

# Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases

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*Children should have competent counsel representing their interests in all significant judicial proceedings that affect their lives.<sup>1</sup>*

## I. Introduction

On August 12, 2003, the American Bar Association (ABA) adopted Standards of Practice for Lawyers Representing Children in Custody Cases (*Custody Standards*).<sup>2</sup> These *Custody Standards* had been unanimously approved by the Council of the ABA Family Law Section on May 2, 2003, after a nearly ten-year drafting process. The *Custody Standards*, which apply to children in all types of custody proceedings, except abuse and neglect cases initiated by a government entity, answer the widespread call for lawyers to represent children<sup>3</sup> and for a “functional, uniform,

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1. ABA STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, AMERICA'S CHILDREN *STILL AT RISK*, 19, 209 (2001) [hereinafter *CHILDREN STILL AT RISK*].

2. American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 *FAM. L.Q.* 129 (2003).

3. See Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 *FAM. L.Q.* 53 (1992); Monroe L. Inker & Charlotte Anne Perretta, *A Child's Right to Counsel in Custody Cases*, 5 *FAM. L.Q.* 108 (1971) (arguing constitutional right to counsel). See also Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 *CREIGHTON L. REV.* 757 (1990); Howard Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 *PEPP. L. REV.* 255 (1991); Tari Eitzen, *A Child's Right to Legal Representation*, 19 *FAM. L.Q.* 53 (1985); Shannan L. Wilber, *Independent Counsel for Children*, 27 *FAM. L.Q.* 349 (1993).

objective and principled set of standards to help attorneys . . . represent child clients.”<sup>4</sup> If implemented by the courts and bar, they should greatly improve representation for children affected by custody disputes.

Currently, a lawyer appointed to represent a child in a custody case may be expected to wear one or more hats, sometimes simultaneously—as an attorney for a child client,<sup>5</sup> as a guardian ad litem who is considered an officer of the court,<sup>6</sup> or in some hybrid capacity.<sup>7</sup> Frustrations with the lack of a clear definition of their role(s),<sup>8</sup> inadequate training, meager compensation, and high caseloads<sup>9</sup> have led to needless confusion and wasted expenses. More importantly, far too many children have been left without an effective voice in custody cases.<sup>10</sup> Within the past decade, some court rules or bar association guidelines have been developed for

4. Michael D. Drews & Pamela J. Halprin, *Determining the Effective Representation of a Child in Our Legal System*, 40 FAM. CT. REV. 383, 384 (2002). See also Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L. J. 299, 305 (1998) (contending that “courts and legislatures have abdicated their responsibilities . . . by failing to clearly identify permissible and impermissible actions by lawyers for children when performing their duties.”).

5. See *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998) (child’s attorney is an attorney, advocating on behalf of a client); *Schult v. Schult*, 669 A.2d 134 (Conn. 1997) (attorney for the child may advocate a different position than recommended by guardian ad litem). See ANN M. HARALAMBIE, *THE CHILD’S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES* (ABA 1993); Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Client Relationship*, 26 LOY. U. CHI. L. J. 259 (1995); Wilber, *supra* note 3.

6. See *Miller v. Miller*, 677 A.2d 64 (Me. 1996) (guardian ad litem is advocate for the child’s best interests); *In re Marriage of Barnhouse*, 765 P.2d 610 (Colo. Ct. App. 1988), *cert. denied*, 490 U.S. 1021 (1989) (attorney appointed for the child should present all evidence regarding child’s best interests, not just repeat the child’s wishes); *In re Marriage of Rolfe*, 699 P.2d 79 (Mont. 1985) (attorney obligated to advocate child’s best interests where child’s wishes clash with those interests).

7. See *Leary v. Leary*, 627 A.2d 30 (Md. Ct. Spec. App. 1993) (trial court should clearly define the duties of the guardian ad litem at the time of the appointment so as to minimize confusion as to whether that duty is “pure representation, pure investigation, or a combination.”). See also Peter Margulies, *The Lawyer as Caregiver: Child Client’s Competence in Context*, 64 FORDHAM L. REV. 1473, n. 1. (1996) (listing some of the literature on lawyering for children since 1976).

8. Guggenheim, *supra* note 4, at n. 37 (indicating that only twelve states give guidance as to the duties to be performed). See Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUBLIC INT. L. 106 (2002); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998); Dana E. Prescott, *The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529 (2000).

9. CHILDREN STILL AT RISK, *supra* note 1, at 211, n. 2 (citing ABA Center on Children and The Law, *Court Improvement Progress Report* (Mark Hardin ed., 1998) (one of the main obstacles courts are facing is an insufficient number of attorneys to handle high caseloads).

10. See Inker & Perretta, *supra* note 3; Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation of Children*, 59 N.Y.U. L. REV. 76 (1984); Elrod, *supra* note 3.

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guardians ad litem and lawyers representing children in custody cases.<sup>11</sup> Unfortunately, few states have statutes on this topic, and attorney practice rules vary widely regarding the differing roles lawyers are expected to play in these cases.<sup>12</sup> These *Custody Standards* clarify the roles lawyers should play in representing children and, hopefully, will serve as a model for states looking to upgrade representation for children in custody disputes.

## II. Reaching Consensus on Standards for Lawyers for Children

The story of how the current *Custody Standards* made it to the American Bar Association House of Delegates in August 2003 is a tribute to collaboration, compromise, and consensus building. Views ranged from allowing total judicial discretion to make appointments in only the rarest of circumstances to appointing a lawyer in every case in which the child's custody is in issue. That any work product made it to final approval reflects the dedication of numerous lawyers and judges whose collective vision was to provide children an effective voice in matters affecting their custody.

### A. History of American Bar Association Involvement

The American Bar Association (ABA) has long supported efforts to improve the availability, quality, stature and professionalism of lawyers representing children. There are several groups within the American Bar Association with a strong interest in children's issues, including the Family Law Section (1958); the ABA Center on Children and the Law (1978); the Litigation Section Task Force on Children (1991); the Steering Committee on the Unmet Legal Needs of Children (1993); and, most

11. See American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIMONIAL. L. 1 (1995) [hereinafter *AAML Standards*]. See also Kan. Sup. Ct. Adm. Order No. 100 (2002); N.Y. State Bar Assoc., Committee on Juvenile Justice and Child Welfare, *Law Guardian Representation Standards* (1988); N.Y. State Bar Assoc. Comm. on Children and the Law, *Law Guardian Representation Standards, Vol. II Custody Cases* (1999). See also Marie Walton & Donna Schmalberger, *Standards of Practice for Guardians ad Litem* 21(9), COLO. LAWYER (1992).

12. See APPENDIX, ABA CHILD CUSTODY PRO BONO PROJECT, APPOINTMENT LAWS IN DIVORCE CASES (Aug. 2003) (showing thirty-nine states leaving appointment exclusively to the discretion of the judge), also available at [www.abachildcustodyproject.org](http://www.abachildcustodyproject.org). See also U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION (1990) (finding considerable variation in the way states define guardian ad litem). There is also some confusion as to when an attorney or guardian ad litem should be appointed. See *Wilkinson v. Declue*, 890 S.W.2d 774 (Mo. Ct. App. 1995) (court should have appointed a guardian ad litem for child when father alleged abuse by the mother); In the Matter of the Paternity of A.R.R., 634 N.E.2d 786 (Ind. Ct. App. 1994) (court not required to appoint guardian ad litem or to order home study merely at request of mother).

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recently, the Child Custody Pro Bono Project (2001).<sup>13</sup> In addition, the ABA has adopted several policies encouraging child representation.<sup>14</sup> In 1993, a Presidential Working Group on Children and Families released an action plan for the future of children that called for greater emphasis on representation for children.<sup>15</sup>

In 1996, upon the recommendation of the Family Law Section, the American Bar Association adopted *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Abuse and Neglect Standards)*.<sup>16</sup> In 2000, the ABA Family Law Section sponsored the Wingspread Conference on High Conflict Custody—Reforming the System for Children. The conferees, which included lawyers, judges, psychologists, social workers, and court service officers, concluded:

As a general rule, in high-conflict cases a child should have a lawyer or representative who is independent of the parents and their lawyers. . . . Taking into account lawyer's ethical rules, jurisdictions should define and describe the roles to be played by the different legal representatives of children, distinguishing . . . between the role of a guardian ad litem and the child's lawyer. Jurisdictions should adopt appointment criteria and performance standards for appointment of children's representatives.<sup>17</sup>

13. Other ABA sections, such as General Practice and Individual Rights and Responsibilities, also have committees on children's issues.

