**Blended Sentencing and the Sixth Amendment**

By Katherine Hunt Federle

In *McKeiver v. Pennsylvania,* the United States Supreme Court held that the Sixth Amendment right to a jury trial does not apply where a juvenile court may impose only a traditional juvenile disposition. Noting that a juvenile proceeding had never been held to be a criminal prosecution for the purposes of the Sixth Amendment, the plurality in *McKeiver* relied on the Due Process Clause to determine whether a juvenile had a right to a jury trial in a juvenile proceeding. The plurality concluded that there was no such right at the adjudicative stage of a juvenile case because that proceeding is different—more informal, protective, experimental, and promising. Fearing that a jury trial would bring with it the “traditional delay, the formality, and the clamor of the adversary process,” the plurality rejected the jury trial as antithetical to the juvenile court’s "separate existence." Thus, the jury trial was seen as inconsistent with the juvenile court’s rehabilitative goals, providing little in the way of improved fact-finding.

The Supreme Court’s decision in *McKeiver* has had an almost talismanic effect on the lower courts’ resolution of a juvenile’s right to a jury trial despite the increasingly punitive approach to the treatment of juvenile offenders taken by

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**Medical-Legal Partnerships for Children**

By Kelly Scott

It cannot be disputed that a child’s health is greatly affected by social circumstances. No amount of medication will help a child that suffers from chronic asthma when she continues to live in an apartment overgrown with mold that the landlord refuses to remove. Nor will a child thrive without proper nutrition and access to health care. However, there is hope when doctors and lawyers work together. An innovative legal services delivery model is gaining momentum: medical-legal partnerships.

The medical-legal partnership is an interdisciplinary approach to solving health issues that are rooted in social circumstances and can be alleviated with the intervention of a lawyer on the medical team. Two professions, typically at odds, work collectively to ensure the best outcomes for pediatric patients and their families.

The first medical-legal partnership for children was founded in 1993 by Dr. Barry Zuckerman, a pediatrician at Boston Medical Center (BMC).

Zuckerman recognized as a physician that there are limits to addressing patients’ medical problems that stem from social circumstances. He realized that a lawyer is necessary to address the legal issues that often affect the health of his patients. Soon after, Zuckerman added a lawyer to the BMC pediatric team, creating the first medical-legal partnership for children. The partnership’s goal was to have the attorney complement the work of doctors by providing a different set of

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MESSAGE FROM THE CHAIRS

As my cochairship of the Children’s Right Litigation Committee comes to an end, I am so very thankful to the many members of the committee and working group, the incredible commitment of the many volunteers and collaborators who have sought justice for children through committee activities, and honored to be part of this vibrant community of advocates for justice and social change. This last chair’s column has given me an opportunity to express concern shared by many of our members about the lagging quality of the juvenile justice system in the United States. Issues relevant to juvenile justice have been a priority of the committee for several years, and it will continue to be a focus of my work as a member of the working group in the coming years. I welcome input, critique, comment, and questions from anyone in the community. Thank you again for your important work for children!

Angela Vigil

Budget Crunches Should Not Result in Cheap Justice for Juveniles

If you give farmers spoon, they cannot plant an entire field successfully. If you give students broken pencils, they cannot complete a test. And if you give judges or juvenile defenders broken, limited, or incomplete resources, they cannot make the promise of the juvenile court come to life. They cannot assure the system rehabilitates, protects the community, or serves the child. Legislatures across the country are cutting back on budgets to deliver broken pencils and tiny spoons to juvenile courts and telling them to meet standards of constitutional rigor and rehabilitative meaning for every child that walks through the doors. The inconsistent funding is leaving kids without services, lawyers, or justice. To be effective, lawyers, judges, and other actors in the juvenile court need resources. Before this crisis, defenders highlighted ways they were woefully under-resourced due to high caseloads and limited program alternatives to incarceration. In response, lawyers often leave juvenile court as soon as they can earn better treatment and more resources in a different department or practice. How could this possibly guarantee justice for the juveniles within the delinquency system?

The juvenile justice courts receive children who are in need of intervention—whether it is to help them steer through a system that has wrongly accused them or to help with behavior and negative habits that have caused them to commit a criminal offense. Unlike the criminal court system, the juvenile justice court is a prevention system. It is designed to prevent future interaction of children with the criminal justice system, to prevent future crime in the community by the accused juvenile, and to deter potential activity by others.

A prevention model of juvenile justice requires the professionalization of the juvenile justice courts and all those who act within it. This is true even when resources are being cut by states and counties. Juvenile justice should not receive even fewer resources due to belt-tightening. Juvenile courts must remain well-resourced.

• They cannot be a training ground for inexperienced lawyers or judges.
• They must be staffed by specialists who bring knowledge and curiosity for the many disciplines that converge in a juvenile matter: social work, pediatrics, nutrition, physiology, psychology, mental health, education, etc.
• In order to retain lawyers, juvenile courts must be vibrant and meaningful practice settings that are well-resourced. They cannot be efficient or professional when the personnel are only there for short stints. Those who move on leave knowledge and talent gaps between personnel changes.
They succeed only with first-class resources for every stakeholder.

The troubles facing the overburdened and under-resourced juvenile justice system stem from some basic failings:

• Attorneys do not receive sufficient training and have high caseloads that prevent them from providing zealous advocacy to each client.

• Decisions about the lives, behaviors, and treatment of children require decision-makers with multi-disciplinary knowledge, ongoing updated information about the sciences of teenage development, and time and resources to adequately review each case and each accused child completely and fairly.

• Court programs sometimes fail to maintain a focus on prevention and success, but rather focus on empty completion of statutory mandates without a goal of providing meaningful change in a child's life.

The financial crisis in state support has only made matters worse. So how do we turn it around? How do we stop the bleeding of budget cuts that cut justice at the same time? Perhaps it is the collaboration of children’s advocates, judges, non-lawyer professionals, and volunteers who could be a voice to tell legislatures not to sacrifice juvenile justice when the budget pen is striking programs. Our community can make recommendations about what is needed:

• Judges need multi-disciplinary training to allow them to understand the intentional and unintentional effects of court actions and apply this knowledge and insight to their decision-making in every case, even in those that appear insignificant.

