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JUDICIARY COMMITTEE: March 2, 2009 PUBLIC HEARING

Testimony of Carolyn Signorelli
Chief Child Protection Attorney

SB No. 1057
HB No. 6404
HB No. 6451



Commission on Child Protection
State of Connecticut

Office of the Chief Child Protection Attorney

Senator McDonald, Representative Lawlor and esteemed Committee Members, for the record I am Carolyn Signorelli, Chief Child Protection Attorney, with the Commission on Child Protection and would like to begin by thanking the Chairs and the Committee for raising three bills based upon proposals I submitted on behalf of the Commission:

Senate Bill 1057 clarifies the respective authority of the court and the Chief Child Protection Attorney in the assignment of children's attorneys and the roles of attorneys and GAL's in child protection proceedings; House Bill 6404 grants indemnification and statutory immunity for state paid contract attorneys providing representation to children and indigent parents in our family and juvenile courts; and House Bill 6451, contains technical amendments regarding the Commission on Child Protection; as well as measures to ensure the right of children to independent counsel and to permit a multi-disciplinary model of legal representation in child protection matters.

S.B. No. 1057 (RAISED) AN ACT CONCERNING APPOINTMENTS OF COUNSEL AND GUARDIAN AD LITEMS IN CERTAIN JUVENILE MATTERS.

The amendments to C.G.S. § 46b-129a found at p. 1, lines 10 - 12 clarifies that the Chief Child Protection Attorney is responsible for assigning attorneys to children in child protection cases, except when there is an immediate need during a court proceeding for the court to appoint an attorney. This clarification will render § 46b-129a consistent with the Commission's enabling legislation and with Court Rule 32a-1(b) (attached).

The following amendments are aimed towards clarifying the duties attorneys and GAL's owe to the children they represent in child protection proceedings and towards increasing attorney accountability to their clients, the Commission and the Court:

1. Children 7 years of age or older receive traditional client directed representation from an attorney (p. 1, l. 14 - p. 2, l. 15);
2. Children are appointed a separate GAL if it is established that they are incapable of acting in their own interests consistent with Rule of Professional Conduct 1.14 (p. 2, lines 22 – 27).
3. The role of a GAL is also more clearly defined by requiring the GAL to conduct an independent investigation and to provide the court with all information relevant to a determination of the child's best interest (p. 2, lines 28 – 30).
4. Exceptions are established from the general rule that the Commission on Child Protection pays for the legal and GAL representation of children in juvenile matters. (p. 2, l. 42 – p. 3, l. 52).

Discussion: Amendments to C.G.S. § 46b-129a:

The field of legal representation in child protection matters has been moving in the direction of improving the advocacy for children in neglect and abuse proceedings by providing trained attorneys committed to zealously advocating for children's interests in court. See, ABA/NACC Revised Standards of Practice for Lawyers Who Represent:
<http://www.naccchildlaw.org/resource/resmgr/Docs/juvenilejustice.doc>
and Connecticut Standards of Practice for Attorneys and Guardians Ad Litem Representing Children in Child Protection Matters (excerpts attached).

Connecticut's current model of child representation mandated by C.G.S. § 46b-129a requires that representatives for children in neglect and abuse proceedings act as both an attorney and a guardian ad litem (GAL). This creates an inherent conflict in the representation since an attorney owes a duty of loyalty and confidentiality to the wishes of his or her client, but a GAL has no such duty and is obligated to advocate for what he or she determines to be in the child client's best interest. The current language in C.G.S. § 46b-129a states: "When a conflict arises between the child's wishes or position and *that which counsel for the child believes is in the best interest of the child*, the court shall appoint another person as guardian ad litem for the child." The combination of this dual role and subjective standard of "best interest" to determine that a conflict exists has permitted attorney/GAL's for children to act more as GAL than attorney. Some attorneys do not work to establish an attorney-client relationship with child clients, do not diligently discern the expressed or implied wishes of children and substitute their subjective judgment of what is in the best interest of children when they advocate before the court or seek a separate GAL. This practice severely limits a child's rights as a party to be legally represented and to be heard in court proceedings.

