

AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES  
August 11-12, 2003

RESOLVED, That the American Bar Association adopts the Standards of Practice for Lawyers Representing Children in Custody Cases, dated August 2003.

# **American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases**

*August 2003*

## **I. INTRODUCTION**

Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case. By adopting these Standards, the American Bar Association sets a standard for good practice and consistency in the appointment and performance of lawyers for children in custody cases.

Unfortunately, few jurisdictions have clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or precisely what the appointee should do. Too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or children's lawyers themselves understand children's lawyers' roles, duties and powers. Children's lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator, and surrogate decision maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system. These Standards distinguish two distinct types of lawyers for children: (1) The Child's Attorney, who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings; and (2) The Best Interests Attorney, who independently investigates, assesses and advocates the child's best interests as a lawyer. While some courts in the past have appointed a lawyer, often called a guardian ad litem, to report or testify on the child's best interests and/or related information, this is not a lawyer's role under these Standards.

These Standards seek to keep the best interests of children at the center of courts' attention, and to build public confidence in a just and fair court system that works to promote the best interests of children. These Standards promote quality control, professionalism, clarity, uniformity and predictability. They require that: (1) all participants in a case know the duties, powers and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions. The American Bar Association commends these Standards to all jurisdictions, and to individual lawyers, courts, and child representation programs.

## **II. SCOPE AND DEFINITIONS**

## **A. Scope**

**These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases. Lawyers representing children in abuse and neglect cases should follow the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996).**

## **B. Definitions**

- 1. “Child’s Attorney”:** A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.
- 2. “Best Interests Attorney”:** A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

### *Commentary*

These Standards and these definitions apply to lawyers fitting these descriptions regardless of the different titles used in various states, and regardless of whether the lawyer is appointed by the court or retained by the child.

A lawyer should be either a Child’s Attorney or a Best Interests Attorney. The duties common to both roles are found in Part III of these Standards. The unique duties of each are described separately in Parts IV and V. The essential distinction between the two lawyer roles is that the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child’s Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

These Standards do not use the term “Guardian Ad Litem.” The role of “guardian ad litem” has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving as a lawyer, and is not a party. This person can be either a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity.

## **III. DUTIES OF ALL LAWYERS FOR CHILDREN**

**In addition to their general ethical duties as lawyers, and the specific duties set out in Parts IV and V, Child’s Attorneys and Best Interests Attorneys also have the duties outlined in this section.**

#### **A. Accepting Appointment**

**The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.**

#### **B. Lawyer’s Roles**

**A lawyer appointed as a Child’s Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.**

#### *Commentary*

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

If these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted. The Child’s Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of his or her position, the Child’s Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.

#### **C. Independence**

**The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.**

#### *Commentary*

The lawyer should not prejudge the case. A lawyer may receive payment from a court, a government entity, or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action.

#### **D. Initial Tasks**

**Immediately after being appointed, the lawyer should review the file. The lawyer should inform other parties or counsel of the appointment, and that as counsel of record he or she should receive copies of pleadings and discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child.**

#### **E. Meeting With the Child**

**The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer should elicit and assess the child's views.**

#### *Commentary*

Establishing and maintaining a relationship with a child is the foundation of representation. Competent representation requires a child-centered approach and developmentally appropriate communication. All appointed lawyers should meet with the child and focus on the needs and circumstances of the individual child. Even nonverbal children can reveal much about their needs and interests through their behaviors and developmental levels. Meeting with the child also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to creative solutions in the child's interest.

The nature of the legal proceeding or issue should be explained to the child in a developmentally appropriate manner. The lawyer must speak clearly, precisely, and in terms the child can understand. A child may not understand legal terminology. Also, because of a particular child's developmental limitations, the lawyer may not completely understand what the child says. Therefore, the lawyer must learn how to ask developmentally appropriate, non-suggestive questions and how to interpret the child's responses. The lawyer may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

While the lawyer should always take the child's point of view into account, caution should be used because the child's stated views and desires may vary over time or may be the result of fear, intimidation and manipulation. Lawyers may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes.

#### **F. Pretrial Responsibilities**

**The lawyer should:**

- 1. Conduct thorough, continuing, and independent discovery and investigations.**
- 2. Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.**
- 3. Stay apprised of other court proceedings affecting the child, the parties and other household members.**
- 4. Attend meetings involving issues within the scope of the appointment.**
- 5. Take any necessary and appropriate action to expedite the proceedings.**
- 6. Participate in, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.**
- 7. Participate in depositions, pretrial conferences, and hearings.**
- 8. File or make petitions, motions, responses or objections when necessary.**
- 9. Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.**

### *Commentary*

The lawyer should investigate the facts of the case to get a sense of the people involved and the real issues in the case, just as any other lawyer would. This is necessary even for a Child's Attorney, whose ultimate task is to seek the client's objectives. Best Interests Attorneys have additional investigation duties described in Standard V-E.

By attending relevant meetings, the lawyer can present the child's perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child's perspective, or when the meeting will not be materially relevant to any issues in the case.

The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer's role is to advocate the child's interests and point of view in the negotiation process. If a party is legally represented,

it is unethical for a lawyer to negotiate with the party directly without the consent of the party's lawyer.

Unless state law explicitly precludes filing pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court's consideration of issues important to the child's interests. Where available to litigants under state laws or court rules or by permission of the court, relief requested may include, but is not limited to: (1) A mental or physical examination of a party or the child; (2) A parenting, custody or visitation evaluation; (3) An increase, decrease, or termination of parenting time; (4) Services for the child or family; (5) Contempt for non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.