• County-by-county implementation of state-wide standards for best practices for juvenile defenders to provide the training, time, and evaluation to lawyers so that they can meet these standards in every case.

• Quantitative time-study analysis of reasonable caseloads by objective, outside sources should evaluate the capacity of a defender to provide first-class legal representation to each child who enters the court in pretrial, trial, and posttrial settings.

• Defender offices need to prioritize the training, selection, and professional development of juvenile defenders to secure a positive career path in juvenile defense.

• Courts must remove all barriers to the appointment of counsel, whether they are statutory or pattern such as minors being urged to waive counsel for seemingly insignificant offenses, or failure to appoint pretrial and posttrial counsel who can provide meaningful, multidisciplinary representation to children in need.

In this era of shrinking budgets in all sectors of public service and court systems, it is particularly heretical to suggest that juvenile justice needs more, when the public sector is being asked to settle for less. But these children cannot and should not settle for less. Only children’s advocates can assure that juvenile justice children will not be hurt worse in this fray. Each of these difficult tasks requires the strong support and mandate of the state’s legislature and judiciary, and their commitment to the idea that the quality of the juvenile system is currently unacceptable. Steps must be taken immediately to make it a model of high-quality legal practice as opposed to the lowest common denominator that minimum funding, unpopular practice, and inexperienced professionals will endure. Can we make juvenile justice the priority that the children within it desperately need? Let’s hope so. It is a challenge for all of us.

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Raising Our Hands
Creating a National Strategy for Children’s Right to Education and Counsel
OCTOBER 23, 2009 | NORTHWESTERN UNIVERSITY SCHOOL OF LAW | CHICAGO, IL

The American Bar Association Section of Litigation Children’s Rights Litigation Committee (CRLC) will be hosting an important national summit to advance the critical issue of a human right to counsel for children, focusing on exclusion from education, and abuse and neglect cases.

For more information about the summit, or to assist with planning, please contact the CRLC Committee Director, Cathy Krebs at krebsc@staff.abanet.org or 202-547-3060
Blended Sentencing

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state legislatures. For example, six states have enacted statutes that explicitly articulate traditional criminal goals, like deterrence, punishment, accountability, and public safety.\(^1\) Another 17 jurisdictions embrace “balanced and restorative justice” principles (including Alabama, Alaska, California, the District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Minnesota, Montana, New Jersey, Oregon, Pennsylvania, Washington, and Wisconsin) that focus on restoration of the victim through offender accountability while balancing the need to return the offender to law-abiding status. Although many jurisdictions still retain language suggesting rehabilitation as a goal, only three states emphasize the best interests of the child as the primary purpose of the juvenile court. Nevertheless, most state courts have rejected the argument that juveniles in juvenile proceedings have a right to a jury trial as a matter of constitutional law, emphasizing the rehabilitative promise rather than the harsh realities of the juvenile court.\(^2\) Similarly, the federal courts have held that a juvenile has no right to a jury trial in federal delinquency proceedings, relying on McKeiver.\(^3\)

Nevertheless, some courts have been willing to examine the constitutional issue McKeiver seemingly precludes. In \textit{In re L.M.},\(^4\) the Kansas Supreme Court held that McKeiver was no longer binding precedent because legislative changes to the Kansas Juvenile Offender Code “have eroded the benevolent parens patriae character that distinguished it from the adult criminal system.”\(^5\) The Kansas Supreme Court thus concluded that a minor in a juvenile proceeding has a right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution as well as the state constitution. The New Hampshire Supreme Court concluded that the imprisonment of a juvenile in an adult correctional facility was unconstitutional where the juvenile had not first been given a jury trial.\(^6\)

Although the court grounded the right in state constitutional law, the court nevertheless noted that the state’s argument that McKeiver foreclosed consideration of a right to a jury trial in a juvenile proceeding was inapposite when commitment to an adult criminal institution is permitted.

Although McKeiver seemingly precludes further consideration of a juvenile’s right to a jury trial in a juvenile proceeding, the structure, purpose, and goals of juvenile courts have changed significantly since the decision was issued over 35 years ago. Since the early 1990s, state legislatures have made sweeping changes to the jurisdictional and dispositional authority of the juvenile courts. Between 1992 and 1997, 44 states and the District of Columbia passed new laws that would send more juveniles to criminal court.\(^7\) Most states simply excluded certain offenders by virtue of age or the charged offense from the juvenile court’s original jurisdiction.\(^8\) Twenty-eight states expanded the list of offenses to be excluded from juvenile court jurisdiction, while seven states lowered the age at which a youthful offender could be transferred to criminal court.\(^9\) Some jurisdictions even shifted the burden of proof to the child to rebut the presumption of transfer.

Despite statistical evidence of a significant downturn in juvenile offending, state legislatures continued to amend their transfer laws. Between 1998 and 2002, 31 states enacted amendments to their transfer laws.\(^10\) Of these, 18 states extended their transfer laws, primarily by expanding the number of transfer-eligible offenses. The most dramatic changes occurred in California with the passage of Proposition 21, which created new mechanisms for transfer initiated by prosecutors and new categories of minors excluded from juvenile court jurisdiction. Only six states narrowed their provisions, yet these changes were relatively minor.

Currently, every state and the District of Columbia rely on a combination of mechanisms to transfer juveniles to criminal court; these include judicial waiver provisions, direct file laws, and statutory exclusions. Forty-six states have enacted judicial waiver laws in which juvenile court judges enter an order authorizing the transfer of the juvenile to criminal court.\(^11\) Fifteen states have direct file laws that allow the prosecutor to decide whether to file in criminal or juvenile court. An additional 29 states rely on statutory exclusion provisions to exclude certain classes of juveniles from juvenile court jurisdiction ab initio while vesting original jurisdiction over these cases in the criminal courts.

