8 things we learned from Fostering Justice

1) Youth voices are essential to the conversation and for changing minds.
2) We need to be partnering with unusual partners to secure and ensure a right to counsel: Business/Private Sector; Youth; the Faith Community; CASA; Community Groups; Doctors and Mental Health Professionals.
3) Many organizations are currently collecting data on outcomes of legal representation.
4) We need to work on our messaging and better use media, including social media, to convey our message, educate and secure partners.
5) We have strong arguments that a case by case approach to a right to counsel is unworkable.
6) Legislation or amendment of court rules can address quality of counsel through Capping caseloads; Setting standards; Clarifying Role of the Lawyer; and Mandating training.
7) There are creative approaches to amending legislation to secure a right to counsel; we need to explore all of these options.
8) More research on right to counsel, including outcomes and what lawyers do, may help to advance this issue.

Themes from Litigation Discussion:

Physical liberty at stake for a child in a hearing is significantly greater than for a parent – we need to focus on physical liberty.

A case by case approach is unworkable. The trouble with case-by-case approach to appointing counsel (the Lassiter approach) is:

- Appellate court is basing its review on a record that is undeniably biased and incomplete because there was no lawyer to develop the record on behalf of the child. It is very difficult to determine what lawyer would have done in trial had one been involved.
- U.S. Supreme Court has recognized difficulty of after-the-fact review. In criminal cases, denial of counsel is presumptively prejudicial because of impossibility of attempting to guess what attorney might have done. In U.S. v. Gonzalez-Lopez, 548 U.S. 140, 150-51 (2006) (authored by Scalia), the Court found that the improper disqualification of particular counsel (a lesser deprivation than complete deprivation) was a structural error defying analysis. Justice Scalia explained such a deprivation was distinct from ineffective assistance of counsel, because for the latter,

    We can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel - in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently - or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with
the prosecutors. And then we would have to speculate upon what effect those
different choices or different intangibles might have had. The difficulties of
conducting the two assessments of prejudice are not remotely comparable.

To attempt harmless error analysis in this scenario, Justice Scalia concluded, was to
engage in “a speculative inquiry into what might have occurred in an alternate
universe.”

- The idea that we can “fix it later” will not work. We need to create the record during
  the court proceedings.
- How can we know whether a child needs an attorney at the start of the case, given that
  the judge has not yet learned anything about the potential complexity of the case? And
  if the judge learns of complexity partway through case, they won’t want to appoint
  attorney at that point, as it would require starting over.

When we litigate we need to talk about lawyers for young kids and we need to have a consistent
message about lawyers for young kids.

When we litigate we need to talk about quality of lawyers for children (and perhaps should consider
claims of ineffective assistance of counsel).

When we litigate, we should consider whether we should use *Mathews v. Eldridge* balancing test.

- We can look to state Constitution, and cases like *In re Gault*
- Some jurisdictions have alternate tests to *Mathews v. Eldridge*. For instance, New
  Jersey has “consequences of magnitude” test as an alternative which comes

  In municipal court matters, the Court has provided guidelines defining
  ‘consequences of magnitude.’ See Guidelines for Determination of Consequence
  of Magnitude, Pressler & Verniero, Current N.J. Court Rules, Appendix to Part VII
  to R. 7:3–2 at 2465 (2013) (the Guidelines). In addition to possible incarceration
  and loss of driving privileges, the Guidelines direct judges to consider ‘[a]ny
  monetary sanction imposed by the [municipal] court of $750 or greater in the
  aggregate, ... including fines, costs, restitution, penalties and/or
  assessments.’ Ibid."

The Guidelines also note that “if a defendant is alleged to have a mental disease or
defect, and the judge, after examination of the defendant on the record, agrees that the
defendant may have a mental disease or defect, the judge shall appoint the municipal
public defender to represent that defendant, if indigent, regardless of whether the
defendant is facing a consequence of magnitude, if convicted.” See also *M. v. S.*, 404
A.2d 653, 656 (N.J. Super. Ct. Law Div. 1979) (“Bastardy proceedings are at least quasi-
criminal in nature ... A paternity action can result in consequences of magnitude
Therefore, in bastardy proceedings an indigent defendant must be assigned counsel without cost.”

If parent’s counsel raises right to counsel for children then we run the risk of a court finding that the parent, through their counsel, can represent and protect the child.

Cases that challenge the system and advocate for a right to counsel have other benefits:

- Outcomes for foster youth are poor – judges and decision makers should question adequacy of current systems
- Litigation forces decision makers to look at data and information about the system.

