

CHAPTER 62
IOWA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING
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CHAPTER 62

IOWA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES

I. Introduction

[1] Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case. The Iowa Standards of Practice for Lawyers Representing Children in Custody Cases (Standards) are a model for good practice and consistency in the appointment and performance of lawyers representing children in Iowa custody cases.

[2] These Standards distinguish two distinct types of lawyers for children: (1) the Child’s Attorney, who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings; and (2) the Guardian ad Litem, who as a lawyer independently investigates, assesses, and advocates the child’s best interests. While some courts in the past have appointed a lawyer, often called a Guardian ad Litem, to report or testify on the child’s best interests and related information, this is not a lawyer’s role under these Standards.

[3] These Standards seek to keep the best interests of children at the center of the court’s attention and to build public confidence in a just and fair court system that works to promote the best interests of children. These Standards promote quality control, professionalism, clarity, uniformity, and predictability. They require that: (1) all participants in a case know the duties, powers, and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions.

[4] These Standards do not add obligations to the Iowa Rules of Professional Conduct, but like the comments to those rules, they provide guidance to attorneys representing children in custody cases for practicing in compliance with the rules. In the event of any conflict between these Standards and a Rule of Professional Conduct, the requirements of the rule take precedence.

II. Scope and Definitions

A. Scope

These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, custody, domestic violence, contested adoptions, and contested private guardianship cases.

B. Definitions

1. “Child’s Attorney”: A lawyer who provides independent legal counsel for a child, and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

2. “Guardian ad Litem”: A lawyer who provides independent legal services for the purpose of protecting a child’s best interests without being bound by the child’s directives or objectives.

Commentary

[1] A lawyer should be either a Child’s Attorney or a Guardian ad Litem, not both. The duties common to both roles are found in Part III of these Standards. The unique duties of each are described separately in Parts IV and V. The essential distinction between the two lawyer roles is that the Guardian ad Litem investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child’s Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

[2] The role of “Guardian ad Litem” has become muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond

recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator, and advocate. Asking one Guardian ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other nontraditional services should appoint an individual for that purpose, such as a Child and Family Reporter (CFR), and make clear that that person is not serving as a lawyer and is not a party. This person can be either a nonlawyer or a lawyer who chooses to serve in a volunteer nonlawyer capacity.

III. Duties of All Lawyers for Children

In addition to their general ethical duties as lawyers and the specific duties set out in Parts IV and V, Child’s Attorneys and Guardians ad Litem also have the duties outlined in this section.

A. Accepting appointment

The lawyer should accept an appointment only with a full understanding of the issues and functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with the lawyer’s ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.

B. Lawyer’s roles

A lawyer appointed as a Child’s Attorney or Guardian ad Litem should not play any other role in the case and should not testify, file a report, or make recommendations except as ordered by the court when appointed in cases under Iowa Code chapter 600, 600A, or both.

Commentary

[1] Neither a Child’s Attorney nor a Guardian ad Litem should be a witness, which means that the lawyer should not be cross-examined and more importantly should not testify or make a written or oral report or recommendation to the court but instead should offer traditional evidence-based legal arguments just as any other lawyer would. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

[2] If these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted. The Child’s Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of the child’s position, the Child’s Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has an attorney-client relationship with a child, the lawyer cannot and should not assume any other role for the child, especially as Guardian ad Litem or witness or CFR who investigates and makes a report.

C. Independence

The lawyer should be independent from the court and other participants in the litigation and unprejudiced and uncompromised in the lawyer’s independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties the court assigns and to participate in the case as fully and freely as a lawyer for a party.

Commentary

[1] The lawyer should not prejudge the case. A lawyer may receive payment from a court, a government entity, or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action.

D. Limited appointments

The court may limit a lawyer’s appointment to a specific issue and direct the lawyer accordingly.

E. Initial tasks

Immediately after being appointed, the lawyer should review the file. The lawyer should inform other parties or counsel of the appointment and that as counsel of record the lawyer

should receive copies of pleadings, discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child.

F. Meeting with the child

The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background, and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer should elicit and assess the child's views.

