

2020 Custody Guardian *ad Litem* Training Manual

4. Defining the Role of the Guardian *ad Litem* in Custody Cases

- a. Practice Standards for Guardians *ad litem* in Custody and Related Consolidated Cases (D.C. Superior Court Administrative Order 14-01)
- b. American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (August 2003)
- c. Practice Pointers for Custody GALs

Superior Court of the District of Columbia

Practice Standards for Guardians ad Litem in Custody and Related Consolidated Cases

Pursuant to D.C. Code Sections 16-918(b) and 16-831.06(c), the court is permitted to appoint an attorney to act as a guardian *ad litem* "to appear on behalf of the child and represent his best interests" in any proceeding "wherein the custody of a child is in question."¹ D.C. Code Section 11-1103 directs the Superior Court to adopt practice standards for all court-appointed attorneys in the Family Court. The following practice standards shall apply, therefore, to guardians *ad litem* who are appointed by the court to represent and advocate for the child's best interests in custody and related consolidated cases involving domestic violence, the dissolution of a marriage, separation, and parentage proceedings, where issues of legal and/or physical custody/placement, parenting plans, access and/or visitation, and related issues involving child support and maintenance shall be adjudicated. These standards do not apply to attorneys appointed as guardians *ad litem* for children in neglect proceedings pursuant to D.C. Code Title 16, Chapter 23.

These standards reflect the unique role of the guardian *ad litem* and the imperative that the standards foster zealous, effective, and competent legal representation of the child's best interests.

I. Appointment of a Guardian *ad Litem*.

A. **Cases Where Appointment is Appropriate.** The court is not required to appoint a guardian *ad litem* but may, in the exercise of its discretion, appoint a guardian *ad litem* to advocate for the child's best interests in cases where the following condition or conditions exist:

1. One or both parties request the appointment;
2. There is a high level of conflict and acrimony between the parties or between a party(ies) and the child;
3. There is a reasonable basis to believe that there is undue parental influence or manipulation;
4. A child has substantial assets/trusts (property or income) and/or will inherit substantial assets; or is receiving Child Support, Temporary Assistance to Needy

¹ These Standards do not apply to attorneys appointed to represent a child's expressed wishes. See D.C. Bar Ethics Comm., Op. 295, n.1 (2000), *Restriction on Communications by a Lawyer Acting as Guardian ad Litem in a Child Abuse and Neglect Proceeding*, available at http://www.dcbare.org/for_lawyers/ethics/legal_ethics/opinions/opinion295.cfm.

Families (TANF), Supplemental Security Income (SSI), or Social Security Disability Insurance (SSDI);

5. There are past or present allegations of neglect and/or abuse of the child or a sibling, or there is a past or pending case involving the neglect and/or abuse of the child or involving a sibling;
6. There are past or present allegations of domestic violence, or there is a past or pending domestic violence case, involving any party or involving a significant other, spouse or family member where substantive issues involving placement, supervision, interaction, and access are implicated;
7. There are present and/or past mental health and/or substance abuse issues involving the child, a sibling and/or a parent(s) or others with significant access or interaction with the child;
8. There are special needs, disabilities or medical conditions involving the child and/or parent(s) or others with significant access to the child;
9. There is a party, significant other, spouse, or family member with considerable interaction and/or access to the child who has a criminal conviction that may reasonably implicate the health, safety, and/or welfare of the child;
10. There is a plan to relocate that will have a substantial impact upon the child's placement, access to, and/or visitation with the child;
11. There are issues involving a change in access to the child;
12. The action involves a third-party complaint (family member or other) where one or both parents oppose the action;
13. The child is of a developmentally appropriate age with reasoned judgment and has voiced a consistent desire to participate in the subject proceedings or has otherwise expressed certain views and concerns;
14. The appointment shall facilitate the judge's ability to decide the case with full knowledge of and access to relevant and material information, which is necessary to a best interests analysis, as required by case law and pertinent statute;
15. There have been attempts to abduct the child or otherwise remove the child from the jurisdiction of the court, from the state, or from the country; and/or there is a history of actual parental kidnapping or removal of the child from the jurisdiction without the consent of a parent; and/or there is the present likelihood that attempts in that regard will be made; and/or
16. Any other reason that the court deems appropriate.

B. Qualifications for Appointment.

1. The lawyer appointed to serve as the guardian *ad litem* shall be a member in good standing of the District of Columbia Bar or authorized to practice law in the District of Columbia pursuant to D.C. Court of Appeals Rule 49, and otherwise satisfies the requirements for an appointment as set forth herein.
2. Prior to appearing as a guardian *ad litem*, the attorney shall receive the necessary training to provide competent representation, which includes familiarity with the following topics:
 - a. Relevant local and federal laws, court decisions and rules, administrative orders, and applicable legal standards;
 - b. The role of the guardian *ad litem* in custody cases;
 - c. District of Columbia Rules of Professional Conduct;
 - d. Evidence and court procedure;
 - e. Basic trial skills;
 - f. Information pertaining to recognizing, evaluating, and understanding evidence of child neglect and abuse;
 - g. Information regarding family dynamics and dysfunction, domestic violence, and substance abuse; and
 - h. Information on competence with regard to cultural, racial, ethnic, economic, or other differences among the guardian *ad litem*, parties, and the child.

