LEGAL ETHICS & THE REPRESENTATION OF CHILDREN IN FAMILY LAW CASES

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Hon. Debra H. Lehrmann has been a judge in Tarrant County for the past eighteen years, serving first as the Title IV-D Associate Judge for all Tarrant County Family Courts and then as the Associate Judge of the 360th Judicial District of Texas. She is about to begin her 6th year as the District Judge of the 360th Judicial District of Texas.

A member of Phi Beta Kappa, Judge Lehrmann graduated with high honors from the University of Texas in 1979 and the University of Texas School of Law in 1982. Prior to her appointment to the bench, she worked as the lead attorney and director of the Enforcement Division of the Tarrant County Domestic Relations Office. She also worked as a family law attorney with the Fort Worth law firm of Law, Snakard & Gambill. In 1990, she was recognized as the Outstanding Young Lawyer of Tarrant County.

Judge Lehrmann currently serves as a commissioner on the National Commission on Uniform State Laws (NCCUSL), is a past president of the Texas Chapter of the Association of Family and Conciliation Courts (AFCC), is a past president of the Tarrant County Young Lawyers Association, is a master member of the Eldon B. Mahon Inn of Court, serves on the Advisory Board of Tarrant County Dispute Resolution Services, is a fellow of the Texas Bar Foundation and the American Bar Association, and is a charter member of the Tarrant County Bar Foundation. She is an active member of the Family Law Section of the American Bar Association (ABA/FLS), serving on the ABA/FLS council, as the chair of the Child Support Committee, on the Continuing Legal Education Committee, on the Publications Board, as the Judicial Liaison to the Judicial Section of the ABA, and on the Nominations Committee. From 2000-2003, she was a member of the ABA/FLS Committee to Develop Standards for Representation of Children in Custody Litigation.

In 2005, Judge Lehrmann received the Court Appointed Special Advocates (CASA) Scott Moore Award. She lectures frequently on family law at Texas Wesleyan School of Law, throughout the state and throughout the country. The author of numerous published articles, in 2003 she received the Texas Bar Foundation’s award for the best bar journal article of the year, for "The Child’s Voice--An Analysis of the Methodology Used To Involve Children in Custody Litigation" (Texas Bar Journal, November 2002). She is the author of a legal treatise entitled Court-Appointed Representation of Children in Texas Family Law Cases—A Practical Guide (Lexis Nexis-Matthew Bender, 1st Edition, 2004).
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LEGAL ETHICS & THE REPRESENTATION OF CHILDREN IN FAMILY LAW CASES

I. INTRODUCTION

Children are often the subjects of family law litigation that will affect the rest of their lives. Although these children are not usually named parties, they are considered “the real parties in interest” to the litigation. These lawsuits frequently result in a court or administrative body taking action that will significantly impact the child’s status and living arrangements. Moreover, these children’s interests are often at odds with those of their parents. As such, it is imperative that the legal system be equipped to provide safeguards to ensure that the needs of children who are the subjects of family law litigation are met. One of the most important safeguards for these children is court-appointed legal representation. Due to the repercussions of these types of proceedings on subject children, no other area of the legal profession has a greater potential impact upon society. However, thorny ethical issues involved with the representation of children make the lawyer’s job extremely difficult.

A. Children Are Not Simply Small Adults

Lawyers representing children are faced with a myriad of challenges involving the ethical duties that accompany this type of representation. Unlike an adult client, the child-client has not sought or selected the lawyer, does not fully understand the lawyer’s function, is unfamiliar with the legal process, may distrust adults generally, lacks the legal capacity to retain counsel and may not possess the capacity to direct counsel. The ability of these children to independently develop a position to be advocated is necessarily affected by their uniquely vulnerable position within the lawsuit. Additionally, the interests of children are hampered when courts are not able to appoint lawyers to assist them in rendering decisions that are in the best interests of subject children.

Ethical issues surrounding competent representation, objectives of representation, diminished capacity, communication with client, protection of children, conflicts of interest and confidentiality present uniquely profound challenges for lawyers representing children. Limited resources make the challenges even more pronounced. This article will examine these complicated ethical issues and discuss the approach taken in Texas.

B. Texas Family Code

While neither the Texas Disciplinary Rules of Professional Conduct nor the ABA Model Rules of Professional Conduct offer adequate direction when it comes to children, the Texas Family Code supplies some answers for those who represent the most vulnerable among us. In 2003, the Texas Legislature massively overhauled Chapter 107 of the Texas Family Code, providing guidance for practitioners. This past legislative session, the chapter was again amended to fill in gaps that were inadvertently left open in 2003. In order to fully understand the requirements of the disciplinary rules as they relate to the representation of children, they must be read in conjunction with these sections of the Texas Family Code. Significantly, in 2005, the code was amended to provide that “an attorney ad litem who fails to perform the duties required by Sections 107.003 and 107.004 is subject to disciplinary action.”

C. National Standards

Several professional organizations have adopted standards of practice to help guide practitioners who are appointed to represent children in family law cases. While these standards are advisory and have no binding effect in individual states, they serve the useful function of elaborating upon state law and filling in gaps where they exist. While all of these standards are helpful to a certain extent, three of them are specifically mentioned in Chapter 107 of the Texas Family Code. Attorneys ad litem are directed to “become familiar with the American Bar Association's standards of practice for attorneys who represent children in abuse and neglect cases, the suggested amendments to those standards adopted by the National Association of Counsel for Children, and the American Bar Association's standards of practice for attorneys who represent children in custody cases.”


3 TEX. FAM. CODE ANN.§ 107.0045.

Amicus attorneys are required to “become familiar with the American Bar Association’s standards of practice for attorneys who represent children in custody cases.” Additionally, the American Academy of Matrimonial Lawyers has adopted Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (AAML Standards), which until 2003 were the only recognized national standards that dealt with custody.

II. DUTIES IMPOSED BY TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The role of a lawyer appointed to represent a child in a family law case has much in common with the role of a lawyer representing an adult client. Active and aggressive involvement is required for both, as is the duty to provide legal services. The Model Rules of Professional Conduct make it clear that the ethical rules apply to the representation for children, to the extent possible. Model Rule 1.14 directs a lawyer as follows: “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.”

A. Texas Disciplinary Rule of Professional Conduct 1.01—Competent & Diligent Representation

Texas Disciplinary Rule 1.01 provides that a “lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence … In representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer; or … frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.” The comment to the rule explains that competent representation is defined to include “possession of the legal knowledge, skill, and training reasonably necessary for the representation.” The comment goes on to provide that “a lawyer should act with competence, commitment and dedication to the interest of the client … A lawyer should feel a moral or professional obligation to pursue a matter … with reasonable diligence and promptness … A lawyer’s workload should be controlled so that each matter can be handled with diligence and competence.” Lawyers are also directed to “strive to become and remain proficient … in the practice of law. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education.”

This duty to provide competent and diligent representation applies to lawyers appointed to represent children to the same extent as it does to lawyers representing adult clients. It applies whether the lawyer has been appointed as an amicus attorney, as an attorney ad litem or in the dual role.
The key elements of this responsibility include training, investigation, preparation of the case for resolution and participation in conferences, hearings and at trial. Incompetent representation can result from inexperience, lack of training, procrastination and neglect of client matters. 16

1. Training

Texas Family Code § 107.003(2) requires both attorneys ad litem and amicus attorneys to “be trained in child advocacy or have experience determined by the court to be equivalent to that training.” 17 The code was amended this past legislative session to also require that an “attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 … complete at least three hours of continuing legal education relating to child advocacy as described by Subsection (c) as soon as practicable after the … appointment. An attorney ad litem is not required to comply with this … if the court finds that the attorney ad litem has experience equivalent to the required education.” 18

This training must “focus on the duties of an attorney ad litem in, and the procedures of and best practices for, a proceeding under Chapter 262 or 263.” 19

“Best practices training” would include a working knowledge of: 1) relevant state law, 2) relevant federal law, which in CPS cases includes the Child Abuse and Treatment Act, the Adoption and Safe Families Act, the Multi-Ethnic Placement Act, the Indian Child Welfare Act, the Foster Care Independence Act of 1999, social security laws and disability laws, 3) evidence and trial procedure, 4) alternate dispute resolution techniques, 5) child development, including attachment and bonding issues, 6) techniques for interviewing children in a developmentally appropriate manner, 7) impact of domestic violence on children, 8) substance abuse issues, 9) issues pertaining to physical assault on children, including sexual assault, 10) parental alienation, and 11) cultural, ethnic and socioeconomic issues.

The lawyer should also be familiar with the available services and resources for the child and family. Because the attorney for the child should identify appropriate extra-judicial resources for the child, he or she must be familiar with what community and court services exist. 20 These would include therapeutic counseling, educational instruction, anger management classes, health services, substance abuse treatment programs, programs for housing and other forms of material assistance, and mentoring programs. 21

2. Investigation

Thorough, independent investigation is crucial to competent representation. The lawyer for the child is required to investigate to the extent necessary to develop a clear understanding of the child, his or her needs and concerns, and the current situation. Chapter 107 of the Texas Family Code requires the lawyer to “investigate the facts of the case to the extent the lawyer feels appropriate.” 22 The code also requires all court-appointed lawyers for children, within a reasonable time, to “interview: (i) the child in a developmentally appropriate manner, if the child is four years of age or older; (ii) each person who has significant knowledge of the child’s history and applies to amicus attorneys, attorneys ad litem and attorneys appointed in the dual role.)

