in forums as diverse as administrative hearings regarding professional licensure, criminal prosecutions, and the U.S. Supreme Court, the court most professionals think of first in connection with child abuse or neglect within the family is the local family or juvenile court. Juvenile or family courts are created by state statutes and are responsible for child protection and foster care. It is the juvenile or family court that receives (and oversees) the work of the physicians, social workers, psychologists, and other members of a community's multidisciplinary child protection network. It is the juvenile or family court that decides whether a child should be removed from a parent's custody, what rehabilitation program should be followed by the parent and the child welfare agency, and, ultimately, whether a child in foster care or other alternative care should be returned to a parent's custody or whether termination of parental rights is the appropriate course in the best interests of the child.

When society at large, through child protective services, attempts to intervene in the private life of a family on behalf of a child, the court must assure that the rights of the parents, the rights of the child, and the rights of society are protected. If any of these rights are to be abridged, this is decided only after full and fair and objective court process. Except in emergency situations, only the court can abridge these personal rights. Only the court can compel unwilling parents (or children) to submit to the authority of the state. The court,
then, controls the coercive elements of our society and allows those coercive elements to be unleashed only after due process of law.

The personal rights at stake for both parents and children in child protection have been recognized in our law as fundamentally important constitutional rights (1). The rights of parents to the care and custody of their children and the rights of children to live with their parents without government interference can be infringed only after due process of law.

Due process of law in our American system of justice generally means, among other things, that a parent and child facing child protection proceedings are represented by a lawyer. The child protection agency also has a lawyer acting on its behalf. What is the proper role of these attorneys? What can the nonlawyers involved in child abuse and neglect cases expect from the lawyers? In this chapter I will examine the three major roles of lawyers in child protection civil proceedings: representing the sometimes overlapping and sometimes conflicting individual interests of the child, the agency, and the parent.

The Adversarial Process

The lawyers' roles in child protection cases are defined in the context of an adversarial process—the traditional basis of all American jurisprudence. For good or ill, the legal system in the United States relies on an adversarial process to evaluate competing legal interests.

As in other areas of legal contest, lawyers in child protection act as advocates for one side or another or for one set of interests or another. Lawyers need not pursue the solution best for all concerned and need not even ascertain what is generally best in the circumstances; rather, they owe primary allegiance to their own client, whose particular position they must determine and then advocate for zealously. According to our legal traditions, the adversarial presentation of competing points of view should result in a fair and just resolution.

Most physicians, psychologists, and social workers come from professional backgrounds encouraging trust and cooperation and find the adversarial court process disconforting, foreign, nonproductive, or counterproductive in terms of the “real problems” faced by a family involved in child maltreatment proceedings. The influence of these “helping” professions, the growth of alternative forms of dispute resolution in the law today, and a problem-solving ethic long held by judges and lawyers experienced in child maltreatment cases all contribute to a muting of the adversarial tone in child protection cases. Instead, we see an emphasis on negotiation and mediation to work these matters out. Several communities have experimented extensively with mediation approaches to child abuse and neglect cases (2). Attorneys accustomed only to the adversarial system are well advised to adjust their thinking in juvenile court to a less confrontational approach and to greater reliance on negotiation and mediation.

There are times, however, when the adversarial process is important and must be relied upon. When negotiation cannot resolve the dispute, when the parties seriously differ about the right of the state to intervene in a family or profoundly disagree about the appropriateness of the action proposed (which could be as fundamental as foster care or termination
of parental rights), some means to resolve these conflicts must be available—and enforceable. That is when the adversarial process has its place. Despite the important movement toward more cooperation and conciliation in family and juvenile court, the legal process remains ultimately adversarial when other means of conflict resolution fail. Participants in the court process must learn to function within the adversarial system, to appreciate its advantages and minimize its many disadvantages.

The Child’s Advocate

Once a matter alleging child maltreatment is brought to a family or juvenile court, an independent advocate, nearly always an attorney, is appointed to represent that child. The Federal Child Abuse Prevention and Treatment Act (3) requires that guardians ad litem be appointed to represent children in civil abuse and neglect cases as a condition of states’ eligibility to receive federal funding for child protection and foster care activities. Consequently, statutes in all states require or permit the appointment of an advocate for the child in child protection cases (4–6). Neither the federal law nor its implementing regulations, however, define the roles or responsibilities of the child’s representative once appointed. The duties and responsibilities of the appointed representative of the child are generally not clearly defined in state statutes either (4, par. 2.1).

Some see the child’s representative as an extraneous figure and argue that the interests of the child are adequately protected by the child welfare agency, by the parents, or by the judge (5, p. 10; 7, p. 5). Others may see the child’s representative as having limited value in a given case since the representative usually has had no special training or background preparing him or her for this nontraditional role (7, p. 13; 8; 9). The influential commentators Joseph Goldstein, Anna Freud, and Albert Solnit, in deference to parental autonomy, would reserve the power to appoint a legal representative for the child only to the parents, unless the parents are displaced as the legal protectors of the child by emergency out-of-home placement or formal court adjudication (10, pp. 111–29).

The prevailing view across the country today, however, is that children should be independently represented in civil child protection proceedings (5, 8, 11, 12). At least one court has held that the child’s right to effective representation is based not only on statute but on the constitution as well. The Supreme Court of New York, Appellate Division, held in In the Matter of Jamie "TT" that the child has a right, in protection proceedings, to effective assistance of counsel not only based on state statute but also guaranteed by her (or his) constitutionally protected liberty interest in the outcome of the proceeding as it affects her personal safety and integrity (13).

