

ABA Standards for the Child's Attorney

A Comparison with Tennessee
Supreme Court Rule 40

The Child's Attorney.

The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

Lawyer Appointed as Guardian Ad Litem.

A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

There is No Attorney Ad Litem in Juvenile Court!

Coming up is a discussion where the term "attorney ad litem" is used.

There is no legal authority for the appointment of an "attorney ad litem" in juvenile court. This is old terminology that many judges and lawyers continue to use.

Supreme Court Rule 40 provides that when there is a conflict in the guardian ad litem's representation between the child's best interest and the child's preference, then the court may appoint an attorney to represent the child's preference. The attorney functions as an attorney pursuant to Rule 40.

There is no difference in the representation of a child by an attorney appointed under Rule 40 to represent the child's preference from any other attorney's representation of a client, other than the client is a child.

If you have any questions, please contact Leslie Barrett Kinkead at: leslie.kinkead@tncourts.gov

Tennessee Rule 40

(1) **The child is the client of the guardian ad litem.** The guardian ad litem is appointed by the court to **represent the child by advocating for the child's best interests and ensuring that the child's concerns and preferences are effectively advocated.** The child, not the court, is the client of the guardian ad litem.

Basic Obligations

The child's attorney should:

- (1) Obtain copies of all pleadings and relevant notices;
- (2) Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- (4) Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- (5) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process;

(6) Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and

(7) Identify appropriate family and professional resources for the child.

Conflicts

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. (2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Tennessee Rule 40

(e) Responsibilities and duties of a guardian ad litem when the child's best interests and the child's preferences are in conflict.

(1) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:

(i) Fully investigate all of the circumstances relevant to the child's position, marshal every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;

(ii) Discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.

(2) If, after fully investigating and advising the child, the guardian ad litem is still in a position in which the child is urging the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian ad litem shall pursue one of the following options:

(i) Request that the court appoint another lawyer to serve as guardian ad litem, and then advocate for the child's position while the other lawyer advocates for the child's best interest.

(ii) Request that the court appoint another lawyer to represent the child in advocating the child's position, and then advocate the position that the guardian ad litem believes serves the best interests of the child.

Client Under Disability.

The child's attorney should determine whether the child is "under a disability" pursuant to the Model Rules of Professional Conduct or the Model Code of Professional Responsibility with respect to each issue in which the child is called upon to direct the representation.

Tennessee RPC 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) 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, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Client Preferences

The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

Child's Interests

The determination of the child's legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

Meet With Child.

Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

Investigate.

To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

- (1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;
- (2) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;
- (3) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;
- (4) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

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- (5) Obtaining necessary authorizations for the release of information;
 - (6) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
 - (7) Reviewing relevant photographs, video or audio tapes and other evidence; and
 - (8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

Tenn. GAL must conduct an independent investigation of the facts, including:

- (i) Obtaining necessary authorization for release of information, including an appropriate discovery order;
- (ii) Reviewing the court files of the child and siblings and obtaining copies of all pleadings relevant to the case;
- (iii) Reviewing and obtaining copies of Department of Children's Services' records;
- (iv) Reviewing and obtaining copies of the child's psychiatric, psychological, substance abuse, medical, school and other records relevant to the case;
- (v) Contacting the lawyers for other parties for background information and for permission to interview the parties;

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- (vi) Interviewing the parent(s) and legal guardian(s) of the child with permission of their lawyer(s) or conducting formal discovery to obtain information from parents and legal guardians if permission to interview is denied;
 - (vii) Reviewing records of parent(s) or legal guardian(s), including, when relevant to the case, psychiatric, psychological, substance abuse, medical, criminal, and law enforcement records;
 - (viii) Interviewing individuals involved with the child, including school personnel, caseworkers, foster parents or other caretakers, neighbors, relatives, coaches, clergy, mental health professionals, physicians and other potential witnesses;
 - (ix) Reviewing relevant photographs, video or audio tapes and other evidence; and
 - (x) Engaging and consulting with professionals and others with relevant special expertise.

File Pleadings.

The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. 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 contact or visitation;
- (4) Restraining or enjoining a change of placement;
- (5) Contempt for non-compliance with a court order;

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- (6) Termination of the parent-child relationship;
 - (7) Child support;
 - (8) A protective order concerning the child's privileged communications or tangible or intangible property;
 - (9) Request services for child or family; and
 - (10) Dismissal of petitions or motions. Filing and arguing necessary motions is an essential part of the representation.

Request Services

Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

- (1) Family preservation-related prevention or reunification services;
- (2) Sibling and family visitation;
- (3) Child support;
- (4) Domestic violence prevention, intervention, and treatment;
- (5) Medical and mental health care;
- (6) Drug and alcohol treatment;

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- (7) Parenting education;
 - (8) Semi-independent and independent living services;
 - (9) Long-term foster care;
 - (10) Termination of parental rights action;
 - (11) Adoption services;
 - (12) Education;
 - (13) Recreational or social services; and
 - (14) Housing.

Negotiate Settlements

The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resource

Hearings

The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child. The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing. Motions and Objections. The child's attorney should make appropriate motions, including motions in limine and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate. The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

Whether the Child Should Testify

The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

Child Witness

The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Questioning the Child

The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Challenges to the Child's Testimony

The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child. Commentary Many jurisdictions have abolished presumptive ages of competency.

Expanded Scope of Representation

The child's attorney may 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. For example:

- (1) Child support;
- (2) Delinquency or status offender matters;
- (3) SSI and other public benefits;
- (4) Custody;
- (5) Guardianship;

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- **(6) Paternity;**
 - **7) Personal injury;**
 - **(8) School/education issues, especially for a child with disabilities;**
 - **(9) Mental health proceedings;**
 - **(10) Termination of Parental rights; and**
 - **(11) Adoption**