14. See, e.g., IJA/ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1980) (enhancing legal representation provided by court-appointed lawyers for children); Counsel for Children Enhancement (1987); ABA Resolution Supporting U.N. Convention on the Rights of the Child (1991) (mandating child of sufficient maturity have a voice in actions concerning child's custody); ABA Guardians Ad Litem (1992) (children in need of care should have appointed attorney and guardian ad litem and guidelines should be developed to aid judges in determining when to appoint counsel); ABA RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995) (stressing importance of quality representation for child clients). The ABA also has policy supporting Court Appointed Special Advocates (Aug. 1989); Bar Association and Attorney Action (Feb. 1984) (encouraging establishment of guardian ad litem programs); Bar and Attorney Involvement in Child Protection Cases (Aug. 1981) (encouraging lawyers to work within the bar to assure quality representation of children).

15. ABA PRESIDENTIAL WORKING GROUP ON CHILDREN AND FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 7 (1993) (meaningful protection of children's rights requires that children be represented by highly skilled counsel at critical stages of critical proceedings. Competent professional representation in proceedings that involve children is vital in a system where decisions about children's rights and liberties and those of their parents are decided).

16. See *Proposed Standards for Representing Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995) [hereinafter *Abuse and Neglect Standards*]. The drafting committee consisted of myself as chair, Gail Baker, Georgia Creel, Howard Davidson, Katherine Hunt Federle, Ann Haralambie, and Jack Sampson.

17. Wingspread Conferees, *High Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589, 596 (2001) [hereinafter *Reforming the System for Children*]. In the spirit of interdisciplinary cooperation, the report and action plan of the international multi-disciplinary conference sponsored by the American Bar Association Family Law Section and the Johnson Foundation is also printed at 39 FAM. CT. REV. 146 (2001).

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The ABA Steering Committee on the Unmet Legal Needs of Children in 2001 authored a report—*America’s Children Still at Risk*—which made the point:

Children routinely appear in court without the benefit of legal counsel in the same situations where rational adults with resources would retain a lawyer. Lack of legal counsel is particularly devastating to children, who often cannot express their own views and may not fully understand the proceedings or the choices they are making. Children need representation by knowledgeable and committed counsel in matters that affect them. . . .<sup>18</sup>

Most recently, the ABA Child Custody Pro Bono Project, jointly sponsored by the Family Law Section and the ABA Standing Committee on Pro Bono and Public Service, has taken a strong lead in child representation issues. The Project has surveyed the laws in all fifty states on child custody representation practices, compiled information on best practices, trained lawyers in representing children, and awarded grants to pro bono child representation projects.<sup>19</sup> The adoption of the *Custody Standards* now adds an ABA-recommended set of guidelines to help ensure that children receive adequate representation.

*B. The Drafting Process*

The “official”<sup>20</sup> drafting process for the *Custody Standards* spanned a full decade. In 1994, the Family Law Section, upon the recommendation of Tim Walker, authorized creation of a committee to study standards of practice for lawyers in both divorce and juvenile court cases. Then Connecticut attorney Ellen Effron chaired an initial meeting of over forty persons attending a Family Law Section meeting who were interested in participating in the project. At a second meeting in Miami, Florida, in Fall 1994, the number of persons interested in attending day-long drafting meetings dwindled to about fourteen. It soon became apparent, however, that there was a need for two committees—one to draft standards for abuse and neglect cases and the other to draft standards for custody cases.<sup>21</sup> The former committee presented the *Abuse and Neglect Standards*

18. CHILDREN STILL AT RISK, *supra* note 1, at 18.

19. See APPENDIX.

20. I say official, because in 1992, a small “unofficial” group composed of Mark Sallus, Jay Elliott, Gail Baker, Howard Davidson, and I met in San Diego at the ABA Annual Meeting and started to work on standards for guardians ad litem in child in need of care cases. We continued our work until Tim Walker asked the Family Law Section to create committees to work on standards. Tim had hoped to have the standards finished for use during his year as chair of the section, 1995–1996.

21. Ellen Effron remained chair of the committee drafting standards for custody cases until 1997; I became chair of the committee drafting standards for abuse and neglect cases.

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to the Family Law Council in August 1995, and as noted earlier, they were adopted by the American Bar Association in February 1996.<sup>22</sup>

## 1. THE PRINCIPLES—PHASE ONE

The custody committee, not wanting to simply duplicate a set of custody representation standards proposed by the American Academy of Matrimonial Lawyers,<sup>23</sup> also had a philosophical dispute about whether there was a need to appoint lawyers for children in most cases. The committee then opted to work on principles of appointment rather than standards for lawyers.<sup>24</sup> In April 1996, Ellen Effron and University of Minnesota Law Professor Robert Levy presented for discussion a thirty-four page draft of *Principles Governing Appointment of Lawyers and Guardians Ad Litem for Children in Divorce-Custody Disputes* to the Family Law Council in Williamsburg, Virginia. No action was taken as Family Law Section Council members were concerned that the draft *Principles* left too much discretion to judges and offered too little direction to lawyers.<sup>25</sup> In noting the difficult issues involved in drafting principles, the reporter recognized, “We doubt that any representative group of lawyers, judges and legislators is likely to reach consensus on these issues.”<sup>26</sup>

22. *The Abuse and Neglect Standards*, *supra* note 16, served as the basis for a conference at Fordham Law School in December, 1995, which dealt with a variety of issues concerning the representation of children in all types of cases. The results of that conference are printed at *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1279 (1996). See also JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (1997) (building on *The Abuse and Neglect Standards* and Fordham conference).

23. See *AAML Standards*, *supra* note 11. The AAML Standards provide that courts should not routinely assign counsel or guardians ad litem for children; that a person appointed should be trained; and that the court should specify the tasks expected. The most controversial part, however, is the presumption that children under the age of twelve cannot direct the actions of their attorneys; therefore they are “impaired” and are not entitled to counsel. See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 *J. AM. ACAD. MATRI. LAW.* 57 (1995).

24. Initial members of the custody drafting committee included Ellen Effron as chair, Frank Cervone, David Hofstein, Maury Kutner, the Honorable Howard Lipsey, and Minnesota Law School Professor Robert Levy, who served as Reporter. Bob Schwartz and other attorneys also attended some meetings.

25. Standards of Practice Committee, *Principles Governing Appointment of Lawyers and Guardians ad Litem For Children in Divorce-Custody Disputes*, Discussion Draft, dated May 22, 1996. For example, Principle 1 stated: “A representative for the child, whether an attorney or guardian ad litem, should not be appointed in every custody or visitation proceeding.” *Id.* at 5. Principle 1.1: “Specific legislation or court rules should govern the circumstances under which a representative should be appointed.” *Id.* at 12. Principle 1.2: A representative should not be appointed . . . unless and until custody of or visitation with the child is the subject of an actual contest between the adult litigants, or (b) unless the judge has some reasonable basis for believing the family’s circumstances clearly require appointment of a lawyer . . .” *Id.* at 13.

26. *Id.* at 3.

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## 2. THE PRINCIPLES—PHASE TWO

Following discussions at the Family Law Section Council meeting at the 1996 ABA annual meeting in Orlando, Frank Cervone, Director of the Support Center for Child Advocates, and New York University Law Professor Marty Guggenheim met with members of the original drafting committee, representatives of the National Council of Juvenile and Family Court Judges, and others in New York to discuss the principles.<sup>27</sup> Ellen Effron submitted a “final committee draft” in July 1997, which indicated it was a joint product of the American Bar Association and the National Council of Juvenile and Family Court Judges. The now eight page *Principles for Appointment of Representatives for Children in Custody and Visitation Proceedings*<sup>28</sup> was to be placed on the Family Law Council agenda for its fall meeting in Phoenix, Arizona.