Nonetheless, dissatisfaction about the representation and advocacy provided children in child abuse and neglect cases remains widespread. Many doubt that attorney represent-

1. “In every case involving an abused or neglected child which results in a judicial proceeding, the state must insure the appointment of a guardian ad litem or other individual whom the state recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the best interests of the child” (45 C.F.R. §1340.14[g]).
tation can really make a difference to the outcome of the case when attorneys generally receive little or no special training in the needs of children or in specific strategies of advocating for them in the complex child welfare system.

The search for the best way to advocate for children has taken many forms. The National Center on Child Abuse and Neglect has funded demonstration projects around the country since 1981 in which children are represented by volunteer lawyers, law students, multidisciplinary child advocate offices, and lay volunteers (5). Communities have experimented with trained volunteers to either represent the child or assist a lawyer in representing the child (14, 15). Seattle began a guardian ad litem program in 1977, using the acronymic title CASA (court appointed special advocate) to designate the lay volunteer who represents children in child protection cases (12). The National Council of Family and Juvenile Court Judges has encouraged CASA program development in many ways, including sponsoring a national CASA seminar. The CASA movement is growing and spreading fast. When the fourth edition of The Battered Child went to press in 1987, there were 173 such programs, in thirty-nine states (16). As of summer 1996, there are 641 CASA programs, in all fifty states, coordinating approximately 38,000 volunteers (17, p. 20). In 1995 these men and women spoke for an estimated 129,000 abused and neglected children in court (17). An active national CASA association publishes a national newsletter, organizes an annual meeting, and provides other services.

The question of whether someone other than a lawyer should represent children has been raised in several quarters (18, 19). The American Bar Association itself, in its 1979 Juvenile Justice Standards Project, comments:

While independent representation for a child may be important in protective and custodial proceedings, a representative trained wholly in law may not be the appropriate choice for this function. . . .

Accordingly it would not seem irresponsible to suggest that a professional trained in psychology, psychiatry, social psychology or social welfare be assigned the initial responsibility for protecting children under these circumstances. There is, however, no evidence that this alternative is presently available, either in terms of numbers of competent personnel or in terms of occupational independence from official and interested agencies. . . . [U]ntil there are sufficient numbers of independent, competent personnel trained in other disciplines who will undertake to ascertain and guard the child's interests in these proceedings, continued reliance on legal representation for the child is necessary. (8, pp. 73–74)

Empirical and anecdotal support for the current unhappiness with the legal representation children receive is close at hand. In 1994 the U.S. Department of Health and Human Ser-
ervices released the most ambitious national empirical study yet of the representation of
children in protection cases (4). This important study, conducted by CSR, Inc., of Wash­
ington, D.C. (hereafter referred to as the Study of Legal Representation), presents a sober­
ing and somewhat disappointing portrait of child representation as currently practiced in
the United States. In one remarkable finding, almost 30% of private attorneys had no type
of contact with their clients, the children. Only 94.5% of the private attorneys attended all
the court hearings in new cases affecting the child; 80% attended all hearings in review
cases. Would an adult agree to be represented by an attorney who did not appear at all
relevant court hearings?

The children themselves were rarely involved in the court process. The private attor­
neys reported that in only 18.6% of the cases did the child appear before the judge in court.
CASAs reported that the child appeared in 12.3% of their cases, and staff attorneys reported
that the child appeared before the judge in court in 9.8% of the cases.

Monitoring the progress of a case is considered by many as an extremely important
aspect of advocacy for the child, yet more than 25% of the private attorneys in the study
said that monitoring activities were inapplicable to their professional role. Over 50% of the
private lawyers had no contact with the child between hearings, and only 36% of case­
workers reported being contacted by the private attorneys.

Dissatisfaction with the present system of attorney representation has provided an im­
petus for clarifying the duties and responsibilities of the child’s representative and for
searching out alternative means of representing children. Even though there is no consensus
on the child advocate role, some common approaches are emerging. In 1988, the New York
State Bar Association published standards for law guardians representing children in child
protection proceedings (20, p. 11). The Colorado State Bar Association did the same in
1992 (20, p. 13). In February 1996, the American Bar Association adopted Standards of
Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. These stan­
dards are likely to be very influential and will provide the needed consensus on the child
advocate role: “All children subject to court proceedings involving allegations of child
abuse and neglect should have legal representation as long as the court jurisdiction con­tin­
ues” (11, p. 1301).

In Advocating for the Child in Protection Proceedings (21, p. 36), I set out ten dimen­sions of child advocacy for the child’s representative to address at each procedural stage of
the proceedings:

1. Investigation
2. Consultation
3. Assessment
4. Identifying the child’s interest
5. Permanency planning
6. Client counseling

4. The complete study is available through the National Clearinghouse on Child Abuse and Neglect Infor­
information, U.S. Department of Health and Human Services, P.O. Box 1182, Washington, D.C. 20013-1182; by fax
at 703-385-3206; or by telephone at 800-FYI-3366.
7. Decision making
8. Problem solving and mediation
9. Identifying action steps
10. Follow-up

Reflecting this emerging consensus on the child advocate role, the national CASA association has developed a very important statement of the roles and responsibilities of guardians ad litem applicable to whomever represents the best interests of the child in that capacity—attorney, CASA, or some other person (22). The guardian ad litem (GAL) must:

1. Act as an independent gatherer of information whose task it is to review all relevant records and interview the child, parents, social workers, teacher, and other persons to ascertain the facts and circumstances of the child’s situation.
2. Ascertain the interests of the child, taking into account the child’s age, maturity, culture and ethnicity, consistent with providing the child with a safe home, taking into account the need for family preservation and permanency planning.
3. Seek cooperative solutions to the child’s situation within the scope of the child’s interest and welfare.
4. Provide written reports of findings and recommendations to the court at each hearing to assure that all the relevant facts are before the court and ensure that appropriate motions are filed seeking child centered relief.
5. Appear at all hearings to represent the child’s interests, providing testimony or ensuring that appropriate witnesses are called and examined.
6. Explain the court proceedings and the role of GAL to the child, when appropriate, in language and terms that the child can understand.
7. Ask that clear and specific orders are entered for the evaluation, assessment, services, placement, and treatment of the child and the child’s family.
8. Monitor implementation of service plans and dispositional orders to determine whether services ordered by the court are actually provided in a timely manner, and are accomplishing their desired goal. Monitor the progress of a case through the court process and advocate for timely hearings.
9. Inform the court promptly if services are not being made available to the child and/or family, if the family fails to take advantage of such services, if services are not achieving their purpose, and bring to the court’s attention any violation of orders, new developments, or changes in the child’s circumstances.
10. Advocate for the child’s interests in mental health, educational, and other community systems. (22, pp. 6–7)

The 1994 Study of Legal Representation included a “technical expert group” of academics, attorneys, judges, and lay volunteers which identified a core set of five functions that the child advocate should perform in order to be effective.

1. The representative should advocate for the child both within and outside the confines of the courtroom. The advocate should pursue the best interests of the child much as a reasonably concerned parent would for his/her own child.
2. The advocate should be *child centered*, that is, be aware of the child’s age-specific, developmental, and cultural needs.

3. Since *continuity of representation* is especially important to a child, the same representative should act for the child from the initial emergency hearing to the time when the court no longer has jurisdiction over the child.

4. A mechanism for *accountability* should monitor and evaluate the performance of the child advocate.

5. The child advocate should act *independently*, as administratively and politically separate from the child welfare agency and the court. (4, pp. 5.2–5.3)

The *Study* encourages the use of CASAs but recommends that an attorney be present at all hearings.

Thus, whether the child is represented by a lawyer or a team of lawyer and lay volunteer, the child advocate’s role should be aggressive, ambitious, and encompass both legal and nonlegal interests of the child. This definition of the child representative’s role, consistent with that of most major commentators (8, 12, 19), rejects a passive, purely procedure-oriented approach. In child protection proceedings, the children need more than a technician to ensure legal precision; they need more than a passive observer and adviser to the court—they need an active advocate for their interests. Advocacy for children includes traditional courtroom advocacy but also emphasizes out-of-court advocacy in informal meetings with the social agencies and telephone contacts with other service deliverers. That advocate is generally a lawyer and is charged both with representing the “best interests” of the child and with making an independent judgment of what those “best interests” might be. The statute in Michigan is illustrative:

> The court, in every case filed under this act in which judicial proceedings are necessary, shall appoint legal counsel to represent the child. The legal counsel, in general, shall be charged with the representation of the child’s best interests. To that end, the attorney shall make further investigation as he deems necessary to ascertain the facts, interview witnesses, examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court, and participate in the proceedings to competently represent the child. (23)

But what are the child’s “best interests”? What goals are child representatives obliged to pursue on behalf of the child? In most settings, a lawyer’s client is an adult and is able to articulate what he or she wants, which essentially determines the position the lawyer will take. In child protection, however, the position to be taken by the advocate may be quite unclear. The child is frequently unable to express a view. And even when a child (sometimes a very young child) does express a view, the advocate charged with representing that child’s “best interests” may disagree with the youthful client and advocate a different position (11, pp. 1308–14; 24, rule 1.14; 25; 26; 27, pp. 296–99).

The child’s best interests are not susceptible to objective definition but remain wreathed in personal values. Robert Mnookin writes:

> Deciding what is best for a child often poses a question no less ultimate than the purposes and values of life itself. Should the decision maker be primarily concerned with the child’s happiness
or with the child’s spiritual and religious training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values of life found in warm relationships? In discipline and self-sacrifice? Are stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is one to look for the set of values that should guide decisions concerning what is best for the child? ... [I]f one looks to our society at large, one finds neither a clear consensus as to the best child-rearing strategies, nor an appropriate hierarchy of ultimate values. (28, p. 18)

Describing the child representative as the advocate for the best interests of the child, moreover, does little to distinguish the child representative’s role from that of the other participants in the child protection process. The child protection agency generally considers that achieving the best interests of the child is its primary goal and purpose. The parents’ attorney will also argue for what his clients see as the best interests of the child (which is generally to be at home with his or her parents free of government interference). The judge makes the ultimate ruling of what is in the best interests of the child, and judicial opinions consistently reinforce the paramount importance of the child’s best interests in court decision making.

The child’s representative faced with deciding what is in the child’s best interests only rarely has received law school training that equips him or her to assess parental conduct, to appraise the harms to a child presented by a particular environment, to recognize strengths in the parent-child relationship, or to evaluate the soundness of an intervention strategy proposed by the social agency.5 The child’s representative, to perform responsibly, must synthesize the results of the protective services investigation; the child’s psychological, developmental, and physical needs; the child’s articulated wishes; and the representative’s own assessment of the facts and of the treatment resources available. Many of the child’s best interests are ordinarily addressed by the various professionals involved in the child protection process, but others may be easily overlooked by all but the child’s representative.

