Children are the central focus in any custody case. However, parents, lawyers, and even judges frequently lose sight of this. Opinions are evolving about how to keep the child as the case’s focus. One such opinion believes that a child’s voice should play a key role in any custodial arrangement. This opens up a wide range of questions and concerns, such as why we should listen to a child, what potential concerns exist when listening to them, and how we should solicit their opinions.

**Why should we listen to a child?** Children are the people most affected by any custodial arrangement. They also have the most pertinent and relevant information as to what is in their best interests. Children can learn better coping skills when dealing with their parents’ separation if their voices are appropriately incorporated into the resolution process.

**What potential concerns exist when listening to a child?** Children who are included in the decision-making process may feel an increased level of stress if the process by which they are included is not child-focused in and of itself. Children need to be assured they are not the final decision-makers, and their preferences are not what will dictate the final outcome. If a child is involved in the process in a way that is not child-focused and appropriately tailored to the child’s age, maturity, and developmental stage, that child may experience increased emotional distress. Furthermore, given the complex nuances inherent to child development, if the child’s voice is not solicited—and interpreted—appropriately, the child’s words may not yield helpful information. A child’s words do not always
express their genuine thoughts or feelings. A child does not always know what is best for him or her. A child may express positions or make statements geared toward what the child feels his or her parent wants to hear. It takes a highly trained individual and a structured process to elicit clear, articulate, and genuine statements from a child, and then further interpret those statements, weigh them against other data, and understand them (including the child’s motivation).¹

How do we solicit a child’s opinion? A variety of methods may be used to hear a child’s voice. These methods fall along a continuum, such as through court-appointed counsel, giving testimony in open court, being interviewed by a judge in chambers, speaking to a custody evaluator, being deposed, executing an affidavit, or participating in confidential settlement negotiations (including in collaborative law, through a child specialist, or in mediation).² The most important thing for a child’s attorney to understand is that the person who interviews a child needs to be properly trained to communicate with a child and to interpret what that child says. The interviewer should have other information at his or her disposal to help interpret the child’s words. Several factors will affect the accuracy of a child’s words. The child may be reluctant to share candid information with an unfamiliar adult. A child may have poor linguistic skills because of age, maturity, education, socioeconomic status, or because English is not their first language. A child may have poor memory retention of events and may tend to forget information more readily than does an adult.³ A child may attempt to fill in gaps for information they lack, rather than disappoint an authority figure by having nothing to say. A child may feel a need to give answers, even when they do not have answers. Two children, of different ages, may recollect the same event very differently. Parents, adults, friends, television, or a variety of other external factors may contaminate a child’s memory. If a parent is routinely telling a child the other parent does bad things, it may not matter if those things have actually happened; the child may create false memories of those events happening. A child may try to provide information adults want to hear (or the child believes the adult wants to hear).

². *Id.* at 375.
The appointment of a child’s attorney is an excellent means by which a child’s voice may be heard while protecting the child. A child’s attorney can engage professionals, take the necessary time and care, and perform the requisite outside investigation to put the child’s words into context and appropriately interpret them. Beyond what a mental health professional can do, the child’s attorney can work alongside others, educate the child, and protect the child’s interests in legal processes that will affect the child. Beyond what judges can do, a child’s attorney can build the necessary rapport, gather the necessary information, and take sufficient time to pull together a full picture of what may be happening in this child’s life. A child’s attorney may be the best ally to gather the child’s words and preferences in the safest, clearest, and most comprehensive way.

A child’s attorney may hold a variety of titles—best interest attorney, guardian ad litem, child advocate, child’s attorney, etc. These terms may mean different things depending on the jurisdiction where the attorney practices. When I refer to a child’s attorney in this book, I will briefly explain the attorney’s role to distinguish between the various titles throughout the text; the general title “child’s attorney” (or child’s counsel, child’s lawyer, or child’s representative) is used to more broadly reference the many roles a lawyer can take when working with a child as legal counsel.

Given the range of roles, titles, and the variety of guidelines and standards (which all vary by state and country), I have focused this handbook primarily on the American Bar Association (ABA) Standards of Practice for Lawyers Representing Children in Custody Cases. I recognize that child’s attorneys in some jurisdictions still testify, write reports, or have limitations such that they cannot represent a child’s “best interests.” Therefore, I will distinguish these different roles in the text, while remaining true to the ABA Standards.

This introductory chapter focuses primarily on the basic principles that are foundational to representing children, provides a review of the differences between the ABA Standards and the 2006 standards promulgated by the American Academy of Matrimonial Lawyers, provides examples of the many roles of a child’s attorney by providing case studies from a handful of U.S. states, and begins a discussion about the competency required to take on this sometimes-overwhelming role of a child’s attorney.

4. The ABA Standards can be found in their entirety in Appendix 4.
Finally, although lawyers may represent children in a variety of cases, such as adoptions, guardianships, and abuse or neglect matters, this book focuses only on custody cases. Throughout the book, I refer to a child’s “parents” and your interaction with those parents; however, I recognize that modern families may have other caretakers, actors, or intervenors in a custody case who are parties to the action or tied to the child in a manner that is akin to a parent. My intent is not to limit the litigants in a custody case to a biological mother and father.