But even those juveniles who remain in the juvenile justice system may be subject to criminal penalties. These laws, known as blended sentences, permit juvenile courts to impose adult sanctions on certain qualifying juvenile offenders. To date, 15 states have enacted provisions authorizing juvenile blended sentences.\(^12\) Typically, these laws authorize a juvenile judge to impose a criminal sentence, usually in addition to the juvenile disposition, that the court then suspends on condition that the juvenile successfully complete his juvenile term. In three of these states, however, the court may directly impose an adult sentence in lieu of a juvenile disposition.\(^13\) In three other states, the court has the authority to impose a term of incarceration that may extend years beyond the age limits of the court’s jurisdiction without reference to the minor’s adjustment or rehabilitation.

In 10 states, the blended sentencing provisions are more expansive than the waiver laws, so more juveniles are at risk of adult sanctions because of these broader eligibility requirements. For example, in some states, the age at which a child may be eligible for a blended sentence is lower than for transfer. Thus, Colorado,
Michigan, Rhode Island, and Texas limit the class of juveniles eligible for transfer by requiring that they be of a certain age, but nevertheless permit the imposition of a blended sentence on a child of any age. Even juveniles in those states that have expansive waiver provisions may be at higher risk for actual imposition of adult sanctions through the blended sentencing laws. Because once a minor has been waived to criminal court, he or she will be treated as an adult for all subsequent criminal prosecutions in most jurisdictions. Waiver is generally an irrevocable and final decision; thus, the decision to pursue a blended sentence may be a way to reach juveniles who would not otherwise warrant transfer.

The Supreme Court has never contemplated a situation where the juvenile court could impose an adult criminal sentence on the juvenile since no statute or other analogous procedure existed in any state at the time McKeiver was decided. Accordingly, McKeiver does not address whether a minor who is given a criminal sentence of imprisonment for a term of years is entitled to a jury trial as a constitutional matter. McKeiver thus has served to bar a critical examination of the assumptions about the juvenile justice system and the rights of juveniles to such an extent that when a minor receives an adult prison term, he or she is not afforded the protections of the Sixth Amendment.

Consequently, the Supreme Court has never had the opportunity to consider the extent to which Apprendi v. New Jersey,16 Blakely v. Washington,17 and their progeny apply to juvenile court proceedings where the minor may receive a prison term in addition to a traditional juvenile disposition. In Apprendi v. New Jersey, the Court held that with the sole exception of prior convictions of the defendant, any fact that increases the penalty for a crime beyond the statute maximum must be submitted to a jury. In Blakely v. Washington, the Court held that the maximum sentence a judge may impose must rest “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Moreover, any judicial fact-finding raises constitutional issues; any fact that elevates a sentence beyond the statutory maximum allowed by a finding of guilt or a guilty plea must be found by the jury. Thus, the Supreme Court made clear that to impose a sentence greater than the statutory maximum, without the necessary factual findings from the jury that would warrant an enhanced sentence, violates the defendant’s right to a jury trial under the Sixth Amendment to the United States Constitution.

However, the Supreme Court is considering a petition for a writ of certiorari to the Ohio Supreme Court on this very issue.20 Pursuant to Ohio law, minors tried in juvenile court in cases designated as serious youthful offender (SYO) proceedings, may receive a blended sentence: a traditional juvenile disposition in addition to a stayed adult prison sentence (a “discretionary SYO sentence”). Prior to imposing a discretionary SYO sentence, the juvenile court is required to make a finding on the record that given the nature and circumstances of the violation and the history of the child, the length of time, level of security and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of Revised Code will be met. . . .

The statute provides that after that finding is made, “the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929 of the Revised Code. . . .”21 Such prison sentences can be lengthy and are indistinguishable from sentences imposed on adult offenders.

Ohio’s discretionary SYO provisions appear to require exactly the type of judicial fact-finding prohibited by Apprendi and Blakely. Petitioner, D.H., was sentenced by a juvenile court judge to serve a traditional juvenile disposition as well as a criminal prison sentence of six years, the latter sentence stayed pending “successful completion” of the juvenile disposition. The juvenile court’s imposition of a criminal prison sentence, however, exceeded the maximum term a juvenile court may ordinarily impose. The Ohio Supreme Court nevertheless concluded that no Sixth Amendment right was contravened because McKeiver held that the Sixth Amendment does not apply to juvenile court proceedings.22 Thus, without further discussion of the Sixth Amendment issue, the Ohio Supreme Court concluded that the statutory procedures did not violate the Due Process Clause of the Fourteenth Amendment.

The minor petitioner in D.H. v. Ohio raises a novel constitutional claim in his petition for certiorari: that the imposition of an adult sentence in addition to a traditional juvenile disposition enhances the sentence beyond the statutory maximum and thus violates the principles articulated in Apprendi, Blakely, and their progeny where the necessary factual findings to enhance the sentence are not made by the jury. The claim is made all the more compelling because the petitioner is not suggesting he did not receive a jury trial: He in fact was tried by a jury in the state juvenile court. Rather, petitioner alleges that
the juvenile court’s decision to impose a criminal sentence beyond the juvenile disposition triggers certain constitutional protections under the Sixth Amendment and that the imposition of the adult sentence violates *Apprendi* and *Blakely*. The Ohio State University Justice for Children Project has filed an amicus brief in support of the petitioner, arguing that the Supreme Court should grant the petition because of the significance of the case, given the novelty of the constitutional claims and the questionable validity of McKeiver in light of the changing face of the juvenile justice system. This case thus represents an important opportunity for the Supreme Court to revisit the extent to which juveniles have constitutional rights in cases where their treatment varies little from that of criminal defendants.

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**Endnotes**

2. Id. at 550.
6. Id. at 469–70.
10. OJJDP Statistical Briefing Book, supra.
18. Id. at 303.
22. Id.
Medical-Legal Partnerships
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skills to pediatricians to keep patients and their families healthy. The medical-legal partnership model proved to be a success.

Today there are over 80 medical-legal partnerships that improve the health and well-being of vulnerable populations across the United States, a majority focusing on children. Medical-legal partnerships can be found at 73 hospitals and 112 health centers across the country. Nearly 75 percent of medical-legal partnerships at hospitals and over half of medical-legal partnerships at health centers serve children. Through the partnerships, lawyers represent patients on a number of issues including housing, access to utilities, immigration, education, public benefits, education, and family law.