Despite the ambiguity of determining a child’s interest (or “best interests”), there are many interests of most children, most of the time, that are quite clear and that a skilled advocate can help realize for the child. Certainly, the child is to be protected from physical and emotional harm and provided with minimally adequate food, clothing, shelter, guidance, and supervision. But other interests are more subtle. The state intervention itself presents additional risks to the child of which the child advocate must be wary. The interests of an individual child are not always consistent with those of the state agency. If it has high caseloads, the agency may not be willing or able to meet each child’s individual needs (for example, for frequent visitation). An overburdened caseworker may not be as sensitive, as careful, or as skilled in judgment as he or she would under less taxing circumstances. Consequently, the caseworker may precipitately recommend separation of the child from fa-

5. The Child Advocacy Law Clinic at the University of Michigan Law School, founded in 1976, may be the longest-running clinic in the United States continuously providing live client-student experience in child protection and foster care. The Michigan clinic is interdisciplinary in approach. There are now approximately twenty American law schools that offer clinical programs in which student lawyers learn about representation of children and parents in child protection and related cases.
miliar surroundings or may inadequately assess the child’s home situation and prescribe remedies that are inappropriate, inadequate, or too late. The child runs the risk of being placed in multiple foster homes, of being placed in inappropriate surroundings, of being abused in foster care, or of not being permitted frequent enough visits with his or her parents and family. Reasonable case plans may be developed by social agencies but not implemented properly, or implemented too slowly, thus adding to the length of time the child is out of his or her home and lessening the child’s chances of ever returning home.

Although family preservation efforts may be in the interests of most children most of the time, an individual child’s interests may not be served by preservation efforts. The child’s advocate must be careful that his or her client is not sacrificed on the altar of family preservation. It is the child, not the family, who is this advocate’s client.

In formulating a defensible position for the child, the child’s advocate must ascertain the facts of the case as clearly as possible by relying on the protective services investigation in some cases and by interviewing family members, neighbors, and others as necessary. The child’s advocate should meet his or her client in every case, even if it is simply for the purpose of getting a “feel” for the child as a real person facing a serious personal dilemma. The advocate should always keep the child in mind in the midst of all the paperwork of court petitions and social work reports.

The child’s representative ought not to accept social work recommendations without analyzing them first. While maintaining a cooperative spirit, he or she should question the social worker closely and extract the underlying basis for the caseworker’s positions and recommendations. The advocate should reach his or her conclusions independently.

The advocate should strive to identify what the determinants of the family’s problems are. Once the underlying determinants are discerned, the advocate can help discover ways to address and ease them. Thus, I would encourage a child advocate to take a broad view of the child’s interests, to avoid a piecemeal approach to the child’s and the family’s problems, and to see the child in the context of his or her family.

Having identified the needs and interests of the child, the representative should advocate vigorously for those interests. The advocacy for the child ought to begin with the social agency that filed the petition. The child’s representative should advocate for a careful assessment of the family situation, for adequate and specific case plans, and for timely implementation of case plans. The child’s interests include preserving his or her placement with a parent (or parents) if at all possible, when consistent with the child’s own well-being and safety. The child generally has an interest in maintaining contact with the family through regular visits. If removal from the family is necessary, separation should be for the shortest time possible, and placement should generally be to a familiar setting (the least restrictive, most family-like setting). If services to the child or the family are needed before the child can be allowed to return home, those services should be identified accurately and provided promptly.

6. Other authorities advocate for the “least intrusive form of intervention” (8, p. 82), or the “least detrimental alternative” (10, pp. 53–64). The Federal Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272, 42 U.S.C.A. §675[5][A]) requires the use of the least restrictive (or most family-like) setting available in close proximity to the parents’ home, consistent with the best interest and special needs of the child.
The child's advocate can play a significant role in facilitating negotiation and mediation. Resolution of the legal dispute that is swift, as cooperative and as nonadversarial as possible, and efficient in providing needed protection and services to the child is nearly always in the child's best interests. Representatives of children should be trained to encourage negotiation and to assume the role of mediator and conciliator between the social agency and the parents.

In the court hearing, the child's representative ensures that all the relevant facts are brought before the judge and advocates for a resolution of the case most likely to achieve the identified interests of the child.

The role of the child's representative after adjudication should remain vigorous and active. The child advocate can press and persuade the responsible social agencies for services and attention which the child client (and perhaps the family) needs. Preferably, such nudging can be done in a collegial, nonaccusatory manner—but if social workers or agencies are not fulfilling their responsibilities to a particular child (or to the parents), the child's representative may insist on a higher standard of service either by entering a direct request to supervisors in the agency or by formally raising the issue before the court.

Thus the child advocate's role covers not only the traditional legal representation of the case but also the social, psychological, and service delivery aspects of the case so important to the child. In an empirical study, advocates trained to represent children in the manner I have described here provided improved representation for children and achieved better outcomes for their young clients (14, 15).

It is often in the interests of children for the child's representative to advocate for the child's interests in the mental health, educational, and juvenile justice systems, as well as in other community systems, if these play a part in the circumstances that caused the child to come within the child abuse and neglect jurisdiction of the juvenile or family court. The legal system may carve a child up into nice, neat categories of problems—but it is still one child after all, and an aggressive advocate can help coordinate the various legal proceedings and help the youngster get treated as a whole person. The advocate can pursue the child's legal rights and secure needed services in those other community systems.

The national *Study of Legal Representation* makes some recommendations about organizing the delivery of advocacy services to children. An optimal approach may involve a child advocate office in which the child is independently represented by an interdisciplinary team of lawyers, social workers, and lay volunteers. In additional to enhancing the advocacy of individual children, such offices may actually achieve some systemic economies by shortening the time spent in court, requiring few court hearings, and reducing the time a youngster spends in temporary foster care.