The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) Child support; (2) Delinquency or status offender matters; (3) SSI and other public benefits access; (4) Mental health proceedings; (5) Visitation, access or parenting time with parents, siblings; or third parties, (6) Paternity; (7) Personal injury actions; (8) School/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

## **G. Hearings**

**The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the lawyer should:**

- 1. Introduce herself or himself to the court as the Child's Attorney or Best Interests Attorney at the beginning of any hearing.**
- 2. Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.**
- 3. Present and cross-examine witnesses and offer exhibits as necessary.**
- 4. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.**
- 5. Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.**
- 6. Where appropriate, introduce evidence and make arguments on the child's competency to testify, or the reliability of the child's testimony or out-of-court statements. The lawyer should be familiar with the current law and**

**empirical knowledge about children's competency, memory, and suggestibility.**

- 7. Make a closing argument, proposing specific findings of fact and conclusions of law.**
- 8. Ensure that a written order is made, and that it conforms to the court's oral rulings and statutorily required findings and notices.**

### *Commentary*

Although the lawyer's position may overlap with the position of one or more parties, the lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. The lawyer should address the child's interests, describe the issues from the child's perspective, keep the case focused on the child's needs, discuss the effect of various dispositions on the child, and, when appropriate, present creative alternative solutions to the court.

A brief formal introduction should not be omitted, because in order to make an informed decision on the merits, the court must be mindful of the lawyer's exact role, with its specific duties and constraints. Even though the appointment order states the nature of the appointment, judges should be reminded, at each hearing, which role the lawyer is playing. If there is a jury, a brief explanation of the role will be needed.

The lawyer's preparation of the child should include attention to the child's developmental needs and abilities. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes, explaining that such a result would not be the child's fault.

If the child does not wish to testify or would be harmed by testifying, the lawyer should seek a stipulation of the parties not to call the child as a witness, or seek a protective order from the court. The lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by law so that the child's views are presented to the court in the manner least harmful to the child, such as having the testimony taken informally, in chambers, without the parents present. The lawyer should seek any necessary assistance from the court, including location of the testimony, determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child. The child should be told beforehand whether in-chambers testimony will be shared with others, such as parents who might be excluded from chambers.

Questions to the child should be phrased consistently with the law and research regarding children's testimony, memory, and suggestibility. The information a child gives is often misleading, especially if adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue, or have an expert present when a young child is directly involved in the litigation, to point out any developmentally inappropriate phrasing of questions.

The competency issue may arise in the unusual circumstance of the child being called as a live witness, as well as when the child's input is sought by other means such as in-chambers meetings, closed-circuit television testimony, etc. Many jurisdictions have abolished presumptive ages of competency and replaced them with more flexible, case-by-case analyses. Competency to testify involves the abilities to perceive and relate. If necessary and appropriate, the lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

## **H. Appeals**

- 1. If appeals on behalf of the child are allowed by state law, and if it has been decided pursuant to Standard IV-D or V-G that such an appeal is necessary, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.**
- 2. The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged.**
- 3. When the appeals court's decision is received, the lawyer should explain it to the child.**

### *Commentary*

The lawyer should take a position in any appeal filed by a party or agency. In some jurisdictions, the lawyer's appointment does not include representation on appeal, but if the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel.

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appeals court's decision, whether there are further appellate remedies, and what more, if anything, will be done in the trial court following the decision.

## **I. Enforcement**

**The lawyer should monitor the implementation of the court's orders and address any non-compliance.**

## **J. End of Representation**

**When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.**

## **IV. CHILD'S ATTORNEYS**

### **A. Ethics and Confidentiality**

- 1. Child's Attorneys are bound by their states' ethics rules in all matters.**
- 2. A Child's Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.**

#### *Commentary*

The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position, and owes traditional duties to the child as client, subject to Rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct (2002).

The Model Rules of Professional Conduct (2002) (which in their amended form may not yet have been adopted in a particular state) impose a broad duty of confidentiality concerning all "information relating to the representation of a client", but they also modify the traditional exceptions to confidentiality. Under Model Rule 1.6 (2002), a lawyer may reveal information without the client's informed consent "to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm", or "to comply with other law or a court order", or when "the disclosure is impliedly authorized in order to carry out the representation". Also, according to Model Rule 1.14(c) (2002), "the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests" when acting under Rule 1.14 to protect a client with "diminished capacity" who "is at risk of substantial physical, financial or other harm."

Model Rule 1.7 (1)(1) (2002) provides that "a lawyer shall not represent a client if ... the representation of one client will be directly adverse to another client ... ." Some diversity between siblings' views and priorities does not pose a direct conflict. But when two siblings aim to achieve fundamentally incompatible outcomes in the case as a whole, they are "directly adverse." Comment [8] to Model Rule 1.7 (2002) states: "... a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited ... a lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. ... The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

### **B. Informing and Counseling the Client**

**In a developmentally appropriate manner, the Child's Attorney should:**

- 1. Meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed.**
- 2. Explain to the child what is expected to happen before, during and after each hearing.**
- 3. Advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation.**
- 4. Discuss each substantive order, and its consequences, with the child.**

### *Commentary*

Meeting with the child is important before court hearings and case reviews. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next.

The Child's Attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning and consequences of the client's choices. A child may not understand the implications of a particular course of action. The lawyer has a duty to explain in a developmentally appropriate way such information as will assist the child in having maximum input in decision-making. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, and of the best position for the child to take, and the reasons underlying such recommendation, and may counsel against the pursuit of particular goals sought by the client. However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express his or her assessment of the case. The lawyer needs to understand what the child knows, and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On the one hand, the lawyer has a duty to ensure that the client is given the information necessary to make an informed decision, including advice and guidance. On the other hand,

the lawyer has a duty not to overbear the will of the client. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by the applicable ethical standards.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

As developmentally appropriate, the Child's Attorney should consult the child prior to any settlement becoming binding.

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children sometimes assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out.