§1.01 Standards and Model Acts

a. ABA Standards of Practice for Lawyers Representing Children in Custody Cases

In August 2003, the ABA approved the Standards of Practice for Lawyers Representing Children in Custody Cases. The ABA Standards attempt to clarify the role of a child’s attorney—something that had become muddled by appointments of parenting coordinators, referees, facilitators, evaluators, and expert (or lay) witnesses. The ABA Standards chose to distinguish between two separate roles for a lawyer who represents a child. The first is deemed a child’s attorney (or, alternatively, a child’s advocate), who represents a child in the same manner—and with the same professional duties—as a lawyer representing an adult client. The second is a best interest attorney, who represents a child’s interests without being bound by the child’s directives. The ABA Standards were drafted as a mechanism to provide more predictability, uniformity, quality assurance, and professionalism; they require certain clarity of a lawyer’s role and his or her performance when representing a child. The ABA Standards avoid the use of the title “Guardian Ad Litem” (GAL), which was the name routinely used for a child’s attorney. The title was believed to have become too synonymous with expert or lay opinions because a GAL was often required to testify or provide a report—tasks that were purposely excluded in the ABA Standards. This handbook is premised on the two distinct types of lawyers outlined by the ABA Standards. The ABA Standards apply regardless of whether the attorney is retained by the child or is court appointed.

The key to representing a child in a contested custody matter is to know your own limitations—emotionally, professionally, and legally. Do not work with a child if it will cause you—or the child—emotional distress. Do not
work with a child if the work requires expertise beyond that of a lawyer, unless you can competently represent the child with the guidance of outside professionals. Do not work with a child outside of the scope of your legal limitations, whether set by the law, ethics, or a court order. For example, the ABA Standards anticipate that you, as a child’s attorney, are responsible for monitoring the implementation of the court’s custody orders and addressing a parent’s noncompliance with those orders; however, this may actually be outside the scope of your court-ordered appointment. Representing a child is, in many ways, significantly different from representing one of the child’s parents, even though your ethical obligations may be identical. You will be working with an individual who is the most vulnerable, requires the most protection, may be the least communicative, may have the most information but no mechanism by which to share it in a comprehensive and understandable manner, and may need the most education in the least “legal” of ways.

b. American Academy of Matrimonial Lawyers Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings

In 2011, the American Academy of Matrimonial Lawyers (AAML) revisited its 1994 standards for representing children in custody and visitation cases to give more clarity to parties and the courts. The AAML Standards acknowledge that, in U.S. family courts, parents often cannot afford their own counsel; therefore, paying for a child’s attorney may be beyond the reach of a particular family, requiring alternatives to hearing a child’s voice by judicial or professional interviews. The AAML Standards further acknowledge the value of a child’s attorney as an advocate for the child’s wishes and someone who tries to shield the child from acrimonious litigation, but tempers those observations with the reality that an attorney who works with a child is placing that child squarely in the middle of litigation. The AAML Standards differ from the ABA’s Standards in a material way: The AAML Standards have only one role for a child’s attorney—that is, as an attorney representing the child in the role of traditional counsel.

The AAML Standards favor limited assignment of a child’s attorney to cases; when assigned to a case, the attorney must be specially trained and designated for the role of a child’s attorney in the lawyer’s jurisdiction. The AAML Standards mandate the child’s attorney to assess each child client’s capacity to direct his or her own representation, and to decline the appointment as counsel if the child lacks capacity. The child’s attorney, if appointed,
must then represent the child’s goals and seek to attain those goals for the child. If a parent is manipulating the child toward a certain outcome, the child’s attorney must fully and frankly counsel the child. The child’s attorney may seek withdrawal under local ethics rules if the child client is insisting on taking action with which the lawyer has a fundamental disagreement. The lawyer must not represent the child’s “best interests,” except to the extent that those interests align identically to the child’s stated wishes. The lawyer does not make any recommendation on the outcome.

c. Uniform Law Commission Model Representation of Children in Abuse, Neglect, and Custody Proceedings Act

In 2007, the Uniform Law Commission (ULC) concluded a model act to improve the representation of children in proceedings directly affecting their custody by defining the roles and responsibilities of the child’s attorney. The Model Act addresses the role of a child’s attorney in more than just custody proceedings. The Model Act gives the court discretion to appoint an attorney for a child in a custody proceeding. Much like the ABA Standards, it defines two separate types of lawyers for children: a child’s attorney and a best interest attorney. The Model Act also defines a best interest advocate who is distinct from an attorney. The Model Act gives guidelines to judges on when it may be appropriate to appoint an attorney or advocate for a child, as well as the factors a judge should consider when deciding whether to appoint someone. The Model Act gives guidance to a court in drafting an order appointing an attorney, its contents (including a mandate that the attorney have access to the child and confidential information related to the child), and its duration. The Model Act includes a list of duties for an attorney who represents a child client, such as meeting with the child, consulting with others, investigating facts, and encouraging settlement, among other tasks. The Model Act also limits who may sue the attorney for malpractice to only the child client. Finally, the Model Act provides for the attorney to be paid for his or her services to the child.

No state has adopted this Model Act.

