

Written Testimony in Support of Reengrossed House Bill 22-1038
Concerning Client-Directed Legal Representation for Youth in Court Proceedings for Youth
Kim Dvorchak, JD, Executive Director,¹ National Association of Counsel for Children
March 16, 2022

Senator Pete Lee, and Committee Members,

The National Association of Counsel for Children submits testimony to the Colorado Senate Judiciary Committee to express our strong support for HB 22-1038.

The National Association of Counsel for Children (NACC) was founded 45 years ago by a handful of lawyers in Denver, Colorado with a singular goal: ensuring children received specialized legal representation in dependency and neglect cases. A national nonprofit now reaching over 10,000 professionals annually, NACC continues to share a special relationship with Colorado stakeholders to whom we provide technical assistance.

Colorado has been and continues to be a leader in children's law. In 1907, Colorado was one of the first states in the country to create a separate juvenile court for children in dependency and delinquency cases.² In 1967, after the US Supreme Court decision *In re Gault*, the Colorado General Assembly adopted the Children's Code providing guardian ad litem for children in dependency cases and client-directed attorneys for children in delinquency cases. And in 1973, when Congress considered requiring representation for children in the Child Abuse Treatment and Prevention Act, Colorado was highlighted as model state providing lawyers to children.³

H.B. 22-1038 will keep Colorado in the forefront of best practices by changing existing law from a guardian ad litem model to a client-directed model for children and youth ages 12 and older.

No Decisions for Youth Without Youth

From the moment the child welfare system intervenes in a child's life, everything is at stake –their home, their bonds with parents and siblings, their education, their community, their belongings. In sum: their future. When a child aged 12 or older is represented by a client-directed attorney, they should have a meaningful voice in the processes that shape the rest of their lives.

In a client-directed model, the attorney presents evidence and makes argument for the child's requests and positions. This does *not* mean that the attorney has reflexive, or "robotic allegiance" to each directive of the client. Client counseling and relationship-building are fundamental to the representation of children and youth in any courtroom. Attorneys with specialized training advise child clients in a developmentally-appropriate manner on their legal rights, their options, and potential outcomes. Child safety is not jeopardized simply because a youth has access to counsel; in fact, it may be enhanced. As the federal government has noted, "[c]onfidential attorney-client privilege allows children to feel safe sharing information with attorneys that otherwise may go unvoiced."⁴

¹ Contact Information: Kim.Dvorchak@NACCchildlaw.org; 720-420-5195. Kim Dvorchak is an attorney licensed in Colorado and was the founding executive director of the Colorado Juvenile Defender Center through 2015.

² King, Laoise. "Colorado Juvenile Court History: The First Hundred Years." *The Colorado Lawyer* 33 (April 2003).

³ Child Abuse Prevention Act, 1973. Hearings Before the Subcommittee on Children and Youth of the Committee on Labor and Public Welfare, United States Senate, Ninety-Third Congress, First Session on S.1191. Statement of Brian Fraser, Staff Attorney, National Center for the Prevention and Treatment of Abuse and Neglect.

⁴ U.S. Department of Health and Human Services, Administration of Children and Families. (2017, January) High Quality Legal Representation for All Parties in Child Welfare Proceedings, Log No: ACYF-CB-IM-17-02.

For 20 years, I provided client-directed representation as a matter of course to children and youth who were accused of crimes. There was no question to whom I owed a duty of loyalty, confidentiality, and advocacy. But I did not simply parrot my client's words in a courtroom; it was through investigation, consistent client communications, advice, and counseling, that we developed a theory of the case together. Through this work, I did not protract litigation but helped achieve what youth most want – a timely exit from the court system. Attorneys in dependency and neglect cases will similarly help to achieve what youth most want: permanency.

Empowering Legal Representation and Fair Proceedings

There is increasing recognition of the necessity of integrating youth voice in child welfare practice and policy. As stated by the U.S. Children's Bureau, "[f]amilies and youth are our best sources of information about the strengths and needs of their families and communities, yet, historically, we make decisions and plans in the absence of their input. Moreover, where input is sought, it may not receive meaningful consideration."⁵

Client-directed representation centers the child's perspective and reasoning, recognizing that they are "the individuals most knowledgeable about solutions that will benefit them."⁶ It is an essential component of procedural justice.⁷ Research has shown that youth perception of the quality of legal representation they receive in foster care is strongly correlated with their perception of the foster care experience.⁸ It comes as no surprise that youth with lived experience in foster care have identified access to high-quality legal representation as a priority area for reform efforts.⁹