### **C. Client Decisions**

**The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.**

#### *Commentary*

The child is entitled to determine the overall objectives to be pursued. The Child's Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult's lawyer would. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client, nor to discuss with the child issues for which the child's developmental limitations make it not feasible to obtain the child's direction, as with an infant or preverbal child.

- 1. The Child's Attorney should make a separate determination whether the child has "diminished capacity" pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation.**

#### *Commentary*

These Standards do not presume that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.

- 2. If the child does not express objectives of representation, the Child's Attorney should make a good faith effort to determine the child's wishes, and advocate according to those wishes if they are expressed. If a child does not or will not express objectives regarding a particular issue or issues, the Child's Attorney should determine and advocate the child's legal interests or request the appointment of a Best Interests Attorney.**

### *Commentary*

There are circumstances in which a child is unable to express any positions, as in the case of a preverbal child. Under such circumstances, the Child’s Attorney should represent the child’s legal interests or request appointment of a Best Interests Attorney. “Legal interests” are distinct from “best interests” and from the child’s objectives. Legal interests are interests of the child that are specifically recognized in law and that can be protected through the courts. A child’s legal interests could include, for example, depending on the nature of the case, a special needs child’s right to appropriate educational, medical, or mental health services; helping assure that children needing residential placement are placed in the least restrictive setting consistent with their needs; a child’s child support, governmental and other financial benefits; visitation with siblings, family members, or others the child wishes to maintain contact with; and a child’s due process or other procedural rights.

The child’s failure to express a position is different from being unable to do so, and from directing the lawyer not to take a position on certain issues. The child may **have no** opinion with respect to a particular issue, or may delegate the decision-making authority. The child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue the objective that appears to be in the client’s legal interests based on information the lawyer has, and positions the child has already expressed. A position chosen by the lawyer should not contradict or undermine other issues about which the child has expressed a viewpoint. However, before reaching that point the lawyer should clarify with the child whether the child wants the lawyer to take a position, or to remain silent with respect to that issue, or wants the point of view expressed only if the party is out of the room. The lawyer is then bound by the child’s directive.

- 3. If the Child's Attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of the child's interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation. The**

**Child's Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise the child's position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.**

*Commentary*

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of a parent, or because of threats or other reasons to fear the parent. The child may choose to deal with a known situation rather than risk the unknown.

It should be remembered in this context that the lawyer is bound to pursue the client's objectives only through means permitted by law and ethical rules. The lawyer may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function, if the lawyer has taken the time to establish rapport with the child and gain that child's trust. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change a dangerous or imprudent position or at least identify alternative choices in case the court denies the child's first choice.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a Best Interests Attorney. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the Best Interests Attorney may never learn of the disclosed danger.

Model Rule 1.14 (2002) provides that "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action ... the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules. States that do not abrogate the lawyer-client privilege or

confidentiality, or mandate reporting in cases of child abuse, may permit reports notwithstanding privilege.

- 4. The Child's Attorney should discuss with the child whether to ask the judge to meet with the child, and whether to call the child as a witness. The decision should include consideration of the child's needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in case, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child's Attorney is bound by the child's direction concerning testifying.**

#### *Commentary*

Decisions about the child's testifying should be made individually, based on the circumstances. If the child has a therapist, the attorney should consult the therapist about the decision and for help in preparing the child. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so.

#### **D. Appeals**

**Where appeals on behalf of the child are permitted by state law, the Child's Attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child's Attorney should appeal. If the Child's Attorney determines that an appeal would be frivolous or that he or she lacks the expertise necessary to handle the appeal, he or she should notify the court and seek to be discharged or replaced.**

#### *Commentary*

The lawyer should explain not only any legal possibility of an appeal, but also the ramifications of filing an appeal, including delaying conclusion of the case, and what will happen pending a final decision.

#### **E. Obligations after Initial Disposition**

**The Child's Attorney should perform, or when discharged, seek to ensure, continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.**

#### *Commentary*

Representing a child continually presents new tasks and challenges due to the passage of time and the changing needs of the child. The bulk of the Child's Attorney's work often comes after the initial hearing. The Child's Attorney should stay in touch with the child, with the parties or their counsel, and any other caretakers, case workers, and service providers throughout the term of appointment to attempt to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

#### **F. End of Representation**

**The Child's Attorney should discuss the end of the legal representation with the child, what contacts, if any, the Child's Attorney and the child will continue to have, and how the child can obtain assistance in the future, if necessary.**

### **V. BEST INTERESTS ATTORNEYS**

#### **A. Ethics**

**Best Interests Attorneys are bound by their states' ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.**

#### *Commentary*

Siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney, because such a lawyer is not bound to advocate a client's objective. A Best Interests Attorney in such a case should report the relevant views of all the children in accordance with Standard V-F-3, and advocate the children's best interests in accordance with Standard V-F-1.

#### **B. Confidentiality**

**A child's communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them.**

#### *Commentary*

ABA Model Rule 1.6(a) bars any release of information "except for disclosures that are impliedly authorized in order to carry out the representation." Under DR 4-101(C)(2), a lawyer may reveal confidences when "required by law or court order". As for communications that are not subject to disclosure under these or other applicable ethics rules, a Best Interests Attorney may use them to further the child's best interests, without disclosing them. The distinction between use and disclosure means, for example, that if a child tells the

lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child. For more discussion of exceptions to confidentiality, see the Commentary to Standard IV-A.

### **C. Limited Appointments**

**If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney's tasks may be reduced as the court may direct.**

### **D. Explaining Role to the Child**

**In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that the Best Interests Attorney will (1) investigate and advocate the child's best interests, (2) will investigate the child's views relating to the case and will report them to the court unless the child requests that they not be reported, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.**

### **E. Investigations**

**The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:**

- 1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers;**
- 2. Reviewing child's social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;**
- 3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs);**
- 4. Contacting and meeting with the parties, with permission of their lawyers;**
- 5. Interviewing individuals significantly involved with the child, who may in the lawyer's discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;**
- 6. Reviewing the relevant evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of it;**

## **7. Staying apprised of other court proceedings affecting the child, the parties and other household members.**

### *Commentary*

Relevant files to review include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted.