16 TEX. FAM. CODE ANN.§ 107.0045 (was amended in 2005 to provide that an “attorney ad litem who fails to perform the duties required by Sections 107.003 and 107.004 is subject to disciplinary action under Subchapter E, Chapter 81, Government Code.”)

17 TEX. FAM. CODE ANN.§ 107.003(2).

18 TEX. FAM. CODE ANN.§ 107.004(b).

19 TEX. FAM. CODE ANN.§ 107.004(c)(2).

20 ABA Abuse & Neglect Standards, supra, note 4, at B-1(7) (requires the lawyer to “[i]dentify appropriate family and professional resources for the child”); ABA Abuse & Neglect Standards, supra, note 4, at C-4 (directs the lawyer to “seek appropriate services (by court order if necessary) to access entitlements, to protect the child’s interests and to implement a service plan”); ABA Abuse & Neglect Standards, supra, note 4, at Comment to C-4 (states that the “lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal requests are unsuccessful, the lawyer should file a motion to bring the matter before the court”); ABA Abuse & Neglect Standards, supra, note 4, at C-5 (states that the lawyer “should assure that a child with special needs receives appropriate services to address the physical, mental or developmental disabilities of the child. These services may include, but should not be limited to: (1) Special education and related services; (2) Supplemental security income (SSI) to help support needed services; (3) Therapeutic foster or group home care; and (4) residential/in-patient and out-patient psychiatric treatment.”)

21 ABA Abuse & Neglect Standards, supra, note 4, at Comment to B-1(7) (states that the lawyer should “identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law. The lawyer can also identify family members, friends, neighbors or teachers with whom the child feels it is important to maintain contact; mentoring programs, such as Big Brother/ Big Sister; recreational opportunities that develop social skills and self esteem; educational support programs, and volunteer opportunities which can enhance a child’s self-esteem.”)

22 TEX. FAM. CODE ANN.§ 107.003(1)(D).
condition, including any foster parent of the child; and (iii) the parties to the suit."  

Competent representation goes beyond merely interviewing witnesses, however. It requires the lawyer to get to know and understand the child, the family dynamics and the family history. The more the lawyer knows about the family, the more apt the lawyer is to really understand the needs and wants of the child.  

Chapter 107 specifically requires the lawyer to “obtain and review copies of relevant records relating to the child.”  

These would include the case file and “records regarding social services, law enforcement records, school records, records of a probate or court proceeding, and records of a trust or account for which the child is a beneficiary.”  

Medical records, mental health records and drug or alcohol treatment records of the child should also be reviewed, but, if privileged or confidential under other law, must be obtained in accordance with that law.  

3. Preparation for Resolution  
The lawyer is required to use the information that has been gathered thus far to prepare the case for resolution. Competent representation involves a review of applicable law, developing a theory of the case, filing appropriate pleadings and preparing the case for trial. While aiding the lawyer in the litigation phase of the lawsuit, this will also facilitate settlement of the case. The lawyer should remain in contact with the child, the parties to the lawsuit, through their lawyers if they are represented, and with any case worker or special advocate that may be involved, throughout the pendency of the lawsuit.  

4. Participation in Conferences and Settlement Negotiations  
The lawyer must participate in all settlement conferences and mediations that involve issues regarding the child.  

This phase of the lawsuit has the greatest potential for addressing the child’s needs and concerns in a manner that does not further traumatize the child. As such, the significance of the lawyer’s involvement at this stage of the lawsuit cannot be over-emphasized. The lawyer is required to promote the amicable resolution of the lawsuit, in a manner that focuses upon the child.  

A critical function that the lawyer for the child provides is to keep the adult participants focused upon the needs and concerns of the child. It is important that the lawyer directs the parties not to lose sight of the child during these negotiations. 

a. Determine Whether to Approve Agreed Settlement  
Prior to 2005, it was not completely clear whether court-appointed lawyers for children were required to consent to settlements that were agreed upon by the named parties. Because these lawyers represent the subject children, rather than named parties, questions remained about their authority to veto settlements. Moreover, while amicus attorneys were required to “review and sign, or decline to sign, a proposed or agreed order affecting the child,” attorneys ad litem were not required to do so.  

This section of the code was amended in 2005, to make it clear that both amicus attorneys and attorneys ad litem are required to “review and sign, or decline to sign, a proposed or agreed order affecting the child.”  

Furthermore the amended code now specifically authorizes amicus attorneys and attorneys ad litem to request a hearing or trial on the merits, in the event that they do not agree with a proposed order agreed to by the named parties.  

b. Texas Disciplinary Rule 1.02—Bound By Child’s Decisions  
Texas Disciplinary Rule 1.02 provides that “a lawyer shall abide by a client’s decisions … [about] whether to accept an offer of settlement of a matter,  

“encourage settlement and the use of alternative forms of dispute resolution”); ABA Custody Standards, supra, note 5, at III-F(6) (states that the lawyer should “[p]articipate in, and, when appropriate, initiate, (sic) negotiations and mediations.”)  

23 TEX. FAM. CODE ANN. § 107.003(1)(A).  
24 Jean Koh Peters, a clinical professor of law and supervising attorney in the Jerome N. Frank Legal Services Organization at Yale Law School, refers to this as getting to know the “child-in-context.” See Jean Koh Peters, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS, (LexisNexis 2001) at pp.1-19.  
26 TEX. FAM. CODE ANN. § 107.006(b).  
27 TEX. FAM. CODE ANN. § 107.006(c).  
28 TEX. FAM. CODE ANN. § 107.003(1)(D) (provides that all court-appointed children for children shall “participate in the conduct of the litigation to the same extent as an attorney for a party”); TEX. FAM. CODE ANN. § 107.003(1)(H) (provides that an attorney ad litem and an amicus attorney must  

29 TEX. FAM. CODE ANN. § 107.003(1)(H)(provides that attorneys ad litem and amicus attorneys are required to “encourage settlement and the use of alternative forms of dispute resolution.”)  
31 TEX. FAM. CODE ANN. § 107.003(1)(I).  
32 TEX. FAM. CODE ANN. § 107.003(3)(B)(provides that attorneys ad litem and amicus attorneys are entitled to “request a hearing or trial on the merits.”).
except as otherwise authorized by law.” However, because an amicus attorney is not bound by the child expressed objectives of representation (as will be discussed more fully below), this rule does not apply to an attorney appointed in this capacity. Similarly, the rule does not apply to an attorney appointed in the dual role who determines that the proposed settlement is not in the child’s best interests. Rather, the lawyer in this situation would be required to either: 1) Request the appointment of a guardian ad litem, while continuing as the attorney ad litem (being bound by the directives of the child, except as set out below) or 2) Use substituted judgment, if Texas Family Code § 107.008(a) conditions have been met.

An attorney ad litem is required to abide by the child’s decisions about settlement, unless the lawyer is required to take protective action because “the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.” In this situation, the lawyer is authorized to use substituted judgment and is therefore not bound by the directives of the child. Moreover, an attorney ad litem is authorized to use substituted judgment for a child who “continues to express objectives of representation that would be seriously injurious to the child,” even if the child is competent. As such, the lawyer in this situation would not be bound by the child’s decisions regarding settlement of the case.

5. Participation in Hearings and at Trial

Prior to 2003, there was some confusion about whether an attorney appointed as a guardian ad litem was authorized to provide legal services for the child. Although the Texas Supreme Court had previously held (in 1995) that a “guardian ad litem is required to participate in the case to the extent necessary to protect the minor,” confusion persisted. In an attempt to remove the confusion, the Texas Legislature removed the term “guardian ad litem” when referring to best interest-directed lawyers, and replaced the term with “amicus attorney” (in cases not filed by DFPS/CPS) and with “dual role” (in suits filed by DFPS/CPS). These best interest-directed lawyers are now clearly required to participate in trial “to the same extent as an attorney for a party.”

This duty to participate fully in trial and at all hearings applies to issues that are within the scope of the appointment. The lawyer “should zealously advocate a position on behalf of the child … In furtherance of that advocacy, the child’s attorney must be adequately prior to hearings. The lawyer’s presence at and active participation in all hearings is absolutely critical.” This would include any temporary or emergency hearings, pre-trial hearings, status review hearings, permanency hearings, placement review hearings, final trial, and post-trial hearings.