Nationally-Recognized Best Practice

HB 22-1038 is consistent with the American Bar Association's Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings,¹⁰ ABA Model Rules of Professional Conduct (R. 1.2), and NACC's Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings¹¹ which endorse client-directed representation. Other states are also turning to client-directed legal representation as a strategy for system improvement. In 2021, Arizona, North Dakota and Washington State all passed legislation expanding access to client-directed counsel and, this year, Florida is poised to do the same.¹²

We commend the Colorado Office of the Child's Representative, a national leader in children's legal representation, for spearheading HB 22-1038. OCR's fervent commitment to best practices is evident in its focus on elevating youth voice, promoting due process, and advancing equity for youth. Colorado youth must have the right to have their perspective considered by legal decisionmakers and be treated as an equal and essential part of their own case. The National Association of Counsel for Children thanks you for considering this critically important issue for youth and urges the committee to vote in support of HB 22-1038.

⁵ U.S. Department of Health and Human Services, Administration of Children and Families. (2019, August) Engaging, empowering, and utilizing family and youth voice in all aspects of child welfare to drive case planning and system improvement. Log No: ACYF-CB-IM-19-03.

⁶ *Id.* at 3

⁷ Tyler, T. & Zimmerman, N. (2010) *Between Access to Counsel and Access to Justice: A Psychological Perspective*. *Fordham Urban Law Journal*, 37, 473-507.

⁸ Miller, J. J., Duron, J., Washington, E. & Donohue-Dioh, J. (2017, July) Exploring the Legal Representation of Individuals in Foster Care: What Say Youth and Alumni? *Children and Youth Services Review*.

⁹ National Foster Care Youth Alumni, Policy Council (2020, December) A Historic Opportunity to Reform the Child Welfare System: Youth and Alumni Priorities on Older Youth Successful Transition to Adulthood.

¹⁰ American Bar Association. (2011, August). Resolution: Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings.

¹¹ Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings, National Association of Counsel for Children (2022, January).

¹² AZ Senate Bill 1391 (2021); ND House Bill 1035 (2021); WA House Bill 1219 (2021); FL Senate Bill 948/ House Bill 1549.

February 9, 2022

Mike Weissman
Chair
House Judiciary Committee
Colorado General Assembly
200 E Colfax Avenue
Denver, CO 80203

Kerry Tipper
Vice Chair
House Judiciary Committee
Colorado General Assembly
200 E Colfax Avenue
Denver, CO 80203

Re: ABA Support for Colorado House Bill 22-1038

Dear Chair Weissman and Vice Chair Tipper:

On behalf of the American Bar Association, the largest voluntary association of lawyers and legal professionals in the world, I write to express our support for Colorado's proposed House Bill 22-1038, which requires client-directed counsel for youth 12 years of age or older in dependency and neglect proceedings.

The ABA has long recognized that children and youth need legal representation in dependency court proceedings. In 1996, the Association approved the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, which state that "[a]ll children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues."

In 2011, after a three-year drafting process that invited input from children's lawyers across the country, the ABA House of Delegates adopted the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (ABA Model Act).¹ The ABA Model Act reaffirms the Association's support for the appointment of a lawyer for every child and states:

"[W]hen the child is capable of directing the representation by expressing his or her objectives, the child's lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct."

Colorado's proposed House Bill 22-1038 aligns directly with the ABA Model Act by requiring appointment of client-directed counsel for children or youth 12 years of age or older. Although all of Colorado's children in foster care currently receive legal representation from guardians ad litem (GALs), that support is not the same as client-directed legal representation in a complex system of laws where children's most fundamental interests are at issue, including their right to family integrity, education, safety, and health care access while in state custody. We encourage the

February 9, 2022

Page 2

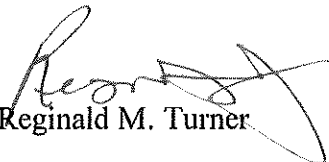
Judiciary Committee to support this legislation, which reflects the best thinking of children's law experts in Colorado and throughout the country.

In addition to aligning with the 1996 ABA standards of legal representation and the ABA Model Act, HB 22-1038 also is consistent with Federal guidance, which recognizes that child welfare court proceedings are complex and "all parties, especially children, need an attorney to protect and advance their interests in court."²

The American Bar Association urges the Judiciary Committee to vote in favor of HB 22-1038, and to ensure that all children 12 and older living in foster care in Colorado have a right to counsel in their dependency and neglect proceedings.