In any case, the ambitious child advocate role suggested here and by other commentators (29) is sorely limited in practice by the lack of specific training for the role and by the low fees paid in many communities to private attorneys representing children. The ABA report *America's Children at Risk* recommends that "[e]very law school should offer its students the opportunity to learn about children's issues (including related topics such as poverty and disability law) as part of their substantive studies and to represent children and families as part of clinical training programs during their law school years" (30, p. 8). The
The Protective Services Attorney

For many years, and continuing today in some jurisdictions, no attorney appeared on behalf of the social agency or the individual that filed the petition alleging child abuse or neglect and seeking to protect a particular child from harm. In the recent past, if an attorney did appear in child protection cases, he or she was likely to be a young assistant prosecutor or assistant county corporation counsel with little preparation time, limited experience in such cases, and little familiarity with either the juvenile court or child protection law. The child neglect attorney, if there was one, was often the staff member most recently hired by the county prosecutor's office. And the juvenile court was seen in those days mainly as a good place for lawyers to get experience before moving up to bigger and more important cases in other courts.

Attorneys assigned to child protection often complained about the lack of specificity with which their social worker clients presented their cases and about the "murkiness" and lack of legal standards in the juvenile court generally. Juvenile court, and especially child abuse and neglect cases, often received low priority among members of the bar.

In recent years, concurrent with the due process revolution in juvenile court, the role and functioning of all attorneys in child protection have gained importance and more precise definition. The need for competent legal advice for petitioning agencies in child protection cases has been increasingly recognized. Proving child abuse or neglect in child protection cases is often very difficult. Furthermore, since the parents are generally represented by an attorney and the child in question must be independently represented, a petitioning protective services worker is at a distinct disadvantage in an adversarial court if he or she is charged with the burden of proof without benefit of legal counsel. In fulfilling their responsibilities to children and to families, child protection agencies need consistent and reliable legal assistance.

David Herring of the University of Pittsburgh Law School has produced a guidebook, *Agency Attorney Training Manual*, which details the important attorney-social worker collaboration necessary for successful child protection and termination-of-parental-rights actions.7 The role of the petitioner's attorney in child protection cases includes conventional attorney duties but differs from the traditional lawyerly tasks in several respects.

Lawyers who represent banks learn the banking business very well. Lawyers who represent labor become acquainted with labor unions and labor organizing from top to bottom. Likewise, lawyers who represent child welfare agencies must get to know both social work as a profession and the child welfare system. The child welfare lawyer must understand and appreciate the emphasis on nonjudicial (yet fair) handling of child protection cases. In addition to traditional legal skills, acquiring a solid background in juvenile court proceedings and family law and philosophy is essential for a protective services attorney. The attorney should comprehend and respect the functions, the capabilities, and the limitations of social workers and other behavioral scientists. The foster care system—its limitations and strengths, its advantages and disadvantages, the benefits and risks to children—must also be carefully studied. Concepts of family preservation, family reunification, and permanency planning should be very familiar to the agency lawyer.

What is the nature of the attorney-client relationship between the child protection agency and its lawyer? The legal agency which assumes responsibility for legal representation of the child protection petitioners in the juvenile or family court varies from state to state or sometimes even from county to county. The duties may be assumed by the local prosecuting attorney, the state attorney general's office, the county corporation (civil) counsel, or at times by lawyers who are actually employees of the child protection agency. Some legal agencies representing protective services assume a quasi-judicial role and will initiate legal action as requested by the social agency only if they personally agree that such action is warranted. Such lawyers exercise a sort of prosecutors discretion about which child protection cases are brought to court.

In contrast, I would recommend that the legal representatives of the agency see themselves in a traditional attorney-client relationship. In invoking the court system, child protection service workers should have access to a lawyer whom they can trust and who will act as the advocate of their point of view as necessary. Consistent with the ABA Model Rules of Professional Conduct, “[a] lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules” (24, rule 1.2).

The lawyer and the agency personnel may not share all points of view and judgments about strategy, but such differences are certainly not unusual between lawyer and client and are rather common in both personal and corporate practice. When such disagreements occur, the lawyer should rely on the traditional counselor function of the lawyer: matters can be discussed in-house and recommendations for actions negotiated. If some differences cannot be resolved in this manner, the lawyer should then defer to his or her social agency clients in matters within the scope of their expertise (namely, in social and psychological judgments and in assessments of the needs of the child and family), while the agency should defer to the lawyer in matters of trial strategy and legal judgment. Unfortunately, in this context the boundaries between legal and social spheres of expertise are often not clear and distinct. Almost every judgment in child abuse and neglect cases reflects a value judgment that certain kinds of parental behavior constitutes legal neglect. Normative judgments of fact are made at every step of the child protection process: by the reporting person, by the social worker, by the social work supervisor, by the lawyers, and finally—and most importantly—by the judge. What is the minimum community standard of child care to
which every child is entitled? What is the threshold of child care below which the state may and should intervene, even coercively, on behalf of the child (and for the good of the family unit)? These questions, addressed in every child protection case consciously or not, blur the distinctions between legal and social spheres of expertise.

With the understanding that their respective spheres of competence are not always clear and distinct, the attorney and the client agency ought to arrive at in-house positions, each deferring to the other's expertise where appropriate, with the lawyer acting as advocate for the final position much as a corporate attorney would adopt the direction of his corporate client.

The interface between the child protection agency and the court system must be explored and understood by the attorney representing the agency. The role of the court must be placed in context for the agency by their lawyer. The court acts as arbiter between the individual citizens and the social agency regarding the agency's right to intervene in the privacy of the family. When the family does not voluntarily agree to the agency's intervention, the court must decide whether or not the circumstances justify coercive, authoritative state intervention on behalf of the child.

Delivery of remedial services to the dysfunctional family remains the duty of the child protection agency whether or not court action is taken. The social workers have the responsibility, the skills, and the expertise to provide assistance to the children and their families. The court's role is to authorize the agency to act in cases in which parents will not voluntarily accept such services. The court order authorizes and facilitates the agency intervention. The court itself, however, has no treatment expertise, nor should it be relied upon to develop a treatment plan. The social worker may not recognize that the role of the court is limited to judicial decisions and that the social agency itself bears the responsibility to develop and implement a treatment plan for the children and family. The agency lawyer must in that case make clear to the social worker clients that the court itself can neither administer treatment nor engage in social planning for a family. The court's role is strictly to prevent unwarranted interferences with their private lives and to approve and monitor the agency intervention.