The lawyer must provide the following legal services, as necessary to advance the child’s interests,

33 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.02(a)(2).
34 TEX. FAM. CODE ANN.§ 107.001(5).
35 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.02(g); ABA Abuse & Neglect Standards, supra, note 4, at Comment to C-6 (states that “[a]s developmentally appropriate, the child’s attorney should consult the child prior to any settlement becoming binding.”)
36 TEX. FAM. CODE ANN.§ 107.008(a)(provides that an attorney ad litem may use substituted judgment if he or she determines that “the child cannot meaningfully formulate the child’s objectives of representation in a case because the child: (1) lacks sufficient maturity to understand and form an attorney-client relationship with the attorney; (2) despite appropriate legal counseling, continues to express objectives of representation that would be seriously injurious to the child; or (3) for any other reason is incapable of making reasonable judgments and engaging in meaningful communication.” A lawyer who determines that the child meets the requirements of either (1) or (3) above is likely to “believe that the [child] client lacks legal competence.”
37 TEX. FAM. CODE ANN.§ 107.008; TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.02(g).
39 TEX. FAM. CODE ANN.§ 107.003(F).
40 ABA Custody Standards, supra, note 5, at V-C (states that if “the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney’s tasks may be limited to the court’s discretion.”) AAML Custody Standards, supra, note 6, at Comment to 2.5 (states that when “as may be expected in the vast majority of cases, the court has limited counsel’s involvement to issues of custody or visitation—excluding counsel from taking part in other matters such as property issues or financial matters—it is appropriate to treat the child’s lawyer as counsel of record only with regard to issues of custody or visitation.”)
41 ABA Abuse & Neglect Standards, supra, note 4, at Comment to B-1; ABA Custody Standards, supra, note 5, at III-G (states that the “lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment.”)
42 ABA Abuse & Neglect Standards, supra, note 4, at D1 (states that the “child’s attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child”); ABA Custody Standards, supra, note 5, at III-F(7) (states that the lawyer should “[p]articipate in depositions, pretrial conferences, and hearings.”)
during trial: 1) make evidentiary objections and responses, 2) participate in voir dire, 3) make legal argument, including opening and closing remarks, 4) present evidence, 5) question and cross-examine witnesses, 6) offer exhibits, 7) file legal briefs, 8) file appropriate motions, including motions in limine, 9) participate in drafting the jury’s charge, 10) poll the jury, and 11) perform any other legal service that is required to serve the child’s interests. 43 While it is critical that the lawyer ensure that evidence is presented and argument is made that supports the child’s interests, the lawyer should not be duplicative or cumulative. The attorney should also preserve legal issues for appeal, as needed throughout the trial. 44

a. Texas Disciplinary Rule 3.08—Lawyer as Witness

Texas Disciplinary Rule 3.08 provides that a “lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer client.” 45 This rule is codified in Texas Family Code § 107.007, which prohibits an attorney ad litem, an attorney serving in the dual role, or an amicus attorney from “testify[ing] in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct.” 46 Similarly, the attorney cannot be compelled to produce work product developed during the appointment or be required to disclose the source of any information. 47

b. Argue a Position

The prohibition against a lawyer participating as a witness in the case does not affect the lawyer’s duty to make legal argument, summarize the evidence and advocate a position. 48 Because all court-appointed lawyers for children are required to “participate in the conduct of the litigation to the same extent as an attorney for a party,” the lawyer should argue for a position based upon the evidence, just as an attorney

43 ABA Abuse & Neglect Standards, supra, note 4, at D3 (states that the lawyer “should make appropriate motions, including motions in limine and evidentiary objections, to advance the child’s position during trial or during other hearings. If necessary, the child’s attorney should file briefs in support of evidentiary issues”); ABA Abuse & Neglect Standards, supra, note 4, at D4 (states that the lawyer “should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary”); ABA Custody Standards, supra, note 5, at III-F(8) (states that the lawyer should “[f]ile or make petitions, motions, responses or objections when necessary”); ABA Custody Standards, supra, note 5, at III-G (states that the “lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment.”)

44 ABA Abuse & Neglect Standards, supra, note 4, at D3 (states that the “lawyer should preserve legal issues for appeal, as appropriate.”)

45 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 3.08(a).

46 TEX. FAM. CODE ANN.§ 107.007(a)(4) (states that “an attorney ad litem, an attorney serving in the dual role, or an amicus attorney may not: (1) be compelled to produce attorney work product developed during the appointment as an attorney; (2) be required to disclose the source of any information; (3) submit a report into evidence; or (4) testify in court except as authorized by Rule 3.08, Texas Disciplinary Rule of Professional Conduct.” Rule 3.08 lists specific exceptions to the prohibition against testifying as a witness, including when “the testimony relates to the nature and value of legal services rendered in the case.” The prohibition does not affect the duty of an attorney to report child abuse or neglect.)

47 ABA Custody Standards, supra, note 5, at III-B (states that a “lawyer … should not testify, file a report, or make recommendations”); ABA Abuse & Neglect Standards, supra, note 4, at III-G(7) (provides that in some states a “guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a ‘lawyer’ “); See In the Interest of J.C., G.C., I.C., and T.C., Children, 151 S.W.3d 284 (Tex. App.—Texarkana 2004, appeal after remand)(wherein the court stated, in dicta, that “the children’s attorney ad litem … testified that the children said Stephen was not a real father to them.” Although this case does not provide direction about the court-appointed representation of children, it is interesting to note that the trial court allowed the attorney ad litem to testify about the children’s desires. When examining the evidence to determine whether it was factually sufficient to support a finding that termination of parental rights was in the children’s best interests, the court mentioned the testimony of the attorney ad litem); In the Interest of K.C.P. and J.D.P., Children, 142 S.W.3d 574 (Tex. App.—Texarkana 2004, no writ)(involved a CASA representative, who had been appointed as a guardian ad litem. Appellant unsuccessfully argued that the guardian ad litem should have been excluded from the courtroom during the testimony of the other witnesses. Citing Tex. Fam. Code Ann. § 107.002(c)(4), and (6), the court held that the guardian ad litem is specifically entitled to attend all legal proceedings in a case and to testify in court regarding the guardian’s recommendation.)

48 ABA Abuse & Neglect Standards, supra, note 4, at D-11 (states that, if appropriate, the lawyer “should make a closing argument, and provide proposed findings of fact and conclusions of law”); ABA Custody Standards, supra, note 5, at III-G(7) (states that the lawyer should “[m]ake a closing argument, proposing specific findings of fact and conclusions of law.”)
for a party would. 49 While the evidence upon which the lawyer bases his or her argument is subject to cross-examination, the argument itself has no probative value and is not subject to cross-examination. 50

It is important to remember that this position should not necessarily align with either party. The lawyer serves a critical function when he or she argues for creative solutions that address the child’s needs and concerns. A primary value of attorneys for children is that they are in key positions to present alternative positions to the court, which may be communicated to the court in the form of legal argument.

49 TEX. FAM. CODE ANN. § 107.003(E); ABA Custody Standards, supra, note 5, at Comment to III-B (explains that “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 of oral report or recommendation to the court, but should instead 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 that all lawyers do”); ABA Custody Standards, supra, note 5, at Comment to III-G (states that “[a]lthough 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 to the child, and, when appropriate, present creative alternative solutions to the court.”)

50 In re Marriage of Bates and Bates, 819 N.E.2d 714 (Illinois 2004)(the Illinois Supreme Court construed the constitutionality of a statute providing for a “child’s representative.” The child’s representative’s duty, as set out in the statute, is to “advocate what the representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child’s representative shall have the same power and authority to take part in the conduct of the litigation as does an attorney for a party and shall possess all the powers of investigation and recommendation as does a guardian ad litem. The child’s representative shall consider, but not be bound by, the expressed wishes of the child … The child’s representative shall not be called as a witness regarding the issues set forth in this subsection.” The court held that this statute was unconstitutional (although the error was found to be harmless) as applied in this case, because the child’s representative’s written report was received into evidence, and the statute expressly prohibits the right to cross-examine the child’s representative. The Texas statute specifically prohibits an attorney ad litem, an attorney serving in a dual role, or an amicus attorney from submitting a report into evidence.)

c. Present Child’s Objectives to Court

All court-appointed lawyers for children are directed to present the child’s objectives of representation to the court, if the child so desires. As will be discussed more fully below, the duty to advocate a position based upon the child’s direction differs, depending upon the nature of the appointment. The position to be advocated will be directed by the child in certain situations and by the lawyer in other situations. However, the duty to present the child’s position to the court applies to all court-appointed lawyers for children, whether appointed as an amicus attorney, an attorney ad litem or in the dual role.

With the child’s consent, the amicus attorney must “ensure that the child’s expressed objectives of representation are made known to the court.” 51 While the code does not expressly direct an attorney ad litem to make such a presentation, such action is implicit in the lawyer’s duty to represent the child in the traditional sense. 52 The Texas Family Code requires lawyers in either role to “consider the impact on the child in formulating the attorney’s presentation of the child’s expressed objectives of representation to the court.” 53

B. Texas Disciplinary Rule 1.03—Communication

Texas Disciplinary Rule 1.03 provides that a “lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information … [and] shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” 54 When discussing clients with disabilities, the comment to this rule goes on to state that “a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes that a client … is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client’s own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children’s opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with

51 TEX. FAM. CODE ANN. § 107.005(b)(1).
52 TEX. FAM. CODE ANN. § 107.004
53 TEX. FAM. CODE ANN. § 107.003(1)(C).
54 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.03.
attention and respect.” This duty extends to child-clients, as it does to all clients with disabilities, regardless of the role assigned by the court. The child is entitled to be consulted to the extent possible, and to be treated with attention and respect.