Thank you for your consideration of these comments. Should you have any questions or need additional information, please contact David Eppstein, Legislative Counsel, ABA Governmental Affairs Office at David.Eppstein@americanbar.org.

Sincerely,


Reginald M. Turner

cc. Members of the House Judiciary Committee

² See U.S. Department of Health and Human Services Administration for Children, Youth and Families Information Memo, ACYF-CB-IM-17-02, January 17, 2017 at 11, which "strongly encourages all jurisdictions to provide legal representation to all children and youth at all stages of child welfare proceedings."



To: Senate Judiciary Committee
Re: Testimony in Support of HB 1038, Judiciary Committee Hearing on 3/16/22
Date: March 7, 2022

Chair Lee, Vice-Chair Gonzales, and Members of the Senate Judiciary Committee:

The National Coalition for a Civil Right to Counsel (NCCRC) strongly supports the passage of HB 1038, which guarantees that older youth in dependency proceedings are appointed a client-directed lawyer who will advocate for the child's distinct legal position. The NCCRC is a coalition of over 600 participants and partners from 41 states, including Colorado. We seek to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs. For over a decade we have been involved in legislative and litigation efforts around the right to counsel for children in child welfare cases, serve on the National Association of Counsel for Children's Advisory Committee, and are a member of the ABA Section of Litigation's Children's Right to Counsel Committee working group.

Both the ABA (via its Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings) and the U.S. Department of Health and Human Services' Administration for Children and Families have called upon jurisdictions to provide legal representation to children in child welfare proceedings. And the ABA Model Act in particular calls for this legal representation to be a client-directed attorney. Fifteen states guarantee client-directed counsel for children of all ages, while another five guarantee client-directed counsel for older children, so Colorado will be in excellent company by enacting this bill.

Child welfare proceedings are difficult civil cases governed by exacting federal, state and local statutes and regulations, decades of case law, and detailed rules of evidence and procedure. Lawyers with a confidential, "traditional" lawyer-client relationship with the child can assess and advocate a child's changing positions on important decisions including visitation, placement, schooling, services, and so on.

In these proceedings, the stakes for children are high. Short and long-term decisions are made about where and with whom a child can reside, how often they can see a sibling, parent or other important family member, who they can generally interact with and in what setting, what services they have to participate in, and so on. Child welfare proceedings have serious, lasting effects on the relationships and well-being of the very children the child welfare system is meant to help. And these consequential decisions arise out of cases that are themselves often fluctuating – from who the caseworker is, to what the goal is, to who is adjudicating the matter. Appointment of counsel at the beginning stages of the proceedings and for the duration of every case can be an important stabilizer for a child. Attorneys improve outcomes for children: when reviewing the provision of legal representation for parents and children, the Administration for

Children and Families found numerous identifiable benefits including an enhanced sense of procedural fairness, better case planning, increased visitation, and expedited permanency.

Representation has also proven essential when crises, such as the current pandemic, disrupt or prevent the child welfare system from functioning properly. Anecdotal reports show that throughout the pandemic, attorneys for children, in states where those roles are specifically established, have zealously advocated to have their clients return to their families when there are no safety concerns, and have opposed blanket visitation halts.

Children do not choose to become entangled in the system. Yet they bear the brunt of these proceedings: they are moved, prevented from seeing important family members, and required to engage in services determined to be in their best interest. At a minimum, older children need an attorney representing their stated interests to help them navigate this system, and to emerge whole. For these reasons, the NCCRC strongly supports the passage of HB 1038.

Thank you, and please let us know if there is any additional information we could provide.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Pollock".

John Pollock
Coordinator, NCCRC



Colorado Office of the
Child's Representative

Empowering Youth: Transition to Client-Directed Representation

What: Change from best interests of the child legal representation to client-directed legal representation for youth aged 12 and older in Dependency and Neglect (D&N) cases.

When: Legislation will be introduced in the 2022 session with a proposed implementation date of January 2023.

Why:

- Essential component of advancing youth rights and giving youth an authentic voice in D&N cases involving their lives, families, and homes.
- Provides parity in D&N cases for youth, enhances quality of decision making and is essential to ensuring procedural justice in D&N cases.
- Improves youth feelings of procedural due process and acceptance of and compliance with court orders.
- Brings Colorado in line with the recommendations of the American Bar Association and the National Association of Child Counsel and ensures Colorado stays at the forefront of child welfare practice.
- Help mitigate potential implicit bias inherent in discretionary decisions.