**Themes from Legislation Conversation**

Legislation or amendment of court rules can address quality of counsel by:

- Capping caseloads
- Setting standards
- Clarifying Role of the Lawyer
- Mandating training

A study of exactly what lawyers do in child welfare cases can assist in illustrating the need for caseload caps and clarifying exactly how many lawyers are needed to represent the children in a specific jurisdiction.

3 step approach to a right to counsel:

- Policy
- Standards
- Practice – implementation
- (Problem: sometimes practice becomes the policy)

Common legislative questions when pushing for a right to counsel:

- How much does it cost? (We don’t have a great answer to this question)
- How do we know that it leads to better outcomes? How do we know that it saves states money?
- How can children direct representation?

Options for moving toward a right to counsel from a national level:

- Amend CAPTA itself
  - It is the driving piece of legislation on this issue
  - But CAPTA only represents approx. 5% of state funding and asking to do more with that funding receives significant push back
  - CAPTA is seen as arcane
  - Pushback re: outcomes
- Stand Alone Legislation
  - Perhaps funded through Court Improvement Project
• Not the most likely method for achieving right to counsel, but is a possibility

- Link CAPTA to IVB and IVE
  • IVB and IVE are where the money is
  • Legislatively it would be easy, but politically difficult due to different committees needing to work together

- Amend IVB and IVE
  • Legislators are slow to change
  • While CAPTA requires re-authorization, there is no schedule for the reauthorization of IV-E and IV-B.
  • Hard to push changing of the umbrella of authority
    o People may not want to let go of their issue

- What about sending a letter asking for a waiver in IV-B funding? The letter could come from welfare administrators to send to HHS to see if it helps reduce foster care costs. Regarding IV-E, put in attorney representation as part of the waiver and argue that this will save money. (Following the argument/outcome that children with lawyers spend less time in foster care). Reprogram the money for different services.
  • Strategy—Find child welfare administrators who are sympathetic.
    For example, Commissioners in CT, MI, and Pittsburgh, find allies. A waiver request could also be co-signed by Chief Justices.
  • In order to redirect the money to hire lawyers, you need a champion at the State level.
  • The IV-E waivers require evaluation – this could be utilized to help show the success of having attorneys for children.
  • Have to figure out how much money are you talking about. Maybe the waiver will fund pilot projects.
  • NOTE – this idea is currently being implemented, e-mail Cathy.Krebs@americanbar.org if you want to learn more.

- More research on right to counsel may help to advance this issue

- Is there anything that can be done through OJJDP to get children a right to counsel? (e.g. Defending Childhood Report; or perhaps providing counsel for crossover youth)

- Is the Court Improvement Project a vehicle for improving the representation of children?
  • The CIP administrators meet annually
  • Are there still yearly summaries of what CIP is doing in various areas (including legal representation)?
    • Analyze CIP programs and their reports - want to know how states are using their court improvement money.
  o Requiring more of the ABA with regard to analyzing what improvements are happening in the child’s right to counsel arena. Perhaps look at the ABA's work on counsel for parents and suggested we work to get the ABA to do similar monitoring of the role and work of counsel for children.
Themes from Outcomes
(full document on file with Cathy.Krebs@americanbar.org)

What studies do we know about?

Specific

National Youth in Transition Database (in almost every state) – college graduation and employment
Court Improvement Projects Data

Federal government receives information particularly on well-being

- State/County Court Admin offices
- Tribal Courts
- Social Security Agencies
- Individual offices, organizations, agencies may keep info too

Children’s Law Centers around the country collecting data – cathy.krebs@americanbar.org for list

General:

Information gathered as a result of litigation

Health/Behavioral Health Records – agency data

Court records

- Unique orders
- Motions filed
- Other court systems (e.g. criminal or family)

School records

Look at budgets

Linking to outside databases (e.g. NSCAW)

Court files & Clerk minutes (court records)

Administrative Office of Court Stats

What do we want to know?

Cost effectiveness:
Economic data – long term vs. short term prove cost effectiveness

We need a cost-benefit analysis for short and long-term impact of counsel – short term = time in care; long-term = lost opportunity; costs of other systems involvement

Being able to show that ensuring RTC has a cost benefit for well being

**Well-being outcomes:**

Number of days runaway or “out of placement” / # of kids coming back from run

Number of kids who age out of care

Number of months in care

How often kids come to court (measured through court improvement?)

Reunification rates

# of placements

Speedy resolution to permanencey

Family contacts

Educational stability/services

Need longitudinal data (atty vs. no atty)

- Measure school success
- Permanency outcome measures
- Health/behavioral health measures
- Involvement with law enforcement
- When children have lawyers do they have improved outcomes?