Although the National Association of Juvenile and Family Court Judges went forward and formally adopted the principles,<sup>29</sup> opposition to the draft surfaced from several places, both within and outside the ABA, almost immediately. First, the *Principles* were perceived to be phrased as negatives with the underlying principle being that children in these cases do not need lawyers. For example, the second principle was “A judge should not appoint a representative for a child unless the failure to make such an appointment would impede the judge’s capacity to decide the case properly, the failure to make such an appointment would risk harm to the child or the child’s voice should become a more prominent part of the case.”<sup>30</sup> Second, the National Association of Counsel for Children was preparing to come out in strong opposition, arguing that the principles did not adequately cover the lawyer as advocate and violated the ABA Model Rules of Professional Conduct.<sup>31</sup> Some of the other criticisms of the 1997 draft were: (1) it was difficult to figure out when the principles applied; (2) the amount of judicial discretion was incredibly expansive; (3) the draft addressed the functions of nonlawyer representatives, which many felt a lawyer organization should not do; and (4) there was a perceived

27. Frank Cervone, Ellen Effron, Hofstra Law Professor John DeWitt Gregory, Marty Guggenheim, Krista Johns and Bob Levy, and Wisconsin Law Professor Margo Melli were among the participants at the New York meeting.

28. Principles of Practice Committee for Attorneys and Guardians Ad Litem in Divorce/Custody Cases, Final Draft Version, dated July 10, 1997.

29. Guggenheim, *supra* note 4, at n. 10.

30. Draft of Principles, dated July, 1997. *See also* Guggenheim, *supra* note 4, at 323 (“Both the AAML Standards and the Principles were crafted from the view that appointment of lawyers to represent children is not invariably good. . . appointment should not be made unless a special reason exists.”).

31. Fax dated October 8, 1997, from Ann Haralambie of a draft NACC Position on Proposed ABA/NCJFCJ Principles for Appointment of Representatives for Children in Custody and Visitation Proceedings, indicating strong opposition.

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failure to capture the complexity of family relationships.<sup>32</sup> With so many big issues unresolved, the *Principles* were deleted from the Family Law Council agenda.

### 3. THE PRINCIPLES—PHASE 3

After the fall of 1997, Frank Cervone led the committee to continue work on the *Principles*. On March 25, 1998, Frank sent a letter and comprehensive draft outlining all of the criticisms and recommendations to the original custody drafting committee, other members of the Family Law Section, the ABA Steering Committee on the Unmet Legal Needs of Children, the ABA Litigation Task Force on Children, the National Council of Juvenile and Family Court Judges, the National Association of Counsel for Children, and a few other child advocates.<sup>33</sup>

On July 31, 1998, at the Family Law Section Council meeting during the ABA annual meeting in Toronto, Marty Guggenheim and Frank Cervone presented *Principles for Appointment of Representatives for Children in Custody Proceedings* (Round 2) based on comments received from the March letter.<sup>34</sup> These *Principles* were phrased in a more positive manner and included four essential (but somewhat confusing) definitions: “representative,” “guardian ad litem,” “child’s attorney,” and “lawyer.” The Round 2 draft also added a list of circumstances when a judge should consider appointing a “representative.” Frank and Marty indicated that they thought the major issues left to be resolved were:

1. Do children need a “lawyer” as their representative or could a nonlawyer fill the role wanted by the court?
2. Is there a right to a lawyer if a child wants one?

32. See Katherine Hunt Federle, e-mail dated Monday, August 18, 1997, on file with author; Ann Haralambie, e-mail dated Thursday, August 14, 1997, on file with the author.

33. Letter from Frank Cervone and Nancy Anderson, Steering Committee on the Unmet Legal Needs of Children, dated March 25, 1998, to Catherine Ross, Jamie Forman, Nancy Anderson, Rachelle Bedke, Mary Curtin, Clint Deveaux, Ellen Effron, Eugene Hamilton, Robert Levy, Matin Olsen, Millie Otey, Kim Robak, Raquel Rodriguez, Shari Shink, Mark Tilden, Kathleen Kennedy Townsend, Gwynne Young, Ellen Rosenblum, Marc Shindler, Doris Clanton, Dan Skoler, Stacey Blume, Bernardine Dohrn, Kristin Brewer, Howard Davidson, Ann Haralambie, Marvin Ventrell, Miriam Rollin, Krista R. Johns, Martin Guggenheim, Bob Schwartz, Alan Lerner, Carole Brill, Donna Wickham Furth, Maurice Kutner, Sandra Morgan Little, Richard Crouch, Robert L. Geltzer, Glenda Berg Sharp, Gregory P. Joseph, Barbara M.G. Lynn, H. Thomas Wells, Jr., Ronald Jay Cohen, and Lynda M. Chott.

34. The following people responded to Frank and Nancy’s letter: Marty Guggenheim, April 6, 1998 (suggesting changes to commentary); Krista Johns, NCFJ, April 28, 1998 (including comments from Chris Bailey; Judges Steve Herrell, Mike Town, Howard Lipsey and Chet Vahle; Professor Margo Melli; psychologist Julian Ferholt); Lisa Donaldson, April 2, 1998 (showing opposition of National Association of Council for Children); Richard Crouch, April 7, 1998 (indicating that draft was improved but still had major flaws). Additional letters were received from Kristen Brewer, Howard Davidson, Jamie Forman, Donna Wickham Furth, Martin Olsen and Professors Annette Appell, Bob Levy, and Barbara Bennett Woodhouse.

### 3. What role should the representative play?

After a long discussion with many questions and suggestions, the Family Law Council asked for further refinements and comments. The Council put the *Principles* on the agenda for additional discussion at the next meeting.<sup>35</sup>

On October 24, 1998, at the Family Law Section Council meeting in Portland, Oregon, Frank Cervone participated by telephone in a discussion of the revisions made to the *Principles* since August. Council discussion, however, revealed substantial disagreements with various aspects of the *Principles*. When the proposal emerged to recommend, but not require, appointment of a representative for a child, a chasm became apparent. For those in states that required appointment as a matter of law, anything short of a mandate looked like a major backslide in the children's rights movement. For those in jurisdictions that left appointments to the discretion of the trial judge, or in the many places in which child advocates were generally not appointed, it was feared that a rule requiring appointment would be too costly, largely ignored or even summarily dismissed.

Maury Kutner, then chair of the Family Law Section, asked an ad hoc group to meet to discuss the numerous issues raised by Council members.<sup>36</sup> I sent a letter and redlined draft of extensive proposals for change to the ad hoc committee.<sup>37</sup> Frank Cervone collected comments and followed up with what was to be the last redraft of "*Principles*."<sup>38</sup> Significant disagreements, however, continued to slow the process. Following a contentious conference call with committee members in April of 1999, Frank stepped back from the process. I sent a memo outlining the major remaining areas of disagreement. In addition to the fundamental question as to whether we were drafting a set of principles or standards, the issues were: (1) mandatory vs. discretionary appointment; (2) whether any ABA document should include guidance for nonlawyers; (3) how to adopt standards that could be useful nationally without hurting the few states that seemed to have good systems; and (4) how much guidance the standards needed to provide to both judges and lawyers. The project stalled as no one had the time to take charge and some of the issues seemed incapable of resolution.

35. Minutes, Family Law Section Council Meeting, July 31, 1998.

36. The Ad Hoc Committee was composed of Jeff Atkinson, Frank Cervone, Linda Elrod, Gregg Herman, Jack Sampson and David Walther. Gail Baker joined in February 1999.

37. Letter from Linda Elrod with "Cricket's Redlined Draft—10/28/98" outlining concerns about not contradicting the already adopted *Abuse and Neglect Standards*, defining the role of the ABA, judges, and lawyers and noting "as written, the document tends to be repetitive, vague, and needs reformatting."

38. Letter from Frank Cervone to Jeff Atkinson, Gail Baker, Linda Elrod, Gregg Herman, Jack Sampson and David Walther finding areas of agreement and making suggestions for creating a list of instances when judges should consider appointing lawyers for children.