Though courts should order automatic access to records, the lawyer may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those which pertain to the parties.

Meetings with the children and all parties are among the most important elements of a competent investigation. However, there may be a few cases where a party's lawyer will not allow the Best-Interests Attorney to communicate with the party. Model Rule 4.2 prohibits such contact without consent of the party's lawyer. In some such cases, the Best-Interests Attorney may be able to obtain permission for a meeting with the party's lawyer present. When the party has no lawyer, Model Rule 4.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Best-Interests Attorney's role.

The parties' lawyers may have information not included in any of the available records. They can provide information on their clients' perspectives.

Volunteer CASAs can often provide a great deal of information. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and reporting on the child's best interests. Where there appears to be role conflict or confusion over the involvement of both a lawyer and a CASA in the same case, there should be joint efforts to clarify and define the responsibilities of both.

### **F. Advocating the Child's Best Interests**

- 1. Any assessment of, or argument on, the child's best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.**
- 2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.**
- 3. At hearings on custody or parenting time, Best Interests Attorneys should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.**

### *Commentary*

Determining a child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child's interests will generally be stated in a state's statutes and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child's desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.

A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

The lawyer must consider the child's individual needs. The child's various needs and interests may be in conflict and must be weighed against each other. The child's developmental level, including his or her sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should bring those facts to the court's attention. This should not be done by ex parte communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before involving the judge.

## **G. Appeals**

**Where appeals on behalf of the child are permitted by state law, the Best Interests Attorney should appeal when he or she believes that (1) the trial court's decision is significantly detrimental to the child's welfare, (2) an appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and (3) the probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo.**

## **VI. COURTS**

### **A. Appointment of Lawyers**

**A court should appoint a lawyer as a Child's Attorney or Best Interests Attorney as soon as practicable if such an appointment is necessary in order for the court to decide the case.**

## **1. Mandatory Appointment**

**A court should appoint a lawyer whenever such an appointment is mandated by state law. A court should also appoint a lawyer in accordance with the A.B.A. Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996) when considering allegations of child abuse or neglect that warrant state intervention.**

### *Commentary*

Whether in a divorce, custody or child protection case, issues such as abuse, neglect or other dangers to the child create an especially compelling need for lawyers to protect the interests of children. Lawyers in these cases must take appropriate steps to ensure that harm to the child is minimized while the custody case is being litigated. Appointing a lawyer is no substitute for a child protective services investigation or other law enforcement investigation, where appropriate. The situation may call for referrals to or joinder of child protection officials, transfer of the case to the juvenile dependency court, or steps to coordinate the case with a related ongoing child protection proceeding, which may be in a different court. Any question of child maltreatment should be a critical factor in the court's resolution of custody and parenting time proceedings, and should be factually resolved before permanent custody and parenting time are addressed. A serious forensic investigation to find out what happened should come before, and not be diluted by, a more general investigation into the best interests of the child.

## **2. Discretionary Appointment**

**In deciding whether to appoint a lawyer, the court should consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:**

- a. Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;**
- b. Relocation that could substantially reduce the child's time with a parent or sibling;**
- c. The child's concerns or views;**
- d. Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;**
- e. Disputed paternity;**
- f. Past or present child abduction or risk of future abduction;**
- g. Past or present family violence;**
- h. Past or present mental health problems of the child or a party;**
- i. Special physical, educational, or mental health needs of a child that require investigation or advocacy;**

- j. A high level of acrimony;**
- k. Inappropriate adult influence or manipulation;**
- l. Interference with custody or parenting time;**
- m. A need for more evidence relevant to the best interests of the child;**
- n. A need to minimize the harm to the child from the processes of family separation and litigation; or**
- o. Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.**

### *Commentary*

In some cases the court's capacity to decide the case properly will be jeopardized without a more child-focused framing of the issues, or without the opportunity for providing additional information concerning the child's best interests. Often, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing the child's case, or a case for the child's best interests, places additional perspectives, concerns, and relevant, material information before the court so it can make a more informed decision.

An important reason to appoint a lawyer is to ensure that the court is made aware of any views the child wishes to express concerning various aspects of the case, and that those views will be given the proper weight that substantive law attaches to them. This must be done in the least harmful manner — that which is least likely to make the child think that he or she is deciding the case and passing judgment on the parents. Courts and lawyers should strive to implement procedures that give children opportunities to be meaningfully heard when they have something they want to say, rather than simply giving the parents another vehicle with which to make their case.

The purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented.

Appointment of a lawyer is a tool to protect the child and provide information to help assist courts in deciding a case in accordance with the child's best interests. A decision not to appoint should not be regarded as actionably denying a child's procedural or substantive rights under these Standards, except as provided by state law. Likewise, these Standards are not intended to diminish state laws or practices which afford children standing or the right to more broad representation than provided by these Standards. Similarly, these Standards do not limit any right or opportunity of a child to engage a lawyer or to initiate an action, where such actions or rights are recognized by law or practice.

### **3. Appointment Orders**

**Courts should make written appointment orders on standardized forms, in plain language understandable to non-lawyers, and send copies to the parties as well as to counsel. Orders should specify the lawyer’s role as either Child’s Attorney or Best Interests Attorney, and the reasons for and duration of the appointment.**

*Commentary*

Appointment orders should articulate as precisely as possible the reasons for the appointment and the tasks to be performed. Clarity is needed to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance. A Model Appointment Order is at the end of these Standards.