This proposal seeks to eliminate that problem for children 7 years of age or older by simply assigning them an attorney and making it clear the attorney's sole responsibility is to provide client directed representation unless the more stringent requirements for protective action of Rule 1.14 are met.¹ Rule 1.14 requires that the client be under an impairment that renders them incapable of reaching an informed decision in relation to the subject matter of the representation. It further requires that that impairment and lack of judgment in relation to the client's own interests is likely to have serious adverse consequences if the attorney does not take protective action. This approach is consistent with a child's party status in juvenile proceedings and with the Commentary to Rule 1.14 which states, "Nevertheless, a client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Conn. Prac. Bk. 1.14, Commentary (attached).

Discussion amendments to C.G.S. § 46b-136:

This amendment renders section 46b-136 consistent with recent changes to Conn. Prac. Bk. § 32a-1(e) and (f). This statute provides for the judicial authority's discretion to appoint counsel in the interest of justice, even where a party might otherwise not be entitled to state paid legal representation. For example, in some delinquency matters parents who are found able to afford to hire counsel for their child fail to do so, yet the court believes the child must be represented. The Chief Child Protection Attorney will assign counsel, the court will assess costs to the responsible party and the Chief Child Protection Attorney can seek reimbursement for the costs of that representation. Another instance where this statute is utilized by the judicial authority is for parents in child protection cases who do not qualify as indigent, but cannot or do not obtain their own attorney. The court can rule that the interest of justice requires that a state paid attorney be appointed by the judicial authority and assigned by the Chief Child Protection Attorney. (p. 3, l. 64 – p. 4, l. 82).

H.B. 6404 (RAISED) AN ACT CONCERNING INDEMNIFICATION AND IMMUNITY FOR CERTAIN CHILD PROTECTION AND GUARDIAN AD LITEMS.

On behalf of the Commission, I have also submitted amendments to C.G.S. §§ 4-141 (p. 2, lines 26 – 28) and 4-165 (p. 4, lines 79 – 81) to include the attorneys providing representation pursuant to C.G.S. § 46b-123d(a)(1) in the

¹ The Commission has obtained an opinion from the Children's Bureau of the Federal Dept. of Human Services that this proposal will not violate CAPTA and therefore not jeopardize federal reimbursement. (attached).

definition of state employee for purposes of indemnification and immunity from liability for negligence.

Juvenile Contract attorneys providing representation in child protection matters should be considered equivalent to special public defenders for purposes of immunity because they are independent attorneys contracting with the state to provide representation to indigent individuals who are constitutionally and statutorily entitled to representation.² Although these contractors are not direct employees of the state, both special public defenders and attorneys that contract with the Chief Child Protection Attorney provide legal representation that the state is required to provide due to the liberty interests at stake and its interference in those liberty interests.

This representation is essential to the state's ability to perform certain functions. Specifically, juvenile contract attorneys assist the judicial system in fulfilling the court's role as arbiter of matters between the State Department of Children and Families, the parents as the respondents brought before the court by the state, and the children who are the subject of the state's petitions. These attorneys, just as special public defenders serve to protect the constitutional rights of indigent criminal defendants, serve to protect the constitutional right of parents and children to family integrity. Therefore, statutory immunity pursuant to § 4-165, should be extended to these attorneys. The amendment also includes the contract attorneys who defend putative fathers and parties facing incarceration in family matters because similar to public defenders they protect the liberty and property rights of putative fathers entitled to a fair adjudication of paternity and the liberty interests of contemnors in family matters cases who are threatened with incarceration.

This bill constitutes an important measure in my efforts as Chief Child Protection Attorney to raise awareness of the importance of this work and gain recognition of the valuable role these attorneys play in the state's ability to preserve the rights of children and families in our child welfare system. In order to attract more competent attorneys to this field, the current lack of prestige associated with the practice needs to improve. To that end I have facilitated Child Welfare Law's recognition in this state as a legal specialty; enactment of this bill will compliment my efforts to raise the bar in the practice of child protection.