1. Getting To Know & Understand the Child
The importance of establishing and maintaining a relationship with the child cannot be overstated. It is the foundation of all court-appointed representation of children and is arguably the most important function that the lawyer provides. Not only is this critical in increasing the lawyer’s ability to meaningfully address the child’s needs and concerns, it also provides the child with an outlet to be heard and feel validated. The lawyer must understand the child, in order to be able to give the child a meaningful voice.

This most important of duties is based upon the need for the child to have an advocate that he or she can depend upon, rather than for forensic purposes. That is, the purpose of getting to know the child is so the lawyer can advocate for the child’s needs and desires, not for the lawyer to use the child to gather information about the truth of the facts that gave rise to the litigation. While there may be some overlap, the focus should be upon getting to know the child for representation purposes, rather than for truth-gathering purposes. A positive focus about what can be done in the future is much more productive than dwelling on the past.

2. Developmentally Appropriate Methodology
This duty to get to know the child is codified in the Texas Family Code, which requires all court-appointed lawyers for children to “seek to elicit in a developmentally appropriate manner the child’s expressed objectives of representation.” Developmentally appropriate has been defined as communications or other actions that are “structured to account for the individual child’s age, level of education, cultural background, and degree of language acquisition.” This duty to seek to elicit the child’s objectives is critical and requires a certain amount of time and finesse.

While getting to know and understand the child is essential, it can be extremely difficult. Developing an understanding of a child is more challenging than with an adult client and involves more than simply interviewing the child. Creating a trusting relationship with a child is more of a process than an event. “[L]awyers for children can and must individualize every representation, in a way that allows maximum participation of the child, so that the representation reflects the child-in-context and the child’s unique view of the world.” In order to fully understand the child’s view of the world, the lawyer must accumulate a critical mass of information about the child’s world.

A child may not understand legal terminology or fully appreciate the implications of a particular course of action. The court-appointed lawyer for the child has the obligation to consider these factors when determining how to proceed and to attempt to communicate with the child in a manner that the child can understand. All court-appointed lawyers for

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55 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at Comment to 1.03.
56 ABA Custody Standards, supra, note 5, at Comment to III-E; see Jean Koh Peters, supra, note 24.
57 The Texas Family Code refers to this duty to get to know and understand the child in several places. TEX. FAM. CODE ANN.§ 107.003(1)(A)(i) (directs all court-appointed lawyers for children to “within a reasonable time after the appointment, interview ... the child in a developmentally appropriate manner, if the child is four years of age or older”). TEX. FAM. CODE ANN.§ 107.003(1)(B) (directs all court-appointed lawyers for children to “seek to elicit in a developmentally appropriate manner the child’s expressed objectives of representation”); TEX. FAM. CODE ANN § 107.003(1)(C) directs all court-appointed lawyers for children to “consider the impact on the child in formulating the attorney’s presentation of the child’s expressed objectives of representation to the court”); TEX. FAM. CODE ANN§ 107.004 directs the attorney ad litem, in a “developmentally appropriate manner” to “advise the child” and to “represent the child’s expressed objectives of representation and follow the child’s expressed objectives of representation during the course of the litigation if the attorney ad litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem”); TEX. FAM. CODE ANN§ 107.005(b) directs the amicus attorney to “in a developmentally manner ... with the consent of the child, ensure that the child’s expressed objectives of representation are made known to the court.”

58 See Charles C. Childress, Representing Abused or Neglected Children in Texas: Child Protection Litigation in Texas and the Role of the Child’s Attorney after September 1, 2003, for the University of Texas School of Law, Children’s Rights Clinic, Ad Litem Training (2004).
59 TEX. FAM. CODE ANN § 107.1(B).
60 ABA Abuse & Neglect Standards, supra, note 4, at A-3.
61 ABA Custody Standards, supra, note 5, at III-E (states that the lawyer “should seek to elicit and assess the child’s views.”)
62 See Jean Koh Peters, supra, note 24 at p.1.
63 AAML Custody Standards, supra, note 6, at 2.8 (directs the lawyer to “use terms and concepts comprehensible to a child of the child’s age and intellect.”)
64 ABA Custody Standards, supra, note 5, at III-E (directs the lawyer to “meet with the child, adapting all communications to the child’s age, level of education, cognitive development,
children should, at a minimum, know how to effectively communicate with children and have a basic knowledge of child development.

3. Duty to Interview the Child

The code specifically requires all court-appointed lawyers for children, within a reasonable time, to “interview … the child in a developmentally appropriate manner, if the child is four years of age or older. While this duty applies regardless of whether the lawyer has been appointed as an amicus attorney, an attorney ad litem or in the dual role, the Texas Family Code was amended in 2005 to require that attorneys ad litem appointed for children in DFPS/CPS cases “meet before each court hearing with: (1) the child, if the child is at least four years of age; or (2) the individual with whom the child ordinarily resides, including the child’s parent, conservator, guardian, …” (except as provided in Subsection (e)).

4. Duty to Inform the Child

The child should be advised about the lawyer’s role in the case as soon as possible. Many children are not sure what a lawyer is or why one has been involved. The child should be made to understand who the lawyer is and what the lawyer intends to do for the child. The facts that gave rise to the appointment should be discussed with the child, in order to give the child a sense of why the lawyer has been involved. Many children, particularly those who have been removed from their homes because of a child protective proceeding, believe that they have done something wrong. The lawyer should try to relieve the child of any misconception about his or her own culpability. The child should also be counseled about the subject matter of the litigation, the court system, the various phases of the litigation process, and what to expect during and after the legal process. 68

The Texas Family Code specifically requires an amicus attorney to “explain the role of the amicus attorney to the child” and to “inform the child that the amicus attorney may use information that the child provides in providing assistance to the court.” 69 It is important that the child whose position is in conflict with the amicus attorney’s determination of what is in the child’s best interests is not made to feel that his or her concerns and views have been ignored. This will take some thought and commitment on the part of the lawyer. The lawyer should make it clear to the child that the child’s concerns and opinions were seriously considered when the lawyer made his or her assessment of what was in the child’s best interests.

C. Texas Disciplinary Rule 1.02—Scope & Objectives of Representation

Texas Disciplinary Rule 1.02 provides that “a lawyer shall abide by a client’s decisions: (1) concerning the objectives and general methods of representation.” 70 However, this duty is subject to the responsibility to “take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.” 71

Reasonable members of the legal profession disagree about the effect of this rule as it relates to the court-appointed representation of children. 72 This is a

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68 ABA Abuse & Neglect Standards, supra, note 4, at B-1(5) (states that the lawyer should “[c]ounsel the child concerning the subject matter of the litigation, the child’s rights, the court system, the proceedings, the lawyer’s role, and what to expect in the legal process”); ABA Custody Standards, supra, note 5, at III-E (directs the lawyer to “inform the child about the court system, the proceedings, and the lawyer’s responsibilities”); ABA Custody Standards, supra, note 5, at Comment to III-E explains that 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.”)

69 TEX. FAM. CODE ANN.§ 107.005(b)(2) and TEX. FAM. CODE ANN.§ 107.005(b)(3).

70 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.02(a).

71 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.02(g).

72 MODEL RULES OF PROF’L CONDUCT, supra, note 2, at 1.14(a) (specifically requires that when “a client’s capacity to make adequately considered decisions in connection with
complicated issue that centers upon the capacity of these children, who are unable to depend upon their parents for guidance, to independently direct counsel. The last several decades have witnessed a great deal of scholarly debate throughout the nation about whether the lawyer for the child should advocate according to the child’s directions or whether the lawyer should determine the goal of representation and advocate what is in the child’s best interests.

1. Best Interest-Directed Model

Some argue that, because minors are not competent to make legally binding decisions and lack the capacity to enter into attorney-client relationships, the duty to be client-directed does not apply to child-clients. The commentary to Texas Disciplinary Rule 1.02 supports this position by conditioning the duty to abide by a client’s decisions upon the assumption that the “usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship.” 73 Proponents of this argument also point out that children who are the subjects of this type of litigation are always incapacitated due to their vulnerable position within the lawsuit and the fact that they cannot rely upon their parents for direction. 74

Prior to 1984, it was generally believed that an attorney appointed to represent a child in a family law case should be best interest-directed. The passage of the Child Abuse and Treatment Act (CAPTA) in 1974 codified this widely held view. 75 This federal act provides that, in order for states to qualify for financial assistance, the state shall provide “that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem … shall be appointed to represent the child in such proceedings. The act was amended in 1996 to clarify that the guardian ad litem is to “make recommendations to the court concerning the best interest of the child.” 76 Case law in Texas and throughout the country supports this position, by holding that lawyers appointed to represent children in family law cases are to be best interest-directed. 77

2. Child-Directed Model

Others argue that some children possess the maturity and competence required to enter into an attorney-client relationship. Proponents of this position argue that the function of a lawyer for a child is to pursue legal objectives based upon the direction of the child, if the child has the capacity to direct counsel. This approach requires the lawyer to make an initial determination about whether the child is of diminished capacity. 78 The Model Rules of Professional Conduct provide that “[i]n determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substance

a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client”); MODEL RULES OF PROF’L CONDUCT, supra, note 2, at 1.14(b) (provides that “the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client … ”); MODEL RULES OF PROF’L CONDUCT, supra, note 2, at Comment to 1.14(a) (states that the “normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor … maintaining the ordinary client-lawyer relationship may not be possible in all respects.”)