When the lawyer is appointed for a narrow, specific purpose with reduced duties under Standard VI-A-2(o), the lawyer may need to ask the court to clarify or change the role or tasks as needed to serve the child’s interests at any time during the course of the case. This should be done with notice to the parties, who should also receive copies of any new order.

**4. Information Access Orders**

**An accompanying, separate order should authorize the lawyer’s reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release, including, but not limited to, social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case; except that health and mental health records that would otherwise be privileged or confidential under state or federal laws should be released to the lawyer only in accordance with those laws.**

*Commentary*

A model Order for Access to Confidential Information appears at the end of these Standards. It is separate from the appointment order so that the facts or allegations cited as reasons for the appointment are not revealed to everyone from whom information is sought. Use of the term “privileged” in this Standard does not include the attorney-client privilege, which is not affected by it.

**5. Independence**

**The court must assure that the lawyer is independent of the court, court services, the parties, and the state.**

**6. Duration of Appointments**

**Appointments should last, and require active representation, as long as the issues for which the lawyer was appointed are pending.**

*Commentary*

The Child's Attorney or Best Interests Attorney may be the only source of continuity in the court system for the family, providing a stable point of contact for the child and institutional memory for the court and agencies. Courts should maintain continuity of representation whenever possible, re-appointing the lawyer when one is needed again, unless inconsistent with the child's needs. The lawyer should ordinarily accept reappointment. If replaced, the lawyer should inform and cooperate with the successor.

**7. Whom to Appoint**

**Courts should appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained as provided in Standard VI-B or are qualified by appropriate experience in custody cases.**

*Commentary*

Courts should appoint from the ranks of qualified lawyers. Appointments should not be made without regard to prior training or practice. Competence requires relevant training and experience. Lawyers should be allowed to specify if they are only willing to serve as Child's Attorney, or only as Best Interests Attorney.

**8. Privately-Retained Attorneys**

**An attorney privately retained by or for a child, whether paid or not, (a) is subject to these Standards, (b) should have all the rights and responsibilities of a lawyer appointed by a court pursuant to these Standards, (c) should be expressly retained as either a Child's Attorney or a Best Interests Attorney, and (d) should vigilantly guard the client-lawyer relationship from interference as provided in Model Rule 1.8(f).**

**B. Training**

**Training for lawyers representing children in custody cases should cover:**

- 1. Relevant state and federal laws, agency regulations, court decisions and court rules;**
- 2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;**
- 3. Applicable representation guidelines and standards;**

4. **The court process and key personnel in child-related litigation, including custody evaluations and mediation;**
5. **Children's development, needs and abilities at different ages;**
6. **Communicating with children;**
7. **Preparing and presenting a child's viewpoints, including child testimony and alternatives to direct testimony;**
8. **Recognizing, evaluating and understanding evidence of child abuse and neglect;**
9. **Family dynamics and dysfunction, domestic violence and substance abuse;**
10. **The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;**
11. **Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;**
12. **Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.**

### *Commentary*

Courts, bar associations, and other organizations should sponsor, fund and participate in training. They should also offer advanced and new-developments training, and provide mentors for lawyers who are new to child representation. Training in custody law is especially important because not everyone seeking to represent children will have a family law background. Lawyers must be trained to distinguish between the different kinds of cases in which they may be appointed, and the different legal standards to be applied.

Training should address the impact of spousal or domestic partner violence on custody and parenting time, and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations, and how that may affect custody awards to victims.

### **C. Compensation**

**Lawyers for children are entitled to and should receive adequate and predictable compensation that is based on legal standards generally used for determining the reasonableness of privately-retained lawyers' hourly fees in family law cases.**

## **1. Compensation Aspects of Appointment Orders**

**The court should make clear to all parties, orally and in writing, how fees will be determined, including the hourly rate or other computation system used, and the fact that both in-court and out-of-court work will be paid for; and how and by whom the fees and expenses are to be paid, in what shares. If the parties are to pay for the lawyer's services, then at the time of appointment the court should order the parties to deposit specific amounts of money for fees and costs.**

## **2. Sources of Payment**

**Courts should look to the following sources, in the following order, to pay for the lawyer's services: (a) The incomes and assets of the parties; (b) Targeted filing fees assessed against litigants in similar cases, and reserved in a fund for child representation; (c) Government funding; (d) Voluntary pro bono service. States and localities should provide sufficient funding to reimburse private attorneys, to contract with lawyers or firms specializing in children's law, and to support pro bono and legal aid programs. Courts should eliminate involuntary "pro bono" appointments, and should not expect all or most representation to be pro bono.**

## **3. Timeliness of Claims and Payment**

**Lawyers should regularly bill for their time and receive adequate and timely compensation. Periodically and after certain events, such as hearings or orders, they should be allowed to request payment. States should set a maximum number of days for any required court review of these bills, and for any governmental payment process to be completed.**

## **4. Costs**

**Attorneys should have reasonable and necessary access to, or reimbursement for, experts, investigative services, paralegals, research, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings.**

## **5. Enforcement**

**Courts should vigorously enforce orders for payment by all available means.**

### *Commentary*

These Standards call for paying lawyers in accordance with prevailing legal standards of reasonableness for lawyers' fees in general. Currently, state-set uniform rates tend to be lower than what competent, experienced lawyers should be paid, creating an impression that this is second-class work. In some places it has become customary for the work of child

representation to be minimal and pro forma, or for it to be performed by lawyers whose services are not in much demand.

Lawyers and parties need to understand how the lawyer will be paid. The requirement to state the lawyer's hourly rate in the appointment order will help make litigants aware of the costs being incurred. It is not meant to set a uniform rate, nor to pre-empt a court's determination of the overall reasonableness of fees. The court should keep information on eligible lawyers' hourly rates and pro bono availability on file, or ascertain it when making the appointment order. Judges should not arbitrarily reduce properly requested compensation, except in accordance with legal standards of reasonableness.