As part of the training process, guardians *ad litem* shall be assigned as determined appropriate by the referring or sponsoring agency or organization to mentors or supervisors with family law experience who have represented parties in domestic relations cases. Guardians *ad litem* should seek the advice and input of these more experienced lawyers.

II. Appointment Order:

A. **Provisions of Appointment Order.**² The court shall issue a written order that:

1. Identifies the guardian *ad litem* and his or her contact information;
2. Specifies the nature, scope and duration of appointment;

² A form guardian *ad litem* appointment order is attached hereto, which is subject to revision at the discretion of the judge presiding over the instant case.

3. Authorizes access by the guardian *ad litem* to the child and, as appropriate to the case and consistent with the best interest of the child, to all significant persons and relevant environments, including but not limited to, the parent's home(s), other home(s) where the child has access and spends significant time, the school placement, academic providers, and a nanny or other childcare provider;
 4. Requires the parties to cooperate fully with the guardian *ad litem*, which cooperation shall include, but not be limited to, completing and signing release forms authorizing the guardian *ad litem* to obtain health care, education, and other information related to the child; providing the guardian *ad litem* with requested information; answering the guardian *ad litem*'s questions truthfully; and making the child available to the guardian *ad litem* upon the receipt of reasonable notice, except where reasonable notice is not possible due to an emergency;
 5. Provides for payment by the parties for services rendered and expenses incurred by the guardian *ad litem*, if not provided by a pro bono attorney or by an attorney employed by a legal services organization or non-profit entity;
 6. For pro bono appointments, provides for the guardian *ad litem* to serve without compensation and without the payment of court costs, filing and other fees, and directs the clerk's office to furnish to the guardian *ad litem* free of charge a copy of all pertinent documents in the court's file in the instant case or any other case involving a party or the child;
 7. Provides for the guardian *ad litem* to obtain confidential court files upon appropriate waiver(s) and/or leave of court in accordance with court rules;
 8. Requires that whenever the guardian *ad litem* prepares a written report, it shall be submitted to chambers (not filed in the public case file) with copies served upon the parties; unless there is good cause, the report shall be submitted at least five business days before the next scheduled hearing or proceeding;
 9. Terminates the appointment 30 days after completion of the case ending in a judgment, adjudication, decree, or final order from which no appeal has been taken and the time allowed for an appeal has expired;
 10. Requires the parties to serve the guardian *ad litem* with all papers filed in the case; and
 11. Contains any other provisions as the court may determine appropriate, including provisions that a guardian *ad litem* may request the court to include.
- B. **Contempt Powers.** The court may enforce its orders under this subsection by use of its contempt powers.

- C. **Continuation of Appointment Post-Judgment Proceedings.** A guardian *ad litem*'s appointment may be extended to authorize representation of the child's best interests in post-judgment proceedings, consistent with the guardian *ad litem*'s assessment of the child's best interests and with the guardian *ad litem*'s willingness to continue to serve.
- D. **Appointment on Appeal.** If notice of appeal has been entered, the guardian *ad litem* may seek an appointment on appeal, subject to any Rules of the D.C. Court of Appeals.

III. **Role of the Guardian *ad Litem*.**

- A. **Attorney Appointed to Represent the Child's Best Interests.** The guardian *ad litem* is an attorney appointed by the court to represent the child's best interests in domestic relations proceedings. The guardian *ad litem* shall represent the child's best interests at any hearing and during all stages of the proceedings, unless relieved, replaced, or the appointment terminates. The guardian *ad litem* shall function independently and is a full and active participant in the proceedings who shall investigate, assess, and evaluate the issues, and shall zealously advocate for the child's best interests. In determining what is in the child's best interests, the guardian *ad litem* should use objective criteria and avoid relying on personal life experiences or stereotypical views of individuals whose backgrounds differ from that of the guardian *ad litem*.
- B. **Guardian *ad Litem* to Have Rights of a Party.** Unless excluded by statute, rule, or case law, the guardian *ad litem* shall have certain rights of a party and fully participate in every court proceeding, at any stage, and shall receive court notice of the same. The guardian *ad litem* shall be authorized to: participate in pre-trial conferences, trial, mediations and negotiations; propound discovery; call witnesses; cross-examine witnesses; submit evidence; give an opening statement and closing argument; submit findings of fact and conclusions of law; preserve issues for appeal; file pleadings and motions; apply for protective orders; and take such actions during the pre-trial, trial and post-trial proceedings as are necessary to zealously advocate for the best interests of the child.
- C. **Duties of the Guardian *ad Litem*.** In fulfilling his or her role, the guardian *ad litem* shall have the following duties:
 - 1. **Initial Tasks.** Immediately after being appointed, the guardian *ad litem* shall review the case file. The guardian *ad litem* shall inform other parties or counsel of the appointment, and that as guardian *ad litem*, he or she should be served with copies of all pleadings filed in the case and any discovery exchanges, and is entitled to notice of and to fully participate in all hearings related to the appointment.