§1.02 U.S. State Laws, Policies, and Procedures

a. Overview

Each state determines how to set standards for a child’s attorney. Some states have that role defined in statute, others in guidelines or court rules, and still others through administrative orders. Even if you find language within your
jurisdiction’s laws permitting appointment of a child’s attorney, you still must assess whether your jurisdiction has clearly defined rules that give your role structure and definition. In this book’s Appendixes, you will find charts that provide information about the diversity of how jurisdictions clarify the role of a child’s attorney. Because this area of practice continues to redefine itself on a routine basis, it is difficult to compile a full summary of the current status of each state. The ABA Family Law Section’s scholarly journal, the *Family Law Quarterly*, publishes yearly summaries of the law in all states, which provide guidance and updates. You do not need to know the law in all states—you simply need to know what your state is doing. As an illustration, I share several case studies below, each from a different state, to provide perspective on the disparities in state practice and law when it comes to a child’s attorney.

b. Case Study: Maryland (by Melissa Kucinski)

In Maryland Rule of Civil Procedure 9-205.1, a court may appoint an attorney for a child in a custody or access case. The rule provides factors a judge should consider in determining whether an appointment is prudent and necessary. It also mandates that certain minimum information must be included in a court order appointing a child’s attorney. Maryland has its own Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody and Access, appended to the Maryland Rules of Civil Procedure.

Maryland recognizes three distinct roles for attorneys who represent children. The first, defined as a Child’s Best Interest Attorney, clearly protects the child’s best interests and is not bound by the child’s directives or objectives. The second, a Child’s Advocate, is a pure advocate for the child’s expressed desires and acts as independent legal counsel, owing the same duties an attorney would to an adult client. The third role (almost a subset) of a child’s attorney is the Child’s Privilege Attorney, which was originally defined by case law in *Nagle v. Hooks*, 296 Md. 123 (1983). This lawyer is appointed by the court to decide whether to assert or waive, on behalf of the child, any privilege an adult would be entitled to waive—most typically a

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5. Appendix 1 contains charts from the Uniform Law Commission’s model act drafting committee in 2006.
mental health privilege, where, in many jurisdictions, it would be the parents who would be required to consent to waiving the child’s privilege so the court could gather otherwise private information. This third type of attorney is subsumed into the first two—the best interest attorney and the child advocate attorney who both have the duty and role of a child privilege attorney, but also have the more expansive role.

The Maryland Guidelines provide guidance on how to determine whether a child has “considered judgment” (in some jurisdictions, called capacity or maturity) by focusing the attorney on the child’s decision-making process rather than on the child’s decision, and deterring the attorney from making a decision about considered judgment solely on any child’s cognitive or emotional capabilities. The Maryland Guidelines also mandate a minimum of six hours of training, including the topics of child development, child abuse, substance abuse, and what resources are available to the attorney and child. The Guidelines set minimum requirements to be appointed as a child’s attorney, in addition to the training. They also require courts to establish compensation structures and assurances the attorney receives compensation in a timely fashion (including the use of retainers and entering money judgments when not paid).

The Maryland Guidelines in many ways mirror the ABA Standards. They give the court guidance as to when to appoint a child’s attorney and lawyers guidance on their tasks in representing a child (depending on the type of appointment). The Guidelines do impose a prohibition on testifying and filing any report with the court.

c. Case Study: Washington (by Linda Mason Wilgis)
Under Washington state law, a court may appoint an attorney to represent a child’s interests on parenting plan issues in dissolutions of marriage, domestic partnerships, and legal separations. This authorization is discretionary, not mandatory. Revised Code of Washington (RCW) 26.09.110 provides: “The court shall enter an order for costs, fees, and disbursements in favor of the child’s attorney. The order shall be made against either or both parents, except that, if both parties are indigent, the costs, fees, and disbursements shall be borne by the county.”

A child does not have a guarantee of attorney representation, but the child’s wishes about how much time they spend with each parent are considered by the court if the child has the mental capacity to express these wishes. The child’s wishes are one of several factors the court considers in
developing a residential schedule. The requirement that a child have the autonomous capacity to rationally articulate what he or she wants is tied to the fundamental principle that “a normal client-lawyer relationship is based on the assumption the client, when properly advised and assisted, is capable of making decisions about important matters.”

Although Washington state law requires the court to consider the wishes of certain children, it does not state this must be through counsel. The Washington Court of Appeals held the trial court was not required to specifically appoint an attorney, but should appoint an attorney or otherwise order an investigation of relevant facts to address a situation where the parties failed to adequately develop relevant factors to make an objective decision to serve the best interest of the child. Similarly, the court of appeals found that the trial court should have appointed an attorney or a GAL to assist the court in reaching an objective decision on custody. The trial court judge had allowed an unrepresented, fourteen-year-old child to testify in chambers that she wanted to live with her mother. The mother had a significant history of mental illness. The court of appeals recognized the lower court’s “difficulty in reconciling [the child’s] strongly stated preference for her mother with the court’s finding of mental illness” and concluded that the input of a GAL or attorney would have been beneficial in determining custody.