73 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at Comment 12 to 1.02.

74 MODEL RULES OF PROF’L CONDUCT, supra, note 2, at Comment 4 to 1.14 (states that in “matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.”)


77 Samara v. Samara, 52 S.W. 3d 455, 458 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (held that the duty of an attorney ad litem was to protect the best interests of a subject child.)

78 The ABA Abuse & Neglect Standards take the position that lawyers are to be directed by their child-clients, with little attention given to the issue of whether the child has the capacity to do so. The NACC Revised Abuse & Neglect Standards recognize that the ABA Abuse & Neglect Standards fail to provide realistic direction to a lawyer who represents a child who is not capable of directing counsel. These standards provide that when the child “cannot meaningfully participate in the formulation of the client’s position … the attorney shall substitute his/her judgment for the child’s and formulate and present a position which serves the child’s interests.” In this situation, the lawyer is directed to advocate per the child’s best interests, which these standards refer to as “substituted judgment.” The ABA Custody Standards provide that this disciplinary rule should be applied differently, based upon the situation at hand. These standards have created the following two roles for lawyers appointed to represent children: 1) the child’s attorney, who is to be directed by the child except in limited circumstances (similar to the ABA Abuse & Neglect Standards) and 2) the best interests attorney, who is to make a determination about what is in the child’s best interests and advocate accordingly.
fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.”

3. Approach Taken By Texas Family Code

Recognizing that a strict approach to either child-directed or best interest-directed advocacy does not offer sufficient protection to subject children, Chapter 107 of the Texas Family Code provides for and defines several roles for the child’s court-appointed representative. Whether a lawyer should be best interest-directed or child-directed depends upon the type of role that has been assigned by the court. Each role in which an attorney may serve includes aspects of both child-directed and best interest-directed advocacy. In 2005, Texas Family Code § 107.003(3)(A) was amended to make it clear that the lawyer for the child is entitled to “request clarification from the court if the role of the attorney is ambiguous.”

a. Amicus Attorney

Texas Family Code § 107.001(1) defines an amicus attorney as “an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child’s best interests rather than to provide legal services to the child.” The focus of this type of an appointment is upon the court’s need to be able to appoint a lawyer to assist it in rendering a decision that is in a subject child’s best interest. Texas Family Code § 107.005(a) provides that an amicus attorney “shall advocate the best interests of the child … and … in determining the best interests of the child … is not bound by the child’s expressed objectives of representation.” It is important to note that the Texas Family Code only allows these types of appointments in suits that are not filed by DFPS/CPS.

b. Attorney ad Litem

Texas Family Code § 107.001(2) defines an attorney ad litem as “an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.” Texas Family Code § 107.004(a)(2) provides that the “attorney ad litem appointed for a child shall, in a developmentally appropriate manner … represent the child’s expressed objectives of representation during the course of the litigation if the attorney ad litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem.”

i. Texas Disciplinary Rule 2.01—Advisor

Texas Disciplinary Rule 2.01 provides that “[i]n advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and

The duty to abide by a client’s decisions has been carved out of the role of amicus attorney, without regard to whether the child has the capacity to direct counsel. Therefore, no potential conflict exists between the child’s objectives and the lawyer’s determination about what is in the child’s best interests. This is the crux of the difference between an amicus attorney and an attorney appointed in the dual role.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is currently in the process of developing a uniform act on the representation of children in family law cases. While this uniform law is still in the drafting phase, in its current form, the act recognizes both a best interest attorney and a child’s attorney. The proposed act states that a best interest attorney, which is analogous to an amicus attorney in Texas, “provides legal services for the purpose of protecting the child’s best interest. Although the best interest attorney is not client directed, the attorney is nevertheless providing legal representation to the child as a lawyer.”

i. Texas Disciplinary Rule 2.01—Advisor

Texas Disciplinary Rule 2.01 provides that “[i]n advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and

The ABA Custody Standards define a best interests attorney as a “lawyer who provides independent legal services for the purpose of protecting a child’s best interest, without being bound by the child’s directives or objectives.”

ABA Custody Standards, supra, note 5, at II-B (2).

This uniform act is in the drafting stage.

TEX. FAM. CODE ANN.§ 107.001(2).

TEX. FAM. CODE ANN.§ 107.004(a)(2).
render candid advice.”  

As such, the attorney ad litem’s duty to advocate per the child’s objectives does not include “robotic allegiance” to each directive of the child.  

“As with any client, the child’s attorney may counsel against the pursuit of a particular position sought by the child.”  

Client-directed representation “involves the attorney’s counseling function and requires good communication between attorney and client.  

The goal of the representation is an outcome which serves the client, mutually agreed upon by attorney and client, following exploration of all available options.”  

ii. Substituted Judgment  

When the child is not competent to meaningfully participate in the formulation of his or her opinion, either because the child: (1) lacks sufficient maturity to understand and form an attorney-client relationship, (2) expresses objectives of representation that would be seriously injurious to the child, or (3) for some other reason is incapable of making judgments and communicating meaningfully, an attorney ad litem is authorized by Texas Family Code § 197.008 to take the protective action of using substituted judgment to advocate an appropriate position for the child.  

This concept of substituted judgment is new to Texas jurisprudence.  As will be discussed more fully below, the Texas Rules of Professional Conduct require an attorney to take protective action for a client who lacks legal competence, if the lawyer determines that such action should be taken to protect the client.  

However, the rules do not completely explain what form this action should take.  

The types of protective action that are specifically mentioned include: (1) a request for the appointment of a guardian or other legal representative for the client and (2) a request for other protective orders.  

The protective action of using substituted judgment is now specifically authorized when Texas Family Code § 107.008(a) conditions exist.  

Significantly, Texas Family Code § 107.008(a)(2) goes one step beyond the disciplinary rules, which only authorize protective action for a client whom the lawyer determines lacks legal competence.  

That is, the code authorizes substituted judgment for a competent child whose position “would be seriously injurious to the child.”  

iii. Attorney ad Litem No Longer To Be Directed By GAL  

Prior to September 2005, an attorney ad litem who used substituted judgment was mandated to look to the guardian ad litem, if one had been appointed, for direction about what to advocate.  

However, this section of the code was amended in 2005, to provide that the attorney ad litem is no longer bound by the guardian ad litem’s opinion about what is in the child’s best interests.  

While the attorney ad litem must consult with the guardian ad litem and ensure that the guardian ad litem’s opinion and the basis for any recommendation regarding the best interests of the child are presented to the court, the attorney ad litem may present a position to the court that the attorney determines will serve the best interests of the child.  

Reasonably appears advisable to do so in order to serve the client’s best interests.”)}

Id.  


Tex. Disciplinary R. Prof’l Conduct, supra, note 2, at 1.02(g), only authorize protective action for a client whom the lawyer determines lacks legal competence.  

Tex. Fam. Code Ann. § 107.008(c)(2003)(stated that an “attorney ad litem or attorney appointed in the dual role who determines that the child cannot meaningfully formulate the child’s expressed objectives of representation under Subsection (a) shall, if a guardian ad litem has been appointed for the child:: (1) consult with the guardian ad litem; and (2) present the child’s objectives of representation to the court based on the guardian ad litem’s opinion regarding the best interests of the child.”)
c. Dual Role

Texas Family Code § 107.001(4) defines dual role as “the role of an attorney who is appointed ... to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity.”

As such, the objectives of representation that an attorney appointed in a dual role must pursue combine child-directed and best interest-directed advocacy. The attorney is obliged to represent a competent child’s expressed objectives of representation, while representing the best interests of the child. It is important to note that the Texas Family Code only allows these types of appointments in suits that are filed by DFPS/CPS.

The Family Code expressly defines the roles of guardian ad litem and attorney ad litem to make it clear that the manner of determining the objectives of representation is distinct. This does not present a problem as long as the child’s position and the attorney’s determination of the child’s best interests coincide. However, in the event of a conflict, the attorney appointed in the dual role must take protective action. This may be in the form of using substituted judgment, if Texas Family Code § 107.008(a) conditions exist, or by requesting the appointment of a separate guardian ad litem.

D. Texas Disciplinary Rule 1.02(g)—Duty To Take Protective Action

Texas Disciplinary Rule 1.02(g) provides that a “lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”

The comment goes on to explain that this rule “requires a lawyer in some situations to take protective steps, such as seeking the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the clients best interests.”