Building a Relationship with the Child.

- a. When the guardian *ad litem* meets with the child, all communications should be adapted to the child's age, level of education, cognitive and emotional development, cultural background, and degree of language acquisition, using an interpreter if necessary.
 - b. The guardian *ad litem* should inform the child, in a developmentally appropriate manner, about the court system, the proceedings, and the guardian *ad litem*'s role and responsibilities.
 - c. The guardian *ad litem* should consider meeting with the child in an environment familiar to the child, including the child's home(s) where appropriate. It is important for the guardian *ad litem* to recognize that children may not be comfortable talking to the guardian *ad litem* in an office. Further, it is generally important for the guardian *ad litem* to observe a child's home(s) and current circumstances to be confident that the child's surroundings are safe and appropriate. While not a mandated reporter of abuse or neglect,³ the guardian *ad litem* should consider making a report to the court and/or appropriate child protection authorities when the guardian *ad litem* has concerns about the safety of the child.
 - d. The guardian *ad litem* should be prepared to spend meaningful time with the child. The guardian *ad litem* should, when appropriate, meet with the child outside the presence of the parties to ensure the child has a safe space to discuss the case and other matters with the guardian *ad litem*. Even preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other adults.
3. **Investigations.** The guardian *ad litem* shall conduct thorough, continuing, and independent investigations in accordance with the zealous representation of the child's best interests, with an awareness of and sensitivity to how his or her actions may impact the child's social, emotional, and educational well-being, including as appropriate:
- a. reviewing any non-confidential court files of the child, siblings, parties to the case, and household members; reviewing relevant confidential court files with special court authorization; and reviewing case-related records of any social service agency and other service providers;

³ See D.C. Code § 4-1321.01 *et seq.*; D.C. Code § 22-3020.52; *see also* D.C. Code § 16-2301 *et seq.* (statutory definition of "neglected child" and related definitions). *But see* D.C. Code § 4-1321.02(b); D.C. Code § 22-3020.52(c)(1).

- b. reviewing the child's medical, social, educational, psychiatric, and psychological evaluations and/or records to which the guardian *ad litem* will be granted access;
 - c. contacting lawyers for the parties;
 - d. contacting and meeting with the parties, with permission of their lawyers if the parties are represented by counsel;
 - e. interviewing individuals who are significantly involved with the child;
 - f. reviewing evidence related to the statutory custody factors set forth in D.C. Code Section 16-914(a)(3) directly, rather than relying principally upon other descriptions and characterizations from parties, counsel, witnesses, or other individuals;
 - g. ascertaining and assessing the child's views in a developmentally appropriate manner;
 - h. staying apprised of other relevant court proceedings affecting the child; and
 - i. where feasible, assisting the parties in identifying and accessing services for the child and family and verifying implementation of such services.
4. **Pre-trial Responsibilities.** The guardian *ad litem* shall:
- a. conduct thorough, continuing, and independent investigations as set forth more fully in paragraph 3 above;
 - b. conduct discovery when appropriate;
 - c. develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues;
 - d. stay apprised of other relevant court proceedings affecting the child, the parties, and other household members;
 - e. attend meetings involving issues within the scope of the appointment;
 - f. take action to expedite the proceedings when appropriate;
 - g. participate in and, when appropriate, initiate negotiations and mediation. When necessary, the guardian *ad litem* should clarify that he or she is not acting as a mediator; and a guardian *ad litem* who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation. If a settlement agreement is reached by the

parties and submitted to the court, the guardian *ad litem* may notify the court of the guardian *ad litem*'s position with respect to whether it is in the child's best interests;

- h. participate in depositions, pre-trial conferences, and hearings; and
 - i. file or make petitions, motions, responses, or objections when necessary.
5. **Hearings.** The guardian *ad litem* shall appear in court on the dates and times scheduled for hearings and proceedings, and shall be prepared to represent fully and zealously the child's best interests. Although the guardian *ad litem*'s position regarding the child's best interests may align with positions of other parties, the guardian *ad litem* shall be prepared to participate fully and shall not simply defer to or endorse the positions of other parties. Specifically, the guardian *ad litem* shall:
- a. identify herself or himself as the guardian *ad litem* at the beginning of any court hearing;
 - b. make appropriate motions, file briefs, and preserve issues for appeal as appropriate;
 - c. present and cross-examine witnesses and offer exhibits as necessary;
 - d. if a child is to meet with the judge or testify, prepare the child by familiarizing the child with the places, people, procedures, and questioning to which the child will be exposed, and seek to minimize any harm to the child from the process;
 - e. make an opening statement and a closing argument proposing specific findings of fact and conclusions of law; and
 - f. advocate for a written order that conforms to the court's oral rulings and includes all statutorily required findings and notices.
6. **Child's Interview or Testimony.** The guardian *ad litem* shall take a position based on the child's best interests regarding whether the child should be interviewed by the judge or testify and shall file any necessary motions to further that position.⁴ Children, if they do testify, can be determined to be competent.⁵

