

# Emerging Consensus and the QIC Best Practice Model

## **Abstract**

This chapter describes the QIC Best Practice Model and the rationale behind the Six Core Skills. It compares and contrasts the QIC Model with the 1996 ABA Standards and the ABA Model Act of 2011. The models agree the following are needed to better equip attorneys to represent children:

- Approach each child through a developmental lens based on his or her age and demographics;
- Better understand and determine a child's ability to direct counsel; and
- Partner children in dependency cases with dedicated attorneys who take a holistic approach to each case.

The chapter also discusses how differences between client-directed representation and best interests representation have narrowed.

## **4.1 Emerging Consensus**

The national needs assessment provides the foundation for the QIC Best Practice Model. Our review of the literature, national standards, conference recommendations and stakeholder opinion reveals an emerging consensus on *nearly all* aspects of the role and duties of the child's legal representative. The exception stems from the

long-standing best interests versus client directed debate, and there is a narrowing of differences on that point too. From that consensus we framed the QIC Best Practice Model (Appendix A) to reflect this general agreement by practitioners, academics and child welfare policy makers across the country as to what the role and duties of the child's legal representative ought to be.

This chapter provides a description of the model, its origins and its rationale, leading to the Six Core Skills training package. This chapter also compares and contrasts the QIC Model with the 1996 ABA recommendations and the 2011 ABA Model Act.

The policy statement of the ABA 1996 Standards echoes a central premise: "*All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court's jurisdiction continues.*" Given the challenges and deficiencies of America's child welfare system, and its enormous complexity, stakeholders recognize the need for individualized child advocacy—getting each child the unique supports necessary for that child's safety and well-being. There seems strong, although not yet universal, agreement that the child needs a *legal* advocate in these important proceedings. Major law firms are paid substantial amounts of money to help corporate clients navigate complex government bureaucracies. America's child welfare bureaucracy is no less complex, the needs of the child client no less compelling. A child needs expert advocacy to guide her through it.

Our review also found few persons fully satisfied with the current policy and practice of child representation. People remain dissatisfied with the gap between the need and the reality.

A key component of law and policy around which this consensus has developed is that a child in the child welfare system requires an engaged, active, involved lawyer—just like a lawyer for any other party in any other litigation. There also appears to be a consolidation of views as to the core functions of the child's representative, something that has eluded the field until recently.<sup>1</sup> The QIC Best Practice Model reflects that consensus and sets out in substantial detail the recommended tasks and duties of the child representative. The QIC tasks and duties are based upon and are essentially consistent with the *1996 ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (see Appendix B) but updated to reflect another 15 years of national discussion and development.

## 4.2 ABA Model Act of 2011

After many years of debate, development and consensus building, the ABA House of Delegates adopted the *ABA Model Act Governing Representation of Children in*

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1. Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FLQ 63, (Spring 2008) at 64.

*Abuse, Neglect and Dependency Proceedings*<sup>2</sup> in August 2011. (The 2011 ABA Model Act is included in Appendix C.) The 2011 Model Act focuses specifically on the role and duties of lawyers representing children. Although it anticipates that a court might appoint a best interest advocate—a lawyer or a lay person—the Model Act specifically does not address the best interests role.<sup>3</sup> The Model Act focuses on the child’s lawyer who owes the same duties to the child as are due to an adult client. The CAI and First Star Report Card says: “This ‘A+’ model law embodies the best practices analyzed in this Report Card for the representation of children. Advocates in states with poor grades can develop legislation to implement this model law in their home states.”<sup>4</sup>

Between the ABA Model Act and the QIC Best Practice Model there is considerable overlap and essential agreement. Although the 2011 Model Act passed a full year after development of the QIC Model, it is not surprising that our conclusions are so consistent since these two independent processes drew from the same well of expert opinion and state experience. Except for some differences in organization and level of practice detail, the ABA Model Act and QIC Model are in essential harmony as to duties of counsel.

The 2011 Model Act and the QIC Best Practice Model complement one another very well. The ABA Model provides the essential legal structure setting out the duties of the child’s lawyer while the QIC Model, reflected in the Six Core Skills training, fills in the clinical knowledge and skills lawyers require to properly fulfill those duties. States should adopt the 2011 ABA Model Act.