The law is scant on detail in that it does not specify an age by which a child is considered by the court to be sufficiently mature to express preferences, nor does it provide other indicia of maturity; however, its flexibility does provide attorneys a foothold by which to request that the court appoint the child an attorney in family law cases. Children age twelve years or older must consent to the release of their medical records and counseling records that may be relevant to an investigation in family law cases. Additionally, in the dependency realm (cases in which the child has been alleged to have

7. Wash. Rev. Code § 26.09.187 directs the court to consider “the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule” Wash. Rev. Code § 26.09.187(3)(vi). Other child-centered factors specified by Wash. Rev. Code § 26.09.187(3) include: (i) The relative strength, nature, and stability of the child’s relationship with each parent; (iv) the “emotional needs and developmental level of the child;” and (v) “the child’s relationship with siblings and with other significant adults, as well as the child’s involvement with his or her physical surroundings, school, or other significant activities.”


been abused or neglected and the state has intervened to protect the child), children age twelve years or older must be notified of their right to request an attorney.\textsuperscript{12} Thus, although there is not a bright-line rule to guide attorneys on when the court will grant a request for attorney representation in a family law custody case, age twelve years is recognized as a significant age of demarcation as to consent in other legal contexts in Washington. This suggests that attorneys in a family law context will have greater likelihood of having their motion granted if their potential client is age twelve years or older.

In the majority of dissolution cases in the state of Washington, children are not appointed attorneys. The culture of practice, an outgrowth of the court having the \textit{discretion rather than mandate} to appoint an attorney, is such that most cases proceed without counsel even requesting they be appointed to represent a child. In contrast, it is common practice in several counties across the state for the court to appoint a GAL or a Parenting Evaluator to investigate and make findings and recommendations to the court. The primary mandate of a GAL is to represent the “best interests of a child.”\textsuperscript{13} However, this statute also states that, “If a child expresses a preference regarding the parenting plan, the guardian ad litem shall report the preferences to the court, together with the facts relative to whether any preferences are expressed voluntarily and the degree of the children’s understanding.”\textsuperscript{14} These experts are called to testify at trial in contested cases, so this becomes the main avenue in Washington cases to convey the preferences of a child as to a residential schedule.

d. Case Study: Kansas (by Ashlyn Yarnell)

In Kansas, GALs are governed by Supreme Court Rule 110A,\textsuperscript{15} which outlines the educational requirements, responsibilities, and general guidelines for involvement in both domestic and child in need of care proceedings. The general understanding is that Kansas GALs act as a “Best Interest Attorney” as defined by the ABA Standards, which define a best interest attorney as a lawyer who provides independent legal services for the purpose of protecting a child’s best interest, without being bound by the child’s directives or objectives.

\textsuperscript{12} Wash. Rev. Code § 13.34.100(7).
\textsuperscript{14} Id.
The only reference or guidance in the Kansas Rules to ethical restrictions is to the Kansas Rule of Professional Conduct 3.7(a), which states that “a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where: 1) the testimony relates to an uncontested issue; 2) the testimony relates to the nature and value of legal services rendered in the case; or 3) the disqualification of the lawyer would work substantial hardship on the client.” Thus, in essence, GALs should be treated as all other attorneys on the matter. They should not receive any sort of power from the court to testify or offer written reports to the court without agreement of the involved parties, waiving the ethical restriction of their involvement on the case.

GALs do not share confidentiality with the children whose interests they represent. The GAL may request an advocate in Child in Need of Care proceedings by a showing of good cause to the court or if the child’s wishes conflict with their recommendations to the point that an additional attorney needs to advocate for a particular position. The appointment of an advocate, however, is permissive by the court. No such provision exists by statute to appoint an advocate under the domestic code.

GALs are required to conduct an independent and ongoing investigation and to have ongoing contact with the child client. They must also explain the proceedings and their role to the child client in a way that is appropriate for that child. GALs in Kansas, above all, serve as attorneys and as parties to the action, filing pleadings, participating in all hearings, advocating for their recommendations, and supervising their subsequent implementation.

e. Case Study: Minnesota (by Valerie Arnold and Micaela Wattenbarger)

In Minnesota, a child generally does not have an independent right to counsel as part of a child custody or parenting time proceeding in family court. However, where the court has reason to believe that the child in question “is a victim of domestic child abuse or neglect,” the appointment of a GAL to represent the child’s best interests, incident to the child custody or parenting time proceeding, is mandatory. In addition, the court has the discretion to appoint GALs to represent the minor child’s best interests if the

18. Minn. Stat. § 518.165, subd. 1 and 2.
court has concerns about the child’s welfare, even if the court does not suspect child abuse.\footnote{Id.}

In juvenile court proceedings, the court “shall appoint a [GAL] to protect the interests of the minor when it appears, at any stage of the proceedings, that the minor is without a parent or guardian, or that the minor’s parent is a minor or incompetent, or that the parent or guardian is indifferent or hostile to the minor’s interests, and in every proceeding alleging a child’s need for protection or services... In any other case the court may appoint a guardian ad litem to protect the interests of the minor when the court feels that such an appointment is desirable.”\footnote{Minn. Stat. § 260C.163, subd. 5(a).}

The GAL program in Minnesota consists of specially trained community volunteers and state employees. A GAL may or may not be a licensed attorney. The role of a GAL in either a custody and parenting time proceeding or a juvenile court proceeding is to (1) conduct an independent investigation to determine the facts relevant to the situation of the child and the family; (2) advocate for the child’s best interests; (3) maintain the confidentiality of information related to the case, with the exception of sharing information as permitted by law; (4) monitor the child’s best interests throughout the judicial proceeding; and (5) present written reports on the child’s best interests that include conclusions and recommendations and the facts upon which they are based.\footnote{Minn. Stat. § 518.165, subd. 2a; Minn. Stat. 260C.163, subd. 5(b).} Regardless of the GAL’s credentials, a GAL does not function as the child’s attorney and does not provide direct services to the child.\footnote{Id.} Nevertheless, the GAL may be afforded standing as a party to the child custody or parenting time proceeding and may be represented by counsel.\footnote{Minn. Gen. R. Prac. §§ 302.02(b) and 357.01.}