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## 4. FROM PRINCIPLES TO STANDARDS

There was little forward movement until the Wingspread Conference in September 2000.<sup>39</sup> As the chair of the Family Law Section, I appointed Virginia attorney John Crouch, co-chair of the Custody Committee, as Chair of a new drafting committee to restart the project. The new committee included those who wanted to be involved from the *Principles* committees,<sup>40</sup> several members of the *Abuse and Neglect Standards* drafting committee,<sup>41</sup> and other lawyers and judges with expertise in the area of child representation.<sup>42</sup>

The focus changed immediately to drafting a set of standards, rather than principles. The last three years has seen a consistent flow of discussion on important issues. There have been hundreds of e-mails<sup>43</sup> and at least twelve drafts. Linda Rio, executive director of the ABA Child Custody Pro Bono Project, helped facilitate meetings and conference calls.<sup>44</sup> The Family Law Council was kept up to date, with current drafts being provided at every meeting since the summer 2001. Although a “final” draft was submitted for comments in the spring of 2002,<sup>45</sup> it was not until spring 2003 that a truly final draft was voted on by the Family Law Section Council at its spring meeting in Las Vegas, Nevada, on May 2nd.

39. See *Reforming the System for Children*, *supra* note 17.

40. Frank Cervone, Director Support Center for Child Advocates in Philadelphia, was the only member of the original drafting committee who participated in the final draft.

41. In addition to myself, the other members of the *Abuse and Neglect Standards* Committee who worked on the *Custody Standards* are: Gail Baker, Rochester, Minnesota, family law attorney who has represented children as a guardian ad litem for 19 years; Howard Davidson, Director, ABA Center on Children and the Law in Washington D.C.; Ann Haralambie, Tucson, Arizona attorney who has represented children for twenty-seven years; Jack Sampson, William Benjamin Wynne Professor of Law at the University of Texas who heads the Children Rights Clinic.

42. John Crouch remained chair of the *Custody Standards* Committee from 2000 to the present. The new, after September 2000, members of the Committee were: Jeff Atkinson, professor at Illinois Judicial Conference and DePaul College of Law; Lewis Becker, Villanova law professor and ethics scholar; Gregg Herman, family law attorney in Milwaukee, Wisconsin, and former state chair of guardian ad litem program; Honorable Debra Lehrmann, District Judge, Tarrant County, Texas; Ron Nelson, family law attorney in Overland Park, Kansas; Linda Rio, executive director of the ABA Child Custody Pro Bono Project in Chicago, Illinois; Andrew Schepard, Professor at Hofstra Law School and Co-director of Center for Children, Families and the Law.

43. I have kept 365 “substantive” e-mails over the past three years. I have no idea how many e-mails on trivial matters (commas, etc.) I deleted.

44. John Crouch deserves the credit for keeping the process moving from the fall of 2000 until its completion in May 2003 by maintaining e-mail communications and doing numerous redrafts to meet member concerns. The committee met in Chicago at least twice for all day meetings and for an afternoon in Orlando, Florida.

45. Some redrafting was extensive. Andy Schepard’s negotiation class found the summer 2002 “final” draft too unwieldy for lawyers to use—the organization hindered the message. The roles lawyers should play were still vague and there was insufficient direction for judges. Phone conversation to Linda Elrod, May, 2002. My Fall 2002 redraft to simplify and reorganize resembled a scene in a Sam Peckinpah movie. John Crouch completed the streamlining process.

### III. A Lawyer Is a Lawyer Is a Lawyer

The overriding theme of the *Custody Standards*, as with the *Abuse and Neglect Standards*, is that a lawyer should act like a lawyer.<sup>46</sup> Lawyers have attended law school, been admitted to at least one state to practice, and are bound by the profession's ethical rules, either the ABA Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, or a state's professional code. Lawyers are trained advocates. Nothing in a lawyer's current training qualifies a lawyer to make decisions on behalf of a client, especially a child client. Therefore, the *Custody Standards* take the position that lawyers should be appointed as lawyers and act as lawyers irrespective of the age of the client.<sup>47</sup>

The *Custody Standards* allow for two alternative capacities in which a lawyer should represent a child in a custody matter:

1. First, as a "Child's Attorney," a lawyer represents the child as any other client, subject to the Model Rules or state law; or
2. Second, as a "Best Interest Attorney," a lawyer represents the child's best interests as a lawyer, but does not serve as an agent of the court.

The *Custody Standards* promote "quality control, professionalism, clarity, uniformity and predictability"<sup>48</sup> by being universally applicable to all lawyers (privately-retained lawyers or court-appointed),<sup>49</sup> by offering guidance to courts as to when to appoint, and detailing what lawyers should do when appointed. In addition, an Appendix provides model orders: one for appointment and the other for access to confidential information.

#### A. Abolition of the Term "Guardian Ad Litem" for Lawyers

In a major change from existing law, the *Custody Standards* eliminate use of the term guardian ad litem for lawyers representing children in custody cases.<sup>50</sup> Today many states refer to the person appointed to represent the child's best interests as a guardian ad litem. In custody proceedings, the term has so many meanings and connotations that it is difficult to define with precision.<sup>51</sup> Guardians ad litem have been referred to as

46. Indeed, even the original draft of the *Principles* maintained that a lawyer's professional representation of a child in a contested custody or visitation proceeding should adhere to the standards the lawyer would follow if the client were an adult. See Draft Principles, *supra* note 24, at 29.

47. Under Model Rule 1.14, age and maturity of the child are factors that may affect the child's ability to direct the lawyer.

48. *Custody Standards*, *supra* note, 2 at I. Introduction.

49. *Id.* at VI. A. 8.

50. The *Custody Standards* are clearer than the *Abuse and Neglect Standards*, *supra* note 15, which retained the term "guardian ad litem" although there is a clear preference for appointment of a child's attorney.

51. HARALAMBIE, *supra* note 5, at 1-14 (discussing historical roles). See also JEFF ATKINSON,

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“investigators, expert witnesses, lawyers, lay advocates for an incompetent child’s best interests, mediators, negotiators, supervisors, monitors, friends or advisors to the court, eyes and ears or arms of the court, recommenders, fact finders, and de facto decision makers.”<sup>52</sup> In some jurisdictions the guardian ad litem can be a lay person or a lawyer who serves as an officer of the court and conducts an investigation, writes a report<sup>53</sup> or testifies and is subject to cross-examination on what is in the child’s best interests.<sup>54</sup> In other states, the guardian ad litem is a lawyer appointed to represent the child’s best interests<sup>55</sup> but may or may not make a report and be subject to cross-examination.<sup>56</sup> In still other states the guardian ad litem is appointed as a lawyer for the child to advocate for the child’s position.<sup>57</sup> As courts change terminology and experiment, increasingly the guardian ad litem is asked to play the role of parent coordinator or case manager. In some states, the guardian ad litem enjoys quasi-judicial immunity.<sup>58</sup>

Many have criticized the ambiguity of the role of the guardian ad litem as well as the lack of training, oversight and accountability.<sup>59</sup> Others have called for appointment of a child’s attorney or lawyer for the child in contested custody cases rather than a guardian ad litem.<sup>60</sup> Still others have called for the appointment of a lawyer when the child is “competent” to direct the terms of representation.<sup>61</sup> But until now, no national standards

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MODERN CHILD CUSTODY PRACTICE § 14-1 (2d ed. 2000); LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, § 12:03 (1993 & Supp. 2002); Elrod, *supra* note 3, at 57-59.

52. See Ducote, *supra* note 8, at 115 (quoting a WASH. STATE BAR NEWS article). See also Tara Lea Muhlhauser, *From “Best to Better”: The Interests of Children and the Role of the Guardian Ad Litem*, 66 N.D. L. Rev. 633, 638 (guardian ad litem as investigator, champion, monitor); Prescott, *supra* note 8.

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

54. *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

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

56. See *In re Hoffman*, 2003 WL 1193770 (Ohio Ct. App. 2003) (due process mandates cross examination of the child’s guardian ad litem in permanent custody proceeding even though law provides that written report is not stated under oath).