In addition, by providing this immunity from negligent behavior, the legislature will *not* be removing accountability for these attorneys or reducing the protections for these clients. It must be acknowledged that one of the reasons for the creation of the Commission on Child Protection was the recognition that many attorneys in this field were not adequately representing the interests of

² Pursuant to P.A. 76-371 Sec. 2, the legislature added public defenders, including special public defenders, to the definition of state employees for purposes of entitlement to qualified immunity under C.G.S. § 4-165.

their clients and that the existing system of representation was not working well. Historically parents had the right to sue for negligent representation, yet the accountability and protection that opponents of this bill attribute to that right was not realized.

A much more effective way to ensure that these clients receive exemplary legal representation is to attract better attorneys to the field; train them in child protection law and practice; provide them with the tools necessary to advocate for their clients; limit their caseloads and hold them to high standards of practice. We can increase the prestige in which the field of child welfare law is held by acknowledging the important role it plays in our system of child welfare and justice, thus attracting better attorneys. Providing immunity and indemnification for these attorneys is one important step to achieve that goal and improve the child protection bar.

For attorneys who wish to focus their practice in this area and become child welfare experts and specialists, the immunity will provide a much needed financial incentive through savings in malpractice insurance costs. Moreover, granting statutory immunity does not remove other means of holding incompetent attorneys accountable, including actions for intentional conduct, the grievance process and loss of their annual contract with the Commission.

For these reasons, I respectfully request that the Committee vote favorably on H.B. 6404.

H.B. 6451 (RAISED) AN ACT CONCERNING THE COMMISSION ON CHILD PROTECTION AND THE CHIEF CHILD PROTECTION ATTORNEY.

H.B. 6451 makes four changes to the Commission's enabling legislation:

1. Section 1 adds a subsection (j) to C.G.S. § 46-123c. This subsection will establish that the Commission on Child Protection is only required to pay for one original transcript when multiple parties that it provides representation for are part of an appeal taken by one of its clients. **(p. 1, lines 3 – 8)**. If the appeal is taken by the Attorney General's Office, the Commission on Child Protection is only responsible to pay for the costs of copies of the additional transcripts required by its contract attorneys. **(p. 1, lines 9 – 13)**.
2. A technical amendment to clarify that the Chief Child Protection Attorney can contract with law firms is contained in section 46b-123c(1)(B)(ii). **(p. 2, l. 29)**.
3. A new subdivision (B) has been included in division (2) of section 46b-123c in order to clarify that the legislature intended the office of the Chief Child Protection Attorney to provide an attorney pursuant to its established system of representation to each and every child who is the subject of an abuse, neglect or termination petition in juvenile court. **(p. 2, lines 35 – 37)**.

4. This new provision added to section 46b-123d(b) creates an exception to the mandated reporting requirements of sections 17a-101 et. seq. for social workers or other mandated reporters employed by an attorney providing legal services pursuant to this section. In furtherance of the multi-disciplinary agency model of legal representation encouraged by subsection, the amendment would apply the attorney-client privilege to the social workers or other mandated reporters working for an attorney under this section. **(p. 3, lines 54 – 65)**. The bill proposes that the exception be contained within the mandated reporting statute as well. **(p. 3, lines 75-77)**.

Discussion new section 46b-123c(2)(B) referenced above in # 3:

I have proposed this section because there is some disagreement over whether or not the system of legal representation established by the Chief Child Protection Attorney pursuant to P.A. 05-3, Sections 44-46, was intended to apply to all children subject to neglect, abuse or termination of parental rights petitions in juvenile court or only to the children of indigent parents. This debate stemmed from a circumstance where non-indigent respondent parents hired and paid for counsel to file an appearance on behalf of the children they were accused of neglecting and abusing.