### **4.3 QIC Best Practice Model Compared with the 2011 ABA Model Act and the 1996 ABA Standards**

Here are some major comparisons of the ABA recommendations and the QIC-Child-Rep Best Practice Model: This chapter discusses the client-directed/best interest question separately, in section 4.7 below.

*Definitions:* By defining *child’s representative* (CR) to include an individual or a multidisciplinary office the QIC expressly anticipates that the child may be represented by an individual lawyer or by a team of multidisciplinary professionals that includes a lawyer plus social workers, paralegals and/or lay advocates. (See Chapter 12 for the

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2. *2011 ABA Model Act Governing Representation of Children in Abuse, Neglect and Dependency Proceedings*. The ABA Model Act “focuses on the representation of children in abuse and neglect cases to ensure that states have a model of ethical representation for children that is consistent with the [1996] ABA Abuse and Neglect Standards, ABA Policy, and the ABA Model Rules of Professional Conduct.” (2011 Model Act Report, p. 18).

3. “Because this Act deals specifically with lawyers for children, it will not further address the role of the best interest advocate.” ABA 2011 *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, Section 3, commentary.

4. *Id.* At 6

results of a QIC empirical study supporting the effectiveness of such multidisciplinary representation.)

*Appointment:* The QIC expressly asks that the child's representative begin service *in advance* of the first hearing. The first hearing is a critical opportunity to protect the child with minimal disruption to the child's life thus easing possible unintended trauma. The first hearing can often set the course of the entire case and a strong child advocate presence there can significantly benefit the child. Like the ABA Standards and Model Act, the QIC requires that the child representative serve until the court's authority over the child ends. Unlike the ABA policy recommendations, which apply only to lawyers, the QIC applies to the entire child representative office, including the non-lawyers.<sup>5</sup>

*Assertive:* A critically important similarity among the models is that all three anticipate a child representative who is an engaged, assertive, and active participant in the proceedings—both in and out of court. The Model Act enhances the child lawyer role by specifically requiring a meeting with the client prior to each hearing and at least once per quarter.<sup>6</sup>

As to *basic obligations* the three recommendations differ slightly in that the QIC emphasizes the importance of the lawyer being engaged in *all* placement decisions “. . . to disrupt the child's world as little as possible . . . remove the danger not the child . . . and help identify placement alternatives.”<sup>7</sup>

As to *Out of Court Actions to be taken*, there is considerable overlap between the recommendations with these additions in QIC. In *meet with the child* the QIC emphasizes, even more than the two ABA policy recommendations, the foundational importance of developing a trusting relationship with the child. QIC expects the child's representative, whether client-directed or best interests, to carefully communicate that the lawyer is directed as much as possible by the child.

In *identifying relatives* QIC expects that the child will have important preferences and likely helpful information as to relatives who might provide emotional support or even placement for the child. As to *outside meetings*, increasingly people recognize that events outside the regular court hearings affect the well-being of the child and the course of their child welfare case. The 1996 ABA encourages such attendance for purposes of *investigation*. But the QIC requires that the child's representative (lawyer or non-lawyer advocate or both) attend these, including treatment meetings and school conferences, not only for investigative purposes, but also as a forum for *advocacy* and *persuasion*.

*Services:* Like the ABA Standards and Model Act, QIC expects the CR to seek appropriate services for the child and his or her family. QIC frames this somewhat

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5. The ABA Rules of Professional Conduct also apply to non-lawyer representatives, however.

6. Model Act, s 7(b)(5).

7. QIC Best Practice Model (1)(d).

differently and identifies several services not listed in the ABA Standards—long-term foster care, adoption, education, recreation or social services, housing and, as required by the Federal Law *Fostering Connections*, an appropriate discharge plan and aging out services.

*Conflict resolution:* QIC augments the ABA call for participating in negotiation by asking the child’s representative to “adopt a problem-solving attitude and seek cooperative resolution of the case whenever possible” and, recognizing the “child’s sense of time” to seek expeditious resolution of the case.