FAQ:

- **Why age 12?** While many states provide client-directed representation to all children and youth in D&N proceedings, states that transition from best interests to client-directed representation use ages ranging from 8 – 14 years old. In Colorado, 12 is consistent with other statutes such as C.R.S. 19-5-203(2) which requires a youth 12 and older to consent to their own adoption; C.R.S. 15-14-203(2) allowing a youth 12 and older to consent to or refuse appointment of a guardian, C.R.S. 19-7-101(z) stating youth 12 and older should be involved in meetings at which decisions are made about their future, and C.R.S. 12-43-202.5(2) allowing minors 12 & older to seek mental health treatment without the consent of the minor's parent or legal guardian.
- **Do other states do this?** Yes, in fact 28 states have some form of client-directed counsel for children and youth. Some examples include Arizona, Georgia, Louisiana, Massachusetts, Nevada, New Jersey, New York, Oklahoma, Vermont, West Virginia. Idaho and Wisconsin both change to client directed representation at age 12, Minnesota at age 10, Washington at age 8 and New Mexico at age 14. New Mexico made this change over 15 years ago and is exploring client-directed legal representation for all youth. The OCR is not aware of any state that has enacted client-directed representation and then later changed back to a best interests model.
- **Will OCR continue to provide oversight?** Yes, the OCR will continue to provide oversight of attorneys representing children and youth pursuant to its enabling legislation, C.R.S. 13-91-101 et. seq. Corresponding changes recommended to the Chief Justice regarding CJD 04-06 will ensure clear practice standards applicable to attorneys under both the

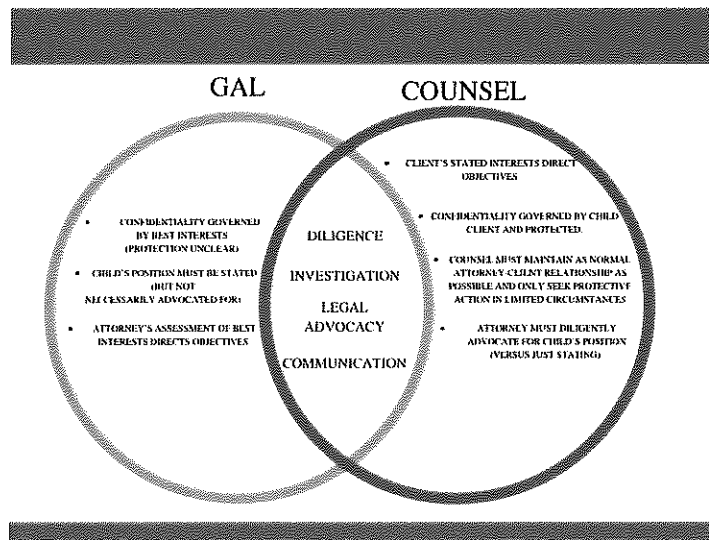
A direct interest
attorney would fight
for what I want. Why
should I go to court
when no one is on my
side? I'm still here.

*Quote from youth in
OCR focus group*

best interests and client directed model. OCR will continue its vigorous oversight of all attorneys contracting with the agency to represent children and youth.

- **How does this impact practice?** Children and youth will be parties in the D&N case they are named in. Attorneys providing client-directed representation will continue to do thorough and independent investigation to ensure they can give competent legal counsel to the youth. Client-Directed attorneys will have a traditional attorney-client relationship with the youth that includes the duty of confidentiality. An attorney providing best interests legal representation to a child under the age of 12 can transition to client-directed counsel when the youth turns 12 so long as they do not have a conflict of interest. An attorney can represent the best interests of siblings under 12 and the stated interest of siblings over 12 so long as the interests of the older clients are not in conflict with each other or the best interests of the younger children. An attorney cannot represent the best interests and the stated wishes of the same client (so, for example, counsel for youth in a D&N case cannot also be GAL in the JD case). Attorneys providing client-directed representation will maintain frequent contact with their youth clients to build a trusting relationship, obtain enhanced information about their needs and goals, and to present robust, youth-centered information to courts.

Role Differences and Similarities:



What it looks like:



Ask youth what they want and then get to the why



Really get to know the youth by:

- Meeting with them and talking to them
- Reading reports and assessments
- Talking to other important people who know the youth
- Talking to the schools, etc.



Advise the youth about what they want, what is likely to win in court or not and why



Problem solve with the youth about what they want and provide guidance



Advocate in Court for what the youth lands on

Please feel free to reach out with any ideas, questions, or concerns to the OCR Legislative Liaison, Ashley Chase, (720) 351-4346, ashleychase@coloradochildrep.org.