In 2006, the Medical-Legal Partnership for Children, the program at BMC, expanded and established a national center to promote the model. Earlier this year, the national center expanded its scope once again to serve all vulnerable populations and is now called The National Center for Medical-Legal Partnership. The National Center for Medical-Legal Partnership assists medical-legal partnership sites in formation, provides training, conducts research, and creates policy.

The Practice of Preventative Law
In the past, patients were generally left on their own to navigate the legal system or referred to a legal services office that was already overburdened by clients in need. One of the distinguishing factors between a medical-legal partnership and a traditional legal services office is the ability to identify and address legal problems before the point of crisis. In the traditional legal services model, a case is not typically taken unless it has reached a certain point—e.g., an eviction notice has been served or benefits have been denied. A medical-legal partnership enables the practice of preventative law. Just like preventative medicine, preventative law catches problems before they escalate.

Educating the health care providers is critical to the practice of preventative law.

In a medical-legal partnership, doctors and their health care colleagues are trained to recognize legal issues that may have a detrimental effect on a patient’s health. The basic idea is that medical professionals are uniquely situated to catch these issues before they reach a point of crisis. After a potential legal issue has been identified, the doctor refers the patient to a lawyer at the medical-legal partnership in conjunction with that hospital or clinic. The lawyer can be a medical-legal partnership staff attorney at a children’s hospital, an attorney at a collaborating legal services office, or a pro bono attorney. Some models consist of only one attorney, while others may have a staff of two or three. Medical-legal partnerships are also found at law schools as a part of law school clinical programs. Some law school clinics are partnered with medical schools and teaching hospitals. Some law firms partner with a hospital, and their lawyers provide legal services on a pro bono basis. While there are various models of medical-legal partnerships, all aim to provide legal services that improve the lives of patients and address the issues that burden a patient’s health.

Educating the health care providers is critical to the practice of preventative law. The success of a medical-legal partnership largely relies on the ability of the health care provider to identify the need for a lawyer to address an issue, and the health care provider’s ability to make referrals to lawyers as part of the medical team. Ultimately, doctors view the attorney as a type of specialist and make referrals to attorneys just as they would another medical specialty such as a cardiologist. However, the referral cannot be made without the recognition of a legal issue. Physicians, medical residents, nurses, and social workers must all be trained to spot legal issues. The training must include information about medical-legal partnerships in general as well as substantive legal issues that the lawyers can address. The training is an integral part of the medical-legal partnership because the medical professionals must be able to do a quick screening for legal issues that impact health outcomes. A number of medical-legal partnerships have an Advocacy Code Card or a similar reference for medical professionals to use as a guide. These reference guides provide quick screening questions, legal issues, and referral information. Training can also take place at workshops by the medical-legal partnerships at hospitals, clinics, and medical schools. In fact, there are even a few medical schools and law schools that offer joint medical-legal partnership courses.

New Opportunities for Attorneys
Medical-legal partnerships have created unique opportunities for pro bono services. In addition to the traditional case-by-case referral method, pro bono attorneys can provide valuable services to medical-legal partnerships in a number of ways. For example, law firms can adopt hospitals or community clinics, and pro bono attorneys can participate in medical-legal partnership clinics.
In the adoption model, a law firm agrees to provide its legal services to the patients of a specific hospital or clinic. This model eliminates the need for patients to travel to a number of places to receive assistance on their basic needs. In this model, the law firm agrees to staff a weekly legal clinic, attend trainings, and represent patients on legal matters while absorbing any out-of-pocket expenses. Doctors will refer the patient to the medical-legal partnership pro bono attorney for intake. Upon the discovery of an unmet legal need, the patient schedules an appointment during the law firm’s weekly clinic hours. The attorney evaluates the legal problem, gives advice, or represents the patient on one or multiple issues. A law firm typically averages 700 hours of pro bono work during the first year of involvement with the adoption model. There are currently five law firms that have adopted clinics in the Boston area. Each firm will provide legal services to an average of 29 families a year.

Another way of utilizing pro bono services is through a pro bono clinic setting where pro bono attorneys can give advice on specific issues. An example of a clinic supported by pro bono attorneys and a medical-legal partnership is a utility clinic. The Medical-Legal Partnership Project in Harford, Connecticut, started the “Keep the Power On” utility clinic. The clinic was created in response to a law in Connecticut, similar to most states, that guarantees utility service during the coldest months of the year. Unfortunately, in the spring, many of these customers are left with an extremely large utility bill and no protection from discontinuation of services. There is an exception made if a medical condition exists in the household that would put the individual’s life at risk if the utilities were disconnected. The clinic serves families who do not fall within this exception. Pro bono attorneys are recruited and trained by the medical-legal partnership to provide budget counseling. The medical partners provide the clinic information to the patients, and utility company representatives attend the clinic and enroll the patients in affordable payment plans. The patients are educated about budgeting on a very limited income and prioritizing expenses with the goal of avoiding a yearly crisis. The result is a balanced budget that can provide for electricity, gas services, rent, and groceries to keep their families healthy.

**A New Resource within the ABA**

As a part of the national movement towards medical-legal collaboration and the new pro bono activities it provides, the ABA Center for Pro Bono is now home to the Medical-Legal Partnerships Pro Bono Support Project (MLP Project). The MLP Project is a joint collaboration of the ABA Center for Pro Bono, the ABA Center for Children and the Law, the ABA Health Law Section, and the ABA AIDS Coordinating Committee. The MLP Project’s goal is to expand the current landscape of medical-legal partnerships by engaging the private bar as a consistent provider of legal services in hospital, clinic, and other health care settings. The MLP Project will provide guidance to medical-legal partnerships as they initiate and develop their programs. To accomplish this objective, the MLP Project will provide support and training to pro bono attorneys through a variety of resources on the website as well as workshops at conferences. The MLP Project will assist medical-legal partnerships in establishing pro bono programs, securing pro bono participation, and ensuring quality service delivery in their community by developing a compendium of best models and best practices. And, the MLP Project will educate both lawyers and health care providers about the enhanced medical outcomes to medical-legal partnership clients.