*In-Court:* When it comes to hearings and active participation in the hearings, the ABA and QIC match up well. The ABA Model Act focuses and roots the lawyer activity on in-court advocacy and obtaining appropriate court orders. The ABA Standards emphasizes the child as witness more, but QIC certainly does not disagree with those recommendations. The ABA Model Act underlines the importance of the child’s presence in court, a position consistent with the QIC but not as strongly emphasized there. Likewise the ABA and QIC recommendations coincide as to post-hearing, appellate advocacy and cessation of representation.

*Administration:* Apart from discussing fees and expenses, the ABA Model Act does not address the organizational structure for delivering legal services to children, perhaps because that was considered beyond its scope. But both the 1996 ABA Standards and the QIC recognize the essential role that the organizational structure plays for assuring quality representation for the child. There are slight variations in the presentation but both call for the child’s lawyer to be independent and for clear court rules governing procedure.

QIC adds that the structure for appointment, support and accountability should be transparent. QIC asks that the administration assure that lawyers are properly qualified, have training programs and mentors available, and that specialty certification be encouraged. Both standards emphasize the need for proper lawyer compensation while QIC asks that lawyers be provided other supports such as for copying, phone, service of process, and transcripts. QIC also specifically speaks to the need for manageable caseload size.

Certainly the 1996 ABA Standards were critical in the emerging consensus that the QIC found. We made remarkably few updates or additions given the passage of 15 years and a fair amount of policy discussion and debate during this period. Likewise, the ABA Model Act further articulates this consensus. One hopes that state legislators and other law makers looking to make their child advocacy reflect the modern best practice will find plenty of guidance and direction in these recommendations.

#### 4.4 Consensus: Adopt a Developmentally Sophisticated Approach to the Child and His or Her Needs.

Across the client-directed/best interests divide it is widely accepted that whether the lawyer serves as a best interests or a client-directed advocate, the lawyer must understand:

- the child's developmental stage and competencies,
- understand the child's family and culture, and
- develop a relationship with the child.

Ann Haralambie and Lauren Adams reflect this consensus when they write: "To effectively represent a child, it is important to understand the child's developmental stage and competencies [including the impact of maltreatment and trauma.]". . . It is difficult to represent a child, either as a client-directed attorney, a best interests attorney or a guardian ad litem without developing a relationship with the child." . . . "Building a relationship and communicating effectively with a child client gives the child a voice in the proceedings and enables the attorney to get the information required to represent the child effectively."<sup>8</sup>

Professor Jean Koh Peters says that the child's attorney "whether assigned to represent a child's wishes or her best interests, must ground her representation in a thickly textured understanding of the child's world."<sup>9</sup>

The 1996 ABA Standards require that a child's attorney structure "all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition."<sup>10</sup> The ABA 2011 Model Act, addressing client-directed counsel, says: "In a developmentally appropriate manner, the lawyer shall elicit the child's wishes and advise the child as to options."<sup>11</sup> The ABA Model Act also expects attorneys to be able to gauge the developmental capacity of their child clients as they determine whether the child has diminished capacity, that is, whether the child has the ability to direct counsel.<sup>12</sup>

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8. Ann Haralambie and Lauren Adams, "Interviewing and Counseling Legal Clients Who Are Children," *CHILD WELFARE LAW AND PRACTICE*, 3d Edition (Duquette, Haralambie and Sankaran, Eds.). They also say: "Older children may be able to articulate their own needs quite accurately. Younger children may demonstrate their needs more through their behavior or emotions." (Id.)

9. KOH PETERS, *REPRESENTING CHILDREN*. See also discussion in Chapter 2 above, 2.6 and following.

10. 1996 ABA Standards, A-3.

11. ABA Model Act, Section 7(c).

12. ABA Model Act, Section 7(d).

Similarly, the recommendations of the UNLV Conference in 2006 would require attorneys to have competency in child cognitive development, effective child interviewing skills, and become familiar with the child's family, community and culture.<sup>13</sup>

It is widely agreed that lawyers for children must understand child development and have the skills to be able to talk with a child, understand the child's world and needs, and use this foundation in counseling and advocacy. The QIC Best Practice Model reflects this consensus and captures it in the first of the Six Core Skills—"Enter the Child's World."