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

58. See APPENDIX, column 5.

59. See Ducote, *supra* note 8, at 106-108 (citing the editorial by a sixteen-year-old girl in the SAN FRANCISCO DAILY JOURNAL in which she complains that the guardian ad litem ignored her reports of abuse by her father and refused to present her wishes to the judge); Lidman & Hollingsworth, *supra* note 8.

60. Elrod, *supra* note 3; Wilber, *supra* note 3; Eitzen, *supra* note 3.

61. *AAML Standards*, *supra* note 11, at 2.1; ALI PRINCIPLES OF THE LAW OF FAMILY

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have outlined what a lawyer representing a child should do.<sup>62</sup>

The abolition of the term “guardian ad litem” from these *Custody Standards* for lawyers does not mean that an attorney can never be appointed as a guardian ad litem. What it means is that a person who serves essentially as a witness through testimony in court or by making a report on facts not otherwise in evidence, *is not serving as an attorney*, and thus is not covered under these *Standards*. The lawyer, when accepting such an appointment, figuratively puts his or her bar card on the back shelf and serves as a volunteer in this nonlegal capacity.

*B. Duties of All Lawyers for Children*

The breakthrough in finally getting the *Standards* adopted came from the consensus at a face-to-face meeting in Chicago in September 2002 that a lawyer should always remain a lawyer whether representing a child or a child’s best interests. Therefore, all lawyers for children have some similar duties. For example, a lawyer should only accept appointment with a full understanding of the issues and functions to be performed.<sup>63</sup> All lawyers must be independent from the court and other participants in the litigation so that the lawyer can exercise independent professional judgment in carrying out the duties assigned and in participating as freely as a lawyer for a party.<sup>64</sup>

Any lawyers should meet with the child client,<sup>65</sup> even a small child. The lawyer should explain in a developmentally appropriate manner the court system, the proceedings and the lawyer’s responsibilities.<sup>66</sup>

1. REPRESENTATION DUTIES

In the pretrial phase, all lawyers should inform the parties and their counsel of the lawyer’s role in the case.<sup>67</sup> The lawyer should conduct discovery; develop a strategy of the case; stay apprised of other court proceedings affecting the child, the parties or other household members; attend meetings involving issues within the scope of appointment; take any necessary action to expedite proceedings; participate in, and when

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DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.13 (3) (2002).

62. The *AAML Standards* arguably apply only to the members of the American Academy of Matrimonial Lawyers. See *AAML Standards*, *supra* note 11.

63. *Custody Standards*, *supra* note 2, at III. A.

64. *Id.* at III. C.

65. *Id.*

66. *Id.* at III. E. Some earlier drafts included a definition of “developmentally appropriate” as “accounting for the individual child’s age, cognitive development, level of education, cultural background, and degree of language acquisition.” Draft, June 7, 2002. The language is incorporated into the black letter part of III-E.

67. *Id.* at III. D.

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appropriate, initiate negotiations and mediation;<sup>68</sup> participate in depositions, pretrial conferences and hearings; file or make petitions, motions or responses when necessary;<sup>69</sup> and where appropriate, request authority to pursue other issues on behalf of child.<sup>70</sup>

At the hearing, both types of lawyers make opening and closing statements, present evidence, examine and cross-examine witnesses. Neither type of lawyer should write a report, make a recommendation, testify, or be cross-examined.<sup>71</sup> If the child is to meet with the judge or testify, the lawyer can prepare the child and seek to minimize harm to the child from the process.<sup>72</sup> Both lawyers ensure that a written order is made which conforms to the court's oral rulings and statutorily required findings. The lawyer should also monitor implementation of the court's orders.<sup>73</sup>

If the case is appealed, the lawyer should continue to represent the child and seek appropriate temporary orders to protect the interests of the child pending appeal. The lawyer should participate in any appeal filed by another party concerning issues relevant to the child and explain the result of any appellate decision.<sup>74</sup>

## 2. TRAINING REQUIREMENTS

The *Custody Standards* recognize that lawyers who represent children need specialized training. A bar card is not sufficient. Lawyers for children

68. The lawyer will participate in pretrial conferences and mediation sessions to advocate for the child but is not a mediator.

69. *Custody Standards*, *supra* note 2, at III. F. The Commentary recognizes that the lawyer for the child may be in a pivotal position in negotiations and should be an active participant in advocating the child's interests and focusing attention on the needs of the child. The lawyer may request relief for such things as a mental or physical examination of a party or the child; a parenting or custody evaluation; an adjustment of parenting time; services for the family or child; contempt for non-compliance with a court order; a protective order for the child's privileged communications; or dismissal of petitions or motions.

70. *Id.* The Commentary notes that other issues that may be relevant, although not specifically within the scope of the original appointment, might be child support, delinquency or status offender matters, SSI and other public benefits access, mental health proceedings, parenting time with parents, siblings or third parties, paternity, personal injury actions, school or education issues, adoption, guardianship, termination of parental rights or a protective order concerning the child's tangible or intangible property.

71. *Id.* at III-B. The Commentary makes it clear that lawyers present evidence. Explaining what a client wants or proffering what one hopes to prove is not testifying. This is a change. Even the 2002 ALI Principles retain the term and concept of guardian ad litem and would allow a party to cross examine the guardian ad litem. *ALI Principles*, *supra* note 61, at § 2.13 (2), (6).

72. *Id.* at III. G. 4. The lawyer can familiarize the child with the place, people, procedures and types of questioning paying special attention to the child's developmental needs and abilities. The Commentary suggests that if the child does not wish to testify or be harmed by testifying, the lawyer should seek a stipulation from the parties not to all the child as a witness or seek a protective order from the court.

73. *Id.* at III. I.

74. *Id.* at III. H.

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need to know how to communicate with children; must be knowledgeable about children's developmental needs and abilities at different ages; and must know how to prepare and present a child's viewpoints, including child testimony and alternatives to direct testimony. In addition to knowing relevant state and federal laws, agency regulations, court decisions, rules, and the legal standards applicable in child-related litigation, lawyers must know the guidelines or standards that apply to their representation; must understand the court process, and the roles of key personnel; recognize, evaluate and understand evidence of child abuse and neglect; be cognizant of the impact of family dynamics and dysfunction, domestic violence and substance abuse; and know the value of the multi-disciplinary input that may be required in child-related cases; and must be familiar with the available services for child welfare, family preservation, medical, mental health, educational and special needs.<sup>75</sup>

#### IV. Appointment of Child's Attorney

While appointment of a lawyer or "guardian ad litem" for a child has been required in cases of abuse and neglect since the 1970s,<sup>76</sup> most of the case and statutory law on the appointment of counsel for children in custody cases has arisen within the past decade.<sup>77</sup> Appointment in most states rests in the discretion of the court.<sup>78</sup>

Section IV of the *Custody Standards* deals with the specific role of the Child's Attorney. The lawyer should represent the child with the same undivided loyalty, confidentiality, and competence as an adult client. The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney must advocate the child's articulated position, and owes the traditional duties to the child as client, subject to a state's professional rules.<sup>79</sup>

75. *Id.* at VI B, 1-12. See also *Abuse and Neglect Standards* I-2, *supra* note 17, at 400-401, describing similar training for lawyers who represent children in abuse and neglect cases. By contrast, the *ALI Principles* suggest only that a lawyer appointed to represent the child have some expertise in recognizing and understanding domestic violence and its effects on victims and parents. *ALI Principles*, *supra* note 61, at 319, Comment to § 2.13 e.

76. The Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5103(b)(2)(G), 45 C.F.R. § 1340.14(g), requires appointment of a guardian ad litem in every judicial proceeding involving an abused or neglected child.

77. See *Leary v. Leary*, 627 A.2d 30 (Md. Spec. Ct. App. 1993). The debate about whether a child should be represented began in the 1960s with the increasing divorce rate and the United States Supreme Court decision in *In re Gault*, 387 U.S. 1 (1967) (granting a right to counsel for a child in a disciplinary proceeding). See Inker & Perretta, *supra* note 3.