Long term outcomes – education, healthcare, jobs, incarceration at age 21, 26, 30

Measuring speed to permanency

Comparison data for kids with counsel for permanency outcomes (i.e. Length to permanency, number of placements)

Comparison data for kids with counsel for safety outcomes (i.e. maltreatment while in care, repeat maltreatment)

Looking at impact of having attorney and those children on psychotropic meds, involuntary hospitalization
Comparison data for kids with counsel for well-being outcomes (i.e. educational, health/mental health outcomes)

Effects on well-being

- Gang involvement
- Truancy
- Education outcomes

About the Lawyer:

Measurement of lawyers background, training, credentials, experience and standards of practice

Kids’ views on outcomes:

We need data on what kids think/want and their views on effectiveness of outcomes

Real kids, really speaking about representation & self-determination

Number of electronic communications between lawyer and client

Stories for youth who were active participants in their dependency and worked with a lawyer – first person accounts of self-determination, empowerment, etc. Stories on a zip drive, website, etc...youth talking about lawyer relationship and outcomes.

Youth narrative (video, testimony, writing)

Testimonials from foster youth & judges

Anecdotal stories form youth about how attorneys affect their well-being for dissemination to legislators and public – can be found at www.ambar.org/fosteringjustice

Compare outcomes of GAL vs. Attorney

Relative efficacy of GAL vs. Attorney

Lawyer-client relationship:

Richness of communication between attorney and client (# of texts & e-mails)

Measure trust in the attorney

Measurement of frequency & nature of visits with clients

Facts on representation:

How often is the child represented by an attorney? How often are they not represented?
Demographics of unrepresented and represented children

Outcome data within a control group

Understanding funding/leveraging existing funding streams

Caseload cap study

How do you quantify access to justice? What data matters???

We need data proving that quality effective client directed representation by lawyers is cost effective compared to other best interest rep (lay & attorney CASA/GAL

Cost of attorney v. funding non attorney GAL or CASA

Uniform standards of data

Cost savings

Create uniform data collection sheet/program for children’s lawyers to utilize nationwide

Quantified measurement of child’s opinion of attorney’s difference

Impact of legislation – federal level.

Funding - what is the cost?

Outcome measures

Quality assurance

Building consensus at top leadership levels across states

Guidelines on tracking of data

- Are kids being appointed counsel when & for how long and what for
- Age of child, # of placements
- Time of attorney with youth, number of visits and duration of visits
- Stakeholder decision
- Number of motions filed but negotiation maybe more important
- Contact with siblings and other family
- How many days in school

Data/info on what people with the $ and power need to know in order to support client-directed representation for children.

What do we need/have to confront opposition to RTC?
Comparing outcomes between CASA and lawyers

What arguments have been successful in countering the opposition

DATA that shows that quality counsel leads to faster permanence

Does presence of attorney for children speed up timelines and result in more and more timely services

Data that shows having a lawyer reduces the rate of cross over into delinquency court system

Research re: outcomes . draw a direct line between attorneys and outcomes. Eg. Permanency, FR, substance abuse, school, mental health, repeat victimization

Do kids with lawyers graduate high school more than those who do not?

Does court get better info or better requests when there is confidentiality between lawyer and child?

Frequency & degree to which children are treated like perpetrators rather than victims i.e. orders/language re: compliance directed at the child

Motions filed by children’s lawyers and rulings on the motions

Where does quality counsel exist and how do you quantify it?

Measuring and evaluation the child’s experience with an attorney

Data from the child clients on the impact of the attorney in their lives

Information on what factors lead to effective lawyering for children

Measuring how often social workers recommendation differs from children’s wishes

**What do lawyers do for kids?**

Explain law, options, outcomes

Listen to child and learn from them

Give child voice and some power

Help child understand process and answers questions

Help kids come in from run

File motions

Keep kids in school and get them better services @ school

Hold the system accountable to children and what they really want
Get kids to court and have their voices LOUDLY heard!
Help keep kids connected to families and their communities
Help kids plan for their future and transition to adulthood
Help children get and keep their stuff
Listen
Research / advise / explain
Advocate / object
Get effective services for the child (ed, med, mh)
Make laws work for child and globally
Help child build sense of self efficacy
Protect
Explaining / navigating system
Advocate for individualized normalization
Doing the law, knowing when to litigate / collaborate
Advocacy re placement / visitation
Build Trust
Remove immediate barriers to healthcare, safety, family planning and education
Deliver bad news (don’t sugar coat)
Ask child what they want (chance to express their wishes)
Provide confidential counseling relationship
Demystify the process
Provide access to courts
Help access legal benefits
Enforce legal rights
Independent investigation
Hold stakeholders accountable
Empower child to feel valued
Ensure school attendance
Refer to other agencies / run interference