#### **4.5 Consensus: Child's Wishes Are Always Relevant**

It is widely acknowledged that children should participate meaningfully in dependency proceedings. We find a national consensus in the view that, regardless of whether or not a child is considered competent to direct the attorney and even if the role of the attorney is defined as other than purely client-directed, the wishes and preferences of the child are always relevant and should be communicated to the court unless limited by privilege.<sup>14</sup>

No matter what weight is given to the child's preferences in determining the goals of advocacy, the attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should communicate the child's wishes and preferences to the court. The lawyer also has a duty to explain to the child in a developmentally appropriate way information that will help the child have maximum input in the determination of the particular position at issue. According to the child's ability to understand, the lawyer should inform the child of the relevant facts, the applicable laws, and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings.<sup>15</sup>

Federal law requires that permanency plans for children 14 and older must be "developed in consultation with youth."<sup>16</sup> State law often requires that the stated wishes and preferences of the child are to be presented to the court.<sup>17</sup>

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13. 2006 UNLV Recommendations 1(C) (2)(b).

14. These include the ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, AND THE NACC REVISED VERSION (SEE APPENDIX A); ADOPTION 2002, THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999) [Hereinafter ADOPTION 2002 GUIDELINES]; the FORDHAM CONFERENCE ON ETHICAL ISSUES IN THE LEGAL REPRESENTATION OF CHILDREN, 64 FORDHAM L.REV (MARCH 1996); and, the UNLV CONFERENCE ON REPRESENTING CHILDREN IN FAMILIES: CHILDREN'S ADVOCACY AND JUSTICE TEN YEARS AFTER FORDHAM, 6 NEV. L. J (SPRING 2006).

15. Duquette & Haralambie, *Representing Children and Youth*, in CHILD WELFARE LAW AND PRACTICE, 3d Edition, Bradford Publishers, 2016 at §31.4.2.

16. 42 USC §675(5)(C).

17. For example, FLA. STAT. § 39.807(2)(b)(1), ME. REV. STAT. tit. 22, §4005(1)(E). Michigan, MCL 712A. 17d (1).

## 4.6 Consensus—A Vigorous and Active Child's Lawyer

The 1996 ABA Standards, the 2011 ABA Model Act and the QIC Best Practice Model all reflect the emerging national consensus on the actual day to day advocacy duties of the child's legal representative. The ABA Standards say: "The chief distinguishing factor between the [client-directed and best interests] roles is the manner and method to be followed in determining the legal position to be advocated." Similarly, QIC says: "Whether the lawyer takes his or her direction from the child or makes a best interest judgment as to what the goals of the litigation should be, once the goals are determined the lawyer is expected to aggressively fulfill the duties and obligations set forth here." The 2011 ABA Model Act sets out very similar fully-engaged, assertive set of duties consistent with the 1996 Standards and the QIC Model.<sup>18</sup>

The U.S. Children's Bureau publication, *Guidelines for Public Policy and State Legislation Governing Permanence for Children*,<sup>19</sup> also grasped this fundamental agreement: No matter whether the advocate represents the child's best interests as determined by the advocate or assumes a client-directed/champion role as recommended by the ABA Standards, these Guidelines expect a vigorous and active participation of the child's lawyer.<sup>20</sup> The *Guidelines* go on to endorse the 1996 ABA Standards as to the specific duties of the child's attorney and say: "State standards should clearly define the duties of the child's attorney. Objective standards make it easier for judges and other review bodies to assess the lawyer's performance on behalf of a client."<sup>21</sup> On this the child advocacy community agrees.

There is a clear national consensus that regardless of how the goals of the cases are identified, whether the lawyer takes his or her direction from the child or makes a best interest judgment, once the goals are determined the lawyer is expected to aggressively fulfill the duties and obligations set forth in these three authoritative recommendations. The child welfare community can build on that foundation. But now let's move to the area of lesser agreement—how to address the fact of child client incapacity to direct counsel at certain ages and stages.

## 4.7 Client Directed Versus Best Interests?

### 4.7.1 Common Ground? Narrow the Differences?

This emerging consensus identified in our national needs assessment covers *nearly all* aspects of the child representative's role—save one. The question around which consensus eludes the field is: Should the child's legal representative be *client directed*, that is, represent the stated wishes of the child arrived at after a period of lawyer-client counseling just as would happen with an adult client? Or should the lawyer represent what

18. Section 7 (a) & (b) of the 2011 ABA Model Act.

19. ADOPTION 2002 GUIDELINES.

20. *Id.* at VII-12.

