

**RAISING THE BAR:
HIGH-QUALITY LEGAL
REPRESENTATION FOR CHILDREN
AND YOUTH IN ARIZONA**

August 10, 2021



Roadmap for Today's Session



- **SB 1391:**
 - *What Changed?*
 - *Why Does It Matter?*
 - *What Does this Mean For Legal Practice?*
- **Voices from the Field**
- **Let's Practice!**
- **Q & A / Discussion**



SB 1391: What Changed?

SB 1391

8-221. Counsel right of juvenile, parent or guardian; appointment; reimbursement; guardian ad litem.

- A. THE COURT SHALL APPOINT AN ATTORNEY FOR A CHILD in all ~~proceedings involving offenses~~, DELINQUENCY, dependency or termination of parental rights PROCEEDINGS that are conducted pursuant to this title ~~and that may result in detention, a juvenile has the right to be represented by counsel~~. THE COURT SHALL APPOINT THE ATTORNEY BEFORE THE FIRST HEARING. THE ATTORNEY SHALL REPRESENT THE CHILD AT ALL STAGES OF THE PROCEEDINGS AND, IN A DEPENDENCY PROCEEDING, THROUGH PERMANENCY

~~G-I.~~ In all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected, the court ~~shall~~ MAY appoint a guardian ad litem to protect the juvenile's best interests. This guardian AD LITEM ~~may~~ SHALL be an attorney ~~or a court-appointed special advocate~~. THE GUARDIAN AD LITEM IS NOT THE CHILD'S ATTORNEY.

New Rules of Procedure for Juvenile Court

- Supreme Court Order in R-20-0044 (the Juvenile Rules petition):
 - July 23, 2021: Public comments due on the rules proposed by R-20-0044.
 - Sept. 30, 2021: Due date for petitioner's reply to the R-20-0044 comments.
- The Order also notes the following:
 - The Court will consider the rules proposed by R-20-0044 at its December rules agenda.
 - The Court contemplates that any adopted rules will not become effective until July 1, 2022.

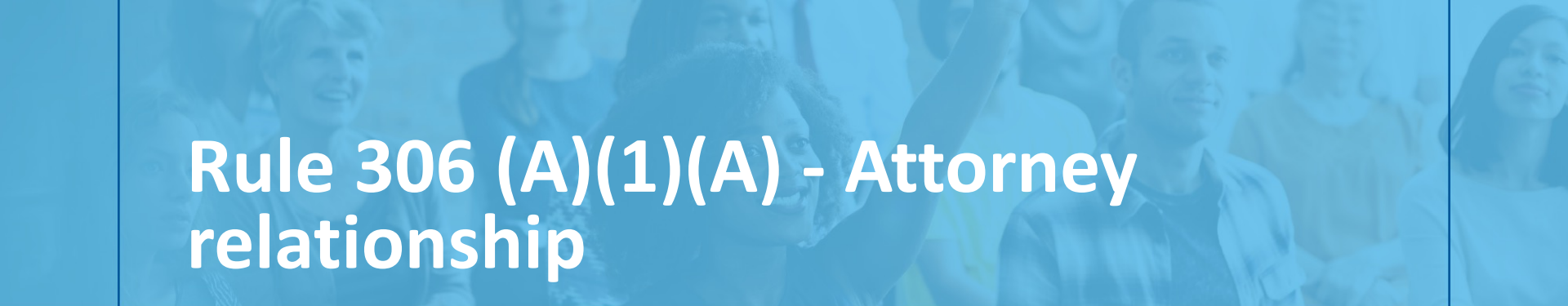
Rule 303. Assignment and Appointment of an Attorney; Advisory Attorney

C. Appointment of an Attorney for a Child. The child's attorney provides legal representation for a child. Children in dependency and termination cases are presumed indigent and are entitled to a court-appointed attorney. The appointment of a child's attorney should be made as soon as practicable to ensure effective representation of the child and, in any event, before the first court hearing. The child's attorney owes the same duties, including undivided loyalty, confidentiality, and competent representation, to the child as is due an adult client. The child's attorney is not a GAL.



Rule 305. Appointment of a GAL

In addition to the appointment of an attorney, the court may appoint a GAL to protect the best interests of a minor or an individual who may be incompetent or in need of protection, or as the court otherwise directs. A GAL appointed under this rule must be an attorney. When the court appoints a GAL, the court must clearly define the purpose and scope of the appointment, the GAL's role in contested proceedings, including disclosure and discovery proceedings, and the court's expectation of the GAL's role in the case. The court must order the parties to disclose all relevant information to the GAL. A GAL is not bound by the expressed preferences of the minor, the individual who is incompetent, or the protected person.