**The Benefits**

Medical-legal partnerships rely on the collaboration of professionals to ensure the best possible outcomes for patients, and the benefits are far reaching. Medical-legal partnerships help break down the stereotypes that often cloud the traditional relationships between doctors and lawyers. Additionally, attorneys are given the opportunity to form collegial relationships with doctors and participate in interdisciplinary work. Doctors learn of legal issues affecting their patients and gain the ability to treat their patients with tools outside the world of medicine. Doctors finally have the resources not only to improve the health of their patients but also to alleviate some of the chronic social burdens that face vulnerable populations.

The children and their families, however, receive the ultimate benefit. They are provided with professionals that act as a team to remove the social impediments affecting their health. With the help of their lawyer, families can navigate the persistent social conditions that contribute to chronic, often debilitating medical conditions, and lead healthy and productive lives.

Kelly Scott directs the ABA Medical-Legal Partnerships Pro Bono Support Project. Prior to joining the ABA, she cofounded a nonprofit that benefits Kurasini Orphanage in Tanzania. To learn more about this project, visit their website at [www.abanet.org/legalservices/probono/medlegal/home.shtml](http://www.abanet.org/legalservices/probono/medlegal/home.shtml).

**Endnotes**

2. Please see The National Center for Medical-Legal Partnership website @www.medical-legalpartnership.org.
3. The Adoption Model was created by Samantha Morton, Executive Director, Medical-Legal Partnership Boston. Information on the Adoption Model was provided by Jennifer Stam Goldberg, Staff Attorney and Pro Bono Manager, Medical-Legal Partnership Boston.
4. The “Keep the Lights On” Clinic information was provided by Bonnie Roswig, Senior Staff Attorney at the Medical-Legal Partnership Project, Center for Children’s Advocacy, Connecticut Children’s Medical Center, Hartford, CT.
5. To learn more about the ABA MLP Project, please visit [www.medlegalprobono.org](http://www.medlegalprobono.org).
Fostering Connection to Success Act: Moving from Act to Action
By John Everett

On Tuesday, March 17, 2009, hundreds of attorneys took advantage of free CLE being offered by the Children’s Rights Litigation Committee, the Young Lawyers Division, the Commission on Youth at Risk, and the ABA Center for Continuing Legal Education. This teleconference, Fostering Connection to Success Act: Moving from Act to Action, was held to discuss how lawyers and judges could use new federal law to improve outcomes for children in the child welfare system.

The presenters for this CLE were Howard Davidson, director of the ABA Center on Children and Law in Washington D.C.; Marisol Garcia, a solo practitioner in Lowell, Massachusetts; and the Honorable Michael Nash, a presiding judge with the Los Angeles Juvenile Court in Los Angeles. Jenny Weisz acted as moderator. Ms. Weisz is with Tufts University Department of Child Development and Urban Policy.

The Legislation
H.R. 6893, the Fostering Connections to Success and Increasing Adoptions Act of 2008 (110th Congress, 2007–2008) was passed in an attempt to assist states in keeping children out of foster care, supporting relative caregivers, and increasing adoptions. It also encourages better care of children in foster care and children aging out of the system. Finally, it provides legal funding for judicial and attorney legal training as well as certain provisions for Indian tribes.

Enhancing Caretaker Support
The act starts its goal to promote and support the use of relative caregivers by requiring state agencies to make due diligence to provide notice to adult relatives about a child’s removal. This notice must be given within 30 days of the child’s removal and must contain provisions that explain the relative’s options to care for the child, describe requirements to become foster parents, and address services and support as well as the availability of guardianship assistance payments. There is an exception to this notice requirement if there is domestic violence or a concern regarding family members.

For attorneys, the notice requirements provide an opportunity to help courts and agencies to identify relatives. They can advocate earlier for family placements and give relatives a stronger chance to provide those placements. Attorneys are encouraged to consider both maternal and paternal relatives, and these provisions should assist a child’s attorney to secure visitation with relatives.

The act also allows states to use Title IV-E money for children in foster care raised by relatives. The children must have been in the care of a relative for six consecutive months, and return to the parents or adoption is unlikely. Licensing standards for relative foster parents can be waived as long as that standard is a non-safety one. Finally, the act provides that children placed with relatives after age 16 are still eligible for independent living services and education vouchers.

Children Post-18
The Fostering Connections Act allows states to use federal care support for a child after the age of 18. The support can be used for children up to age 21. It also allows for Title IV-E money to continue for children who leave foster care either through guardianship with a relative or adoption post-16. That support can continue as long as the adoptive parents are still supporting the child, including if the child is in high school or a GED program, in a post-secondary school or vocational program, employed at least 80 hours per month, or has a medical condition that prohibits school or work.

In what Howard Davidson called one of the most important provisions, the act calls for a personalized transition plan for children within 90 days of leaving foster care. These transition plans must be as detailed as the youth wishes but should include housing, health insurance, education, mentoring, continuing support services, and employment services. Judge Nash stated that California already does this, and he emphasized the need for the child to be involved and to make sure that the participants have all the information they need about the child’s history. That history would be especially important regarding physical and mental health as well as financial concerns.

Promote Sibling Co-placements
A new Title IV-E requirement is put in place by this act. The provision requires reasonable efforts on the part of child welfare agencies to place siblings together if in the best interest of the child or provide for frequent visits between the siblings. The emphasis on sibling visits allows child advocates and lawyers the opportunity to insist on placement of siblings in the same home or sibling visits, even if the parents are not visiting. There is an exception that allows siblings to be placed in separate foster homes if there is violence between the siblings.

The presenters expressed some concerns about the provisions for sibling co- placements. The act uses several terms that it does not define nor does it give guidance on how to determine when certain criteria exist. It also would put the judge in the position of having a role in determining the placement of children in foster homes.
Some judges have historically left that role to the child welfare agencies. Finally, the court must make specific findings if the siblings are not to be placed in the same home.

**Training**

Training is also covered by this legislation. It allows Title IV-E money to be used to train judges and lawyers. In 2009, the reimbursement rate is 55 percent, but that will be gradually increased to 70 percent by 2012. The purpose of this part of the act is to help advance the number and quality of guardians ad litem, including CASA GALs. It can also cover the training for public agencies, private child welfare agencies, court personnel and relative guardians, and foster and adoptive parents.