21. *Id.* at VII-12.

the lawyer believes to be in the *best interests* of the child? Despite the strong support for *client-directed* representation in the academic community and the national child advocacy community, state legislatures retain an affinity for a *best interest* approach to child representation. Are we doomed to an irresolvable conflict of opinion? Will this best interest/client directed debate continue to paralyze the field for another two decades? Maybe not.

Theoretically the controversy is framed as opposites—the client-directed lawyer advocates for the *child's* stated wishes and the best interest lawyer advocates for the outcome that the *lawyer* thinks is best for the child. But in practice few attorneys adopt an absolutist position under either approach. Some authors consider the actual percentage of cases in which a child's best interests and expressed wishes conflict to be relatively small.<sup>22</sup>

When the two approaches are analyzed carefully there is a great deal of common ground in the lawyer's child development savvy approach to the child, the importance of the child's voice and wishes in determining the goals of the advocacy, and the vigor and assertiveness of the child's lawyer once the direction of the advocacy is established. Without denying the essential differences between the approaches, there may be significant points of harmony that allow the field to move forward.

The major theoretical difference between the two approaches seems to come down to two: 1) determining the child's capacity to instruct counsel; and, 2) in light of the determination of capacity, deciding how much weight is to be given to a child's wishes and preferences in deciding the objectives of the case?

#### 4.7.2 *Determining a Child's Capacity to Direct Counsel*

In a best interests regime the lawyer essentially *presumes* that the child client lacks capacity to instruct counsel. On the other hand, a client-directed regime *requires the lawyer to determine* whether the child has diminished capacity.<sup>23</sup>

Both the best interests lawyer and the client-directed lawyer require a more nuanced understanding of the child's capacity to direct counsel for reasons discussed below. This shared need for a better understanding of the child leads both types of lawyers to engage in certain actions to inform the determination of capacity. These *common actions* further link the best interests role and the client directed role and further narrows the differences between the approaches.

Both client-directed and best interests lawyers need to assess the child's capacity and the steps an attorney takes to do so are similar no matter the role. That is, both types of lawyers would meet with the child, develop as much trust and rapport as possible, and would consider the various dimensions that we summarize as the first QIC

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22. Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1746.

23. 2002 ABA Model Rules of Professional Conduct, §1.14; 2011 ABA Model Act (7)(d).

Core Skill, “Enter the Child’s World,” such as the child’s developmental stage, level of trauma, general intelligence, and existing relationships.

Similarly, Comment 6 to ABA Model Rule 1.14 provides guidance—to both client-directed and best interest lawyers—saying lawyers should consider and balance factors like:

- Client’s ability to articulate reasons leading to a decision;
- Variability of state of mind;
- Ability to appreciate consequences and fairness of a decision; and
- consistency of a decision with the known long-term commitments and values of client.

If appropriate, lawyer may seek guidance from an appropriate diagnostician.

The best interests lawyer needs to take these steps to inform their best interests advocacy position in the proceedings and to maximize the input of the child into that decision as is the prevailing practice.<sup>24</sup>

The client-directed lawyer will encounter children unable to direct counsel and must be able to assess their capacity objectively. 2011 ABA Model Act typifies the client-directed approach when it requires the *lawyer* to determine whether the child has diminished capacity but provides little guidance as to how to do this<sup>25</sup>. Apart from the limited guidance of the ABA Model Rule 1.14, the lawyer is left to his or her own unfettered and subjective judgment. The lawyer is permitted to consult others and the commentary recognizes that a child may be competent for some things and not for others. “A determination of incapacity may be incremental and issue-specific.”<sup>26</sup> Yet there is little direction in the Model Act in *how* the diminished capacity determination is to be made. (The ABA Model Act is very helpful in its discussion of how to proceed *after* a determination of diminished capacity is made, however. We turn to that below.)