⁴ See *N.D. McN. v. R.J.H., Sr.*, 979 A.2d 1195 (D.C. 2009); *In re Jam.J.*, 825 A.2d 902 (D.C. 2003).

⁵ See e.g., *Barnes v. United States*, 600 A.2d 821 (D.C. 1991); *Smith v. United States*, 414 A.2d 1189 (D.C. 1980); *Robinson v. United States*, 357 A.2d 412 (D.C. 1976); *Edmondson v. United States*, 346 A.2d 515 (D.C. 1975); *In re Lewis*, 88 A.2d 582 (D.C. 1952).

The guardian *ad litem* should seek to minimize any adverse consequences that may arise from a child being interviewed by a judge or called as a witness by seeking all appropriate accommodations permitted by law. The child should be told in advance that in-chambers or court testimony will be shared with the parties. The guardian *ad litem* should be cognizant that the trial court can limit questions and should request that all parties submit questions to chambers in advance.⁶

7. **Reports.** The guardian *ad litem* may prepare written and/or oral reports during the *pendente lite*, pre-trial, trial, and post-trial stages of the proceedings. Whenever the guardian *ad litem* submits a written report, it shall be provided directly to the judge's chambers and to the parties at least five business days before the next scheduled hearing or proceeding, unless good cause is shown. All written reports shall be served upon the parties by first class mail or e-service as appropriate and shall be accompanied by a certificate of service in conformity with court rules. All written reports should be limited to information the guardian *ad litem*: (a) believes to be supported by admissible evidence; and (b) intends to introduce at trial or an evidentiary hearing. The judge shall make a docket entry in the court's official case file that the written report was submitted and the date of submission.

IV. **Applicability of District of Columbia Rules of Professional Conduct.**

The District of Columbia Rules of Professional Conduct apply to guardians *ad litem* just as they do to all other attorneys practicing before the court, and specifically with respect to the following ethical issues that often arise for guardians *ad litem*:

- A. **Zealous Representation of Child's Best Interests.**⁷ A guardian *ad litem* shall represent the child's best interests zealously and diligently within the bounds of the law. In doing so, the guardian *ad litem* has professional discretion in determining the means by which the matter should be pursued. Because the guardian *ad litem* represents the child's best interests, and not the child's expressed wishes, the guardian *ad litem* is not bound by the explicit direction of the child and may make recommendations to the court that are different from the child's expressed wishes. However, the guardian *ad litem* should inform the court if the child's wishes are different from the guardian *ad litem*'s recommendations and, in some instances as set forth in paragraph C below, an expressed wishes attorney may be appointed.
- B. **Confidentiality of Communications.**⁸ The guardian *ad litem* shall comply with applicable District of Columbia Rules of Professional Conduct and ethics opinions

⁶ See e.g., *Jam.J.*, 825 A.2d 902; *In re T.W.*, 623 A.2d 116 (D.C. 1993). For further case law on children's testimony, see generally Ravdin & Brenneman, *Domestic Relations Manual for the District of Columbia* (Matthew Bender 2012).

⁷ D.C. Rules of Prof'l Conduct R. 1.3.

⁸ D.C. Rules of Prof'l Conduct R. 1.6, R. 1.14.

with respect to the confidentiality of communications between the guardian *ad litem* and the child and other confidential information obtained during the representation. The guardian *ad litem* may disclose the child's confidential information if the child consents or if the guardian *ad litem* believes doing so would be in the best interests of the child. The guardian *ad litem* shall consider the potential impact upon the child of any such disclosures to the court and the parties.