It is my position, as well as that of the Commission, that:

- i. The plain language of our enabling statute makes no distinction based upon indigent status with respect to our responsibility to assign counsel for children³; in fact, section 46b-129a, the statute prior to the Commission's establishment that provided for the appointment of counsel for children by the court, also makes no reference to indigent status of a child's parent being found prior to the court's obligation to appoint counsel for a child;
- ii. There exists a conflict that is not consentable under the Rules of Professional Conduct where the respondent-parents in a neglect and abuse petition hire, pay for and have the ability to fire counsel for their child who is the subject of the petition, requiring the child to provide informed consent. See Rules of Professional Conduct: 1.7(a)(2), 1.8(f), 5.4(d)(3) (attached). Matters concerning the consequences of and alternatives to one's parent providing legal representation in a child protection proceeding is not a matter typically considered within the ability of a child to "understand, deliberate upon, and reach conclusions about..." for purposes of providing the informed consent required by Rule 1.8(f)(1). (See, Rule 1.14, Commentary);

³ C.G.S. § 46b-123d(a)(1) provides: "The Chief Child Protection Attorney appointed under section 46b-123c shall: Establish a system to provide ... (B) legal services and guardians ad litem to children, youths and indigent legal parties in proceedings before the superior court for juvenile matters." Note that the word indigent does not refer to or qualify children or youths, just legal parties in addition to children or youth.

iii. Permitting wealthier parents to choose and hire counsel for their allegedly abused or neglected children would mean that wealthier respondent-parents would have a greater right and ability to control the course of the proceedings, flow of information to the court and ultimate outcome of the case, than that of indigent parents. Conversely, children of wealthier parents would have less guarantees of independent legal counsel owing a duty of loyalty only to them, than children of indigent parents; and

iv. Unlike the situation where attorneys representing sibling groups in these cases assess whether or not their representation of any of the siblings will be materially limited, the risks of inadequate protection of the child client's rights, interests and well-being where counsel is hired and paid by the child's parents in a neglect and abuse proceeding are too significant to conduct case specific inquiries about the ability of counsel to provide conflict free representation. The risk that an attorney's independent professional judgment and his or her ability to maintain an unfettered attorney-client relationship will be compromised when the person who may have abused or neglected their client is paying them, warrants the current statutory framework whereby originally the court and now the Chief Child Protection Attorney automatically assign counsel to children regardless of their parents' financial status. This amendment seeks to make that clear.

I respectfully request that the Committee vote to approve H.B. 6451.

Thank you for this opportunity to be heard. If there are any questions, I welcome them at this time.

Respectfully Submitted

Carolyn Signorelli

MATERIALS RE: SB 1057

CHAPTER 32a
RIGHTS OF PARTIES
NEGLECTED, UNCARED FOR AND DEPENDENT
CHILDREN AND TERMINATION OF PARENTAL RIGHTS

<p>Sec. 32a-1. Right to Counsel and to Remain Silent 32a-2. Hearing Procedure; Subpoenas 32a-3. Standards of Proof 32a-4. Child or Youth Witness 32a-5. Consultation with Child or Youth</p>	<p>Sec. 32a-6. Interpreter 32a-7. Records 32a-8. Use of Confidential Alcohol or Drug Abuse Treatment Records as Evidence 32a-9. Competency of Parent</p>
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For previous Histories and Commentaries see the editions of the Practice Book corresponding to the years of the previous amendments.

Sec. 32a-1. Right to Counsel and to Remain Silent

(a) At the first hearing in which the parents or guardian appear, the judicial authority shall advise and explain to the parents or guardian of a child or youth their right to silence and to counsel.

(b) The child or youth has the rights of confrontation and cross-examination and shall be represented by counsel in each and every phase of any and all proceedings in child protection matters, including appeals. The judicial authority before whom a juvenile matter is pending shall notify the chief child protection attorney who shall assign an attorney to represent the child or youth.