Commentary

[1] Establishing and maintaining a relationship with a child is the foundation of representation. Competent representation requires a child-centered approach and developmentally appropriate communication. All appointed lawyers should meet with the child and focus on the needs and circumstances of the individual child. Even nonverbal children can reveal much about their needs and interests through their behaviors and developmental levels. Meeting with the child also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to creative solutions in the child's interest.

[2] The nature of the legal proceeding or issue should be explained to the child in a developmentally appropriate manner. The lawyer must speak clearly, precisely, and in terms the child can understand. A child may not understand legal terminology. Also, because of a particular child's developmental limitations, the lawyer may not completely understand what the child says. Therefore, the lawyer must learn how to ask developmentally appropriate, nonsuggestive questions and how to interpret the child's responses. The lawyer may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

[3] While the lawyer should always take the child's point of view into account, caution should be used because the child's stated views and desires may vary over time or may be the result of fear, intimidation, or manipulation. Lawyers may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes.

G. Pretrial responsibilities

The lawyer should:

- 1. Conduct thorough, continuing, and independent discovery and investigations.**
- 2. Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.**
- 3. Stay apprised of other court proceedings affecting the child, the parties, and other household members.**
- 4. Attend meetings involving issues within the scope of the appointment.**
- 5. Take any necessary and appropriate action to expedite the proceedings.**
- 6. Participate in, and when appropriate, initiate negotiations and mediation. The lawyer should clarify, when necessary, that the lawyer is not acting as a mediator. A lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.**
- 7. Participate in depositions, pretrial conferences, and hearings.**
- 8. File or make petitions, motions, responses, or objections when necessary.**
- 9. Where appropriate, within a lawyer's area of competency and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.**

Commentary

[1] The lawyer should investigate the facts of the case to get a sense of the people involved and the real issues in the case, just as any other lawyer would. Guardians ad Litem have additional investigation duties described in Standard V.D.

[2] By attending relevant meetings, the lawyer can present the child's perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child's perspective, or when the meeting will not be materially relevant to any issues in the case.

[3] The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer's role is to advocate the child's interests and point of view in the negotiation process. If a party is legally represented, it is unethical for a lawyer to negotiate with the party directly without the consent of the party's lawyer.

[4] The lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court's consideration of issues important to the child's interests. Where available under state law or court rules or by permission of the court, relief requested may include, but is not limited to: (1) a mental or physical examination of a party or the child; (2) a parenting, custody, or visitation evaluation; (3) an increase, decrease, or termination of parenting time; (4) services for the child or family; (5) contempt for noncompliance with a court order; (6) a protective order concerning the child's privileged communications; and (7) dismissal of petitions or motions.

[5] The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) child support; (2) delinquency or status offender matters; (3) Supplemental Security Income and other public benefits access; (4) mental health proceedings; (5) visitation, access, or parenting time with parents, siblings, or third parties; (6) paternity; (7) personal injury actions; (8) school or education issues, especially for a child with disabilities; (9) guardianship; (10) termination of parental rights; (11) adoption; and (12) a protective order concerning the child's tangible or intangible property.

H. Hearings

The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the lawyer should:

1. Introduce herself or himself to the court as the Child's Attorney or Guardian ad Litem at the beginning of any hearing.

2. Make appropriate motions, including motions in limine and evidentiary objections, file briefs, and preserve issues for appeal, as appropriate.

3. Present and cross-examine witnesses and offer exhibits as necessary.

4. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to, and seek to minimize any harm to the child from the process.

5. Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.

6. Where appropriate, introduce evidence and make arguments on the child's competency to testify or the reliability of the child's testimony or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility.

7. Make a closing argument, proposing specific findings of fact and conclusions of law.**8. Ensure that a written order is made and that it conforms to the court's oral rulings and statutorily required findings and notices.***Commentary*

[1] Although the lawyer's position may overlap with the position of one or more parties, the lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. The lawyer should address the child's interests, describe the issues from the child's perspective, keep the case focused on the child's needs, discuss the effect of various dispositions on the child, and, when appropriate, present creative alternative solutions to the court.

[2] A brief formal introduction should not be omitted, because in order to make an informed decision on the merits, the court must be mindful of the lawyer's exact role, with its specific duties and constraints. Even though the appointment order states the nature of the appointment, judges should be reminded at each hearing which role the lawyer is playing.