The agency lawyer must understand the role and functioning of protective services well enough to identify the long-term social objectives of the agency as separate and distinct from the generally shorter-term, more immediate legal objectives. The more thoroughly the lawyer understands the agency goals, the more creative he or she can be in the use of the court process. The agency lawyer should not define the client's goals only in terms of legal objectives—for instance, to acquire temporary jurisdiction, to prove probable cause, or to obtain emergency detention. With the help of the social worker, the attorney must identify the social goals of the agency as specifically as possible. Thereafter, by creative use both of the court process and of negotiation, the lawyer may be able to help accomplish the social goals whether or not the specific legal goals prove to be attainable.

To this end, the attorney should work closely with the protective services agency. In the initial interview with an agency social worker, the lawyer must ask: "What do you want to result from the legal action?" "What are your professional (that is, social work) goals for the client family?" The lawyer should test the social work strategy in a collegial but "dev-
il’s advocate” way: “Will court action facilitate the social work intervention strategy?” “How will it do so?” “Can each of the elements of the intervention plan be justified by facts presentable to the court?”

The social worker, with his or her experts and team members, must be able to articulate the social objectives of court action. The lawyer may wish to attend multidisciplinary team meetings concerning treatment plans for cases on which he or she is or may be active. The lawyer needs to know the behavioral science reasoning behind a particular intervention strategy, and he or she may be able to contribute knowledge to the team about the legal process available to facilitate the strategy. Knowing the plan and its basis, the lawyer is better able to support it in court through expert and material witnesses.

Attorneys should bear in mind that the legal process itself may add to the family dysfunction. Sometimes the trauma of adversary litigation cannot be avoided. But often, when the social objectives of the agency are clearly defined, an attorney can accomplish the goals of the agency without going to trial, through strategies of negotiation, mediation, and pacing the litigation.

It is a challenge for the lawyer to achieve the social results in an efficient, effective, and direct way which avoids or minimizes the negative effects of the adversary process. A process of mediation or negotiation may avoid the adversary system in which family members must testify against family members, and helpers (such as social workers and physicians) must testify against the parents they are trying to help. Skills and tactics in negotiations and mediation are especially important to the child protection attorney.

Thus far, I have identified two separate aspects of the protective services attorney’s role: first, to prove and present the client’s case in the most persuasive fashion possible; second, to understand and embrace the social goals of the client agency and to further those goals by nonadversarial means if possible.

We now come to a third aspect of the agency attorney’s role: preparing the client agency for ongoing court review of a treatment plan ordered by the court. Certainly, as we have seen already, the preparation of the treatment plan remains in the sphere of the social worker. The lawyer, however, understands the degree of specificity and prompt action required by the court for such plans and serves the client agency well by encouraging the client to efficiently and clearly state the goals and specific details of the plan. The lawyer understands the legal significance of the treatment plan and the ramifications that noncompliance by the agency or the parents may have in subsequent court proceedings.

The court retains ultimate responsibility for the well-being of children under its jurisdiction. It cannot abrogate that responsibility. Federal legislation and several recommended model statutes contain procedures that formalize legal standards for the review of continuing intervention in a family under court authority (31, 32).

At a review hearing, the child protection agency is in a position to give an account of its stewardship. Before such a hearing, the court will have taken jurisdiction over a child and ordered certain interventions, which may have included placement of the child outside the home and counseling or other treatment for the family. At a review, the agency must report to the court about what services have been provided and what progress has been made by the family. The agency attorney can aid his or her client by not allowing matters
to drift between the initial court order and the review hearing. Correlatively, the parents must give an account of themselves and show what progress they have made in correcting the problems that brought their child to the attention of the court.

The agency, in essence, is asking that the court extend its authorization to intervene in the family, perhaps including continued foster placement or termination of parental rights. Agencies must demonstrate that a treatment plan has been followed and that the legal and social intervention in the family's life is justified by tangible benefits, either realized or nearing realization, to the child and the family.

If the agency cannot justify its continued involvement with the family by demonstrating good faith efforts to rehabilitate the family, the court may revoke the agency's authority to act, that is, terminate the court's jurisdiction, place the child with another agency, or return a child to his or her home despite agency requests to the contrary. Admittedly, a return of the child to his or her home against the agency recommendation is a rare thing for a judge to authorize without some expert opinion to counter the agency recommendation or without additional resources to alleviate the family's troubles. A court whose orders are not followed may also use its contempt power and levy fines or even impose jail time.

The agency attorney must also recognize the importance to the child and the family of other legal proceedings which may be going on concurrently but not in conjunction with the local jurisdiction. At the same time that the child protection action is under way, a child custody dispute may be pending before another judge as part of a divorce or postdivorce action, or a guardianship action may be pending. It is not unusual for a criminal action also to be pending in which the child is a victim and/or a witness. These cases are all likely to affect the child protection case. The agency attorney should accept the responsibility of coordinating the response to these actions to the full extent possible; minimally, he or she should at least be fully informed about them, so he or she can keep the child protection court up-to-date on the status of these other proceedings.

The agency attorney's role demands well-developed traditional legal skills. However, the attorney must also know the "business" of his or her clients very well. Ultimately, a successful intervention in a family requires close collegial cooperation between the lawyer, the child protection agency, and the psychiatric, psychological, and medical consultants to the agency.