What attorneys and child advocates will need to do, according to Mr. Davidson, is work with the children welfare agencies to use the money for legal training. Attorneys and courts need to define what training qualifies for the money and work with the state agencies to maximize the training dollars where they will have the biggest impact.

**Support Children in Foster Care**

Children who enter foster care face a number of hurdles. They could be behind in school, they may have had limited access to medical care, and they may need many services. There are a number of provisions to address those concerns for the child entering foster care and ensure that the child entering the system is receiving the medical and educational care they need.

The education component requires that all school-age children must be in school full-time or medically excused from full time study with regular updates. The child welfare agency must include the education plan in the case plan. The state must assure that it has established with the local education agencies a plan to ensure that a child entering foster care remain in school. The law is clear that the intent of these provisions is to keep the child in the school of origin unless it is not in the child’s best interest. The law provides that Title IV-E money may be used to transport the child to the original school if necessary, and that a placement decision must consider the appropriateness and proximately of the local school. If the child is not staying in the same school, he or she must be enrolled immediately with his or her school records into the new school.

Both Judge Nash and Mr. Davidson stressed that lawyers and judges must now be involved in the school decisions. Judge Nash recommended that the judge inquire about education at every hearing, and the 2002 recommendations from the National Council of Juvenile and Family Court Judges recommends that judges check on the educational needs of children in foster care.

The health care provisions of the act are more comprehensive. Each state must have a plan to ensure cooperation between Medicaid and pediatric experts for ongoing oversight and care of foster children. The plan must include a schedule for health, mental health, and dental screening, as well as any necessary follow-up screening. The expectation is that child welfare agencies will work with providers to ensure screenings and timely follow-up care.

The plan must include specifics of how health care needs will be identified and addressed. This will include how medical information on each child is updated and shared. The expectation is that the plan will promote a continuity of health care services and may include the establishment of a medical home for every child.

It is also expected that this type of information will be included in the transitional plans for children aging out of the system and include specific ongoing treatment options for the child.

**Adoption Incentives**

Several provisions deal with adoption assistance. The first is that prospective adoptive parents must be told about the Adoption Tax Credit. Also, the amount of money available to states is greater. There are enhanced incentives including allowing an additional $1,000 per adoption if the state adoption rate is greater. The act extends the current Adoption Incentive Grant Program five years and doubles awards to $8,000 per child nine-years-old or older and $4,000 award per special needs child above baseline.

The act also de-links a child’s eligibility for federal adoption assistance from AFDC income requirements. This de-linking is to be phased in over nine years and will start with older children. But special needs children are eligible regardless of age during the phase-in period. Finally, children who are adopted after the age of 16 still qualify for independent living services.

**Tribal Foster Care and Adoption**

For the first time, tribes can receive direct access to Title IV-E funds for foster care, adoption assistance, kinship guardianship, and independent living. To qualify for the funds, the tribe must have a plan that shows evidence of sound financial management, description of the service area, and assurance that the funds will be used for above listed purposes. Further, the law allows the tribal match of the Title IV-E funds to be done with in-kind contributions.

As can be seen, this act is squarely focused on child-centered changes to the policy and procedures of the child welfare agencies. It provides many opportunities for the child attorney and juvenile judge to assist children in foster care to receive the services they need. It also provides encouragement for adoptions, as well as support to older children as they age out of the foster care system.

To listen to the full teleconference at no cost, visit the Children’s Rights Litigation Committee’s website at www.abanet.org/litigation/committees/childrights.

John Everett is the prosecutor for the city of Kettering, Ohio. He is a member of the newsletter editorial board for Children’s Rights.
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Attacking Adverse Experts

Stephen D. Easton

“Attacking Adverse Experts” by Steve Easton is an authoritative resource on the law of expert witnesses and on proven methods for attacking your opponent’s experts before and during trial. Full of both citations to authority and practical advice, this book should be on the shelf of every trial lawyer.”

Thomas A. Mauet
Professor of Law, University of Arizona Rogers College of Law, Tucson, AZ

Attacking Adverse Experts is a step-by-step guide to investigating, evaluating, and attacking the adverse expert in civil cases. It outlines tactics you can use to gather information about the adverse expert, both in the discovery process and on your own; to take an effective expert deposition; to evaluate the adverse expert’s analysis of the key issues; to move to exclude his testimony; to cross-examine him effectively when he testifies at trial; to handle voir dire, opening statement, closing argument, and other aspects of the trial to maximize the effectiveness of your attack on the adverse expert; and even to successfully handle appeals regarding experts.

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Trial lawyer and professor Stephen D. Easton provides a comprehensive review of well-established tactics for expert cases and offers innovative techniques to increase your effectiveness. Provocative and insightful, Attacking Adverse Experts will help you find and relentlessly expose every crack, weakness, or fallacy in the work of an adverse expert.
Tips for the Young or Pro Bono Lawyer in a Child Welfare Case
By Robert M. Murphy Jr.

You are a new or pro bono child welfare attorney who has just accepted the appointment of your first child client. The first court appearance is only one or two days away. Suddenly, the training you took on how to represent a child client seems very long ago. Where do you begin?

Assess the Posture of the Case

Litigation is an art, not a science. In other words, there is no one way to do things. Additionally, every state’s child welfare procedures are different, making generalizations, even about the procedure of a case, difficult. But here are some thoughts.

First, find out the status of the case. It is likely that the state has already been to court to obtain emergency custody of the child, but that decision must be reviewed in a full hearing within a short time frame. The full hearing is sometimes called a “preliminary protective hearing,” a “shelter care hearing,” a “72-hour hearing,” or a “temporary custody hearing.” Basically, it is a hearing in front of the judge in which the state attempts to retain custody of the child by proving that the child would be at risk if returned home. Look at it like a preliminary hearing in a criminal case or a hearing on a motion for a preliminary injunction in a civil matter but with a lot less due process.

During the hearing, it is essential that all parties be represented by counsel, as it may be the last chance to challenge the state’s removal of the child before the trial that might take place up to one year later. Be sure that the hearing will be recorded by a court reporter or audio device to ensure a record of the hearing.