[3] The lawyer's preparation of the child should include attention to the child's developmental needs and abilities. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes, explaining that such a result would not be the child's fault.

[4] If the child does not wish to testify or would be harmed by testifying, the lawyer should seek a stipulation of the parties not to call the child as a witness or should seek a protective order from the court. The lawyer should seek to minimize adverse consequences by seeking any appropriate accommodations permitted by law so that the child's views are presented to the court in the manner least harmful to the child, such as having the testimony taken informally in chambers without the parents present. The lawyer should seek any necessary assistance from the court, including location of the testimony, determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child. The child should be told beforehand whether in-chambers testimony will be shared with others, such as parents who might be excluded from chambers.

[5] Questions to the child should be phrased consistently with the law and research regarding children's competency, memory, and suggestibility. The information a child gives is often misleading, especially if adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue or have an expert present when a young child is directly involved in the litigation to point out any developmentally inappropriate phrasing of questions.

[6] The competency issue may arise in the unusual circumstance of the child being called as a live witness, as well as when the child's input is sought by other means such as in-chambers meetings, closed-circuit television testimony, etc. Iowa has no presumptive ages of competency; rather, courts engage in more flexible, case-by-case analyses. Competency to testify involves the abilities to perceive and relate. If necessary and appropriate, the lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

I. Appeals

1. If an appeal on behalf of the child is permitted by state law, and if it has been decided pursuant to Standard IV.D or V.F that such an appeal is necessary, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal. See Iowa Rule of Appellate Procedure 6.109(4).

2. The lawyer should participate in any appeal filed by another party concerning issues relevant to the child and within the scope of the appointment, unless discharged.

3. When the appeals court's decision is received, the lawyer should explain it to the child.

Commentary

[1] The lawyer should take a position in any appeal filed by a party, consistent with the other provisions in these Standards. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel.

[2] As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appeals court's decision, whether there are further appellate remedies, and what more, if anything, will be done in the trial court following the decision.

J. Enforcement

The lawyer should monitor the implementation of the court's orders and address any noncompliance.

K. End of representation

When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

IV. Child's Attorneys**A. Ethics and confidentiality**

1. Child's Attorneys are bound by Iowa's ethics rules in all matters.

2. A Child's Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.

Commentary

[1] The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position, and owes traditional duties to the child as client, subject to Iowa Rules of Professional Conduct 32:1.2(a) and 32:1.14.

[2] The Iowa Rules of Professional Conduct impose a broad duty of confidentiality concerning all "information relating to the representation of a client," but they also modify the traditional exceptions to confidentiality. Under rule 32:1.6, a lawyer may reveal information without the client's informed consent "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm," or "to comply with other law or a court order," or when "the disclosure is impliedly authorized in order to carry out the representation." Also, according to rule 32:1.14(c), "the lawyer is impliedly authorized under rule 32:1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests" when acting under rule 32:1.14 to protect a client with "diminished capacity" who "is at risk of substantial physical, financial, or other harm."

[3] Iowa Rule of Professional Conduct 32:1.7 provides that "a lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client . . ." Some diversity between siblings' views and priorities does not pose a direct conflict. But when two siblings aim to achieve fundamentally incompatible outcomes in the case as a whole, they are "directly adverse." Comment [8] to rule 32:1.7 states that "a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited [A] lawyer asked to represent several individuals . . . is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

B. Informing and counseling the client

In a developmentally appropriate manner, the Child's Attorney should:

- 1. Meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child and at other times as needed to gain the child's trust and establish a rapport with the child.**
- 2. Explain to the child what is expected to happen before, during, and after each hearing.**
- 3. Advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation.**
- 4. Discuss each substantive order and its consequences with the child.**

Commentary

[1] Meeting with the child is important before court hearings and case reviews. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next.

[2] The Child's Attorney has an obligation to explain clearly, precisely, and in terms the child can understand, the meaning and consequences of the child's choices. A child may not understand the implications of a particular course of action. The lawyer has a duty to explain in a developmentally appropriate way such information as will assist the child in having maximum input in decision-making. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

[3] As in any other attorney-client relationship, the lawyer may express the lawyer's assessment of the case, the best position for the child to take, and the reasons underlying such recommendation, and the lawyer may counsel against the pursuit of particular goals sought by the client. However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult-child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express the lawyer's assessment of the case. The lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child.