Many children go unrepresented because of a lack of resources. A three-fold solution is appropriate: hold more parents responsible for the costs of representation, increase public funding, and increase the number of qualified pro bono and legal service attorneys. All of these steps will increase the professionalism of children's lawyers generally.

As much as possible, those whose decisions impose costs on others and on society should bear such costs at the time that they make the decisions, so that the decisions will be more fully informed and socially conscious. Thus direct payment of lawyer's fees by litigants is best, where possible. Nonetheless, states and localities ultimately have the obligation to protect children in their court systems whose needs cannot otherwise be met.

Courts are encouraged to seek high-quality child representation through contracting with special children's law offices, law firms, and other programs. However, the motive should not be a lower level of compensation. Courts should assure that payment is commensurate with the fees paid to equivalently experienced individual lawyers who have similar qualifications and responsibilities.

Courts and bar associations should establish or cooperate with voluntary pro bono and/or legal services programs to adequately train and support pro bono and legal services lawyers in representing children in custody cases.

In jurisdictions where more than one court system deals with child custody, the availability, continuity and payment of lawyers should not vary depending on which court is used, nor on the type of appointment.

#### **D. Caseloads**

**Courts should control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet these Standards. If caseloads of individual lawyers approach or exceed acceptable limits, courts should take one or more of the following steps: (1) work with bar and children's advocacy groups to increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders**

**that excessive caseloads jeopardize the ability of lawyers to competently represent children; and (6) seek additional funding.**

#### **E. Physical accommodations**

**Courts should provide lawyers representing children with seating and work space comparable to that of other lawyers, sufficient to facilitate the work of in-court representation, and consistent with the dignity, importance, independence, and impartiality that they ought to have.**

#### **F. Immunity**

**Courts should take steps to protect all lawyers representing children from frivolous lawsuits and harassment by adult litigants. Best Interests Attorneys should have qualified, quasi-judicial immunity for civil damages when performing actions consistent with their appointed roles, except for actions that are: (1) willfully wrongful; (2) done with conscious indifference or reckless disregard to the safety of another; (3) done in bad faith or with malice; or (4) grossly negligent. Only the child should have any right of action against a Child's Attorney or Best Interests Attorney.**

#### ***Commentary***

Lawyers and Guardians Ad Litem for children are too often sued by custody litigants. Courts, legislatures, bar organizations and insurers should help protect all children's lawyers from frivolous lawsuits. Immunity should be extended to protect lawyers' ability to fully investigate and advocate, without harassment or intimidation. In determining immunity, the proper inquiry is into the duties at issue and not the title of the appointment. Other mechanisms still exist to prevent or address lawyer misconduct: (1) attorneys are bound by their state bars' rules of professional conduct; (2) the court oversees their conduct and can remove or admonish them for obvious misconduct; (3) the court is the ultimate custody decision-maker and should not give deference to a best-interests argument based on an inadequate or biased investigation.

**APPENDIX A**

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_

\_\_\_\_\_  
Petitioner,  
v.  
\_\_\_\_\_  
Respondent.

Case No. \_\_\_\_\_

In Re: \_\_\_\_\_, D.O.B. \_\_\_\_\_

**CHILD REPRESENTATION APPOINTMENT ORDER**

**I. REASONS FOR APPOINTMENT**

This case came on this \_\_\_\_\_, 20\_\_\_\_, and it appearing to the Court that appointing a Child’s Attorney or Best Interests Attorney is necessary to help the Court decide the case properly, because of the following factors or allegations:

**A. Mandatory appointment grounds:**

- The Court is considering child abuse or neglect allegations that warrant state intervention.
- Appointment is mandated by state law.

**B. Discretionary grounds warranting appointment:**

- Consideration of extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent
- Relocation that could substantially reduce of the child’s time with a parent or sibling
- The child’s concerns or views
- Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party
- Disputed paternity
- Past or present child abduction, or risk of future abduction
- Past or present family violence
- Past or present mental health problems of the child or a party
- Special physical, educational, or mental health needs requiring investigation or advocacy
- A high level of acrimony
- Inappropriate adult influence or manipulation
- Interference with custody or parenting time
- A need for more evidence relevant to the best interests of the child
- A need to minimize the harm to the child from family separation and litigation
- Specific issue(s) to be addressed: \_\_\_\_\_

## II. NATURE OF APPOINTMENT

\_\_\_\_\_, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as  Child's Attorney  Best Interests Attorney, for the  the child or children named above  the child(ren) \_\_\_\_\_, to represent the child(ren) in accordance with the Standards of Practice for Lawyers Representing Children in Custody Cases, a copy of which  is attached  has been furnished to the appointee. A Child's Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child's best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.

## III. FEES AND COSTS

The hourly rate of the lawyer appointed is \$ \_\_\_\_\_, for both in-court and out-of-court work.

The parties shall be responsible for paying the fees and costs. The parties shall deposit \$ \_\_\_\_\_ with  the Court,  the appointed lawyer. \_\_\_\_\_ shall deposit \$ \_\_\_\_\_, and \_\_\_\_\_ shall deposit \$ \_\_\_\_\_. The parties' individual shares of the responsibility for the fees and costs as between the parties  are to be determined later  are as follows: \_\_\_\_\_ to pay \_\_\_\_\_ %; \_\_\_\_\_ to pay \_\_\_\_\_ %.

The State shall be responsible for paying the fees and costs.

The lawyer has agreed to serve without payment. However, the lawyer's expenses will be reimbursed by  the parties  the state.

## IV. ACCESS TO CONFIDENTIAL INFORMATION

The lawyer appointed shall have access to confidential information about the child as provided in the Standards of Practice for Lawyers Representing Children in Custody Cases and in an Order for Access to Confidential Information that will be signed at the same time as this Order.

**THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.**

DATE: \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
JUDGE

**APPENDIX B**

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_

\_\_\_\_\_  
Petitioner,  
v.  
\_\_\_\_\_  
Respondent.

Case No. \_\_\_\_\_

In Re: \_\_\_\_\_, D.O.B. \_\_\_\_\_

**ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION**

\_\_\_\_\_ has been appointed as  Best Interests Attorney  Child's Attorney for  the child or children named above  the child \_\_\_\_\_, and so shall have immediate access to such child or children, and to all otherwise privileged or confidential information regarding such child or children, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Child's Attorney or Best Interests Attorney only in accordance with such laws.

**THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.**

DATE: \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
JUDGE

# REPORT

## Standards of Practice for Lawyers Representing Children in Custody Cases

### Introduction

These Standards of Practice for Lawyers Representing Children in Custody Cases were unanimously approved by the Council of the ABA Family Law Section on May 2, 2003. In 1996, the American Bar Association adopted Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases. The new proposed Standards apply to children in all types of custody proceedings other than abuse and neglect cases.

These new Standards are the product of nearly ten years of work by numerous lawyers and judges. The final product was put together over the past three years by a distinguished drafting committee composed of lawyers with expertise in the area of child representation who are either in private practice, academics or judges.<sup>1</sup>

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<sup>1</sup> John Crouch, Virginia family law attorney who chaired the Custody Standards Committee from 2000 to the present; Jeff Atkinson, author *Modern Child Custody Practice* (2d ed 2000) and professor at Illinois Judicial College; Gail Baker, a family law attorney from Rochester, Minnesota, who has represented children as a guardian ad litem for over 18 years; Lewis Becker, Villanova law professor and ethics scholar; Frank Cervone, Director Support Center for Child Advocates; Howard Davidson, Director ABA Center on Children and the Law in Washington D.C.; Linda Elrod, Director Washburn Law School Children and Family Law Center, author of *Child Custody Practice and Procedure* (1993 & Supp. 2002); Ann Haralambie, Tucson, Arizona attorney who has represented children for 25 years and authored three national books on child representation and custody; Gregg Herman, family law attorney in Milwaukee, Wisconsin; Honorable Debra Lehrmann, District Judge, Tarrant County, Texas; Ron Nelson, family law attorney in Overland Park, Kansas; Linda Rio, ABA Child Custody Pro Bono Project in Chicago, Illinois; Jack Sampson, William Benjamin Wynne Professor of Law at the University of Texas who heads the Attorney ad Litem program. Significant contributions on earlier drafts were made by Louis Parley, former attorney for children in Connecticut; Professor Cynthia Mabry of Howard Law School; Robert Schwartz, Juvenile Law Center in Philadelphia; and Andrew Schepard, Professor at Hofstra Law School and Director of Center for Children, Families and the Law.

## Appointment of Lawyer

While appointment of a lawyer has been required in cases of abuse and neglect since the 1970s, until recently, there was little case or statutory law on the appointment of counsel for children in custody cases. Within the past decade many states have considered the issue of appointment of counsel in custody cases. Appointment is usually discretionary with the court<sup>2</sup> unless there are allegations of abuse and neglect.

Many states refer to the person appointed to represent the child's best interests as a "guardian ad litem." The use of the term "guardian ad litem" in custody proceedings has so many meanings and connotations that it is difficult to define with precision. Guardians ad litem have been referred to as "investigators, expert witnesses, lawyers, lay advocates for incompetent child's best interests, mediators, negotiators, supervisors, monitors, friends or advisors to the court, eyes and ears or arms of the court, recommenders, fact finders, and de facto decision makers."<sup>3</sup> In some jurisdictions the guardian ad litem can be a lay person or a lawyer who serves as an officer of the court and conducts an investigation, writes a report<sup>4</sup> or testifies and is subject to cross examination on what is in the child's best interests.<sup>5</sup> In other states, the guardian ad litem is a lawyer appointed to represent the child's best interests<sup>6</sup> and may or may not make a report and be subject to cross examination. In still other states the guardian ad litem is appointed as a lawyer for the child to advocate for the child's position.<sup>7</sup> Increasingly as courts are changing terminology and experimenting, the guardian ad litem is being asked to play the role of parent

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<sup>2</sup> See Appendix A, ABA Child Custody Pro Bono Project Chart on Appointment Laws in Divorce Cases, col. 2. See also *Schult v Schult*, 699 A.2d 134, 140 (Conn. 1997).

<sup>3</sup> See Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOYOLA J. PUBLIC INT. L. 106, 115 (2002)(quoting a WASHINGTON STATE BAR NEWS article).

<sup>4</sup> *Shainwald v. Shainwald*, 395 S.E.2d 441 (S. C. Ct. App. 1990); *Gilbert v. Gilbert*, 664 A.2d 239 (Vt. 1995).

<sup>5</sup> *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

<sup>6</sup> See *Miller v. Miller*, 677 A.2d 64 (Me. 1996)(finding that children were not entitled to attorney of their choosing where a guardian ad litem had been appointed even though the children contended that the guardian did not represent their position).

<sup>7</sup> See Appendix A, col. 3. See *Meldrum v. Novotny*, 599 N.W.2d 651 (S.D. 1999)(after death of the mother, it was reversible error to not appoint an attorney for nine year old child in custody dispute between father and mother's boyfriend with whom child had lived for six years). See also *Newman v. Newman*, 663 A.2d 980 (Conn. 1995)(role of counsel for child differs from role of guardian ad litem or next friend).

coordinator or case manager. In some states, the guardian ad litem enjoys quasi-judicial immunity; in other states, there is none.<sup>8</sup>

Many have criticized the ambiguity of the role of the guardian ad litem as well as the lack of training, oversight and accountability.<sup>9</sup> Others have called for appointment of a child's attorney or lawyer for the child in contested custody cases rather a guardian ad litem.<sup>10</sup> There are no Standards governing what a lawyer for a child should do.<sup>11</sup>

These new Standards will improve practice nationwide by making it clear that a lawyer always acts as a lawyer. These Standards offer guidance as to when a lawyer should be appointed and precisely what the lawyer should do. The Standards require that all lawyers appointed to represent children have training in child advocacy, a thorough understanding of the role they are playing, and the support to act as independent lawyers.