Lawyers are not trained in child development. The question of competency and maturity is an evolving and elusive judgment that doctoral level psychologists have a difficult time making. In the case of the very young child or the older child, the question of competence to instruct counsel may not be so difficult. If the client is an infant and cannot speak, the client cannot instruct counsel.

If a client is a normally developed 15- or 16-year-old, however, he or she is quite likely to have clear views as to the proper decisions to be made affecting his or her life. Those views should be aggressively argued to the court and most would urge traditional client-directed representation for the older youth. But determining capacity for the middle-years child, from 8 to 12 for instance, or the immature or mentally challenged child, and the weight to be given to that child’s preferences is perhaps the most difficult question in child advocacy today, and it does not yet have a clear answer.

24. Duquette and Haralambie supra note 14 at §31.5.1.

25. ABA Model Act (7)(d).

26. *Id.*

The imprecision of this important determination exacerbates the existing risk that similarly situated children will get quite different representation depending on the subjective view of their lawyer as to their maturity and ability to understand the situation. Lawyers need more guidance in making this important determination and the Model Act, for all its virtues, fails on this point.

There are risks in the best interests approach too. The best interests lawyer is even more untethered than the client-directed lawyer. There are even fewer guideposts in determining basic competency. Given that amorphous situation it is easy for the lawyer to override the wishes of a child because the lawyer disagrees with the child. Disagreement with the lawyer's own judgment can easily be seen as clear evidence of a child's incompetence.

The ABA Model Act helps in the question of determining capacity when it allows the state to establish a *bright-line age* at which a child is presumed capable of directing counsel at a particular age and presumed incapable below that age. Several states have adopted this bright line approach.<sup>27</sup> Under this approach the presumption of diminished capacity may be rebutted if the lawyer determines that the child is capable of directing representation.<sup>28</sup> This alternative reflects the view that neither a best interests model nor the client-directed model can meet the needs of all children, given their widely differing level of development. The older child needs a traditional attorney and the younger child requires a representative who can define and advocate for his or her best interests.<sup>29</sup>

States that have opted for this approach reflect most legislators' preference for the paternalism and perceived protectiveness of the best interests approach (with which I disagree). A bright-line approach may represent a political compromise in that the youngest children would get a best interests advocate but the voice of older youth would be strengthened by preserving a client-directed attorney. More youth may get a stronger advocacy for their views.

Caution is warranted in that some of the statutory bright-line ages are set higher than psychological and medical research would dictate.<sup>30</sup> The bright line could be drawn at quite a young age, say at 10. The rule would only create a presumption of competence, of course, and the lawyer would have the guidance of the ABA Model Act, if adopted by their state, and of ethics rules MRPC 1.14 when that capacity is questionable. The difficulty of making the determination of a child's competence has been explored in the literature.<sup>31</sup>

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27. New Mexico at 14, Wisconsin at 12 Washington State at 12.

28. 2011 ABA Model Act (7)(d).

29. Duquette, Two Distinct Roles/Bright Line Test, 6 NEVADA L.J. 1240 (Spring 2006).

30. Hei Lei, Helen No, and Sarah Plotnick, *A Guide to Accommodating a Child's Wishes: The Progression of Agency*, on the QIC website [www.ImproveChildRep.org](http://www.ImproveChildRep.org).

31. Rachel Martin, Jena Gutierrez, Jerome Galang, *Evaluating the Decision-making Capacity of Children: A Guide for Legal Practitioners*, on the QIC website [www.ImproveChildRep.org](http://www.ImproveChildRep.org).

The U.S. Supreme Court addressed the analogous question of when a youth should be held fully culpable for homicide and adopted a categorical rule barring imposition of the death penalty for offenders under the age of 18. In *Roper v. Simmons*,<sup>32</sup> the Court rejected a case-by-case approach and adopted a categorical age-based prohibition of the death penalty. “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate, yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>33</sup>

Largely because of the difficulty in determining maturity and culpability, the court drew a bright line at 18, ‘the point where society draws the line for many purposes between childhood and adulthood.’<sup>34</sup> We will not go into further depth here except to urge that we continue to explore this pressure point. The main purpose is to highlight the *determination of capacity* as one of the most significant elements where consensus in child representation still eludes us.