Rule 306 (A)(1)(A) - Attorney relationship

The child's attorney must maintain a normal attorney-client relationship with the child in accordance with the rules of professional conduct when the child is capable of directing the representation by expressing the child's objectives.

Rule 306 (A)(1)(B) - Diminished capacity

The child's attorney must determine whether the child has the capacity to make adequately considered decisions pursuant to E.R. 1.14. In making the determination, the attorney should consult the child and may consult other individuals or entities to determine the child's ability to direct the representation. When a child has diminished capacity, the child's attorney must make a good faith effort to determine the child's needs and wishes. The attorney must, as far as reasonably possible, maintain a normal attorney-client relationship with the child.



Rule 306 (A)(2)(C) - GAL

The child's GAL must assist the court in determining what is in the child's best interests and is not bound by the client's expressed preferences.

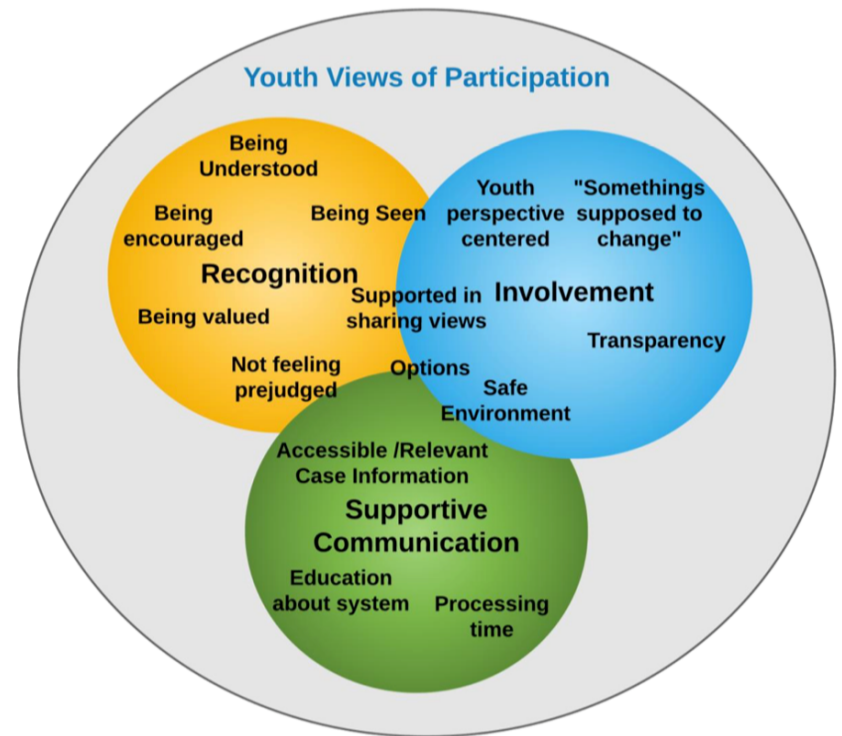


SB 1391: Why Does it Matter?

Youth Should Be Seen & Heard

Persons with lived experience in the child welfare system overwhelmingly indicate a desire to:

- Be heard;
- Be engaged in their legal proceedings;
- Be told what is happening in their case.



Cody, Anna. "Children's Participation Rights in Child Welfare Systems: Identifying Opportunities for Implementation." <https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=7617&context=etd>

A Growing Body of Research

A 6-year federal study found that children represented by specially trained counsel were 40% more likely to exit foster care within first 6 months.

Research in Florida's Palm Beach County showed that children represented by standards-based counsel exited to permanency at rates up 1.39 times higher than comparison children, primarily due to higher rates of adoption and long-term custody.

In Washington State, legal representation increased reunification & guardianship rates by 41%.


A Growing Body of Research



INCREASES IN:

- Kinship placements
- Permanency timeliness
- Youth/ family engagement in case planning, services and court hearings
- Youth/family mental and physical well-being
- Engagement in extracurricular / "normalcy" activities

DECREASES IN:

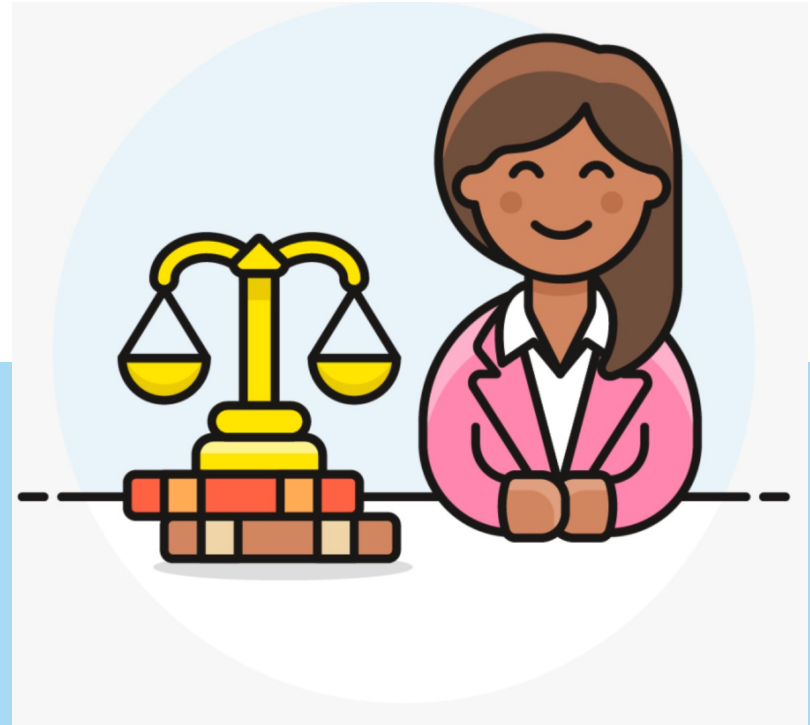
- Family separation
 - Placement changes
 - Repeat maltreatment
 - Re-entry to foster care
 - School changes
 - Agency costs
 - Long term social costs (incarceration, homelessness, etc.)
- 

But Any Lawyer Won't Do



High-Quality Legal Representation (HQLR)

- Specialized Knowledge
- Specialized Skills
- HQLR Best Practices





SB 1391: What Does this Mean for Legal Practice?



Sources of Authority

- Arizona Rules of Professional Conduct
- ABA Rules of Professional Conduct
- ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (2011)

Client-Directed Model

- Consistent with legal representation for adults (ABA Model Rule 1.2);
- Used in delinquency cases since 1967 In Re Gault decision;
- Mitigates (but does not resolve) potential bias;
- Reserves opinion testimony for qualified experts;
- Best interest remains the province of the court.



Client Counseling is Key



Client counseling: Arizona E.R. 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

- [1] A client is entitled to **straightforward advice** expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
- [2] "...It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice..."
- [4] "Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; ...Where **consultation with a professional in another field** is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts."



What about
little ones?



Arizona E.R. 1.14 – Client with Diminished Capacity

“[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.

For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”



Arizona E.R. 1.14

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as:

- child's ability to articulate reasoning leading to a decision,
- variability of state of mind and ability to appreciate consequences of a decision;
- substantive fairness of a decision; and
- consistency of a decision with the known long-term commitments and values of the child.

In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Rule 306 (a)(1)(C) - Substituted judgement

During any period in which a normal attorney-client relationship is not reasonably possible to maintain, the child's attorney must make a substituted judgment. The attorney must advise the court of the determination of capacity that requires substituted judgment and any subsequent change in that determination. A substituted judgment includes determining **what the child would decide if the child was capable of making an adequately considered decision** and representing the child in accordance with that determination. The attorney should take direction from the child as the child develops the capacity to direct the attorney.



Seven Questions (Jean Koh Peters)

1. Am I making the best effort to see the case from my client's point of view, rather than my own, adult, viewpoint?
2. Does the child understand as much as I can explain about what is happening?
3. If my client were an adult, would I be taking the same actions, making the same decisions, treating her in the same way?
4. If I treat my client differently from an adult client, in what ways will my client concretely benefit from that?
5. Is it possible I am making decisions for the gratification of the adults in the case, and not the child?
6. Is it possible I am making decisions for my own gratification?
7. Does my representation reflect what is unique and idiosyncratically characteristic of this child?