The Model Rules of Professional Conduct explain that these protective measures “could include: consulting with family members, ... using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

1. Types of Protective Action Authorized by the Texas Family Code

Because this duty to take protective action is particularly important when representing children, the Texas Family Code specifically authorizes specific types of such action. These include the use of substituted judgment and a request for the appointment of a guardian ad litem. The type of protective action authorized in a particular situation depends upon the type of case and the nature of the appointment, as set out below:

a. Suits Filed by DFPS/CPS

In a child protective case, the lawyer appointed in the dual role who determines that protective action is necessary, may either: 1) use substituted judgment, if authorized by Texas Family Code § 107.008, or 2) request the appointment of a separate guardian ad litem, while continuing as the attorney ad litem.

Prior to 2003, a lawyer appointed in the dual role, who determined that the child’s objectives of representation were in conflict with the lawyer’s determination of what was in the child’s best interests, was required to withdraw as the guardian ad litem, continue to serve as the attorney ad litem, and request the appointment of a new guardian ad litem. While this action is no longer required, the lawyer in the dual role is nevertheless required to take some type of protective action in the event of a conflict, due to the lawyer’s duty to “represent the best interests of” the child.

On the other hand, the lawyer appointed as an attorney ad litem is not required to take protective action simply because he or she determines that a

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106 Tex. Disciplinary R. Prof’l Conduct, supra, note 2, at 1.02(g).
107 Tex. Disciplinary R. Prof’l Conduct, supra, note 2, at Comment to 1.02(g).
108 Model Rules of Prof’l Conduct, supra, note 2, at Comment 5 to 1.14.
110 Id.
conflict exists between the child’s objectives of representation and the lawyer’s determination of what is in the child’s best interests. The attorney ad litem is required to take protective action when he or she determines that the child “lacks legal competence” and that such action “should be taken to protect the client.”

This protective action may be in the form of either: 1) using substituted judgment, if authorized by Texas Family Code § 107.008, or 2) relying upon the guardian ad litem for protection.

b. Other Types of Family Law Suits

In other types of family law cases, the lawyer appointed as an amicus attorney is specifically required to take protective action. However, the lawyer appointed as an attorney ad litem is only required to take protective action when he or she “reasonably believes that the [child] client lacks legal competence and that such action should be taken to protect the client.” This action may be in the form of either: 1) using substituted judgment, if authorized by Texas Family Code § 107.008, or 2) requesting the appointment of an amicus attorney or a separate non-lawyer guardian ad litem, and withdraw from the case.

e. Texas Disciplinary Rule 1.05—Confidentiality of Information

Texas Disciplinary Rule 1.05 provides that “a lawyer shall not knowingly … reveal confidential information of a client or a former client” unless “the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Rule of Disciplinary Conduct, or other law.” The comment to this rule explains that the “lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g),” which mandates protective action for a client who lacks competence in certain situations.

Model Rule 1.14 clarifies that the duty to take protective action for a client who lacks legal competence may include “consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian … Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”

1. Approach Taken By Texas Family Code

The Texas Family Code has codified the rules of confidentiality with regard to the court-appointed representation of children in several places. As explained below, these rules differ to a certain extent, based upon the type of role that has been assigned by the court. However, the duty to report child abuse per the Texas Code Family is not affected by the fact that a lawyer has been appointed for the child, regardless of the role assigned. As a professional having “cause to believe” that a child has been or may be abused or neglected, or is a victim of sexual abuse, the attorney is required to make a report to the child abuse hotline within forty-eight hours of learning thereof. This duty to report is explicitly applicable to communications that would otherwise be privileged.

a. Amicus attorney

Although an amicus attorney is “not bound by the child’s expressed objectives of representation,” communications made between the child and the lawyer are nevertheless subject to certain protections. The Texas Family Code provides that the amicus attorney “may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the

113 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at 1.02(g).
114 TEX. FAM. CODE ANN.§ 107.005(a)(requires an amicus attorney to “advocate the best interests of the child.”)
115 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at 1.02(g).
116 TEX. FAM. CODE ANN.§ 107.021 (was amended in 2005, to make it clear that the court is only authorized to appoint “one of the following: (1) an amicus attorney; an attorney ad litem; or a guardian ad litem” in cases other than those filed by DFPS/CPS. As such, an attorney ad litem must withdraw from the case if the court appoints an amicus attorney or a non-lawyer guardian ad litem); TEX. FAM. CODE ANN.§ 107.021(a) (was amended in 2005, to make it clear that in a private termination case, the court must appoint one of either an amicus attorney or an attorney ad litem, “unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child’s interests.”)
117 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at 1.05.
118 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at Comment to 1.05.
119 MODEL RULES OF PROF’L. CONDUCT, supra, note 2, at 1.14 (b).
120 TEX. FAM. CODE ANN.§ 261.101.
121 TEX. FAM. CODE ANN.§ 261.101(c).
122 TEX. FAM. CODE ANN.§ 107.005(a).
best interests of the child.” 123 The ABA Custody Standards state that a “child’s communications with a 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.” 124 As such, the amicus attorney may use the information provided by the child as necessary to protect the child, but should not disclose that the source of the information was the child.

b. Attorney ad litem

The Texas Family Code defines an attorney ad litem as “an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.” 125 Clearly, communications between a competent child-client and the attorney ad litem are confidential. However, the issue becomes more complicated when the attorney ad litem determines that protective action should be taken on behalf of the child.

i. When Child Lacks Legal Competence

When the attorney ad litem is required to take protective action per Texas Disciplinary Rule of Professional Conduct 1.02(g), the lawyer is authorized by Texas Disciplinary Rule 1.05(c)(4) to “reveal confidential information … [w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.” 126 The comment to this rule specifically states that “the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g).” 127 As such, an attorney ad litem is authorized to reveal confidential information to the extent that is reasonably necessary to seek protection for a child when the lawyer determines that “the client lacks legal competence and that such action should be taken to protect the client.” 128 Therefore, an attorney ad litem may reveal the confidences of a child who lacks legal competence to a non-lawyer guardian ad litem in a suit filed by DFPS/CPS, when reasonably necessary.

ii. When Child is Competent

An attorney ad litem is not authorized to reveal confidential information, even if he or she determines that protective action is necessary, if the lawyer determines that the child is legally competent. As such, although the attorney ad litem is authorized to use substituted judgment when a competent child “continues to express objectives of representation that would be seriously injurious to the child,” he or she is not allowed to reveal the child’s confidences when doing so. 129 The safer route for the attorney ad litem may be to request that the court appoint an amicus attorney or a non-lawyer guardian ad litem for the child, while taking care not to disclose the reason for such request. In suits filed by DFPS/CPS, the attorney ad litem must take care, when consulting with the non-lawyer guardian ad litem, not to reveal the child’s confidences in this situation. In other types of suits, the attorney ad litem must withdraw from the case if a separate amicus attorney or non-lawyer attorney ad litem is appointed. 130

c. Dual role

The rules of confidentiality apply to an attorney appointed in the dual role to the same extent as they do to the lawyer appointed as an attorney ad litem. Because the lawyer appointed in the dual role has the dual responsibility of representing the child in the traditional sense and of representing the best interests of the child, he or she must take special care to ensure that protective action is taken when necessary. This is particularly important, as these types of appointments always involve action taken by DFPS/CPS, and no separate guardian ad litem has been appointed for the child. 131

i. When Child Lacks Legal Competence

When representing a child who lacks legal competence, the lawyer appointed in the dual role may either use substituted judgment or request the appointment of a non-lawyer guardian ad litem. As with an attorney ad litem, the lawyer in this situation is authorized to reveal confidential information to the extent that is reasonably necessary to seek protection.

123 TEX. FAM. CODE ANN. § 107.005(c).
124 ABA Custody Standards, supra, note 5, at V-B.
125 TEX. FAM. CODE ANN. § 107.001(2).
126 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.05(c)(4).
127 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at Comment to 1.05.
128 TEX. DISCIPLINARY R. PROF’L CONDUCT, supra, note 2, at 1.02(g).
129 TEX. FAM. CODE ANN. § 107.008(a)(2).
130 TEX. FAM. CODE ANN. § 107.021 allows the court to only appoint “one of the following: (1) an amicus attorney; an attorney ad litem; or a guardian ad litem” in cases other than those filed by DFPS/CPS. As such, an attorney ad litem who is required to take protective action, but is not authorized to use substituted judgment, must request the appointment of either an amicus attorney or a non-lawyer guardian ad litem, and withdraw from the case.
131 TEX. FAM. CODE ANN. § 107.022(1) prohibits a dual appointment in a suit other than one filed by DFPS/CPS.
for a child when the lawyer determines that “the client lacks legal competence and that such action should be taken to protect the client.” 132 If the lawyer requests the appointment of a separate non-lawyer guardian ad litem and continues as the child’s attorney ad litem, he or she is authorized to reveal the confidences of a child who lacks legal competence to a non-lawyer guardian ad litem, when reasonably necessary.

ii. When Child is Competent

When representing a competent child, the lawyer is not allowed to reveal confidences, even when protective action is required. As such, a lawyer who is authorized to use substituted judgment because the child “continues to express objectives of representation that would be seriously injurious to the child” is not allowed to reveal the child’s confidences. Rather than using substituted judgment for these children who are apt to be older, the safer route may be for the lawyer to request the appointment of a separate non-lawyer guardian ad litem, while continuing as the attorney ad litem. The lawyer must take care in this situation, however, not to reveal the child’s confidences to the new guardian ad litem.