#### 4.7.3 How Much Weight to Wishes of Child with Diminished Capacity?

The *weight* given to a child's stated wishes and preferences in determining the case theory and goals of the advocacy generally depends on the lawyer's determination of a child's mental competence and maturity. As described above, that is a difficult determination for a lawyer to make—and re-make since the wishes and preferences of the child must be elicited throughout the case, not just at a single point, and capacity may well change in the course of a single case.

For the client-directed lawyer the statements of the *competent* child provide the clear answer, subject only to the same counseling that a lawyer would provide an adult or corporate client. But both the client-directed lawyer and the best interests lawyer face the same question if the child is determined to have diminished capacity: How much *weight* is to be given to the child's stated preferences in determining the goals of the advocacy?

The trend identified by the QIC national needs assessment is to encourage a more traditional lawyer role for both best interests and client directed lawyers in which the lawyers give more deference to the child's wishes and preferences. This is a position consistent with the vast majority of legal scholars and with the MRPC Rule 1.14 admonition for the lawyer to maintain a normal client-lawyer relationship with the diminished capacity client. Even in a best interest jurisdiction it is often seen to be in the child's best interests for the child's views to be fully argued to the court.

The ABA Model Act addresses how the lawyer is to deal with children's varying capacity in several ways, tracking the provisions of MRPC 1.14. When a child is

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Hei Lei, Helen No, and Sarah Plotnick, *A Guide to Accommodating a Child's Wishes: The Progression of Agency*, on the QIC website [www.ImproveChildRep.org](http://www.ImproveChildRep.org).

32. *Roper v. Simmons*, 543 U.S. 551 (2005).

33. *Id.* at 572.

34. *Id.* at 573.

determined NOT to have capacity to instruct counsel, the ABA Model Act allows the lawyer to take reasonably necessary protective action where the client has diminished capacity and is at risk of serious harm. The 2011 ABA analysis rests squarely on existing rules of professional responsibility that apply to clients generally, without finding the need to carve out different or separate rules for children. The protective action may include “consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a best interests advocate or investigator to make an independent recommendation to the court with respect to the best interests of the child.”<sup>35</sup>

The best interests and client directed approaches merge on this point so as to be practically indistinguishable. Capacity is not an either-or proposition, particularly for the middle-years child. Children mature at different rates and may be capable for some judgments and not for others. Professor Jean Koh Peters creates the image of a sliding scale or “dimmer switch” in which the child’s capability is not an “on or off” phenomenon where a child is either capable of directing the lawyer or not.<sup>36</sup> A child’s capacity, then, is a broader spectrum where children may be able to contribute various amounts to guide the representation if the lawyer properly incorporates the child’s unique individuality.

State law and practice may incorporate the “dimmer switch” concept in authoritative directions to the lawyer. If the lawyer is appointed to represent the “best interests of the child,” for instance, some state statutes recognize the child’s growing capacity. In Michigan, for example, the duties of the lawyer/guardian-ad-litem include:

(h) To make a determination regarding the child’s best interests and advocate for those best interests according to the lawyer-guardian ad litem’s understanding of those best interests, regardless of whether the lawyer-guardian ad litem’s determination reflects the child’s wishes. *The child’s wishes are relevant to the lawyer-guardian ad litem’s determination of the child’s best interests, and the lawyer-guardian ad litem shall weigh the child’s wishes according to the child’s competence and maturity.* Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child’s wishes and preferences.<sup>37</sup> (Emphasis added)

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35. 2011 ABA Model Act (7)(e) The commentary says that recommendation of a best interests advocate is to be reserved for extreme cases.

36. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 53-54 (1997). “Competency, in this context, is a dimmer switch: the client can shed light on some aspects of the representation, even though she cannot participate in all of it.”

37. MCL 712A.17d(1)(h). Where there is a disagreement between the lawyer-guardian ad litem and the child as to the child’s best interests, the lawyer is to bring the question before the court and the court may appoint an attorney for the child who as the same duty of zealous representation as for an adult and serves in addition to the lawyer-guardian ad litem (MCL 712A.17d(2)).