The Attorney Two-Step

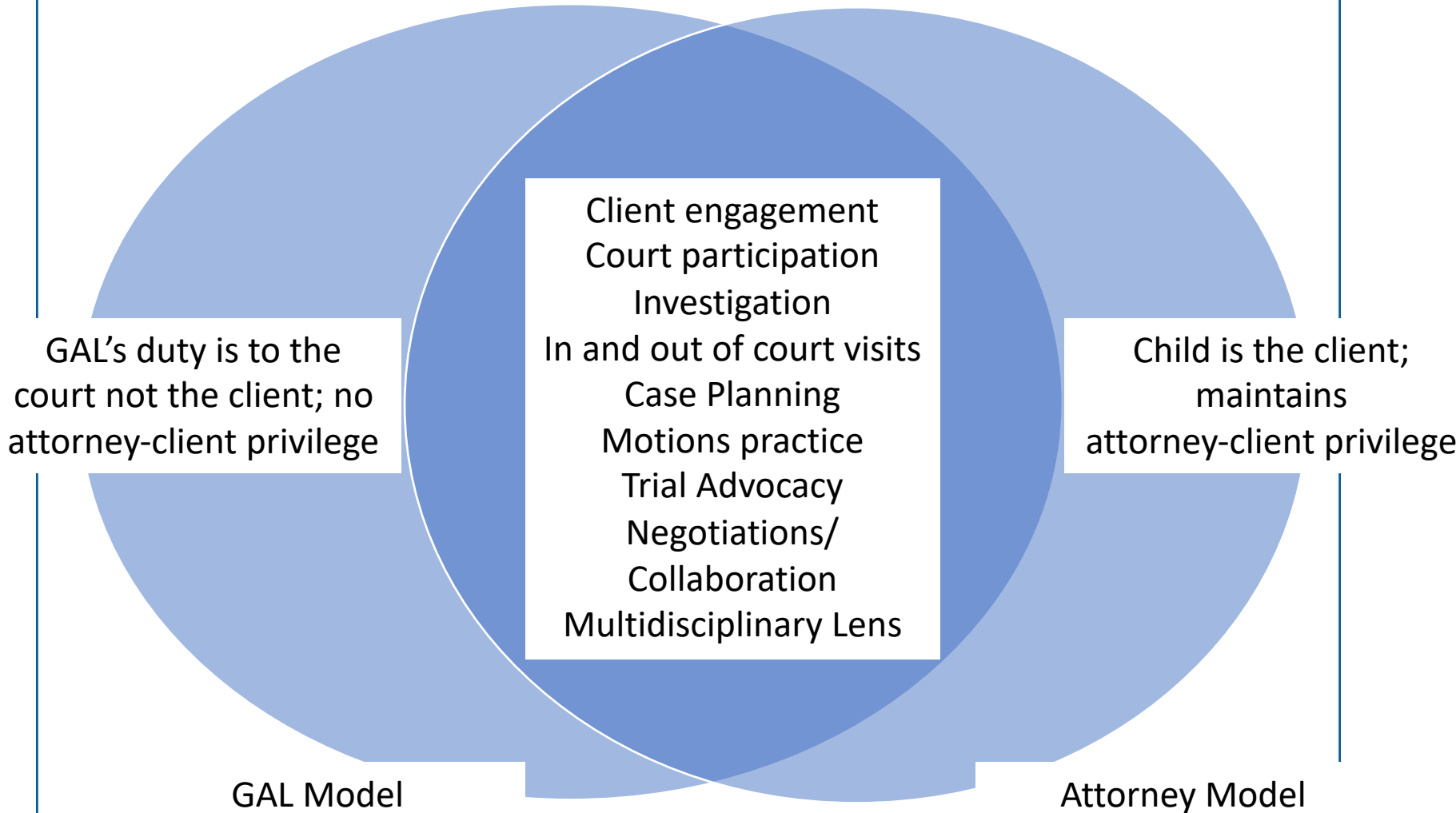
Step 1: Diminished Capacity Analysis

If yes, proceed to **Step 2:** Sub. Judgment Analysis

Best Practices for Very Young Clients

- Trauma-informed lens, guided by understanding of attachment and the very young brain;
- Family integrity is the starting point;
- First-hand assessment and interaction;
- Cultural humility;
- Ongoing inquiry with collaterals (family, caregivers, daycare providers, medical professionals, social worker, etc.);
- Expert consultation as needed;
- Encompass legal rights and interests;
- Inform the court when using SJ model;
- Expressed interest may be possible at varied times on certain issues;
- GAL requests may occur in rare/ exceptional situations;
- Continual reassessment of DC & SJ determinations;

SB 1391 Comparison





Celebrity Interviews



**Let's see this
in practice...**



You are the attorney for Tommy (8) and Sara (10) who wish to return home to their mother. DCS reports that their mother's home had a number of safety concerns during the last home inspection and they oppose return. The court orders you or your social worker to view the home and write a report to the court about the condition of the home. As attorney for the children, what do you do?



You are the attorney for Sam (3), Amanda (10) and Ariel (12) who have all been in DCS care for two years. They reside with a foster parent who is willing to adopt.

A severance trial is set for their mother, who has been minimally involved in the case plan but recently entered residential treatment. Amanda and Ariel oppose termination and do not wish to be adopted. What position do you take on behalf of Sam? How do you formulate that position?



Q & A



“Sir, I have a question that’s lunch-related.”

Contact Us!



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