- C. **Conflicts of Interest.**⁹ The guardian *ad litem* should always give careful consideration to potential conflicts and seek guidance as necessary. When the guardian *ad litem*'s assessment of the child's best interests conflicts with the views of the child, the guardian *ad litem* shall notify the court of the conflict and in some circumstances, an attorney may be appointed to represent the child's expressed wishes. The new attorney for the child will represent the child's expressed wishes, while the guardian *ad litem* will advocate with regard to the child's best interests. As soon as the court resolves the issue that caused the conflict, the attorney for the child representing the child's expressed wishes may request leave of court to withdraw. The guardian *ad litem* also shall consider if a conflict of interest exists with regard to serving as the guardian *ad litem* for more than one child or sibling. The guardian *ad litem* shall not represent two or more siblings when their interests are adverse and shall never represent siblings when it is alleged that one sibling has physically or sexually abused the other. If the guardian *ad litem* determines that representation of multiple children could result in taking two or more adverse positions in the case, he or she shall make a request to the court for the appointment of a second guardian *ad litem* or may have to withdraw from representation of all of the children.
- D. **Dealing with Represented and Unrepresented Parties.**¹⁰ The guardian *ad litem* shall not contact or interview represented parties without permission from the party's attorney; provided that, the guardian *ad litem* may contact represented parties without such consent for the limited purpose of scheduling visits with the child. The guardian *ad litem* may not circumvent the District of Columbia Rules of Professional Conduct concerning communication with a represented party by requesting that a third party ask a represented party for information. In dealing with a person who is not represented by counsel, the guardian *ad litem* shall not state or imply that he or she is disinterested, and if the unrepresented person misunderstands the guardian *ad litem*'s role, he or she shall make reasonable efforts to correct the misunderstanding.
- E. **Ex-Parte Communications.**¹¹ The guardian *ad litem* shall not engage in *ex-parte* communications with the court except: (1) in the event that a request for an emergency hearing is necessary to prevent imminent harm to the minor child, or (2) as authorized by the parties or counsel on behalf of the parties.

⁹ D.C. Rules of Prof'l Conduct R. 1.7; D.C. Bar Ethics Comm., Op. 295 (2000); *In re. A.S. & J.S.*, 118 Daily Wash. L. Rptr. 2221, 2227 n.15 (D.C. Super. Ct. Oct. 11, 1990).

¹⁰ D.C. Rules of Prof'l Conduct R. 4.3; D.C. Bar Ethics Comm., Op. 295 (2000).

¹¹ D.C. Rules of Prof'l Conduct R. 3.5(b).

- F. **Independence and Objectivity.**¹² The guardian *ad litem* shall maintain independence, objectivity, and fairness, as well as the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom. It is important to the fulfillment of the guardian *ad litem*'s role and duties to make every effort to develop and maintain a professional working relationship with all parties, their counsel, and others who have significant access and/or interaction with the child, and to do so without sacrificing independence and focus.
- G. **Guardian *ad Litem* as Witness or to Provide Testimony.**¹³ Unless required by law, a guardian *ad litem* shall not be called as a witness nor shall a guardian *ad litem* testify, orally or in writing, in any hearing or evidentiary proceeding.

¹² D.C. Rules of Professional Conduct R. 3.4, R. 4.1; D.C. Bar, *Voluntary Standards for Civility in Professional Conduct*, available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/index.cfm.

¹³ D.C. Rules of Professional Conduct R. 3.7; *S.S. v D.M.*, 597 A.2d 870 (D.C. 1991).

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**FAMILY COURT
DOMESTIC RELATIONS BRANCH**

)	
)	Case Number
Plaintiff)	Judge
)	Next Hearing Date:
v.)	
)	
)	
)	Related Cases:
Defendant.)	
_____)	

ORDER APPOINTING GUARDIAN AD LITEM

It is this ____ day of _____, 20__, by the District of Columbia Superior Court,
ORDERED that _____ is hereby appointed as the guardian *ad litem*
("GAL") for the minor child(ren): _____, born _____, and _____,
born _____; and it is further

ORDERED that the GAL shall represent the best interests of said child(ren) in the
above-captioned case in all matters relating to custody and visitation; and it is further

ORDERED that the GAL shall undertake his or her duties hereunder in accordance with
the *Practice Standards for the Appointment of Guardians ad Litem in Custody and Related
Consolidated Cases*; and it is further

ORDERED that the GAL shall have access to the child(ren) and, as appropriate to the
case and consistent with the best interest of the child(ren), to all significant persons and relevant
environments, including but not limited to, the parent's home(s), other home(s) where the
child(ren) has access and spends significant time, the school placement, related academic
providers, a nanny or other childcare provider; and it is further

ORDERED that the parties shall cooperate fully with the GAL, which cooperation shall include but not be limited to: completing and signing release forms authorizing the GAL to obtain health care, education, and other information related to the minor child(ren); providing the GAL with requested information; answering the GAL's questions truthfully; and making the minor child(ren) available to the GAL upon the receipt of reasonable notice, except where reasonable notice is not possible due to an emergency; and it is further

[ORDERED that the parties shall provide payment for services rendered and expenses incurred by the GAL, if not provided by a pro bono attorney or by an attorney employed by a legal services organization or non-profit entity; and it is further]

[ORDERED that if the GAL serves without compensation, the GAL shall be permitted to participate in this case without the payment of court costs, filing and other fees, and the clerk's office shall provide to the GAL free of charge a copy of all pertinent documents in the court's file in the instant case or in any other case involving the parties or the child(ren); and it is further]

ORDERED that the GAL may obtain confidential court files upon appropriate waiver(s) and/or leave of court in accordance with court rules; and it is further

ORDERED that unless there is good cause, whenever the GAL writes a report, it shall be submitted to chambers five business days before the next scheduled hearing or proceeding, with copies served upon parties; and it is further

ORDERED that this appointment shall terminate 30 days after completion of the case ending in a judgment, adjudication, decree, or final order from which no appeal has been taken, and the time allowed for an appeal has expired; and it is further

ORDERED that all parties shall serve the GAL with any papers filed in this case at the address set forth below.