Assuming the state wins the hearing, it maintains the child in its custody. The state might release the child back to the physical custody of the parents with a safety plan or keep the child in a shelter or foster care. Another possibility, which federal law prefers, is placement with suitable relatives. The parents then have a certain amount of time to correct the conditions that led to the court finding the children abused and neglected. The state caseworker will put together a service plan outlining the steps that the parents must take to regain custody. If the parent satisfies the conditions, the court should return the children home. If not, the state has a federal mandate to bring an action to terminate parental rights if the child has been in an out-of-home placement for 15 of the most recent 22 months. In some states, the parties are entitled to a jury trial on this issue. If the court terminates parental rights, the child is then eligible for adoption. In short, the two extremes are reunification with the parents or termination of parental rights.

Now that you have a brief idea of the possible outcomes and where procedurally the case starts and stops, what do you do as the lawyer for the child?

Representing a Child

Finding your client is the first order of business, which may mean tracking down a child protection worker who is in court or out of the office on visits. It is essential to meet your client prior to your first hearing, which can be difficult given limited time. Nevertheless, it is important to visit your client’s foster home or shelter to get to assist you in formulating your position for the first hearing. Even if your client is pre-verbal, it is important to see where the child lives and if your client is safe and well-cared for in the placement.

It is extremely important to establish rapport with your client. One of the best ways to do so is to show that you care about your client as a person. Once you do this, you can work to establish trust with your client. Depending on age, the child may feel that he or she is on an assembly line and you are simply one part of the line. To overcome that feeling, do something early to advocate for his or her needs. For instance, at the initial court hearing, even if you are only entering your appearance, you may want to ask for something on behalf of your client. Make arrangements to get your client his or her clothing; if the child would like to visit with his or her mother or father, make that request; ask about the child’s returning to his or her school; request phone and Internet access for your client while at the shelter. Also arrange for contacts with his or her siblings, relatives, or others.

Remember, your client did not select you—the court appointed you or someone assigned you the case. Thus, it is up to you to build trust with your client. By doing these things, it will improve your client’s confidence and comfort level with you. You also learn more in subsequent interviews with your client. It is important that you continue to meet with your client regularly throughout the case.

Also, talk to your client about placement options. Are there relatives or friends with whom your client might be able to live? The child is often a good resource for placement options, but often no one asks for his or her thoughts. This is your job as the child’s attorney. Not only is this zealous advocacy but it also shows the client that you are on his or her side. Analogize it to representing a defendant in a criminal case where one of the first
things you do in court is to request a reduction in bail. This action shows your client that you are advocating for him or her and no one else. By doing so, the client will begin to trust you and will open up and tell you more.

*Follow the interview guidelines*—do not take notes—or if you do, only take a few notes and ask permission to do so; don’t interrupt your client; and maintain good eye contact. Watch your client’s body language and adapt your interview accordingly. You might also try to do some “mirroring.” For example, if your client has his or her arms folded, you fold your arms; if the child rests hands behind his or her head, you do likewise. Also use age-appropriate language.

**Work Together to Develop a Goal**

Now that you and your client have made a connection, work on your game plan. It is important to get your client’s input, regardless of whether you are in a state in which your role is client-directed or a state in which you advocate for the child’s best interest. Your client has to be onboard with the goal in the case. Is it reunification, termination, or something in between? Let’s face it—if your client is an adolescent, just because it is a court-ordered service plan does not ensure the child’s cooperation. Having input through counsel, even if that input is rejected by the court, makes the outcome easier to accept.

If you have strong rapport with your client, you will be able to work together to formulate a goal. Together you should explore all of the possibilities. If your client wants an outcome that you as the attorney feel is not in the child’s best interest, explore why he or she wants that outcome. Your client may have very legitimate reasons, and once you know what they are, you can explore options that ensure safety while still addressing his her underlying goals. Even if you are to represent the client’s best interest, it is often true that what the client wants and what is in his or her best interest may be the same after you explore all of the options.

Also come up with a Plan B in case your client’s goal cannot be achieved. It may be that reunification with parents is the goal for the state and the child, but if the parents have a relapse that derails reunification, it is important to think through other options. Plan B could be relative or kinship placement. If no relatives are available, then perhaps the child has friends that have a psychological if not a biological connection. Foster care can be very unstable and unpredictable, so placement with friends or relatives is often preferable for the child. If the child is very young and there are no relatives available, adoption might be the plan.

If you have been appointed to represent siblings, be alert to conflicts of interest. Siblings may have different parents so may have different placement options. They may want different outcomes in the case. It is important that each child in the child welfare system have conflict-free representation.

**Obtain All Records**

It is important to order all records for the case. You will want to order all of the social service records in the case, both for the current case and any proceeding interventions into the family. Be skeptical of CPS reports. Read them like you would read an opponent’s brief—very carefully. You will find that some reports may appear to be factual but are a lot like police reports—very one-sided and exaggerated.

Also, ask for access to non-court records such as school and medical records. Determine if your child has special needs. If so, you need to know what your client’s rights are and what resources are available. The Children’s Rights Litigation Committee (CRLC) maintains a website with good resources at www.abanet.org/litigation/committees/childrights. They also have a very good video on interviewing children). Also, if your client is an Indian child, see Steven Hager’s article on this subject in the 2009 spring issue of *Children’s Rights* (prior issues are maintained on the CRLC website as a resource).

Once you have obtained your client’s records, you should meet again with your client. As an absolute minimum, I suggest speaking with your client once per week by phone and once per month face-to-face.

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**Prepare for Court**

Now let’s turn to how you should prepare for court and what the judge wants to know. First, one of the most important things in the judge’s eyes is establishing credibility. One way to establish this is “candor towards the tribunal.” Obviously, the model rules require this. What it means is that you are wiling to admit obvious facts and establish common ground with the other party when you are able to do so.

If you are with me so far, you have rapport with your client and credibility with the court. But before going much further, let’s look more closely at the judge. What is his or her background,
and what type of work did he or she do prior to taking the bench? If the judge is new to the bench and did not practice in juvenile law, educating the judge on the law will be particularly important. What is the mindset of the judge—is he or she an independent neutral or in the hip pocket of child protective services?