(c) The judicial authority on its own motion or upon the motion of any party, may appoint a separate guardian ad litem for the child or youth upon a finding that such appointment is necessary to protect the best interest of the child or youth. An attorney guardian ad litem shall be appointed for a child or youth who is a parent in a termination of parental rights proceeding or any parent who is found to be incompetent by the judicial authority.

(d) The parents or guardian of the child or youth have the rights of confrontation and cross-examination and may be represented by counsel in each and every phase of any and all proceedings in child protection matters, including appeals. The judicial authority shall determine if the parents or guardian of the child or youth are eligible for counsel. Upon a finding that such parents or guardian of the child or youth are unable to afford counsel, the judicial authority shall notify the chief child protection attorney of such finding, and the chief child protection attorney shall assign an attorney to provide representation.

(e) If the judicial authority, even in the absence of a request for appointment of counsel, determines that the interests of justice require the provision of an attorney to represent the child's or

youth's parent or parents or guardian, or other party, the judicial authority may appoint an attorney to represent any such party and shall notify the chief child protection attorney who shall assign an attorney to represent any such party. For the purposes of determining eligibility for appointment of counsel, the judicial authority shall cause the parents or guardian of a child or youth to complete a written statement under oath or affirmation setting forth the parents' or guardian's liabilities and assets, income and sources thereof, and such other information as the commission on child protection shall designate and require on forms adopted by said commission.

(f) Where under the provisions of this section, the judicial authority so appoints counsel for any such party who is found able to pay, in whole or in part, the cost thereof, the judicial authority shall assess as costs on the appropriate form against such parents, guardian or custodian, including any agency vested with the legal custody of the child or youth, the expense so incurred and paid for by the chief child protection attorney in providing such counsel, to the extent of their financial ability to do so, in accordance with the rates established by the commission on child protection for compensation of counsel. Reimbursement to the appointed attorney of unrecovered costs shall be made to that attorney by the chief child protection attorney upon the attorney's certification of his or her unrecovered expenses to the chief child protection attorney.

(g) Notices of initial hearings on petitions, shall contain a statement of the respondent's right to counsel and that if the respondent is unable to afford counsel, counsel will be appointed to represent the respondent, that the respondent has a right to refuse to make any statement and that any statement the respondent makes may be introduced in evidence against him or her.



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EXCERPTS
from

**CONNECTICUT STANDARDS OF PRACTICE FOR ATTORNEYS
& GUARDIANS AD LITEM REPRESENTING CHILDREN
IN CHILD PROTECTION CASES.**

Adopted by the Connecticut Commission on Child Protection on
November 16, 2006, pursuant to Connecticut General Statute § 46b-123c(3)
(Subject to Revision)

INTRODUCTION

These standards have been adapted from the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases adopted on February 5, 1996 and Revised and Adopted by the National Association of Counsel for Children (NACC) on April 12, 1999. In keeping with its legislative mandate to adopt standards of practice, the Commission on Child Protection convened a Work Group consisting of the Chief Court Administrator for Juvenile Matters, Commission members, and attorneys currently practicing in the child protection field, including two juvenile contract attorneys*. The Work Group reviewed, discussed and revised the model standards to ensure their consistency with Connecticut law and practices.

All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. These Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights.

These Standards apply here in Connecticut to lawyers in their role as an attorney and when appointed in the dual capacity of an attorney/guardian ad litem. Even in the dual capacity role, the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The attorney/guardian ad litem (GAL)(1) should therefore perform all the functions of a "child's attorney," except as otherwise noted. Section V. of these standards applies when an attorney is appointed to act solely as GAL and represent the child's best interest.

The Standards are divided as follows:

- I.** Definitions
- II.** Connecticut Framework for the Appointment of Attorney and GAL's for Children in Child Protection Matters Basic Obligations of Parents' Attorneys.
- III.** Summary of the General Authority and Duties of the Attorney/GAL and Duties of the GAL
- IV.** General Authority and Duties of the Attorney/GAL.
- V.** Duties of GAL for the Minor Child.