[4] The Child's Attorney has dual fiduciary duties to the child that must be balanced. On the one hand, the lawyer has a duty to ensure that the child is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by the applicable ethical standards.

[5] Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

[6] As developmentally appropriate, the Child's Attorney should consult the child prior to any settlement becoming binding.

[7] The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children sometimes assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out.

C. Client decisions

The Child’s Attorney should abide by the child’s decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer and does so. The Child’s Attorney should pursue the child’s expressed objectives unless the child requests otherwise and follow the child’s direction throughout the case.

Commentary

[1] The child is entitled to determine the overall objectives to be pursued. The Child’s Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult’s lawyer would. These Standards do not require the lawyer to consult with the child on matters that would not require consultation with an adult client, or to discuss with the child issues for which the child’s developmental limitations make it not feasible to obtain the child’s direction, as with an infant or preverbal child.

1. The Child’s Attorney should make a separate determination whether the child has “diminished capacity” pursuant to Iowa Rule of Professional Conduct 32:1.14 with respect to each issue for which the child is called upon to direct the representation.

Commentary

[1] These Standards do not presume that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of the child’s position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.

2. If the child does not express objectives of representation, the Child’s Attorney should make a good faith effort to determine the child’s wishes and advocate according to those wishes as if the child had expressed them. If a child does not or will not express objectives regarding a particular issue or issues, the Child’s Attorney should determine and advocate the child’s legal interests or request the appointment of a Guardian ad Litem.

Commentary

[1] There are circumstances in which a child is unable to express any positions, as in the case of a preverbal child. Under such circumstances, the Child’s Attorney should represent the child’s legal interests or request appointment of a Guardian ad Litem. “Legal interests” are distinct from “best interests” and from the child’s objectives. Legal interests are interests of the child that are specifically recognized in law and that can be protected through the courts. A child’s legal interests could include, for example, depending on the nature of the case: a special needs child’s right to appropriate educational, medical, or mental health services; helping assure that children needing residential placement are placed in the least restrictive setting consistent with their needs; a child’s child support, governmental, and other financial benefits; visitation with siblings, family members, or others the child wishes to maintain contact with; and a child’s due process or other procedural rights.

[2] The child’s failure to express a position is different from being unable to do so and from directing the lawyer not to take a position on certain issues. The child may have no opinion with respect to a particular issue or may delegate the decision-making authority. The child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue the objective that appears to be in the client’s legal interests based on information the lawyer has and positions the child has already expressed. A position chosen by the lawyer should not contradict or undermine other issues about which the child has expressed a viewpoint. However, before reaching that point the lawyer should clarify with the child whether the child wants the lawyer to take a position, remain silent with respect to that issue, or express a point of view only if the party is out of the room. The lawyer is then bound by the child’s directive.

3. If the Child’s Attorney determines that pursuing the child’s expressed objective would put the child at risk of substantial physical, financial, or other harm, and is not merely contrary to

the lawyer’s opinion of the child’s interests, the lawyer may request appointment of a separate Guardian ad Litem and continue to represent the child’s expressed position, unless the child’s position is prohibited by law or without any factual foundation. The Child’s Attorney should not reveal the reason for the request for a Guardian ad Litem, which would compromise the child’s position, unless such disclosure is authorized by the applicable ethics rule on confidentiality.

Commentary

[1] One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all the child knows, because of a feeling of blame or of responsibility to take care of a parent, or because of threats or other reasons to fear the parent. The child may choose to deal with a known situation rather than risk the unknown.

[2] It should be remembered in this context that the lawyer is bound to pursue the client’s objectives only through means permitted by law and ethical rules. The lawyer may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.

[3] In most cases the ethical conflict involved in asserting a position that would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer’s counseling function, if the lawyer has taken the time to establish rapport with the child and gain the child’s trust. While the lawyer should be careful not to apply undue pressure to the child, the lawyer’s advice and guidance can often persuade the child to change a dangerous or imprudent position or at least identify alternative choices in case the court denies the child’s first choice.

[4] If the child cannot be persuaded, the lawyer has a duty to safeguard the child’s interests by requesting appointment of a Guardian ad Litem. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the Guardian ad Litem may never learn of the disclosed danger.