78. See APPENDIX, col. 2. See also Guggenheim, *supra* note 4, at 307, n. 35

79. *Custody Standards*, *supra* note 2, at IV A Commentary. The majority of states have adopted the Model Rules of Professional Conduct (MRPC). In particular, MRPC 1.2(a), 1.6, and 1.14 apply.

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The Child's Attorney has the duty to meet with the client, explain what is happening before, during and after each hearing; advise the child and provide guidance, and discuss each substantive order and its consequences.<sup>80</sup> The Commentary to IV. B. indicates that part of the job of the Child's Attorney is to explain clearly, precisely and in terms the client can understand, the meaning and consequences of the child's choices, as the child may not recognize the implications of a particular course of action. As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, make recommendations, and give reasons as to the positions to take. The lawyer, however, needs to be careful to not "take over" for the child. The *Standards* contemplate that the Child's Attorney has dual fiduciary duties to the child—the duty to ensure that the client is given the information to make an informed decision and the duty not to overbear the will of the client.<sup>81</sup>

"Client Decisions," found in Section IV. C., contain the heart of the *Standards'* difference from common practices in child representation. The Child's Attorney should be bound by the child's directives on each issue on which the child is competent to direct the lawyer and does so, subject to the general ethical rules on diminished capacity or the client's inability or a client's unwillingness to express objectives of representation.<sup>82</sup> As with the *Abuse and Neglect Standards*, the *Custody Standards* do not presume that children of certain ages are "impaired," "disabled," "incompetent," or lack the capacity to determine their position in litigation. Disability is "contextual, incremental, and may be intermittent."<sup>83</sup> The age and maturity of the child may affect the child's ability to express a position.<sup>84</sup>

One of the most difficult ethical issues arises when a child is able to express an opinion but the lawyer believes the position is inappropriate, or could result in serious injury to the child. The fact that the lawyer is bound by state law and ethical rules will prevent the Child's Attorney from tak-

80. *Id.* at IV. B. 1-4.

81. *Id.* at Commentary to IV. B. See also Guggenheim, *supra* note 4, at 313-319.

82. Model Rules of Professional Conduct 1.14 states that a lawyer shall maintain, as reasonably as possible, a normal attorney-client relationship, using professional judgment to represent the client at all times.

83. *Custody Standards*, *supra* note 2, at IV. C. 2. Commentary.

84. See *Veazey v. Veazey*, 560 P.2d 382, 390 (Alaska 1977) (guardian ad litem not required to advocate whatever placement seems preferable to a child of tender years but should not discredit a mature teenager's reasoned preference); *Fuerstenberg v. Fuerstenberg*, 591 N.W.2d 798 (S.D. 1999) (important to consider the wishes of adolescents); *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998). Twenty-eight states require that before a child's preference as to his or her custodian becomes mandatory, the judge must make preliminary findings that the child is of sufficient mental capacity and maturity. See Kathleen Nemecheck, Note, *Child's Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 454 (1998).

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ing positions not grounded in fact and warranted by existing law. In most cases, the lawyer can counsel the client as to why a particular position is harmful. If, however, the child cannot be persuaded and the Child's Attorney believes that the child's directives "would be seriously injurious," not merely contrary to the lawyer's opinion of the child's interests, the Child's Attorney can ask for a "best interests attorney" to be appointed.<sup>85</sup> The *Standards* require fidelity to the client's confidences in compliance with the Model Rules and state law.<sup>86</sup>

In the absence of direction, the Child's Attorney should represent the child's *legal* interests.<sup>87</sup> The *Standards* Commentary distinguishes between a child's failure to express a position because he or she is unable to do so and not wanting to express a position because of the child does not care about the issue or a desire not to hurt one of the parties. In the latter case, the lawyer may pursue the objective that appears to be in the child's legal interests based on information the lawyer has and on the child's prior stated positions.<sup>88</sup>

## V. Best Interests Attorney

Section V of the *Custody Standards* covers the Best Interests Attorney, who investigates and advocates the child's best interests, but is not bound by the child's wishes. The Best Interests Attorney should explain to the child that he or she will investigate and advocate for the child's best interests; will investigate and present the child's position to the court unless the child requests otherwise, but will not necessarily advocate what the child wants as a lawyer for a client would.<sup>89</sup>

In advocating the child's best interests, the lawyer must use objective criteria as set forth in the law related to the purposes of the proceedings. The key is not to substitute the lawyer's personal view of "best interests."<sup>90</sup>

85. *Custody Standards*, *supra* note 2, at IV. C. 3.

86. *Id.* at A-1, Commentary. "The Model Rules of Professional Conduct (2002) . . . impose a broad duty of confidentiality concerning all information relating to the representation of the client. . . a lawyer may reveal information . . . to the extent the lawyer reasonably believes necessary. . . to prevent reasonably certain death or substantial bodily harm, or to comply with other law or a court order, or when the disclosure is impliedly authorized in order to carry out the representation. . . ."

87. "Legal interests," distinct from both "best interests" or the child's objectives, are those that are specifically recognized in law and that can be protected through the courts, such as child support, government benefits, special education needs, etc. The standard here is more specific than the Commentary to B.5 in the *Abuse and Neglect Standards*, *supra* note 16, at 383 (defining the term "legal needs" as basic physical and emotional needs such as safety, shelter, food, and clothing.)

88. *Custody Standards*, *supra* note 2, at IV. C. 2. Commentary.

89. *Id.* at V. D.

90. *Id.* at V. F. Commentary (indicating that the lawyer should not allow personal values, philosophies and experiences to control). Jean Koh Peters proposes that lawyers representing

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The Commentary to V. F. suggests that determining the child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards (state's statutes and cases) to them.<sup>91</sup> The lawyer must consider the individual child's needs, the child's developmental level, including the child's sense of time. The lawyer may need to consult experts in determining and weighing such needs and interests.<sup>92</sup>

As a general rule the Best Interests Attorney should encourage settlements. If, however, an agreement of the parties appears to not be in the child's best interests, the attorney should discuss any concerns with the parties and counsel. As a last resort, the Best Interests Attorney should present evidence to make the court aware of any facts which, considered in context, call into question the advisability of a particular agreed settlement.<sup>93</sup> The Best Interests Attorney does not use ex parte communications.<sup>94</sup> At hearings on custody or parenting time, Best Interests Attorneys should present the child's stated desires unless the child expressly does not want them presented.<sup>95</sup> The confidentiality owed to a child by a Best Interests Attorney is the same as that owed by the Child's Attorney except that the Best Interests Attorney may also use the child's confidences for the purposes of the representation without disclosing them.<sup>96</sup>

The Best Interests Attorney should appeal, if allowed by state law, when he or she believes that the trial court's decision is detrimental to the child's welfare, an appeal could be successful, and the benefit to the child from a successful appeal outweighs the detriment to the child from extending the litigation and increasing the expenses to the parties.<sup>97</sup>

## VI. Duties of the Court

The *Custody Standards* recognize, as did the 1996 *Abuse and Neglect*

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children should answer seven questions: (1) Am I making the best effort to see the case from my client's point of view rather than an adult's? (2) Does the child understand as much as I can explain about what is happening? (3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her the same way? (4) If I treat my client differently from the way I would treat an adult, in what ways will my client concretely benefit? (5) Is it possible that I am making decisions for the gratification of the adult, and not the child? (6) Is it possible I am making decisions for my own gratification, not the client's? (7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child? PETERS, *supra* note 22.

91. *Custody Standards*, *supra* note 2, at V. F. Commentary.

92. *Id.*

93. *Id.* at V. F. 2.

94. *Id.*

95. *Id.* at V. F. 3.

96. Compare IV. A. and IV. B.

97. *Custody Standards*, *supra* note 2, at V. G. Appeals.

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*Standards*, that courts are crucial to the implementation of change. No matter what standards or guidelines are adopted for lawyers, there can be little improvement in practice unless “judicial administrators and judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers. . . .”<sup>98</sup>

Section VI sets out the duties of the court with respect to the appointment of children’s lawyers in custody cases. That the judge should make clear the purpose of the appointment is one of the concepts that has remained from draft one of the *Principles* until the final draft of the *Standards*. The appointment orders, which should be sent to both parties and the lawyers, must be in writing, plain English and on a standard form.