The standards include "black letter" standards, or requirements written in bold. Following the black letter standards are "actions." These actions further discuss how to fulfill the standard; implementing each standard requires the accompanying action. After the action is "commentary" or a discussion of why the standard is necessary and how it should be applied. When a standard does not need further explanation, no action or commentary appears. Several standards relate to specific sections of the Rules of Professional Conduct, and the Rules are referenced in these standards. The terms "child" and "client" are used interchangeably throughout the document.

Representing a child in an abuse and neglect case is a complicated and emotional job. There are many responsibilities. These standards are intended to help the attorney prioritize duties and manage the practice in a way that will benefit each child on the attorney's caseload.

* Work Group Members:

Hon. Barbara Quinn; Carolyn Signorelli, Esq.; Shelley Geballe, Esq., Martha Stone, Esq.; Sarah Eagan, Esq.; Arthur Webster, Esq.; Amy Klein, Esq.; Thomas Esposito, Esq., Christina Ghio, Esq.; Greg Stokes, Commission Member

I. DEFINITIONS

- A. Legal Rights:** A child who is the subject of a juvenile matters proceeding has a right to be a legal party to the proceeding, the right to be heard at that hearing and the right to be represented by a lawyer. *Tayquon H.*, 76 Conn. App. 693, 707 (2003).
- B. Best Interest:** The term "best interest" has been generally defined as a measure of a child's well-being, including his or her physical, emotional, psychological, intellectual and moral needs. *Id.* at 704. The best interests of the child also encompass the child's interests in sustained growth, development, well-being, and continuity and stability in the child's environment. *Cappetta v. Cappetta*, 196 Conn. 10, 16 (1985).
- C. Developmentally-Appropriate:** The child's attorney/GAL must ensure that the child can understand his or her current circumstances, the purpose of the pending proceedings, the choices available and the child's ability to exercise choices, as well as ensure that the child can communicate his or her preferences and direct the attorney/GAL's actions. To ensure this, the child's attorney/GAL should structure all communications to account for the individual child's age, level of education, cultural background and context and degree of language acquisition, as well as to avoid additional emotional trauma to the child (2).
- D. Child:** Any person under the age of eighteen.

II. CONNECTICUT FRAMEWORK FOR APPOINTMENT OF ATTORNEYS AND GUARDIANS AD LITEM FOR CHILDREN IN CHILD PROTECTION MATTERS

A. C.G.S. § 46b-129a(2):

"In proceedings in the Superior Court under section 46b-129 ... a child shall be represented by counsel knowledgeable about representing such children who shall be appointed by the court *to represent the child and to act as guardian ad litem* for the child.

The primary role of any counsel for the child including the attorney who also serves as guardian ad litem, shall be to advocate for the child in accordance with the Rules of Professional Conduct

When a conflict arises between the child's wishes or position and that which counsel for the child believes is in the best interest of the child, the court shall appoint another person as guardian ad litem for the child. The guardian ad litem shall speak on behalf of the best interest of the child and is not required to be an attorney-at-law but shall be knowledgeable about the needs and protection of children.

In the event that a separate guardian ad litem is appointed, the person previously serving as both counsel and guardian ad litem for the child shall continue to serve as counsel for the child and a different person shall be appointed as guardian ad litem, unless the court for good cause also appoints a different person as counsel for the child. No person who has served as both counsel and guardian ad litem for a child shall thereafter serve solely as the child's guardian ad litem." C.G.S. § 46b-129a(2).

B. ROLE OF ATTORNEY/GAL FOR MINOR CHILD

1. No conflict: As long as there is no conflict between the obligation of the attorney/GAL to represent a child's legal interests (i.e., by protecting the child's legal rights to be a party to the legal proceeding and to have his or her position advocated for by his or her attorney during juvenile proceedings) and the attorney/GAL's assessment of the child client's best interest, then that attorney/GAL can act to enforce the child's legal rights, represent the child's stated wishes and protect the child's best interest.