The major suggested change from existing laws is that the Standards delete use of the term "guardian ad litem" for lawyers representing children. This does not mean that the term "guardian ad litem" can never be used, or that an attorney could never be appointed as a guardian ad litem. What it means is the Association's position would be that a person who serves essentially as a witness, by making a report on facts not otherwise in evidence, is not serving as an attorney and thus is not covered under these Standards. The lawyer, when accepting such an appointment, figuratively puts his or her bar card in an envelope and is a volunteer in this nonlegal capacity.

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<sup>8</sup> See Appendix A, column 4.

<sup>9</sup> See Ducote, *supra* note 3, at 106-108 (citing the editorial by a sixteen year old girl in the SAN FRANCISCO DAILY JOURNAL in which she complains that the guardian ad litem ignored her reports of abuse by her father and refused to present her wishes to the judge); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998).

<sup>10</sup> Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L. Q. 53 (1992); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L. Q. 349 (1993); Tari Eitzen, *A Child's Right to Legal Representation*, 19 FAM. L. Q. 53 (1985).

<sup>11</sup> While the American Academy of Matrimonial Lawyers offered standards in 1995, they apply only to Academy members. In addition, the AAML Standards were for both attorneys and guardians ad litem and basically provide for appointment of a lawyer for a child over age twelve. See *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIMONIAL LAWYERS 27, 35 (1996).

These new Standards propose that there are two alternative capacities in which a lawyer should represent a child in a custody matter:

3. a child's attorney who represents the child client as any other client, subject to the Model Rules; or
4. a best interest attorney who represents the child's best interests as a lawyer, not as an agent of the court.

Neither type of lawyer should write a report, testify, or be cross-examined. Section III sets forth the duties for all lawyers. Both types of lawyers function in a legal capacity – they are independent of the court and the parties, they should meet with the client in advance, conduct an independent investigation, and present evidence to the court. If the case is appealed, the lawyer should continue to represent the child.

Section IV deals with the specific role of the child's attorney. Section IV C. "Client Decisions" contain the heart of the Standards' difference from common practices in child client representation. The child's attorney should be bound by the child's directives subject to the general ethical rules on diminished capacity or the client's inability or unwillingness to express objectives of representation. In the absence of direction, the child's attorney should represent the child's *legal* interests. If the child's attorney believes that the child's directives will result in harm to the child, the attorney can ask for a "best interests attorney" to be appointed.

Section V covers the Best Interests Attorney, who investigates and advocates the child's best interests but is not bound by the child's wishes. The Best Interests Attorney, however, does present the child's wishes to the court. The Best Interests Attorney should advise the child that he or she will not necessarily advocate what the child wants.

Section VI sets out the duties of the court with respect to appointments of children's attorneys in custody cases. As with the 1996 Standards on representing children in abuse and neglect cases, the courts are crucial to implementation of changes. Courts must be willing to appoint a child's attorney or a best interests attorney when necessary to fully develop the case. These Standards provide a list of situations where such an appointment may be appropriate. Finally, the Standards address the court's role in providing training and assuring adequate compensation to attorneys appointed to represent children in custody matters.

### III. Conclusion

The ABA should provide the national leadership in the area of representation of children. These new Standards fill a void and will contribute to a higher quality of representation for children as well as to uniformity across the country.

Respectfully Submitted,

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Joel D. Tenenbaum  
Chair  
Section of Family Law

August 2003

## GENERAL INFORMATION FORM

Submitting Entity: Section of Family Law

Submitted by Joel D.Tenenbaum, Chair, Section of Family Law

### I. Summary of Recommendation

The American Bar Association should adopt the Standards of Practice for Lawyers Representing Children in Custody Cases, dated May, 2, 2003.

### II. Approval by Submitting Entity

This report with recommendation was approved by Family Law Section for consideration by the ABA House of Delegates in August 2003.

### III. Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?

Not specifically. In 1996, however, the ABA approved Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases. These new Standards would apply to all other types of custody cases.

### IV. What Existing Association Policies Are Relevant To This Recommendation and Would They Be Affected by Its Adoption?

In February 1996, the ABA approved the Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases. The proposed Standards provide guidance for lawyers representing children in other types of cases and would not affect the prior policy.

### V. What Urgency Exists Which Requires Action at This Meeting of the House?

Throughout the country, state legislatures, bench-bar committees and others are grappling with the role of lawyers representing children. Florida, Minnesota, Ohio, South Carolina in particular are currently considering what to do about guardians ad litem. Other states are beginning to enact court rules or laws. The ABA has the opportunity to be the leader by providing guidance to states. If the ABA delays, the ability to affect the debate diminishes.

VI. Status of Legislation

Several states and bar committees have been working on legislation for lawyers representing children. Others have not yet begun to work on standards or laws.

VII. Cost to the Association (both direct and indirect costs)

None.

VIII. Disclosure of Interest

No conflicts of interest are known to exist with regard to this recommendation at this time.

IX. Referrals

Commission on Domestic Violence; Steering Committee on the Unmet Legal Needs of Children; Litigation Section; Judicial Division; the Standing Committee on Pro Bono and Public Service; General Practice, Solo and Small Firm Section and the Individual Rights and Responsibilities Section.

X. Contact Persons (prior to meeting)

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XII. Contact Person Regarding Amendments to this Recommendation

Same as above.