Under Michigan law, when formulating the litigation goal the lawyer gives increasing weight to the preferences of the child according to the child's age and maturity. The idea is that at some point the weight given to the child's wishes becomes stronger and stronger, and the benefit to the child of merely having his or her position strongly advocated similarly grows stronger, so that approach taken by a best interests lawyer becomes hardly distinguishable from the client-directed approach.

The best interests and wishes of the child merge and the lawyer-GAL ends up representing the stated wishes of the child. If, however, a conflict remains between the child and the lawyer-GAL regarding the child's best interests, the lawyer-GAL should bring the matter to the court, which may appoint an *attorney* for the child who serves in addition to the lawyer/GAL.<sup>38</sup> (It seems more consistent for a best interest advocate to request a client-directed attorney than for a client-directed lawyer to jeopardize loyalty to a client by seeking a best interest advocate who by definition would generally advocate for something other than what the child wants. A client-directed lawyer asking for a best interest attorney telegraphs disagreement between lawyer and child-client.)

#### 4.8 QIC Approach

The "wishes or best interest" debate has dominated the child representation field for four decades. Some would say it has distracted us from settling other fundamental questions about the child attorney role. That continued disagreement within the child advocate community presents a major obstacle to strengthening the law and practice governing child representation and deters robust development of the child representative work force. Despite the fundamental philosophical difference between client-directed and best interests, there is also considerable overlap in the practical approach that may allow the field to move forward.

The QIC tried to finesse the disagreement by asking the lawyer to "accommodate the child's wishes" as much as possible, whether operating under a client-directed or best interests state law. The two states in which we experimented with the QIC Best Practice Model were different. One was client-directed (Washington State) and the other best interests (Georgia—at the time of the research, but no longer). Under the QIC Model, lawyers are asked to recognize the importance to a child personally and to the entire child welfare process of having the child's voice and views strongly presented to the court. The voice of the child should not be merely *stated*, but *advocated for* and pursued in a strategic manner, trying from one hearing to another to eliminate the obstacles to realizing a child's position.

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38. MICH. COMP. LAWS § 712A.17d(1)(h). Where there is a disagreement between the lawyer-guardian ad litem and the child as to the child's best interests, the lawyer is to bring the question before the court, and the court may appoint an *attorney* for the child who has the same duty of zealous representation as for an adult and serves in addition to the lawyer-guardian ad litem. MICH. COMP. LAWS § 712A.17d(2).

Even in best interest jurisdictions the QIC Model urges lawyers to follow the ABA Model Rule 1.14, “The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” We urge the best interests lawyers to enter the child’s world as much as possible and really listen to the child; understand what is important from the child’s perspective and how decisions will impact on the child’s experience of his or her life. We urge lawyers to act with humility when considering taking a position contrary to the child’s express wishes.

We urge lawyers in best interests states to recognize the best interests benefits of the child having his or her voice fully expressed. Advocating for the child’s stated goals is often in the child’s best interests and thus consistent with that model because of the perception of fairness and procedural justice. The child benefits from being fully heard, respected and treated with fairness and dignity. A fully presented voice of the child may also help the court understand the situation better and arrive at overall better decisions, which would, of course, certainly reflect the best interests of the child.

Once the wishes and preferences of the child are given their appropriate weight and the objectives of the case are established, the lawyer activities are essentially the same. Whether client directed or best interests, the lawyer remains vigorous and active, in-court and out of court. Under either role, the lawyer counsels the child and communicates the child’s wishes to the court.

## 4.9 Conclusion

The Children’s Bureau’s quest for consensus as to the role of the child’s legal representative is slowly being realized by the national standard setting bodies as updated by the QIC Best Practice Model. A consensus has emerged around the *core tasks and duties* expected of the child’s legal representative—whether client directed, best interests or some combination. It is not surprising these independent processes should come to such similar conclusions about the fundamental tasks and duties of the child’s representative. Both the QIC and the ABA recommendations are influenced by the same pool of academic writings and research and the experiences of individual states as they try to develop and implement law and policy governing individual child representation.

We have not found any other duties for the child representative substantially different from what is described here or that is considered equal or superior. Having arrived at this position, we turn to the question of how to train lawyers to implement this assertive model of child representation. Then we evaluate the effect of training lawyers to implement this QIC model. Our research theory is that fully implementing this model will improve child representation and contribute to better outcomes for children.