The Attorney for the Parents

The attorney for the parents is charged with representing the interests of his or her clients zealously within the bounds of the law.8 Advocacy for the parents usually takes the form of minimizing the effects of state intervention on the family and may include diplomatic attempts to persuade the agency to withdraw petitions, in-court advocacy for dismissal, insistence that the charges brought by the state be legally proven in court, and negotiation for dispositions that are most acceptable to the parents.

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8. "A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules" (24, rule 1.2).
A danger exists in child protection cases that the personal rights of parents and children will be infringed in the well-intentioned zeal to help children and parents. Even before an attorney is appointed to represent the parents, government intervention in the family may have been initiated that has not been reviewed by any court or magistrate. The good intentions of the child protection system do not alter the need to recognize and respect the personal integrity and autonomy of parents. Mr. Justice Brandeis warned about the dangers to liberty presented by the benevolently intended state:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. (33)

The U.S. Supreme Court in *In re Gault* held that benevolent state intentions do not justify any relaxation of legal safeguards or procedural protections for parents or children (34).

Child protective services is an area of state control over individuals and families rarely visible to most members of the community. Social workers and other helping professionals involved in child protection activities intend no harm to client families but aspire, instead, to stabilize the family as a unit, to protect the child, and to impart skills of child rearing where they are lacking. In spite of the benevolent motives of child protective services, however, significant intrusions by government into personal and family life is possible without the safeguards of due process of law. Government intrusions in family life by extensive child welfare services may not be warranted in some cases.

Children's services workers and supervisors should recognize that the clients often attribute considerably more power and authority to them than they and their agencies may actually possess. Child welfare clients are often poor and powerless. They may agree to accept intervention into their family privacy out of fear of agency authority or fear of a court petition. Overestimating the power of the department, the family may believe that a petition to the court is tantamount to removal of their children, not understanding that parents have rights in the legal process too. The exaggerated perception of protective services authority and the fear of the court process may intimidate clients into acquiescing to "voluntary" plans for services or for placement of their children outside the family home. Such "voluntary" and nonjudicial arrangements provide neither safeguards for the rights of the parents and the children nor checks on a possibly overzealous agency or social worker. Parents may well feel betrayed by the agencies ostensibly providing services to the family. A good part of any legal case brought on behalf of children (and against their parents, as the parents may see it) often comes from the parents' own solicited statements and candid admissions. Parents can, as a result, find themselves "condemned out of their own mouths."

Therefore, the risk of arbitrary social work action, of agency coercion, and of overreaching in violation of personal liberty and personal integrity looms large indeed. How should personal freedoms of parents and children be preserved in child welfare? Should procedural safeguards be established within the administrative structure of children's services to protect the privacy and personal liberties of clients? Federal law (35, 36) already
requires "fair hearings" for recipients of services to appeal the "denial of or exclusions from a service program, failure to take account of recipient choice of service or a determination that the individuals must participate in the service program" (37, p. 3, emphasis added; 38, pt. 8, pp. 66–76).9

Some have suggested not only that all child welfare clients be given a warning upon first contact that anything they say can be used against them in court but also that a warrant be required prior to any protective services investigation (39). Such warnings and warrants are not now required by law. Basic fairness and good social work practice and ethics require that clients be fully advised of the protective services role and the limits of agency authority from the very first contact. Because child abuse and neglect cause such great societal concern and because the child protection network has generally been seen as benevolently motivated, society has, up to now, been willing to run the risk of occasional coerced and perhaps unwarranted invasions of family privacy in exchange for swift identification of and response to child abuse and neglect and related ills. The law has not required that notice and hearing be provided before child protective services is allowed to become involved with the family. Child welfare professionals, however, ought to be aware of the personal liberty issue and be responsive to it in their every dealing with potential clients—but they sometimes are not. The attorney consulted on behalf of parents who are the subjects of a child abuse and neglect investigation or of family reunification services should determine if the investigation has violated any state and federal standards and be prepared to invoke fair hearing provisions regarding reunification services. Each state has provision for expunging reports of child abuse and neglect; the parent's attorney may wish to pursue these provisions, to protect the reputation and good name of the clients.

Once a child protection action is actually filed, the attorney for the parents should know the applicable law and the local court procedures and practices. He or she should understand the particular family and thoroughly investigate the facts of this particular case (40). He or she should also become well acquainted with the common dynamics of child abuse and neglect and with the treatment programs in the local community that deal with such problems. Considerable information can be obtained from reading, but the lawyer should also be apprised of and familiar with the local scene. One of the best ways to achieve this is to spend time with local social workers, physicians, psychologists, and other lawyers with experience in child abuse and neglect cases.

Representation of parents in cases of alleged child abuse and neglect requires unique skills and resources in addition to those of traditional advocacy. Lawyers must first deal with their negative feelings toward the parent accused of child abuse or neglect. The feelings toward a client, unless dealt with deliberately from the beginning, can sabotage a lawyer's advocacy, either consciously or unconsciously. One means of working through personal feelings toward allegedly abusive or neglectful parents is to understand the dynamics behind child abuse and neglect. Accused parents often have difficulty trusting others, forming relationships (including relationships with their lawyers), and deferring gratification.

9. Not all states have implemented this federally mandated fair hearing system for child welfare services.
Lawyers are counselors-at-law as well as advocates. In the agency attorney's role, the lawyer may advise a client social worker to pursue nonlegal avenues in a case before taking legal action or to consult other professionals about treatment strategy before initiating court action. Similar advice may be given to parents.