F. Texas Disciplinary Rule 1.06—Conflict of Interest; General Rule

Texas Disciplinary Rule of Professional Conduct 1.06(b) provides that a “lawyer shall not represent a person if the representation of that person … involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer.” 133 The comment explains that this rule relates to the representation of multiple parties and states that a conflict of interest exists “if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, the other client.” 134 The comment further explains that “loyalty is an essential element in the lawyer’s relationship to a client … When more that one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 [dealing with confidentiality] and 1.09 [dealing with conflicts of interest with former clients].” 135 The effect of this rule upon court-appointed lawyers for children depends upon which type of appointment has been assigned by the court.

1. Amicus Attorney

Although the interests of multiple siblings may conflict due to differing needs and concerns, this situation should not present a problem for the amicus attorney. “Siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney [amicus attorney], because such attorney is not bound to advocate a child’s objectives. A Best Interests Attorney [amicus attorney] in such a case should report the relevant views of all the children … and advocate the children’s best interests … 136 However, because the amicus attorney is required to advocate “the best interests of the child,” a conflict could arise if the amicus attorney were to determine that a single outcome was not in each child’s best interests. 137

2. Attorney ad Litem

An appointment as an attorney ad litem presents unique challenges when siblings are involved. Because the objectives of these multiple child-clients may conflict, the lawyer may be required to “decline representation or withdraw from representing all of the children.” 138 Siblings may require separate attorneys, particularly if the lawyer is not authorized to use substituted judgment on behalf of one or several of the clients. 139 “Some diversity between siblings’ views and priorities do 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.’” 140

132 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at 1.02(g).
133 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at 1.06(b).
134 TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at Comment to 1.06(b).
135 Id.
136 ABA Custody Standards, supra, note 5, at Comment to V-A.
137 TEX. FAM. CODE ANN.§ 107.005(a).
138 ABA Custody Standards, supra, note 5, at IV-A(2) (states that 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.”)
139 AAML Custody Standards, supra, note 6, at Comment to 2.3 (states that the representation “of multiple clients in the same proceeding presents special concerns regarding conflicts of interest. Counsel should remain sensitive to the possibility that siblings may require separate counsel and that representing both an unimpaired and an impaired client in the same proceeding may result in a conflict of interest.”)
140 ABA Custody Standards, supra, note 5, at Comment to IV-A(2).
3. Dual Role

The same challenges that face an attorney ad litem appointed to represent multiple siblings exist for an attorney appointed in the dual role. However, the lawyer appointed in this capacity must be on the lookout not only for whether the objectives of the siblings conflict, but also for whether the same outcome is in each child’s best interests. Particularly if the lawyer is not authorized to use substituted judgment for one or several of the children, the lawyer may be required to “decline representation or withdraw from representing all of the children.” 141

G. Texas Disciplinary Rule 1.15—Declining or Terminating Representation

Texas Disciplinary Rule 1.15 provides that “a lawyer shall not withdraw from representing a client unless … a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement.” 142 As such, an attorney ad litem or an attorney appointed in the dual role may file a motion to withdraw if the child’s objectives of representation satisfy this condition for withdrawal. Because an amicus attorney is not bound by the child’s expressed objectives of representation, this condition for withdrawal would not apply.

H. Texas Disciplinary Rule 3.05—Maintaining Impartiality of Tribunal

Texas Disciplinary Rule 3.05 provides that a “lawyer shall not … communicate or cause to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter …” 143 This rule applies to all court-appointed lawyers for children, regardless of the role assigned by the court. 144 Because court-appointed lawyers are often referred to as “arms of the court,” some confusion exists about the attorney’s authority to engage in ex parte communications. 145 However, the reference to court-appointed lawyers as “extensions of the court” refers to the duty to perform services that would assist the court in rendering a decision that is in a particular child’s best interest, rather than to an authorization for these attorneys to participate in unethical communications with the court.

I. Texas Disciplinary Rule 4.02—Communication with One Represented by Counsel

Texas Disciplinary Rule 4.02 provides that “a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” 146 The Texas Family Code explicitly makes the duty of an attorney ad litem and an amicus attorney to “interview each person who has significant knowledge of the child’s history and condition, including any foster parent of the child; and … the parties to the suit” subject to Rule 4.02. 147 As such, all court-appointed lawyers for children must get the consent of any lawyer representing such a person before conducting the required interview. 148

J. Texas Disciplinary Rule 4.03—Dealing with Unrepresented Person

Texas Disciplinary Rule 4.03 provides that when “dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or otherwise cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” 146

141 ABA Custody Standards, supra, note 5, at IV-A(2).
142 TEX. DISCIPLINARY R. PROF’L CONDUCT , supra, note 2, at 1.15.
143 TEX. DISCIPLINARY R. PROF’L CONDUCT , supra, note 2, at 3.05(b).
144 ABA Custody Standards, supra, note 5, at Comment to V-F (states that when the best interests attorney brings facts to the court’s attention regarding a proposed settlement, this should not be done by ex parte communication’); although no Texas case has specifically dealt with this issue, the Wyoming Supreme Court has held that an attorney appointed as a “guardian ad litem may not engage in ex parte communications with the trial court.” Moore v. Moore, 809 P.2d 261 (Wyo. 1991); ABA Custody Standards, supra, note 5, at III (indicates that the ‘general ethical duties’ that apply to all lawyers also apply to court-appointed lawyers for children. This would include the duty not to engage in ex parte communications with the court.)
145 Delcourt v. Silverman, 919 S.W. 2d 777, 782 (Tex. App.—Houston [14th] 1996, writ denied) (in custody case, the court held that “when judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment … [A] party is entitled to absolute immunity when the party is acting as … an ‘arm of the court.’ ”)
146 TEX. DISCIPLINARY R. PROF’L CONDUCT , supra, note 2, at 4.03(a).
147 TEX. FAM. CODE ANN.§ 107.003(1)(A).
148 Because children are not usually named parties to these types of law suits and because an amicus attorney does not represent the child in the traditional sense, prior to 2005, there was confusion about whether an attorney representing one of the named parties was required to obtain consent from the attorney ad litem or the amicus attorney before interviewing the child. In 2005, TEX. FAM. CODE ANN.§ 107.003(3)(C) (was amended to make it clear that consent must be obtained by an attorney ad litem for a child or an amicus attorney, in order for another attorney to interview the child.)
imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented party misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”¹⁴⁹ The comment to this rule goes on to explain that an “unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.”¹⁵⁰

All court-appointed lawyers for children must take special care when dealing with unrepresented parties, regardless of the role that has been assigned by the court. The lawyer must ensure that these parties understand that he or she is not disinterested, and that his or her loyalty is to the child. Although an amicus attorney is not bound by the child’s expressed objectives of representation, he or she is required to “advocate the best interests of the child,” and must ensure that unrepresented parties understand this to be the case.¹⁵¹ The Texas Family Code explicitly makes the duty of an attorney ad litem and an amicus attorney to “interview each person who has significant knowledge of the child’s history and condition, including any foster parent of the child; and … the parties to the suit” subject to Rule 4.03.¹⁵²

K. Texas Disciplinary Rule 4.04—Respect of Rights of Third Parties

Texas Disciplinary Rule 4.04 provides that when “representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third party, or use methods of obtaining evidence that violate the legal rights of such a person.”¹⁵³ The Texas Family Code explicitly makes the duty of an attorney ad litem and an amicus attorney to “interview each person who has significant knowledge of the child’s history and condition, including any foster parent of the child; and … the parties to the suit” subject to Rule 4.04.¹⁵⁴ As such, all court-appointed lawyers for children are required to comply with this rule, regardless of the role assigned by the court.

¹⁴⁹ TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at 4.03
¹⁵⁰ TEX. DISCIPLINARY R. PROF’L. CONDUCT, supra, note 2, at Comment to 4.03.
¹⁵¹ TEX. FAM. CODE ANN. § 107.005(a).
¹⁵² TEX. FAM. CODE ANN. § 107.003(1)(A).
¹⁵³ TEX. FAM. CODE ANN. § 107.003(1)(A).

III. DUTIES IMPOSED BY OTHER AUTHORITY

Certain aspects of the role of the lawyer for the child differ significantly from that of a lawyer representing an adult client, and are not dealt with in the Texas Disciplinary Rules of Professional Conduct. These duties, which are discussed below, are set out in the Texas Family Code and in the national standards that have been referred to throughout this article.