Judge

Copies to:

Names and Addresses of Parties/Attorneys

Name and Address of GAL

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
ADMINISTRATIVE ORDER 14-01**

**Practice Standards for Guardians ad Litem (GAL) in
Custody and Related Consolidated Cases**

WHEREAS, the Superior Court has authority under D.C. Code §§ 16-918(b) and 16-831.06(c), to appoint attorneys to act as guardians *ad litem* “to appear on behalf of the child and represent his [or her] best interests” in any proceeding “wherein the custody of a child is in question”; and

WHEREAS, D.C. Code § 11-1103 directs the Superior Court to adopt practice standards for all court-appointed attorneys in the Family Court; and

WHEREAS, the Family Court Domestic Relations GAL Standards Committee has developed Practice Standards for Guardians ad Litem in Custody and Related Consolidated Cases, in consultation with representatives from the bench, the bar and local community-based organizations that provide legal representation in Family Court; and

WHEREAS, the proposed Practice Standards are intended to apply to guardians *ad litem* who are court-appointed to represent and advocate for the child's best interests in custody and related consolidated cases involving domestic violence, the dissolution of a marriage, separation, and parentage proceedings, where issues of legal and/or physical custody/placement, parenting plans, access and/or visitation, and related issues involving child support and maintenance shall be adjudicated; and

WHEREAS, these standards do not apply to attorneys appointed as guardians *ad litem* for children in neglect proceedings under D.C. Code Title 16, Chapter 23, whose standards of practice were previously adopted through Administrative Order 13-06;

NOW, THEREFORE, it is by this Court,

ORDERED, that the attached Practice Standards for Guardians ad Litem in Custody and Related Consolidated Cases are adopted pursuant to this Administrative Order, shall take effect on the date of this order, and shall govern representation in custody and related consolidated cases as defined above; and it is further

ORDERED, that this Order shall take effect on January 24, 2014.

SO ORDERED.

BY THE COURT

January 24, 2014

/s/

Lee F. Satterfield
Chief Judge

Copies to:

Judges
Senior Judges
Magistrate Judges
Division Directors
Executive Officer
Clerk of the Court
Family Court Director
CCAN Office Director
Library
DC Bar Family Law Section
Children's Law Center
Legal Aid Society
Bread for the City
DCVLP
Council for Court Excellence
Daily Washington Law Reporter

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

Practice Pointers for Custody GALs

Appointment order

CLC provides a sample appointment order in cases referred through CLC. The D.C. Superior Court Practice Standards for Guardians *ad litem* in Custody and Related Consolidated Cases (Practice Standards) also includes a sample appointment order. Most judges use the sample from the Practice Standards when appointing a GAL and appreciate if you submit the sample proposed order with your information. *The appointment order should include a fee waiver provision, which will ensure that you do not have to pay filing fees or photocopying costs at court.*

Read the file

Read the entire court file in your case, including the docket. The court file may be obtained from the Family Court Clerk's office file room, room JM-300. The Clerk's office of the Family Court Central Intake Center can also print out the docket for you.

Contact attorneys and pro se parties promptly

In some cases, you may want to dive in and start meeting with people immediately. In other cases, you may simply want to introduce yourself and let them know that you will be meeting and talking with them so that you have a little time to review the file, try to get a sense of the issues and the dynamics of the case, and think about how you want to proceed. Whichever approach you choose, parties may be anxious about if and when they are going to hear from you and thus touching base promptly, even on a limited basis, may help alleviate that anxiety.

Go to all hearings

As a "best interests" GAL, you do not represent a client/party in the traditional sense, and there is very little law that gives definition to the role of the GAL but in general, and consistent with the Practice Standards, your role in the case is analogous to that of counsel for a party. Thus GALs will attend and participate in the proceedings as any attorney would.

Can I file motions?

The Practice Standards provide that GALs may file pleadings and litigate the case to the same extent as any other party/attorney regarding procedural and substantive issues (*e.g.* a motion to modify visitation). See Practice Standards at III.B.

Check court records for other cases.

You may be surprised at the useful information you may learn through a review of court records. It's relatively easy to check and probably should be checked in all cases, at least for the parties' current states of residence, although also consider checking Maryland as well as other states in which a party has resided. The rules vary from jurisdiction to jurisdiction but civil, criminal, domestic relations (divorce and custody), and domestic violence protection order court files are typically open to the public and some information and/or records may be available on-line. Other kinds of cases may not be open to the public (e.g. neglect/dependency cases, juvenile criminal cases, sometimes paternity and child support, adoptions). For some of these kinds of cases, the court can authorize access to the court file.