The lawyer as counselor to parents must feel comfortable engaging each parent as a person, must evaluate the parents' difficulties and their legal and social situation, and should only then provide legal counsel as to how to accomplish their goals. The lawyer may explore the parents' perspective both on whether or not particular personal and family problems exist and on whether or not the social agencies can help them. He or she may counsel parents to accept certain services, seeking postponement of the court process in the interim. As a result, the parents may be willing to accept some limited assistance from an agency voluntarily. The parents may even be advised to forego immediate legal advantage in order to benefit from a social intervention that is calculated to prevent recurrence of abuse or neglect.

The parent's attorney can sometimes perform valuable functions for the parents by encouraging nonjudicial resolutions of the case. A voluntary plan of treatment may avoid formal court jurisdiction and still protect the child and address the problems which may have been identified by protective services. Nonjudicial resolutions reached in concert with legal representation of the parents avoid the danger of improper invasion of personal liberties without due process. A lawyer representing parents should make a point of ensuring that whatever agreement they enter into really is done voluntarily and knowingly, that is, with their full awareness of possible consequences.

Where the parents are willing to accept some services under the shadow of court action, the parents' lawyer should obtain from the social worker a detailed treatment plan for the family. The social worker should also make a contract with the parents defining in concrete terms the problems that are to be worked on, the obligations of the parents and of the agency, and the expectations of what is to be achieved by the parents before the child can be returned or the intervention by the agency terminated.²

The counselor's role is quite consistent with traditional lawyerly functioning and is similarly based on building trust and treating clients as important individuals. However, these nonadversarial tasks of the lawyer may be even more important in child protection cases than in other areas of the law. In exercising the counselor function, the lawyer must be careful to establish and encourage whatever trust he or she can with the clients. When the lawyer recommends cooperation with social agencies, he or she should do so carefully, to help the clients understand that even if the suggestions of the lawyer are not accepted, the lawyer will nevertheless stand by the clients as a vigorous advocate of their position. The lawyer's obligation is to advocate for what the client wants—so long as those objectives are legal. The client must clearly understand that duty of loyalty.

After exercising the counselor function, the lawyer may decide that vigorous advocacy of his or her clients' goals is necessary. This decision may be based on an appraisal that the case against the parents is weak or unfounded or that the agency response is unduly harsh.

or drastic in light of the family problems identified. The attorney or parents may feel that the agency is offering no better alternative for the child: the tenuousness of foster care may be less desirable than attempting to protect the child in his own home and provide necessary family services. Federal law in fact requires that a child be placed in the “least restrictive alternative placement” and that “reasonable efforts” be taken to prevent or eliminate the need for out-of-home placement of the child (31). The client may also firmly deny the allegations in the petition and instruct the lawyer to contest the case. The lawyer is then duty bound to advocate zealously for his or her client. As one commentator notes:

It is imperative that the attorney not be concerned with the best interests of the child. That is the initial task of the caseworkers and the ultimate task for the court. (40, p. 229)

Certainly, the lawyer begins his or her advocacy for the client through negotiation and conciliation efforts with the protection agency itself. Some discussion and negotiation may lead to a resolution of the conflict between parents and agency. Lawyers must learn the important art of persuading a large bureaucracy convinced of the inherent rightness of its position to modify that very position. In spite of the desirability of nonjudicial resolutions of disputes between the parents and the social agency, however, it is often necessary to proceed to trial.

The responsibility of a parent for injuries to or possible neglect of a child may be a contested issue. The lawyer has a duty to vigorously and resourcefully stand as the ardent protector of his or her clients’ constitutional and personal rights. The lawyer must bring to the task the usual tools of the advocate—familiarity with the applicable law, ability to logically present the pertinent facts, and facility for forceful and persuasive exposition of the parents’ cause. A few jurisdictions have developed resources for parents’ attorneys which can be very helpful (41, 42).

Many nonlawyers find the lawyer’s role as the zealous advocate for the parents in serious child abuse cases disquieting and difficult to understand. Lawyers are committed to the principle that all accused persons are entitled to a defense. The agency may, after all, be wrong or overly zealous. The injuries may be “apparently inflicted injuries” and not child abuse after all. This issue is one raised regularly in interdisciplinary groups concerned with child abuse and neglect.

In the dispositional phase of a case, the parents’ lawyer may serve several different functions:

1. The lawyer can ensure impartiality by acting as a counterbalance to pressure exerted on the court by the emotionally charged nature of the issues.
2. He or she can assure that the basic elements of due process are preserved, such as the right to be heard and the right to test the facts upon which the disposition is to be made.
3. He or she can make certain that the disposition is based upon complete and accurate facts and that all the circumstances which shed light upon the conduct of his or her client are fully developed.
4. The lawyer can test expert opinion to make certain that it is not based on mistakes arising from either erroneous factual premises or limited expertise.
5. He or she can give the frequently inarticulate parents a voice in the proceeding by acting as their spokesperson.

6. The attorney's relationship with the parents may even enable him or her to give the protective services or court staff new and meaningful insights into the family situation.

7. Finally, the parents' attorney can interpret the court and its processes to the clients and thus assist the parents in genuinely accepting the actions of the court (43).

Conclusion

Attorneys in child protection, whether representing the child, the parents, or the protective services agencies, face unique challenges for which traditional law school education has probably not prepared them. In a recent report on the unmet legal needs of children and their families, the American Bar Association has recommended that the quality of counsel be improved, that Lawyers Committees for Children be established, and that training for attorneys who represent children be developed (30).

To function effectively in any of the lawyer roles, the attorney needs advice and consultation from social work and mental health professionals. This interdisciplinary collaboration is most beneficial when it goes both ways. Nonlawyers in child protection services need to know what to expect of the lawyers they meet in the court system. Interdisciplinary knowledge is as important to effective legal proceedings as it is to other aspects of state intervention on behalf of children.

References


36. 45 C.F.R. 1355.21(b), 205.10.