[5] Iowa Rule of Professional Conduct 32:1.14 provides that “when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action” and “the lawyer is impliedly authorized under rule 32:1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”

[6] If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps necessary to ensure the child’s safety, respecting and following the child’s direction to the greatest extent possible consistent with the child’s safety and ethical rules.

4. The Child’s Attorney should discuss with the child whether to ask the judge to meet with the child and whether to call the child as a witness. The decision should include consideration of the child’s needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in the case, the necessity of the child’s direct testimony, the availability of other evidence or hearsay exceptions that may substitute for direct testimony by the child, and the child’s developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child’s Attorney is bound by the child’s direction concerning testifying.

Commentary

[1] Decisions about the child testifying should be made individually based on the circumstances. If the child has a therapist, the Child’s Attorney should consult the therapist about the decision and for help in preparing the child. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so.

D. Appeals

If an appeal on behalf of the child is permitted, the Child’s Attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child’s Attorney should appeal. If the Child’s Attorney determines that an appeal would be frivolous or that the Child’s Attorney lacks the expertise necessary to handle the appeal, the Child’s Attorney should notify the court and seek to be discharged or replaced.

Commentary

[1] The Child’s Attorney should explain not only any legal possibility of an appeal, but also the ramifications of filing an appeal, including delaying conclusion of the case, and what will happen pending a final decision.

E. Obligations after initial disposition

The Child’s Attorney should perform, or when discharged, seek to ensure, continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child’s placement or services, so long as the court maintains its jurisdiction.

Commentary

[1] Representing a child continually presents new tasks and challenges due to the passage of time and the changing needs of the child. The Child’s Attorney should stay in touch with the child, the parties or their counsel, and any other caretakers, case workers, and service providers throughout the term of appointment to attempt to ensure that the child’s needs are met and that the case moves quickly to an appropriate resolution.

F. End of representation

The Child’s Attorney should discuss the end of the legal representation with the child, what contacts, if any, the Child’s Attorney and the child will continue to have, and how the child can obtain assistance in the future if necessary.

V. Guardians ad Litem

A. Ethics

Guardians ad Litem are bound by Iowa’s ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.

Commentary

[1] Siblings with conflicting views do not pose a conflict of interest for a Guardian ad Litem, because such a lawyer is not bound to advocate a client’s objective. A Guardian ad Litem in such a case should report the relevant views of all the children in accordance with Standard V.E.3, and advocate the children’s best interests in accordance with Standard V.E.1.

B. Confidentiality

A child’s communications with the Guardian ad Litem are subject to Iowa’s ethics rules on attorney-client confidentiality, except that the lawyer may also use the child’s confidences for the purposes of the representation without disclosing them.

Commentary

[1] Iowa Rule of Professional Conduct 32:1.6(a) bars any release of information except for disclosures that are “impliedly authorized in order to carry out the representation.” Under rule 32:1.6, a lawyer may reveal confidences “to prevent reasonably certain death or substantial bodily harm,” “to comply with other law or a court order,” or for other named reasons. As for communications that are not subject to disclosure under these or other applicable ethics rules, a Guardian ad Litem may

use the communications to further the child's best interests without disclosing them. An example of this distinction is if a child tells the lawyer that a parent takes drugs: the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child. For more discussion of exceptions to confidentiality, see the Commentary to Standard IV.A.

C. Explaining role to the child

In a developmentally appropriate manner, the Guardian ad Litem should explain to the child that the Guardian ad Litem will (1) investigate and advocate the child's best interests, (2) investigate the child's views relating to the case and will report them to the court unless the child requests that they not be reported, and (3) use information from the child for those purposes, but (4) not necessarily advocate what the child wants as a lawyer for a client would.

D. Investigations

The Guardian ad Litem should conduct thorough, continuing, and independent investigations, including:

1. Reviewing any court files of the child and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers.

2. Reviewing the child's social services records, if any, mental health records (except as otherwise provided in Standard VI.A.3), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case.

3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs).

4. Contacting and meeting with the parties with permission of their lawyers.

5. Interviewing individuals significantly involved with the child, who may in the Guardian ad Litem's discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.