Consider reading the entire court file for any case you find. The docket may not be a complete or accurate indication of the events in or outcome of the case. In addition, the file may contain additional useful information in pleadings, reports and orders that is not reflected in the docket.

Court files that are usually open to the public in D.C. are:

- ***criminal***
 - Criminal Division Clerk's Office, 4th floor west.
 - Criminal dockets are now also on line through the court's public access database, <https://www.dccourts.gov/superior-court/cases-online>.
 - Pleadings and orders are on-line for some cases but not others.

- ***civil protection order (domestic violence restraining orders)***
 - Domestic Violence Unit Clerk's Office, Room 4510
 - CPO case information is not on-line.

- ***domestic relations (divorce, custody, and some non-confidential child support cases)***
 - Domestic Relations Branch Clerk's Office, Room JM-300
 - Domestic relations case information is not on-line.

- ***civil; landlord and tenant (eviction)***
 - Civil case files are in the Civil Clerk's Office, Room 5000
 - Landlord-tenant case files are in the Landlord-Tenant Branch Clerk's Office, Court Building B, 510 4th Street, N.W., Room 110.
 - Civil dockets are on line back to 2000 at <https://www.dccourts.gov/superior-court/cases-online>.
 - Pleadings and orders are on-line for some cases but not others

- Searches can be done by name. A middle name or initial, date of birth, or address may be helpful in order to figure out whether or not your party is in fact the person in the case, particularly if the name is a common one. There

should not be a copying fee; if you are told there is, show them your appointment order with the fee waiver language.

Practice pointer: search variations of the name with as few letters as the search allows.

Maryland:

- Dockets for all cases (except those not open to the public) are on line through *Maryland Judiciary Case Search*, <http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp>
- Searches can be done by name.

Virginia:

- Docket information for all cases (except those not open to the public) can be obtained at <http://www.courts.state.va.us/caseinfo/home.html>.
- Cases in Juvenile and Domestic Relations Court may not be on-line.
- Searches can be done by name, but not state-wide; you must search by court/county or other location.

Other States:

- Some courts have on-line databases (statewide or by court or county); some don't. You can usually check the court's website or call the clerk of the court to find out about access.

Federal:

- It's unusual, but by no means unheard of, for someone to have a federal case pending. Federal dockets and the majority of pleadings are on-line through the PACER system, www.pacer.gov.

Who should I talk to as I prepare my case?

Generally, you should talk to people who may know something about the child or the parents.

Weigh and be sensitive to the fact that people might not know everything that you know (they may not even know that there is a case) and to the possible effects of sharing information or making your presence/role known.

Family members or friends/acquaintances of the parties can be useful sources of information – sometimes even people who haven't seen the parties for a long time, although you may have to take that into consideration. Information can be helpful even if you expect someone to be "biased." Often they aren't and instead are very candid; or they may be candid about "facts" even if they draw different conclusions or are siding with one party. Or they may start from a more "positioned" standpoint, but become more candid as time goes on. GALs always face the challenge of evaluating information but it is likely that any data will prove useful in some way.

You may want to talk with people more than once in order to create opportunities for more information to emerge. For many reasons, people may say more in subsequent conversations than they do initially.

Let people talk.

Even if initially reticent, given a little time, people will often talk with little encouragement. It is often helpful to let them take the lead in the conversation, to see what they want to say and how they say it. If you structure the conversation too much, it may have an inhibiting effect or may simply focus the conversation too narrowly. You may want to introduce certain topics, ask certain questions, or guide or focus the conversation; but if you let people talk, it can be surprising how much they will volunteer. Assess each situation individually, but don't be afraid of a little initial silence.

Do you want home studies? Forensic evaluations?

This is a strategic question that probably depends on the specifics of your case. Possible advantages include new information or, if not precisely new information, corroboration or evidence that you want or need to confirm or prove up your own impressions and conclusions. Possible disadvantages include delay, loss of control, and unpredictability of quality. These services are available at no cost when court-ordered. A party or GAL can file a motion or the court may order (or may have ordered) these assessments *sua sponte*.

What's really going on here?

Sometimes things may seem so clear that you wonder why a GAL was appointed. And you may be right in that assessment. Perhaps the situation, for whatever reason, wasn't clear to the judge; or perhaps the judge still feels that s/he needs the help of a GAL to bring in the information for the record and to assist the judge in moving the case forward to a resolution. Or perhaps the judge is hoping that the GAL will be able to reduce the level of conflict in the case.

Whether the case initially seems simple or complicated, keep an open mind. Sometimes things are exactly the way they appear, sometimes not. Also be alert to examining assumptions you may be bringing to the case without realizing it; sometimes they may be borne out, sometimes not.

Pulse of the case.