In juvenile court proceedings in Minnesota, in addition to utilizing the services of a GAL when a child is found to be in need of protection and/or services, a child “has the right to effective assistance of counsel.”\footnote{Minn. Stat. § 260C.163, subd. 3(a).} Except in cases where the sole basis for the petition is habitual truancy, the court is to appoint counsel to represent the child at public expense if a child aged ten years or older desires counsel but is unable to employ counsel.\footnote{Id. at subd. 3(b).} The social services agency involved in the child protection proceeding must (within ten days after filing the petition or at the emergency removal hearing if the
child is present) inform the child of the child’s right to be represented by appointed counsel upon request and shall notify the court as to whether the child desired counsel.\textsuperscript{26} An attorney representing a child has the same professional obligations in that representation as he or she would have in representation of an adult. In juvenile delinquency cases, the attorney appointed for the child is to initially meet with the child privately, outside of the presence of the child’s parent(s) or guardian.\textsuperscript{27} The attorney “shall act solely as counsel for the child.”\textsuperscript{28}

\textbf{f. Case Study: Germany (by Jutta Carrington-Conerly)}

Since changes in German Family Law and new regulations became effective on September 1, 2009, courts can and shall appoint an attorney for a minor child in custody, visitation, child neglect, limitation of access to a child, child abduction cases, and all other child and parent matters to represent the child’s interests independently from either one of his or her parents.\textsuperscript{29}

If a child is between fourteen and eighteen years of age, he or she can request a representative of his or her choice, as long as the individual meets the necessary criteria to represent the child adequately. As a general rule, the appointment of a specialist (usually a lawyer or psychologist, or in rare cases, a specially trained social worker) is required by law in these cases and in cases where the court may be required to remove the child from a parent or legal guardian for the child’s own protection (i.e., mental or physical abuse).

A judge should appoint a child’s attorney as early as possible in any court proceeding and, in its order, explain the role of the child’s attorney in detail. Through the court appointment, the attorney becomes a participant in the proceedings. The parties are prohibited from filing motions or appealing any custody decision. The GAL has his or her own right to appeal a decision in the best interests of the child despite the fact that the GAL is not the legal representative of the child. The GAL will determine the interests of the child in the disputed legal matter and inform the court about the results of the GAL’s review of the case, as well as any interviews done with the child to learn more about the situation from the child’s point of view. Once the court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} \textit{Id}. at subd. 3(d).
\item \textsuperscript{27} \textsc{Minn. R. Juv. Del. P}. § 3.01.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} The exact description of the duties can be found in § 158 FamFG (Act on the Procedure in Family Matters and in Matters of Non-Contentious Jurisdiction).
\end{enumerate}
\end{footnotesize}
makes a decision and the GAL does not appeal that decision on behalf of the child, the appointment, if not previously rescinded because of a settlement or other closure, shall expire with the decision becoming final.

The GAL is reimbursed with a one-time flat fee paid by the government as compensation for the performance of his or her duties and depending on whether the GAL had direct communication with the child. Because the GAL is typically a professional in the field of family law or psychology, judges tend to adhere to their advice. Therefore, the role of a GAL is of great importance and influence in any child-related legal matter in Germany.

§1.03 Types of Lawyers for Children

Who decides the role, designation, and mandate of the attorney working with a child? The court? The attorney? The short answer is that, if your jurisdiction has distinct and multiple roles for a child’s attorney, then the court (at least initially) will likely determine what role you take when it appoints you. This initial determination, however, may not limit you, as the attorney, from petitioning the court to change your role or appoint a second attorney on behalf of the child as you become familiar with the child’s position, maturity, and judgment. If you believe at some point in your representation that your child client requires a different type of attorney (e.g., a best interest attorney if you feel the child does not have sufficient judgment to form a position as to his or her best interests), you need to follow your ethical guidelines in determining the next step. You cannot prejudice your child client’s position, nor disclose confidential information, which may make this next step more difficult for you. Throughout the process, you must continue advising your child client and communicating with him or her about the case. There may be circumstances, however, when you may ultimately need to withdraw from their representation.

The ABA Standards prohibit a child’s attorneys from testifying, filing a report, or making recommendations. A child’s attorney may explain what the child client wants, proffer what the lawyer anticipates the evidence will prove, and provide evidence to support a position or argument. The lawyer acts independently and must exercise independent judgment. Their loyalty is to the child client, no matter who pays for the lawyer’s services. The lawyer, regardless of his or her role (as a child’s advocate
or a best interest attorney), needs to consistently assess and reassess the child’s viewpoint. The child’s viewpoint may vary over time, change as circumstances change (particularly in protracted and lengthy litigation), or result from fear, intimidation, or manipulation. Thus, a more in-depth analysis by the lawyer would be required, including work with other professionals to facilitate communication with the child and fully understand the child’s views.

a. Lawyers Who Represent a Child’s Best Interests

Even though the ABA and the ULC both provide for two distinct roles for a child’s attorney, the AAML instead limited a child’s attorney to the traditional legal representation afforded a parent, where the client dictates his or her own objectives. Given the AAML’s decision to limit the role of a child’s attorney to that of a pure advocate, one must ask whether a lawyer should be making an independent assessment about what is best for his or her client and then advocating for that position. We do not—and cannot—take on that role when representing a parent. Why is a child different, particularly when there are many professionals that can provide a bona fide analysis and reach a conclusion on the child’s best interests, such as custody evaluators, psychologists, and even therapists?