2. Conflict: Under Connecticut's framework of dual representation for a minor child in juvenile matters, as set forth in C.G.S. § 46b-129a(2) and discussed in *In re Tayquon H. supra*, the attorney/GAL for a child must attempt to provide traditional client-directed representation whenever possible. To that end the attorney/GAL must assess the child's competency to render decisions concerning the objectives of representation and his or her own best interest. Only when it is determined that the child client does not have such competency or has diminished capacity can an attorney/GAL substitute his or her objective determination of the child's best interest and request a separate GAL due to the existence of a conflict.

Commentary: These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client. Consistent with Rule of Professional Conduct 1.14, "Client with Diminished Capacity" the attorney/GAL must seek the appointment of a guardian only when a client's ability to make an adequately considered decision is diminished.

The assessment must be based upon objective criteria, not the attorney/GAL's personal philosophy or opinion. The question of diminished capacity should not arise unless the lawyer has some reason to believe that the client does not have the ability to make an adequately considered decision. The ability of a child client to express a preference constitutes a threshold requirement for determining ability. Once that threshold is passed, the child is presumed to have the ability to direct representation.

In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client; as with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

- a. If the attorney/GAL determines that there is a conflict caused by performing both roles of GAL and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as GAL. The lawyer should request appointment of a GAL without revealing the basis for the request.
- b. 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.
- c. The child's attorney should determine whether the child's "capacity is diminished" pursuant to the Rule of Professional Conduct 1.14 with respect to each issue in which the child is called upon to direct the representation.

The following are factors to assess whether the child has a diminished capacity: 1. Developmental Stage of the Child Client: Cognitive Ability, Socialization and Emotional Growth; 2. Medical Status: Mental and Physical; 3. Personal History: Individual Experience, Family and Medical Background; 4. Expression of a Relevant Position: Ability to Communicate with Lawyer and Ability to Articulate Reasons; 5. Individual Decision-Making Process: Undue-Influence, Conformity and Variability and Consistency; 6. Ability To Understand Consequences: Risk of Harm and Finality of Decision. Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Report of the Working Group: Determining the Child's Capacity to Make Decisions, 64 Fordham L. Rev. 1339,1340, 1342 (1996).

Also see, Draft UNLV Recommendations of the Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham: pp. 1-6

C. ROLE OF ATTORNEY FOR MINOR WHEN SEPARATE GAL PRESENT

When both a guardian ad litem and an attorney are present, the attorney's role "should mirror as closely as possible the attorney's role when representing "unimpaired adults." *Ireland v. Ireland*, 246 Conn. 413, 438 (1998) (en banc).

B. ASSESS CLIENT PREFERENCES

- 1. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance.**

Action: The child's attorney must listen carefully to the child and treat the child's agenda as the starting point for the representation. The child's attorney must represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

- 2. To the extent that a child cannot express a preference, due to age and/or development, the child's attorney/GAL shall make a good faith effort to determine the child's wishes.**

Action: The attorney/GAL shall accomplish such determination through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria shall include but not be limited to a thorough investigation of the child's circumstances; discussions with the child, if possible; discussions with individuals and experts involved in the child's life; and observations of the child. The attorney/GAL shall advocate accordingly.

- 3. To the extent that a verbal or unimpaired child does not or will not express a preference about particular issues, the child's attorney/GAL should determine if the child has no opinion and is willing to delegate the decision-making authority to the attorney/GAL, wishes the attorney/GAL to remain silent on the issue, or wishes a preference to be expressed only if the parent or other parties are not present. The position taken by the attorney/GAL should not contradict or undermine other issues about which the child has expressed a preference.**

Commentary: A difficult situation arises when a competent child that is not under a diminished capacity does not want to express a preference or direct counsel. If the child's capacity is truly not diminished, then the child's decision not to direct the attorney may implicate the client counseling function and should not automatically result in abandoning client directed advocacy. If the child truly does not want to participate in the representation, the attorney should seek permission to withdraw rather than assume the role of a GAL or seek the appointment of a GAL. If the child continues to refuse to direct their new attorney, then appointment of a GAL should occur. Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Report of