Sometimes delay may actually be beneficial. People get to tell you their stories and you become for them a surrogate for the judge. That can help them come to terms with the situation, feel like they've explained themselves, "fought" for their position, told their story and been heard. This may reduce the level of conflict and may make it easier for the matter to be resolved in an appropriate way. More time can also create more opportunities for people's personalities to emerge, or for things to happen that will give you insight into the situation.

However, sometimes prompt resolution is preferable. For example, it may be better for the child to resolve the uncertainty sooner rather than later. In some cases, or at a certain point in a case, one or both parties will continue to litigate or behave at a "high conflict" level, because they think that

what they say or do may influence the outcome, or perhaps for no other reason than that they have a forum within which to do so. But once it becomes clearer that the court process can't be manipulated or used as a weapon, or once a final decision is made, the party/ies will accept that.

Taking a position (or not) and the timing.

The parties/attorneys/judge sometimes push for an early position from the GAL to the court on custody. Not surprisingly, they may want to know what your position is (and as a matter of fundamental fairness, at a certain point, particularly prior to trial, the parties may be entitled to know what your position is). They may also think that if everyone knows what the GAL's position is, it will facilitate resolution of the case. You will have to assess the dynamics of your case and decide when and how to articulate your position, but consider something that may be counterintuitive, which is that sometimes articulating a recommendation or taking a clear position too quickly may be counterproductive. The party you are recommending against may respond that you're "biased" or "on the other party's side." That may cause that party to be more resistant not only to your involvement, but to the court process.

Filings?

As with the timing of making a recommendation or stating your position, you need to decide, strategically, what type of pleading is most likely to get you the outcome you want.

CLC prefers a motions-based practice over filing reports. GALs are attorneys and are best trained to file pleadings, make arguments, and present evidence to the court. We have sample motions for psychological evaluations or home studies, motions to change custody arrangements and sample pre-trial statements. We are also always available to help you think creatively about what pleading you should file. The Practice Standards do permit reports, but they are not evidence in the case.

Settlement

Most cases settle. GALs can play a significant role in facilitating settlement. Settlement is often desirable, but by no means always. Judges may want cases to settle, but the goal is not settlement; it is an outcome that is in the best interests of the child.

Role at trial

Most judges expect that GALs will play the same role at trial as any other attorney. You can take a position, and you can present evidence, call and examine witnesses, and cross-examine other parties' witnesses.

As a practical matter, if one or both parties have counsel, you may have a less active role at trial. However, depending on the circumstances, and particularly if both parties are pro se, you may have a more significant role.

Children as witnesses

Typically, judges do not expect or want children to testify. They will look for alternative ways of finding out, directly or indirectly, about the child's wishes, feelings, and relationships (*e.g.*, a GAL,

a forensic evaluation). Some judges are very willing to talk with the children in chambers; others are reluctant to do so.

You can advocate for whatever you believe to be in the best interests of the child. See Practice Standards at III.C.6. There is no statute in D.C. regarding children's testimony (nor any special hearsay exceptions). *N.D. McN. v. R.J.H., Sr.*, 979 A.2d 1195 (D.C. 2009) addresses some issues regarding *in camera* interviews of children by the judge. There is some case law in the context of neglect cases about children's testimony and the court's authority not to allow a child to be called as a witness or to set conditions on the child's testimony. See, e.g., *In re K.S.*, 966 A.2d 871 (D.C. 2009); *In re Jam. J.*, 825 A.2d 902, 915 (D.C. 2003).

Are my communications with the child confidential/privileged?

Again, as with most issues in this area, there is no law on this issue in D.C. If you believe it is in the child's best interests not to disclose what the child has said to you, many judges will respect your judgment, and lawyers in the case will generally not try to force the issue; but that is not always the case. As a matter of law, the issue has not been addressed or resolved. See Practice Standards at IV.B.

Duration of representation

Cases technically don't "close" insofar as custody orders can always be modified until the child reaches age 18, the age of majority in D.C. But there are "final orders" in custody cases as in any other kind of litigation.

Superior Court Domestic Relations Rule 101(e)(4) provides that "the appearance of any appointed or other attorney in any action under D.C. Code Title 16, Chapter 9 shall be deemed to have terminated for all purposes upon completion of the case ending in a judgment, adjudication, decree, or final order from which no appeal has been taken when the time allowed for an appeal expires, and, if notice of appeal has been entered, upon the date of final disposition of the appeal . . ." While this rule appears to be self-executing, it may be prudent to file a praecipe (notice to the clerk) at the appropriate time that states that, pursuant to this rule, your appearance is terminated.

Some judges understand that your appearance terminates upon the entry of a final order; others may not. Some might contact you if there is subsequent litigation to see whether you would be willing to resume being the GAL.

Be aware, however, that if there is subsequent litigation, you may still get computer-generated notices of hearings from the court regardless of whether or not you are still serving as the GAL.