

Guardian Ad Litem Training 2022

I. Welcome – set agenda for the hour long training

II. Children’s Justice – history – importance and priority of juvenile court practice
ASFA/One Judge One Family/Collaboration/Family First Legislation/New Guardianship law

III. NACC Recommendations for Representation of Children in Abuse and Neglect Cases/ABA Standards

A. Different models of representation – **Client driven** representation

i. Traditional attorney – advocates for the express wishes of the client and is bound by the wishes of the client and the client’s objectives of the representation. Can counsel client on law, facts, and appropriate options – nor does it require attorneys to advocate positions not supported by the facts or the law. (About 45% of the states use some variation)

a. Pros – empowers the child and gives voice to their autonomy.

Encourages independent zealous advocacy

b. Cons – does not work as well for young children who cannot meaningfully direct the litigation.

ii. Child’s attorney (ABA standards model) – a lawyer who provides legal services for a child and who owes the same duty of loyalty, confidentiality and competency to child as to an adult. To the extent able given the child’s developmental level – good faith effort to determine the child’s preferences and represent the child throughout the course of the litigation. If the child will not or does not express preferences the attorney can advocate for the legal interests of the child. If the lawyer believes the child’s express preferences would be harmful to the child, the attorney can

request appointment of an independent GAL to advocate for best interests. (Iowa?)

a. Pros – an evolution from the GAL model of the 1970's - takes role and duty confusion out of the picture. Discourages relaxed advocacy.

b. Cons – does not work well for younger children – focusing on legal interests because sometimes those are unclear or contradictory.

iii. Child's attorney – (NACC model) – This model requires the attorney assume the traditional zealous advocate role and not GAL – avoiding lax advocacy. At the same time – it recognizes some children not capable of directing their case. The distinction between the ABA standards model and NACC model is that where the ABA remained consistent in the client directed attorney throughout – the NACC carves out a significant exception where the child cannot meaningfully participate in a formulation of a position. In such cases the NACC model sets out more objective criteria for GAL type decision making. In addition, in situations where the child's wishes are considered to be seriously injurious to the child the NACC version requires appointment of a GAL. (Connecticut uses a form of this model)

a. Pros – NACC believes this is the best blending of the traditional attorney/GAL providing the best of both

b. Cons – Critics say by blending the attorney/GAL role it dilutes both.

B. Different models of representation – **Advocate directed** representation

- i. Lay guardian ad litem model – calls for a lay person to represent child’s “best interests” – usually a non-professional volunteer, i.e. CASA. (Florida, Hawaii and Maine)
 - a. Pros – has value when used with an attorney as legal counsel for child
 - b. Cons – this model (without use of an attorney) is not legal representation; cannot be substitution for trained legal counsel for children; this model may encourage unauthorized practice of law (without use of an attorney)

- ii. Two-Distinct Lawyer Roles model – requires appointment of a best interest lawyer-guardian ad litem for a child to represent “best interests” of child; prescribes aggressive duties for the lawyer/GAL and provides attorney-client privilege; requires lawyer/GAL to advise the court of the child’s wishes and requires lawyer/GAL to weigh child’s wishes in making best interest recommendation. When appointed as attorney the attorney owes same duty and loyalty as if client was an adult. (Michigan)
 - a. Pros – this is a statutory scheme established in Michigan – well defined circumstances depending on age and maturity of the child; lessens tendency toward “relaxed advocacy”
 - b. Cons – The appointment of an attorney/GAL is the rule and an attorney is appointed only in rare circumstances; also in rare circumstances child may have both an attorney/GAL and an attorney advocate.

iii. Hybrid model – Attorney and Guardian ad Litem – in this model the “best interests” of the child take precedence over the client’s wishes – About 1/3 of the states use this model.

a. Pros – traditional model for representing particularly young children and protects older children from the harm of their own bad choices

b. Cons – “old fashioned” approach – ethically attorneys cannot disregard their client’s directives; attorneys not qualified to make “best interests” determinations; legal system requires zealous advocacy – this model has contributed to substandard representation of children in child welfare

IV. GAL duties – unlike responsibilities related to representing parents and the department – GAL duties are set out in Iowa Code Sec. 232.2(22) – should make it easier to comply – to do a good job for your client. Right?