A. Duty to Mitigate Conflict Caused by Litigation

The court-appointed lawyer for the child’s duty includes more than advocating a particular position or assisting the court in rendering a proper decision. Unlike a lawyer’s responsibility to an adult client, the duty to the child includes advancing the child’s interests by protecting him or her from unnecessary conflict caused by the process of the litigation. It includes encouraging the parties to understand that the legal system itself can be a source of stress and trauma for the child, and that attempts should be made to resolve the case expeditiously and in the least adversarial manner possible.¹⁵⁵ This duty is arguably the most important function that the lawyer for the child provides. Undoubtedly, the lawyer’s actions during this phase of the lawsuit have the greatest potential for truly improving the child’s situation.

1. Encourage Alternative Dispute Resolution & Take Action to Expedite the Proceeding

The Texas statute codifies this duty to mitigate the conflict caused by the process of the litigation by requiring the lawyer to: 1) take any action consistent with the child’s interests that the attorney considers necessary to expedite the proceedings, and 2) “encourage settlement and the use of alternative forms of dispute resolution.”¹⁵⁶ The AAML Custody Standards expound upon this duty by providing that counsel “take appropriate steps to de-escalate all conflict in the litigation. Counsel should try … (a) to resolve the dispute in the least contentious manner, (b) to resolve the dispute in the most expeditious manner; and (c) to expose the child to as little of the

¹⁵⁴ AAML Custody Standards, supra, note 6 at 2.6 (states that “it is appropriate for counsel to advance the interests of the child by protecting him or her from unnecessary conflict. Counsel should be ever mindful that the prosecution of the litigation often can be harmful to children of any age. For example, counsel should try to minimize the number of interviews to which a child may be exposed as a result of the investigations or expert evaluations.”)
¹⁵⁵ TEX. FAM. CODE ANN. § 107.003(1)(G); TEX. FAM. CODE ANN. § 107.003(1)(H).
controversy as possible.” 156 A settlement conference should therefore be scheduled a soon as possible, after a legal theory of the case has been developed. Mediation should be discussed and encouraged early in the process, before the parties become more alienated and entrenched in their positions. If the case must proceed to trial, the lawyer should attempt to reduce case delays and set the case for trial as soon as possible. 157

B. Duty To Seek Appropriate Services

The court-appointed lawyer for the child should seek extra-judicial services for the child as are needed to protect the child’s interests and address the child’s needs. These services may include therapeutic counseling, educational instruction, anger management classes, health services or substance abuse treatment programs. Mentoring programs, such as Big Brothers/Big Sisters, recreational opportunities that develop social skills and self-esteem, educational support programs, and volunteer opportunities should also be identified. 158 Particular attention should be paid to ensure that a child with special needs receives appropriate services to address his or her disabilities. 159 The lawyer should also identify family members, friends, neighbors or teachers with whom the child should maintain contact. This is particularly important in child protective cases that have resulted in the child’s removal from the home. 160

156 AAML Custody Standards, supra, note 6, at Comment to 2.6.

157 TEX. FAM. CODE ANN.§ 107.003(3)(B) (was amended in 2005 to provide that an attorney ad litem and an amicus attorney is entitled to “request a hearing or trial on the merits.”)

158 ABA Abuse & Neglect Standards, supra, note 4, at B-1(7) (requires the lawyer to “[i]dentify appropriate family and professional resources for the child”); ABA Abuse & Neglect Standards, supra, note 4, at C-4 (directs the lawyer to “seek appropriate services (by court order if necessary) to access entitlements, to protect the child’s interests and to implement a service plan.”)

159 ABA Abuse & Neglect Standards, supra, note 4, at C-5 (states that the lawyer “should assure that a child with special needs receives appropriate services to address the physical, mental or developmental disabilities [of the child]. These services may include, but should not be limited to: (1) Special education and related services; (2) Supplemental security income (SSI) to help support needed services; (3) Therapeutic foster or group home care; and (4) residential/in-patient and out-patient psychiatric treatment.”)

160 ABA Abuse & Neglect Standards, supra, note 4, at Comment to B-1(7) (states that the lawyer should “identify family members, friends, neighbors, or teachers with whom the child feels it is important to maintain contact.”)

In the majority of cases, the most effective way to address the child’s needs is by focusing on the needs of their parents. In high conflict custody cases, the family should be referred to cooperative parenting classes and counseling services to assist them in learning to work together for their children’s benefit. Substance abuse, anger management and other counseling services should also be recommended when appropriate. 161

While in cases filed by DFPS/CPS, the case worker is primarily responsible to initiate services for the child and the family, the lawyer for the child should monitor this activity to ensure that the child’s interests are being adequately protected. 162 The lawyer for the child should work with members of the family (upon the consent of each party’s lawyer) to assist them in implementing the service plan that has been developed by DFPS/CPS. In other family law cases, the lawyer should develop an informal service plan. If informal attempts to refer the child to appropriate services fail, the lawyer should request, by proper motion, that such services be court-ordered. 163

C. Duty to Use Objective Criteria

As has been discussed above, there are times when all court-appointed lawyers for children are authorized to advocate per a child’s best interests. By definition, amicus attorneys and attorneys appointed in the dual role are required to advocate as such. 164 An attorney ad litem is also authorized to advocate per a child’s best interests when using substituted judgment. 165

When advocating per this standards, it is critical

161 ABA Abuse & Neglect Standards, supra, note 4, at Comment to C4 (states that the lawyer should “identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law.”)

162 ABA Abuse & Neglect Standards, supra, note 4, at B-1(7) (requires the lawyer to “[i]dentify appropriate family and professional resources for the child”); ABA Abuse & Neglect Standards, supra, note 4, at C-4 (directs the lawyer to “seek appropriate services (by court order if necessary) to access entitlements, to protect the child’s interests and to implement a service plan.”)

163 ABA Abuse & Neglect Standards, supra, note 4, at Comment to C4 (states that the “lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal requests are unsuccessful, the lawyer should file a motion to bring the matter before the court.”)

164 TEX. FAM. CODE ANN.§ 107.001(1) and TEX. FAM. CODE ANN.§ 107.001(5).

165 TEX. FAM. CODE ANN.§ 107.008(c)(2).
that the lawyer use extreme caution to be as objective as possible.

Because the concept of “best interests” is subjective, it is not readily subject to verifiable examination. One of the major criticisms of best interest advocacy is that it allows the lawyer unlimited discretion in determining the goals of litigation and thus, without the guidance of an active client, permits the lawyer to substitute his or her values for the child’s. Therefore, it is imperative that any lawyer who advocates per a child’s best interests exercise caution to use objective criteria to the greatest extent possible.  

The NACC Abuse and Neglect Standards specifically require the court-appointed lawyer to use objective criteria to the extent possible, including, but not limited to: 1) a determination of the child’s circumstances through a full and efficient investigation, 2) an assessment of the child at the moment of the determination, 3) an examination of each option in light of the two child welfare paradigms; psychological parent and family network; and 4) a utilization of medical, mental health, educational, social work and other experts.

D. Duty to Provide Closure

When the representation ends, it is imperative that all court-appointed lawyers for children explain to the child that the representation is ending and how the child can obtain further assistance, should it become necessary. It is important for the child to experience closure and to understand why the relationship is ending.

IV. CONCLUSION

A lawyer cannot simply apply the ethical duties that apply to the representation of an adult client to the representation of a child. While ethical responsibilities apply to the extent possible, they must be adapted to account for the child’s minority. The Texas Disciplinary Rules of Professional Conduct do not offer sufficient instruction about how to ethically represent children. However, the Texas Family Code offers guidance, by setting out specific duties that are required of lawyers appointed to represent children. These must be studied in conjunction with the Texas Disciplinary Rules of Professional Conduct and the national guidelines that are referred to in the code. The Texas Family Code now makes it clear that the duties set out therein are to be taken seriously. The code was amended in 2005, to provide that “an attorney ad litem who fails to perform the duties required by Sections 107.003 and 107.004 is subject to disciplinary action.”

166 ABA Custody Standards, supra, note 5, at V-F (states that 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”); ABA Custody Standards, supra, note 5, at Comment to V-F (states that the best interests attorney “should base the child’s needs and interests, and not merely on the lawyer’s personal values, philosophies, and experiences”); NACC Revised ABA Abuse & Neglect Standards, supra, note 4, at B-4(2) [states that best interests advocacy “must be accomplished through the use of objective criteria, rather than solely on the life experience or instinct of the attorney.”]

167 NACC Revised ABA Abuse & Neglect Standards, supra, note 4, at B-4(2).

168 NACC Revised ABA Custody Standards, supra, note 5, at III-J (states that when the “representation ends, the lawyer should inform the client in a developmentally appropriate manner”; NACC Revised ABA Abuse & Neglect Standards, supra, note 4, at F-5 (states that the lawyer “should discuss the end of the legal representation and determine what contacts, if any, the child’s attorney and the child will continue to have.”)

169 NACC Revised ABA Abuse & Neglect Standards, supra, note 4, at Comment to F-5 (states that when “the representation ends, the child’s lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.”)

170 TEX. FAM. CODE ANN. § 107.0045.