One might argue that a mental health professional is a much more appropriate advocate for a child’s “best interests” because this professional has a rigorous structure in place that provides guidelines on how to reach such a conclusion and has had training in making such an assessment. How is a lawyer truly able to know what is best for the child client? Perhaps this is an appropriate segue to our discussion on why a child may need a lawyer in the first place. Lawyers do much more than advocate. They educate, advise, and counsel. They also shield and act as a buffer between the court process and the client. A lawyer, whether representing a child’s interests or position, has a role to discover admissible evidence geared squarely at helping a court reach a conclusion, presenting it clearly, and ensuring the client understands the process and the outcomes. Not all children have considered judgment/capacity/maturity (or any other word you wish to substitute here). Should those children not have the benefit of legal guidance simply because a lawyer cannot ethically advocate for their stated wishes? The role of a best interest attorney may require counsel to rely very heavily on those other professionals, including mental health professionals, when ultimately taking a position on behalf of the child.
b. Lawyers Who Advocate for the Child’s Position

If you are hired or court appointed to represent a child’s stated position, this role does not obviate the need to perform an independent investigation of the child client’s circumstances. Your investigation serves to help you, as the child’s attorney, understand the child’s communication, represent his or her position, present the best evidence to attain the client’s goal, and, most importantly, know whether the child is able to actually take a position. Some children are not mature enough to take a position. Some may take a position, but lack the judgment necessary to understand and appreciate the impact of that position, even with your guidance. Your investigation also furnishes you with information sufficient to counsel your client. If your client elects to take a position that makes little sense to you, after your investigation, you can help educate the child about the practical outcome if the child’s goals were reached.

If you are representing a child’s position, you are playing a traditional lawyer role. You must ensure that you meet all ethical standards, regardless of the child’s behavior, position, disclosures, or actions contrary to his or her own interests. This may be difficult if you disagree with your child client. You will need to carefully weigh your ability to work with a client who is difficult to counsel. You may have opportunities during the representation to ask the court to vacate your appointment or to amend your role to that of an advocate for the child’s interests, not position. Regardless, you will need to maintain your client’s confidentiality and be able to explain to the child why you are asking to change the dynamic and your role.

c. Lawyers Who Address a Child’s Privilege

A child holds the same privileges that an adult holds, and this will most prominently be seen if the child is in therapy with a mental health professional. As a child’s attorney, you clearly need access to the information that a mental health provider has about your client. Do your jurisdiction’s laws and/or your order of appointment permit you access to otherwise privileged information about your child client? Assuming the person from whom you are requesting privileged information is permitted to share their information with you, what can you share with this person? You may also have a privilege with your child client. When you are talking to the person who is treating your client, you may be tempted to share information with this treatment provider, particularly if it relates to the child’s health and well-being. Tread carefully. Ensure you are not crossing any ethical boundaries.
any conversation you intend to have with this person should be discussed with the child client first. Although you may not need the child’s permission or authorization to speak with the treatment provider, your client should understand what steps you are taking in their representation. This is particularly important so that you do not destroy any confidence the child has in you or in their treatment provider.

If you gather privileged information from your child client’s provider, when can you use this information in your representation of your child client? Depending on your jurisdiction’s rules, simply speaking with the individual does not mean that the child’s privilege has been waived with that person. Each state has different rules as to who may waive a child’s privilege. In some jurisdictions, it may be the child (if the child is of a certain age). In others, it may be the parents (and, clearly, this will require the parent or parents with legal custody to waive privilege, which may ultimately yield information that is contrary to their position in court). In still others, you, as the child’s attorney, may have the sole authority to waive the child’s privilege. If I have the authority to waive a child’s privilege, I start from the premise that the privilege exists for a very important reason—to protect a relationship between the child and their treatment provider. If this treatment provider were to share private information with others (including a judge, lawyers, or even the parents), how would that affect the child’s ongoing treatment? Will the child need ongoing therapy? Does the child understand that their communication with their treatment provider is private? Are you able to obtain admissible evidence about the child from other sources than the treatment provider? How important is the treatment provider’s information to a final custody determination? Often, treatment providers obtain most of their information from the child client’s parents and may have very few unique details, observations, or assessments. It may also be that the child has no privilege with the treatment provider because the provider was evaluating the child and not treating the child. The child may have seen the treatment provider so few times that the provider has no real assessment of the child’s situation.