If you don’t know the answers to these questions, ask some fellow lawyers who practice in front of the judge to find out. You will find lawyers who will eagerly tell you exactly how the judge measures up. Maybe you can take them to lunch and get to know them better, and you’ll probably find that they will be quite happy to educate you on how things usually go in court. But remember that the law constantly changes in this area, and simply because they have some experience does not mean that their knowledge of the law is current. This is where you can gain the advantage.

You can be the one to advise the court of recent changes in the law, and while things may have been done one way in the past, it no longer applies in the future. They will begin to look to you as an expert on the law, and as such, it will strengthen your arguments in court, which will then carry more weight.

**Bringing Your Child Client to Court**

Find out whether the judge typically has the children attend court proceedings. After all, depending on the state, they may be parties to the case and should be entitled to attend. Whether they do or not is often up to the judge. Typically, state protective services will resist bringing the children to court. Usually, it is because they are the ones that have to bring them to court, and they will have all kinds of excuses as to why it is not in the children’s best interest to attend. It means taking them out of school, they have to travel, it’s disruptive, the courtroom is scary, they don’t understand what happens, etc.

Before conceding these points, carefully consider what the purpose of court is. Are protective service’s objections to bringing children to court realistic? I’ve talked to many foster children that have aged out of the system, and it is almost unanimous that they say it is absolutely essential that the children attend every court session. They don’t have to be there for the whole time, but they should appear.

When I was a judge, I would also have my bailiff take pictures of the children and the other parties so I could better remember them, and the photos would be a visual reminder of how they looked in court. Oftentimes, I found that I could better evaluate the case by watching how the parents and children interacted in court better than I could from reading all the case reports. Things I would notice were: Did the children stand close to their parents; did they hug them; did they jump into their arms; were they under control in the courtroom, or did they run back and forth the entire time; did they stay seated with their hands folded in their lap? In short, having the children in court taught me much more than reading the dry reports. It made the case come alive.

Another source of information for the judge comes from the court personnel, be that a clerk, bailiff, or secretary. Many times, my secretary would comment on how the parties behaved in the hallway, who the kids went to, and things of that sort. All such information is not on the record but nonetheless is important.

**Courtroom Etiquette**

Behave professionally when you present yourself to the court. There is nothing the court dislikes more than an obnoxious, difficult attorney. Objecting to every single question is one way to become obnoxious to the court. While this may have helped your grades in law school, it will not help you in the courtroom. Be careful when making an objection and know how the rules of evidence apply in child welfare cases in your state. Ask yourself: Will this evidence truly hurt my client’s case? If not, why bother to object, especially if the case is being argued to the judge rather than a jury. One hint is that if the judge stares at you during opposing counsel’s questioning, it probably means that for whatever reason he wants you to object and you should certainly do so. You will find the judge sustaining your objection as soon as you stand up and say “Objection.”

By all means, do object when it is important, but remember that it is very annoying and time consuming and slows down the proceedings to rule on unnecessary objections.

Something else to avoid is arguing with or interrupting the judge. If the judge is absolutely wrong, be delicate about how you make this known. Try to argue that it is not the judge who is wrong but the other side that is advocating the position that the judge seems to take that is wrong. If you do get into an encounter where you and the judge are dialoguing and the judge is making the case for the opposite side, do what you can to get the attorney representing the opposite side to engage in the argument.

Gently remind the judge that it is the judge’s decision to make, but it is up to the other side to make that argument, and you would like for them to do so if they truly support it. This should prompt the other attorney to speak up, and the judge will then take a back seat. Then you can argue with opposing counsel, not the judge, and the judge can listen, which is what the judge should do in the first place. If this does not work and you end up debating the law or the facts with the judge, prepare to lose. I have never heard of a judge losing an argument in his courtroom. While the judge may get reversed on appeal, he or she rarely reverses himself or herself.

On the other hand, if the judge takes your position, by all means keep quiet and let the other side argue all they want with the judge. There is a scene from the movie *The Verdict* where Paul Newman tells the judge “I don’t mind you arguing the case for me, just don’t lose it.” Never do such a thing, as you will insult the judge.
Be respectful not just of the judge but of all court staff. Any negative remarks you make towards the staff will be relayed to the judge almost immediately. You will quickly find there are very few secrets in the courthouse. This also includes the courthouse security personnel in the court clerk’s office, the janitors, and anybody else who works there. Anything that comes to their attention makes its way to the judge’s chambers. Therefore, it is extremely important that you treat all courthouse employees very professionally.

Finally, in evaluating the judge, remember that at end of the day, it is the trial judge’s decision that is final. He or she is the only one that you need to convince. Don’t worry about convincing protective services or the other parties—focus on the judge. To quote George W. Bush, the judge is “The Decider.”

Decisions in these kinds of cases are the toughest any judge has to make. The judge has to determine what is in the best interest of the child. It is much more complicated to make a ruling in a case like this than it is to decide a motion for summary judgment. It is much more difficult than sentencing a criminal defendant to a term in prison or granting probation. What the judge decides in these cases has a huge impact on the parties, especially on the children.

Nothing weighs heavier on the judge’s mind than what is going to happen to the children as a result of his or her decision. If a child dies and that death is somehow linked to the decision the judge made, then the judge’s career is most likely over. Such cases and outcomes tend to generate an enormous amount of publicity.

Therefore, be respectful and considerate of the decisions the judge has to make. Help the judge as much as you can by being a zealous advocate for your client. Remember the paramount concern in the judge’s decision is the best interest of the child: safety, permanency, and well-being.

In summary, establish rapport with your client to determine what is in your client’s best interest or to help your client express his or her interest and couch this in terms the judge can appreciate and understand. Remind your client that he or she is the one that will either be helped or hurt by the court’s decisions. Realize that you cannot save all the children you represent, but what you do for them you do because you care about them, and you will find that in doing so, it is much more rewarding than any other experience you can enjoy as an attorney. In fact, it might just give you a chance to see justice work.

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