V. Start with the Quiz – Question nos. 1-11

VI. Ethical rules – think about those responsibilities in conjunction with Iowa’s Rules of Professional Conduct

A. Competence – A lawyer will provide competent representation to a client. Rule 32:1.1

i. Legal knowledge and skill

a. Complexity and specialized nature of the matter

b. Lawyer’s general experience and training and experience in the matter

ii. Thoroughness and Preparation

a. Inquiry and analysis into legal and factual elements of the matter

iii. Maintaining Competence

- a. Keeping abreast of changes in law and practice

B. Scope of Representation and Allocation of Authority Between Client and Lawyer Rule 32:1.2

- i. A lawyer must abide by a client's decisions concerning objectives of representation
- ii. A lawyer shall communicate with a client and abide by a client's decision to settle case

C. Diligence – A lawyer shall act with reasonable diligence & promptness in representing a client Rule 32:1.3

- i. Take whatever lawful and ethical measures are required to vindicate a client's cause
- ii. A lawyer's work load must be controlled so that each matter is handled competently
- iii. Procrastination is a shortcoming that is widely resented
- iv. Carry through on matters until their conclusion/succession plan

D. Communication Rule 32:1.4

- i. Promptly inform the client of any decision or circumstance requiring client's consent
- ii. Consult with client about the means by which objectives are to be accomplished
- iii. Keep client reasonably informed about the matter
- iv. Promptly reply with reasonable requests for information
- v. Advise client about limitations in lawyer's conduct or representation
- vi. Explain the matter to enable the client to make informed decisions

E. Client with Diminished Capacity Rule 32:1.14

- i. Maintain client relationship when a client's capacity to make considered decisions is diminished by minority
 - a. A client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting client.
 - b. Children as young as 5 or 6 or certainly 10 or 12 are regarding as having opinions that are entitled to weight in legal proceedings concerning their custody.
 - c. Treat client with attention and respect
 - d. Client may wish to have parents or other persons present – this generally does not affect the attorney-client relationship or privilege
 - e. Whether the lawyer looks to the child client's parents depends on type of proceeding

VII. GAL Reports – What to report and how to do it

VIII. Question 12 – Bifurcation of responsibilities –

A. Iowa Code Section 232.89(4) – The same person may serve both as the child's counsel and as guardian ad litem. However, the court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel and also represent the best interest of the child as guardian ad litem...".

B. In the Interest of A.T. and T.P. (Iowa Court of Appeals 2007)

C. In the Interest of A.D.W. (Iowa Court of Appeals 2012)

Hypothetical one: Sherrie has a 12-year old son, Taylor, who has twice been removed from his mother's home due to substance abuse, primarily methamphetamine and alcohol. During the time Taylor was in foster care he was physically abused. Taylor sees a counselor regularly and has consistently maintained throughout those sessions he wants to return to his mother's home. He also has expressed knowledge of his mother's shortcomings related to her use of illegal drugs and the dangers that presents to him. He sees his mother regularly and is bonded to her. Taylor has also repeatedly expressed to his attorney he does not want his mother's parental rights terminated. Taylor's attorney/GAL has made the juvenile court aware of Taylor's wishes, but has nevertheless continued to advocate for permanency for Taylor – and she supports termination of parental rights if Sherrie is unable to remain sober.

Following the last removal a permanency hearing was held in which the juvenile court allowed Sherrie six additional months to work toward reunification. Sherrie continued to have issues with illegal substance use and the state filed a petition for termination of parental rights. At the termination proceeding Sherrie requests that the juvenile court appoint a separate attorney for Taylor who might advocate for Taylor's wishes that her parental rights not be terminated.

Should the juvenile court grant that request?

Can the attorney/guardian ad litem adequately represent Taylor?

What findings are required to have separate attorney appointed?

Should the juvenile court appoint a new attorney or a new GAL?

Hypothetical two: Melissa has a child, Xavier, age 8, who removed from his mother's home due to concerns involving Melissa's substance abuse and her relationship with a paramour – involving domestic violence. Xavier was later returned to his mother's care and custody, but a violent altercation between Melissa and her paramour resulted in a second removal. Eventually after

Melissa failed to make adequate progress the state pursued termination of parental rights. During the termination hearing Melissa asked that Xavier be appointed to represent Xavier's interests – in addition to the guardian ad litem that had previously been appointed. As a basis for her request Melissa cited a statement by Xavier to his therapist that he does not want to leave his mother and never see her again. Xavier also wrote a letter to the court indicating he is worried if he goes back to his mother's home bad stuff will happen between Melissa and her boyfriend – and Xavier said he is happy living with his foster parents. The attorney/GAL for Xavier does not believe a separate attorney was necessary.

Should the juvenile court grant Melissa's request?
How is this different from the first hypothetical?