What will happen once the child’s privilege is waived? Depending on where the treatment provider is situated, that provider may now be asked to provide records or oral testimony, either in deposition or in court. The treatment provider may be subject to the Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, health care providers may share protected health information if obligated to do so by a court order
(limited to only what is covered by the court order). A subpoena by a court clerk or a lawyer will need to follow additional notification requirements before the HIPAA provider is obligated to release information.30

As you can imagine, mental health professionals and other doctors are going to be very hesitant to speak with you. Not only are you a lawyer (and when people get calls from lawyers, it raises red flags), but also they do not want to violate their ethical obligations to their patient. Be courteous and understanding of these concerns. Ensure your order of appointment or other court order clearly gives them permission (or a mandate) to communicate with you. Share that order with the providers well in advance of scheduling a meeting, so that they can consult with their lawyers before speaking with you.

d. Lawyers Who Are Experts

As seen from the ABA Standards, the AAML Standards, and the ULC Model Act, the expectation in today’s legal climate is that a child’s attorney is truly a lawyer in all senses of the word. The child’s attorney will not testify, provide a report, or give an opinion. Jurisdictions have adapted and clarified the role of a child’s attorney, in most instances, because of the influx of new processes and professionals available to families (e.g., custody evaluators, parenting coordinators). The clarifications have also emerged as a way to protect lawyers. A lawyer that adheres to a very clear set of guidelines, practice rules, and ethics is less likely to lose a lawsuit when sued for malpractice. Nonetheless, some jurisdictions still permit child’s counsel to draft a report or testify; when doing so, that lawyer has to ensure that he or she is following the jurisdiction’s guidelines. Will hearsay rules apply? Must the information provided by the child’s attorney be admissible evidence upon which the lawyer would rely if it were offered in trial? If you are testifying or writing a report, will you be qualified as an expert? Will you be required to use a specific methodology when conducting your investigation? Must your testimony or report cite to standards, publications, or other quantifiable research? Is your work product subject to discovery or subpoena? If your jurisdiction’s rules, guidelines, and the court order appointing you as the child’s attorney are unclear, you need to be certain what they are before putting your name, reputation and expertise before the court. Must you rely on other professionals when opining, such as mental health professionals?

Is your role one where you may request psychological or psychiatric evaluations? Is your report required to provide verbatim testimony or proffers of those you interviewed?

If you are going to take on a role that places you squarely in the position of giving the court an opinion, you clearly need to document everything you do. Will the child’s words to you be protected by a privilege? Will you be required to disclose other protected information? How do you describe your role to the child?

e. Lawyers Who Are Hired Privately by the Child/One Parent

In some situations, a child may need his or her own attorney, but the court has refused, failed, or has no legal authority to appoint an attorney for the child. In situations where the child may testify, be interviewed, is asked to sign an affidavit, or has the right to intervene, the child must understand his or her rights but should not be counseled by his or her parents. This child may be in a position to hire private counsel who is not specifically court appointed.

A lawyer who is not court appointed may have more difficulty securing information from third parties. A privately retained lawyer may need to file motions with the court (if permitted to do so) to request permission for access to information, particularly if the child client is unable to provide the information or consent to its release.

Another potential issue is whether the attorney is paid, and by whom. Typically, when the court appoints a child’s attorney, it provides for payment, including an hourly rate or flat fee, and any retainer obligation. The order may also dictate the terms under which the lawyer may collect, whether he or she may obtain a judgment, and whether the attorney is obligated to begin work before collecting a retainer. If a lawyer is not court appointed, the lawyer may require a retainer agreement, which is a complicated legal document for a child to understand and an overwhelming burden for the child to afford. A child’s parent may become involved in retaining the lawyer, which gives the impression that the lawyer is not necessarily representing the child’s interests so much as representing the person who pays the bills.

When a lawyer is privately retained, what guidelines should the lawyer abide by? While the ABA Standards specify that the guidelines apply to lawyers who are court appointed or privately retained, certain states dictate that their guidelines (and also therefore requirements regarding training and experience) are only mandatory for court-appointed lawyers.
If the privately retained attorney determines that a child has no capacity or is immature and cannot direct his or her own representation, then the lawyer must—like all lawyers—abide by the Rules of Professional Conduct and Rules of Court to terminate the relationship with the child client and withdraw from the case as counsel for an intervening party (who may or may not have standing). When you are privately retained, to have permission to stand in court and represent your client, you need to request permission for your child client to intervene (if this is even the role for which you are retained). This may be a difficult concept to sell to a judge who would rather the child not be involved at all. If the child is merely a witness, the lawyer may only work with the child client on a limited basis to prepare the child to testify and attend any hearing to make appropriate objections on behalf of the child.

f. Case Study

You represent a sixteen-year-old child. She goes to the courthouse, unhappy with the existing access schedule outlined in her parents’ custody order. She has been refusing to spend time with her father. The child completes a form at the courthouse asking to change the access schedule to eliminate the time with her father. Assuming the matter proceeds (and there are not grounds on which to reject the child’s court filing) or (at the very least) the child’s filing provokes the parents to seek to modify their access order, what happens to the child now? She is clearly invested enough in the outcome that she wants to be directly involved. If her court pleading remains in the file, she is now put in the middle of litigation.

The child comes home from school one day and tells her mother that her friend Carol’s mother was represented by you in a custody case and that the child wants to meet with you. At a loss for what to do, the mother takes her daughter to meet you. How do you proceed? You need to set guidelines for this type of situation. Do you treat this like an initial consultation with the child and maintain that the child has a confidential relationship with you? Do you meet with the parent, either separately or simultaneously with the child? Do you get paid? Do you even ask for money? How are you retained? Would discussing finances with the child only further entrench her in the middle of a difficult situation? Assuming you can actually resolve getting paid, then what?