6. Reviewing the relevant evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of it.

7. Staying apprised of other court proceedings affecting the child, the parties, and other household members.

Commentary

[1] Relevant files to review include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted.

[2] Though courts should order automatic access to records, the Guardian ad Litem may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those pertaining to the parties.

[3] Meetings with the child and all parties are among the most important elements of a competent investigation. However, there may be a few cases where a party's lawyer will not allow the Guardian ad Litem to communicate with the party. Iowa Rule of Professional Conduct 32:4.2 prohibits such contact without consent of the party's lawyer. In some such cases, the Guardian ad Litem may be able to obtain permission for a meeting with the party's lawyer present. When the party has no lawyer, rule 32:4.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Guardian ad Litem's role.

[4] The parties' lawyers may have information not included in any of the available records. They can provide information on their clients' perspectives.

E. Advocating the child's best interests

1. Any assessment of, or argument on, the child's best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.

2. Guardians ad Litem should bring to the attention of the court any facts that when considered in context seriously call into question the advisability of any agreed settlement.

3. At hearings on custody or parenting time, Guardians ad Litem should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.

Commentary

[1] Determining a child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions, and then applying legal standards to those interests. Factors in determining a child's interests are generally stated in Iowa's statutes and case law, and Guardians ad Litem must be familiar with these factors and how courts apply them. A child's desires are usually one of many factors in deciding custody and parenting time, and the weight given the desires varies with age and circumstances.

[2] A Guardian ad Litem is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Guardian ad Litem should base this determination on objective criteria concerning the child's needs and interests and not merely on the Guardian ad Litem's personal values, philosophies, and experiences. A best-interests case should be based on Iowa's governing statute and case law, or a good-faith argument for modification of case law. The Guardian ad Litem should not use any other theory, doctrine, model, technique, ideology, or personal rule without explicitly arguing for it in terms of governing law or the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

[3] The Guardian ad Litem must consider the child's individual needs. The child's various needs and interests may be in conflict and must be weighed against each other. The child's developmental level, including the child's sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

[4] As a general rule Guardians ad Litem should encourage, not undermine, settlements. However, in unusual cases where the Guardian ad Litem reasonably believes the settlement would endanger the child and the court would not approve the settlement were it aware of certain facts, the Guardian ad Litem should bring those facts to the court's attention. This should not be done by ex parte communication. The Guardian ad Litem should ordinarily discuss the Guardian ad Litem's concerns with the parties and counsel in an attempt to change the settlement before involving the judge.

F. Appeals

If an appeal on behalf of the child is permitted, the Guardian ad Litem should appeal when the Guardian ad Litem believes that (1) the trial court's decision is significantly detrimental to the child's welfare, (2) an appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and (3) the probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo. See Iowa R. App. P. 6.109(4).

VI. Training

Training for lawyers representing children in custody cases should cover:

- 1. Relevant state and federal laws, agency regulations, court decisions, and court rules.**
- 2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law.**
- 3. Applicable representation guidelines and standards.**

- 4. The court process and key personnel in child-related litigation, including custody evaluations and mediation.**
- 5. Children’s development, needs, and abilities at different ages.**
- 6. Communicating with children.**
- 7. Preparing and presenting a child’s viewpoints, including child testimony and alternatives to direct testimony.**
- 8. Recognizing, evaluating, and understanding evidence of child abuse and neglect.**
- 9. Family dynamics and dysfunction, domestic violence, and substance use disorder.**
- 10. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation, and testimony.**
- 11. Available services for child welfare, family preservation, medical care, mental health, education, and special needs, including placement, evaluation and diagnostic, and treatment services, and provisions and constraints related to agency payment for services.**
- 12. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.**

Commentary

[1] Courts, bar associations, and other organizations should sponsor, fund, and participate in training. They should also offer advanced and new-developments training and provide mentors for lawyers who are new to child representation. Training in custody law is especially important because not everyone seeking to represent children will have a family law background. Lawyers must be trained to distinguish between the different kinds of cases in which they may be appointed and the different legal standards to be applied.

[2] Training should address the impact of spousal or domestic partner violence on custody and parenting time and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations and how that may affect custody awards to victims.

[Court Order August 28, 2018; January 26, 2024]