The *Custody Standards* require appointment of a lawyer for a child whenever mandated by state law, usually in cases of abuse and neglect.<sup>99</sup> The more controversial questions arise as to discretionary appointment. Indeed, this has consistently been one of the crucial issues in many of the earlier drafts as some advocates would like to see lawyers in every case and others are more conservative. The compromise was to compile a list of the usual circumstances when a judge should seriously consider appointment of a lawyer to fully develop the case. The list is not exclusive, but does include most of the situations where an appointment may be appropriate to further the fact finding and give the child a voice. The list includes situations when there is:

- a. consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;
- b. relocation that could substantially reduce the child’s time with a parent or sibling;
- c. the child has concerns or views;
- d. harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;
- e. disputed paternity;
- f. past or present child abduction or risk of future abduction;
- g. past or present family violence;

98. See *Abuse and Neglect Standards*, *supra* note 16, at 395-396, II. Enhancing the Judicial Role in Child Representation, Preface.

99. *Custody Standards*, *supra* note 2, at VI. A. 1. At least nine states require appointment of counsel if there are allegations of abuse and neglect. The Appendix shows FLA. STAT. ANN. § 61.401; LA. REV. STAT. § 9:345; MINN. STAT. ANN. § 518.165 (20); MISS. CODE ANN. § 43-21-121; MO. ANN. STAT. § 452.423(1); S.D. CODIFIED LAWS § 25-4-45.4; VA. CODE § 16.1-266; W. VA. CODE § 48-11-302(b); WYO. STAT. ANN. § 14-3-211. Wisconsin mandates appointment of counsel in contested custody proceedings. WIS. STAT. ANN. § 767.045 (1). Oregon requires appointment of counsel if a child requests. OR. STAT. § 107.425. Texas requires appointment if it is in the child’s best interests. TEX. FAM. CODE §§ 107.001, 107.002, 107.011 & 107.014.

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- h. past or present mental health problems of the child or a party;
- i. special physical, educational, or mental health needs of a child that require investigation or advocacy;
- j. a high level of acrimony;
- k. inappropriate adult influence or manipulation;
- l. interference with custody or parenting time;
- m. a need for more evidence relevant to the best interests of the child;
- n. a need to minimize the harm to the child from the processes of family separation and litigation; or
- o. specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.<sup>100</sup>

Competence and experience are important for lawyers who represent children. The *Custody Standards* emphasize the importance of both judicial and lawyer training.<sup>101</sup> The court should only appoint lawyers who have agreed to serve in child custody cases and who have been trained or are qualified by appropriate experience in custody cases.<sup>102</sup>

Appointment, however, is not enough. The court must assure that the lawyer is independent of the court, court services, the parties, and the state. The judge should monitor the case to ensure the competent and effective representation of the child as long as the issues are pending which necessitated the appointment. The court should control the size of caseloads so that lawyers do not have so many cases that they are unable to meet the criteria of the *Standards*.<sup>103</sup>

The burden is on the court to assure that lawyers receive adequate, predictable, and timely compensation by requiring the entry of a written order addressing compensation and costs at the time of appointment.<sup>104</sup> Among the sources for payment for lawyers are (a) the incomes and assets of the parties; (b) targeted filing fees assessed against litigants; (c) government funding; (d) voluntary pro bono service.<sup>105</sup> The rate of payment is to be based on legal standards used for determining the reasonableness of privately-retained lawyers' hourly fees.<sup>106</sup>

100. *Id.* at VI. A. 2.

101. *Custody Standards*, *supra* note 2, at VI. B.

102. *Id.* at VI. A. 7. While some on the drafting committee believed that all lawyers should have training, others believed that good trial lawyers are good no matter the type of case.

103. *Id.* at VI. D.

104. *Id.* at VI. C. 1.

105. *Id.* at VI. C. 2.

106. The compensation provision is slightly different from the *Abuse and Neglect Standards* which required "adequate and timely" compensation "commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications

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The *Custody Standards* recognize that custody disputes cause high emotions and unhappy people. The courts should protect lawyers from frivolous lawsuits and harassment from adult clients. Best Interests Attorneys should have qualified, quasi-judicial immunity for civil damages unless their actions were willfully wrongful; done with conscious indifference or reckless disregard to the safety of another; done in bad faith or with malice; or grossly negligent. Only the child should have any right of action against a Child's Attorney or a Best Interests Attorney.<sup>107</sup>

## VII. Conclusion

Once again, the ABA provides national leadership to enhance legal representation of children. These new Standards fill a void and will contribute to a higher quality of lawyering for children as well as to uniformity of legal practice across the country. Both the black letter standards and the extensive commentary provide answers to lawyers who seek to know what they are to do for their child client. The *Standards* provide a map. The American Bar Association, by approving both the *Standards of Practice for Lawyers Representing Children in Custody Cases* and the *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, have established a comprehensive guide to those in our profession who are appointed by the courts to represent children.

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and responsibilities." The comparison is to privately-retained rather than court-appointed lawyers. See *Abuse and Neglect Standards*, *supra* note 16, at 398 (H-2) and 402 (J-1).

107. *Custody Standards*, *supra* note 2, at VI. F. The *Standard* sets out the majority rule in cases today—qualified judicial immunity. See APPENDIX.

**APPENDIX\***  
**Appointment Laws in Divorce Cases**

STATE	WHEN APPOINTED	ROLE OF APPOINTED PERSON	WHO IS APPOINTED	IMMUNITY	FEES	QUALIFICATIONS
<b>AL*</b> ALA. CODE 26-14-11 (2000)	Discretionary	GAL	Atty	No	Parties	No
<b>AK</b> <i>Stat Def</i> A.S. 25.24.310 (2001)	Discretionary	Atty for Child ----- GAL	Atty or Gov't Atty ----- Atty or Gov't Atty	Yes	Parties or State	No
<b>AZ</b> A.R.S. 25-321	Discretionary	Atty for Child	Atty	No	Parties	No
<b>AR</b> A.C.A. 9-13-101	Discretionary	Atty for Child	Atty	No	Parties or State	No (pending)
<b>CA</b> <i>Stat Def</i> CAL. FAM. C 3150,3151 (2001)	Discretionary	Hybrid	Atty or Gov't Atty	Yes	Parties or County	No
<b>CO</b> C.R.S.A. 14-10-116 (2000)	Discretionary	Atty for Child (legal representative) ----- GAL (special advocate)	Atty ----- Atty or other Professional	Yes	Parties or State	No
<b>CT</b> CGSA 46b-54 ----- CGSA 45a-132	Discretionary	Atty for Child ----- GAL	Atty ----- Atty or other Professional	No—Atty, Yes—other Professional	Parties	No
<b>DE</b> <i>Stat Def</i> 13 DEL.C 701, 721 29 DEL.C. 9007	Discretionary	Atty for Child ----- GAL	Atty ----- Atty or other Professional	Yes	Parties or State	Yes
<b>D.C.</b> D.C. CODE 1981 § 16-918	Discretionary	GAL	Atty	No	Parties	No
<b>FL</b> FSA § 61.401  <i>Stat Def</i> FSA 61.402 & 403	GAL Required if abuse	Atty for Child ----- GAL	Atty ----- Atty or "citizen certified by GAL program"	Yes	Parties	No
<b>GA*</b> OCGA 29-4-7 (2000)	Discretionary	GAL	Atty	No	Parties	No
<b>HI</b> <i>Stat Def</i> HRS 571-46(8)	Discretionary	GAL	Atty (in practice also custody evaluators who are social workers or psychologists)	Yes	Parties	No
<b>ID</b> IC § 32-704	Discretionary	Atty for Child	Atty	No	Parties or County	No

*Source: ABA Child Custody Pro Bono Project. Also available at [www.abachildcustodyproject.org](http://www.abachildcustodyproject.org).*