If you have questions for your child client, what do you do? Would you ask the child client permission to begin calling others? What happens if the others refuse to talk to you? How do you evidence that you are representing
the child? At what point do you approach the parents and request releases to speak to medical providers and others on behalf of the child? What happens if one or both of the parents refuse to sign the release? Do you go to the court and request that you be appointed as the child’s “court-appointed” attorney? Do you have authority to do that, particularly if your client’s petition was dismissed or the court rejected her ability to intervene? What happens if the parents disagree with your involvement? Do you merely serve as a lawyer to help educate the child? What happens if the other lawyers will not communicate with you and keep you abreast of what is happening, so that you do not know what to tell your child?

This type of role is fraught with difficulty. If you agree to accept a child as privately retained counsel, you need to understand the complexity that is involved, review the rules of conduct in your jurisdiction, and be prepared that you may have a significantly limited role that is not accepted by all parties or their counsel.

§1.04 Training and Competency

While a child’s attorney must be familiar with laws, rules, guidelines, and ethical principles, one of the most important concepts that a competent child’s attorney must study is child development. In preparing to represent children as clients, a child’s attorney must build a network of other professionals with whom to consult so that they understand the child’s communication and are adequately communicating back to the child in a manner understandable by a child of that age and maturity. Some jurisdictions may mandate training and continuing education for a child’s attorney to accept cases.

a. Elements in Training Programs

The ABA Standards list substantive topics that should be covered in specialized training for child’s attorneys. These topics include relevant laws and regulations; legal standards; the guidelines in that jurisdiction; the court process and key personnel (including court and private services typically used in these cases, such as custody evaluations or mediation); child development and needs; communicating with children; how to prepare and present a child’s viewpoint; child testimony; alternatives to direct child involvement; how to recognize, evaluate, and understand child abuse or neglect; family dynamics, particularly with the presence of domestic violence and substance
abuse; resources, including local resources; services available to children and families, including welfare, mental health, educational, special needs, placement, evaluation, and treatment services; and advanced laws such as child custody jurisdiction laws, relocation laws, and abduction laws.

Besides training, should a child’s attorney be trained in any other legal disciplines? Should the lawyer be a practicing custody attorney or family lawyer? Can or should a lawyer who does not practice in the family law field undertake representation of a child client? Regardless of your background and whether you meet your jurisdiction’s standards, you must be comfortable with the complex and dynamic relationship you will have with a child client.

b. Experience

It goes without saying that even if you have significant training, you need to feel comfortable communicating with children of all ages, learning abilities, needs, cultures, and circumstances. Although you can improve these communication skills through study and practice, some will simply be innate. Being a parent does not mean you can adequately communicate in an appropriate, healthy, and understandable way with a child who is in a distressed state. You may want to consider working as co-counsel for a child, if your jurisdiction so permits this type of appointment, so that you can have a mentor to learn the skills necessary to work with children as their attorneys. You may also want to engage in local, national, or international networks of child’s attorneys to be able to discuss more complicated issues and how to address them when they arise in your cases. Finally, be sure to befriend competent child psychologists, therapists, and mental health professionals in your jurisdiction. Not only will they be helpful when you need a referral for the court or the parents, but they are an excellent resource of information when you need guidance on a variety of questions, such as, “How do I ask a child if they are gay?,” “How do I tell my five-year old client that their mom and dad are in court?,” or “What is my child client really saying when he tells me that he does not want to eat at his mother’s house?”

c. Model Rule 1.1—Competence

A child’s attorney has an ethical duty to provide competent representation to their child client. Model Rule 1.1 of the ABA Model Rules of Professional Conduct states that “competent representation requires the legal knowledge,
skill, thoroughness and preparation reasonably necessary for the representation.” When you represent a child, this competency will require you to have knowledge about your child client and his or her abilities and needs, the skill to speak with and properly advise your child client in an understandable and relatable manner, the thoroughness to gather information that your child client may not have or be able to share, and the preparation to advance your child client’s best interests. You need to be competent in the law, but also in so much more. It is rare that a law school would offer a class that prepares you for the undertaking of representing a child client. Whether or not your jurisdiction has minimum requirements to accept court appointment as a child’s attorney, you should be prepared to go beyond those minimum requirements. You need to continually educate yourself. Each child will have different needs and abilities, different ways of communicating, different circumstances and problems, and different networks and allies. You need to be an investigator, a confidant, an armchair psychologist, a skilled communicator, and a confident advocate.

d. Need for Pro Bono Help in Courts

It may be impossible for a family who desperately needs a lawyer for their child to secure one, simply because of cost. Even if the family can afford a child’s attorney, the likelihood is that this lawyer is the third one in the case, increasing costs for the entire family. Given that your role is unique and requires a lot of independent investigation to verify details, facts, and to understand the child’s viewpoint (as opposed to simply having the client tell you his or her position and the facts needed to make your case), it can be costly. You may need to travel to your child client, to his or her school, activities, or elsewhere. Your work will not be restricted to your office and the courthouse. If you represent a child client, your workweek will be predominantly out of the office. This may leave the most vulnerable of family members without a necessary advocate. For lawyers who represent children, you will become accustomed to accepting cases at lower hourly rates, capped fees, or pro bono. Courts may hold special funds to pay counsel their fees. Other courts may have rosters of pro bono child’s attorneys.