

ABA Practice Standards

- **ABA Standards of Practice for Lawyers Representing Child Welfare Agencies (2004).**
- **ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (2006).**
- **ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996).**

Appointment of GAL and AAL

- Under Texas Family Code §107.011, the court must appoint a guardian ad litem for the child.
- Under Texas Family Code §107.012, the court must appoint an attorney ad litem for the child.
- Under Texas Family Code §107.0125, all attorneys appointed to represent children are automatically appointed to serve in the dual role unless and until the court appoints a separate guardian ad litem.

Differences Between GAL and AAL

- GAL is self directed and represents the best interest of the child.
 - GAL must elicit child's expressed objectives, but is not bound by those objectives. Texas Family Code §107.002(b)(2).
- AAL is client directed and represents the child's objectives.
 - AAL must represent the child's expressed objectives of representation and follow the child's expressed objectives during the course of litigation, if the AAL determines that the child is competent to understand the nature of an A/C relationship and has formed that relationship with the AAL. Texas Family Code §107.004(a)(2).
- Key Differences:
 - GAL is self directed and AAL is client directed.
 - GAL may testify and AAL may not.
 - No testimonial privilege between GAL and child.
 - GAL is not a party and GAL's consent is not needed for an agreed order.

Duties as *Attorney ad Litem*

- Be a Lawyer
- Interview the Child (or caretaker if child less than 4 years)
- Investigate
- Obtain and Read the Records
- Interview Relevant People
- File Pleadings and Go to Court
- Be Trained in Child Advocacy

Representing Children's Expressed Objectives

- Texas Family Code § 107.004: The attorney ad litem appointed for a child shall:
 - (1) Advise the child;
 - (2) Represent the child's expressed objectives:
 - (1) If, the child is competent to understand the nature of an attorney-client relationship,
 - (2) And, has formed that relationship with the attorney ad litem.
- What about bad choices?
 - Children are just like other clients
 - You are an Attorney and Counselor at Law



Substituted Judgment

Texas Family Code §107.008:

- (a) An AAL appointed to represent a child may determine 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.
- (b) If AAL is in the dual role as A/GAL, the attorney may present to the court a position that the attorney determines is in the best interests of the child.
- (c) If a GAL has been appointed, an AAL who determines that the child cannot meaningfully formulate the child's expressed objectives of representation:
 - (1) shall consult with the GAL, but is not bound by the GAL's opinion or recommendation, but must ensure that the GAL's opinion is presented to the court; and
 - (2) may present to the court a different position that the attorney determines will serve the best interests of the child.

ABA Standards

- ABA B-2. Conflict Situations. (1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.
- Under ABA Standards:
 - If AAL is not in the dual role, the AAL always argues for expressed objectives, relying upon the GAL to argue for best interest.
 - If AAL is not in the dual role, and child cannot or does not have expressed objectives, AAL argues for best interest as determined by 1) the GAL or 2) the AAL.
 - If AAL is in the dual role as an A/GAL, continuing in the dual role is inappropriate whenever client's expressed objectives conflict with the client's best interest. In such a situation, the A/GAL must request that the court appoint another person as GAL so that the attorney can function as an attorney, maintaining confidentiality and arguing for the client's expressed objectives.
 - If AAL is in the dual role as an A/GAL, and there is no conflict between a child's expressed objectives and best interest, the A/GAL can argue for both.

Reconciling Family Code and ABA

- The Texas Family Code and the ABA Standards do NOT perfectly align.
- A lawyer can follow the ABA Standards and fully comply with Texas Family Code.
- A lawyer should always follow the ABA Standards.



Go with the ABA!

- ABA approach is permissible under the Texas Family Code.
 - Under Texas Family Code §107.008, substituting judgment is discretionary, not mandatory
 - Under Texas Family Code §107.0125(c), an AAL may always request appointment of a separate GAL.
- ABA approach is preferable:
 - Best implements adversarial model. To be true to adversarial model, the child's voice must be heard. "Best interest" is best determined by the clash of positions.
 - No need to lose sleep worrying that court won't figure out the best interest unless you personally point it out.
 - Opinions about best interest are job of GAL. Your job is to give a voice to the child's wishes.
 - Preamble, ABA Model Rules: ". . . when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."