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STATE	WHEN APPOINTED	ROLE OF APPOINTED PERSON	WHO IS APPOINTED	IMMUNITY	FEES	QUALIFICATIONS
<b>IL</b> <i>Stat Def</i> 750 ILCS 5/506 (2000)	Discretionary	Hybrid or GAL or Atty	Atty or Gov't Atty	Yes	Parties	Yes by County
<b>IN</b> <i>Stat Def</i> IN ST § 31-15-6-1 & IN ST § 31-17-6-1	Discretionary	GAL	Atty or CASA trained	Yes	Parties	Atty—No Other—Yes
<b>IA</b> I.C.A. § 598.12	Discretionary	Atty for Child (GAL in case law)	Atty	No	Parties or County	No
<b>KS</b> No statute <i>S. Ct. Rule 100</i>	Discretionary	GAL	Atty	Yes	Parties or County	Yes
<b>KY</b> <i>Stat Def</i> KY CODE 403.090	Discretionary	GAL (friend of court)	Atty	No	Parties or County	Yes by County
<b>LA</b> LSA-RS 9:345 (2001)	Required if Abuse	Atty for Child	Atty	Yes	Parties or Pro Bono Atty	No
<b>ME</b> 19-A M.R.S § 1507 (2000) <i>S. Ct. Rules</i>	Discretionary	GAL	Atty or other Professional	Yes	Parties	Yes
<b>MD</b> MD FAMILY § 1-202	Discretionary	Atty for Child ----- GAL (case law)	Atty ----- Atty	No	Parties	No
<b>MA</b> MGLA 215 § 56A	Discretionary	GAL	Atty or "disinterested person" (case law)	Yes	Parties or State	No
<b>MI</b> MCLA 712A.17d <i>Stat Def</i>	Discretionary	Hybrid	Atty	No	Parties	No
<b>MN</b> MSA § 518.165 <i>Stat Def</i> <i>S. Ct. Rule 901</i> <i>et seq.</i>	Required if Abuse	GAL	Does not specify (S. Ct. Rule 902 has qualifications, can be lawyer or non-lawyer)	No	Parties or State	Yes
<b>MS</b> <i>Stat Def</i>	Required if Abuse	GAL	Atty or other Professional	No	Parties or County	Atty—No Other—Yes
<b>MO</b> Mo St 452.423 <i>Stat Def</i>	Required if Abuse	GAL	Atty	No	Parties or State	Yes by County
<b>MT</b> Mt St 40-4-205 <i>Stat Def</i>	Discretionary	GAL	Atty or other	No	Parties or Fees Waived	No (pending)
<b>NE</b> RRS Neb § 42-358	Discretionary	Atty for Child ----- GAL(case law)	Atty ----- Atty	Yes	Parties or County	No

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STATE	WHEN APPOINTED	ROLE OF APPOINTED PERSON	WHO IS APPOINTED	IMMUNITY	FEES	QUALIFICATIONS
<b>NV</b> No Statute	Discretionary	GAL	Atty or other professional	Yes	Parties or County	No
<b>NH</b> RSA 458:17-a <i>S. Ct. Rules</i>	Discretionary	GAL	Atty "except in extraordinary circumstances" (S. Ct. Rule)	Yes	Parties or State	Yes (developing)
<b>NJ</b> NJ § 9:2-4 S. Ct. Rule 5:8 A & B	Discretionary	Atty ----- GAL	Atty ----- Atty, soc. worker, mental health	Yes	Parties	No
<b>NM</b> NM § 40-4-8 <i>Stat Def</i>	Discretionary	GAL	Atty	No	Parties	No
<b>NY*</b> NY CLS FAM Ct ACT § 241 <i>S. Ct. Rule 835.2</i>	Discretionary	Atty for Child  ----- GAL (law guardian)	Atty  ----- Atty or Gov't Atty	Yes	Parties or Indigent Fund or Gov't	Yes
<b>NC*</b> NC ST RULES Civ PROC. § 1A-1, Rule 17	Discretionary	GAL	Does not specify (except if abuse, use atty)	No	Parties	No
<b>ND</b> ND CODE § 14-09-06.4 <i>Stat Def</i> S. Ct. Rule 8.7	Discretionary	GAL	Atty	Yes	Parties or County	Yes
<b>OH</b> <i>Stat Rules</i>	Discretionary	GAL or Atty for Child	Atty	No	Parties	Yes by County
<b>OK</b> 43 OKL. ST. ANN. § 107.3	Discretionary	GAL	Atty	Yes	Parties	No
<b>OR</b> OR ST § 107.425	Required if Minor Requests	Atty for Child	Atty	No	Parties	No
<b>PA</b> <i>Stat Rules</i> PA RULE CP 1915.11	Discretionary	Atty for Child (in practice Atty, GAL or Hybrid)	Atty	Yes	No Statute	No
<b>RI</b> RI ST S 15-5-16.2	Discretionary	Atty for Child ----- GAL	Atty ----- Does not specify	No	Parties	No
<b>SC</b> SC CODE § 20-7-1545 (eff 1/15/03) <i>Stat Def</i>	Discretionary	GAL	Atty or Layperson	No	Parties	Yes
<b>SD*</b> SD CODIFIED L § 25-4-45.4	Discretionary	Atty for Child	Atty	Yes	Parties	No
<b>TN</b> TN CODE 36-4-132	Discretionary	GAL	Does not specify (atty by practice)	Yes	Parties or Fees Waived	No

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STATE	WHEN APPOINTED	ROLE OF APPOINTED PERSON	WHO IS APPOINTED	IMMUNITY	FEES	QUALIFICATIONS
<b>TX</b> TX FAM CODE 107.011 & 107.014 TX FAM CODE 107.001 & 107.002	Required if in best interest	Atty for Child (Attorney ad Litem) ----- GAL	Atty ----- Atty or other Adult	Yes	Parties	Atty—No Other—Yes
<b>UT</b> UT St § 30-3-11.2 UT St § 78-7-45	Discretionary ----- Discretionary	Atty for Child ----- GAL	Atty ----- Atty or Gov't Atty	Yes	Parties ----- State or Pro Bono	No ----- Yes
<b>VT</b> 15 Vt CODE § 594 ----- 15 Vt CODE § 669 Fam Ct Rule 7	Required if Minor is Witness ----- Discretionary	Atty for Child ----- GAL	Atty ----- Atty	No	Parties	No
<b>VA*</b> VA CODE § 16.1-266	Required if Abuse	GAL or Atty for Child	Atty	No	Parties	No
<b>WA</b> ARCW § 26.12.175 & 26.09.220 Stat Def	Discretionary	GAL	Atty or other	Yes	Parties or County or Pro Bono	Yes
<b>WV</b> WV CODE § 48-11-302(b) ----- WV CODE § 48-11-302(a) W.Va Trial Ct Rule 21.01	Required if abuse alleged unless certain conditions present	Atty for Child ----- GAL	Atty ----- does not specify	Yes ----- Yes	Parties	No
<b>WI</b> Wis. STAT § 767.045 Stat Def	Required if contested unless certain conditions present	GAL	Atty	Yes	Parties or County	Yes
<b>WY*</b> WY STAT 14-3-211	Required if Abuse	Hybrid	Atty	Yes	Parties	No

CODE:

- \* = Jurisdictions without a specific statute relating to appointment of attorneys and/or GALs in their domestic relations code. These jurisdictions use the child protection or general defense of infant's statutes to appoint attorneys and/or GALs.
- Stat Def = Jurisdictions having a definition of the roles and responsibilities of the attorney and/or GAL in the statute
- Stat Rule = Jurisdictions having specific codes or rules related to the duties, responsibilities, and obligations of an attorney or GAL for minor.
- Discretionary = Appointment within judge's complete Discretion.
- Required = Appointment required in all cases, and also allows for Discretionary appointment if the factors for mandatory appointment are not met.
- Abuse = Child abuse or neglect alleged or shown (standards vary by state).
- Atty = Private or legal service or pro bono attorney.
- Other Professional = Psychologists, social workers, or CASAs.
- Gov't Atty = Attorney employed by a state or county office.
- GAL = Guardian ad Litem—reports to the court what is in the "best interest" of the child.
- Atty for Child = Typical attorney role; advocates for the child's wishes and interests.
- Hybrid = Child representative has elements of both the GAL (best interest) role and the attorney role (advocate for the child).