4. Determine if the child has the “ability to make adequately considered decisions.”

Action: If the child’s attorney/GAL determines that the child’s expressed preference is not based upon an ability to make an adequately considered decision in the child’s own best interest and, therefore, the child client’s capacity is diminished, the lawyer must request appointment of a separate GAL and continue to represent the child’s expressed preference, unless the child’s position is prohibited by law.(5) The child’s attorney shall not reveal the basis of the request for appointment of a GAL which would compromise the child’s position. Only where there is a substantial danger of serious injury or death shall the attorney disclose any attorney-client privileged information to the GAL.

Commentary: Pursuant to Rule of Professional Conduct 2.1 attorneys also act in an “advisory” role: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Extrapolating from this Rule in the context of representing a child, an attorney/GAL should provide advice regarding the issues effecting the child’s best interest and course of action. “Client directed representation involves the attorney’s counseling function and requires good communication between attorney and client. The goal of the relationship is an outcome which serves the client, mutually arrived upon by attorney and client, following exploration of all available options.” (6)

Under 2. above this standard addresses the situation where a child may have a preference discernible by the attorney through investigation rather than eliciting the child’s own verbally articulated position. Once an attorney/GAL feels comfortable that he or she has determined the child’s preference on a particular issue, he or she must advocate for that preference. The standard in 4. above addresses the circumstance where a child’s discerned or expressed preference is not based upon a competent decision due to the child’s diminished capacity and the attorney/GAL has objectively determined that an alternate decision is in the child’s best interest. At that point a separate GAL must be secured.

necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency. The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role. There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation. Subsection (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 1.14. Client with Impaired Capacity

(Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 30, 2008, to take effect Jan. 1, 2009.)

(a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, 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 is unable to make or communicate adequately considered decisions, is likely to suffer 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 legal representative.

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

(P.B. 1978-1997, Rule 1.14.) (Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 30, 2008, to take effect Jan. 1, 2009.)

HISTORY—2009: Prior to 2009, this section was entitled, "Client with Diminished Capacity." In 2009, in the first clause of subsection (a), "or communicate" was added after the phrase "to make," and in subsections (a) and (c) "impaired" was substituted for "diminished".

Prior to 2009, subsection (b) read: "(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."

COMMENTARY: The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or is unable to make or communicate adequately considered decisions, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation under these rules. Even if the person

has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not constitute a waiver of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under subsection (b), must look to the client, and not family members, to make decisions on the client's behalf.

If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client only when such decisions are within the scope of the authority of the legal representative. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2 (d).

Taking Protective Action. If a lawyer reasonably believes that a client is likely to suffer substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in subsection (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then subsection (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

In determining the extent of the client's impaired capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If a legal representative has not been appointed, the lawyer should consider whether appointment of a legal representative is necessary to protect the client's interests. In addition, rules of procedure in litigation sometimes provide that minors or persons with impaired capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition. Disclosure of the client's impaired capacity could adversely affect the client's interests. For example, raising the question of impaired capacity could, in some circumstances, lead to proceedings for involuntary conservatorship and/or commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so by these rules or other law, the lawyer may not disclose such information. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, subsection (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance. In an emergency where the health, safety or a financial interest of a person with impaired capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

A lawyer who acts on behalf of a person with impaired capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

AMENDMENT NOTES: The above changes make Rule 1.14 more clearly consistent with recent changes in conservatorship law and will reduce situations in which people having impaired capacity are placed in conservatorships when less restrictive alternatives are available.

Rule 1.15. Safekeeping Property

(a) As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee.

(2) An "eligible institution" means (i) a bank or savings and loan association authorized by federal or state law to do business in Connecticut,

OPINION OF ADMINISTRATION OF CHILDREN & FAMILIES

From: Palmer, Allison (ACF)
Sent: Thursday, February 14, 2008 11:49 AM
To: Vizziello, JoAnn (ACF)
Cc: McHugh, Kathleen (ACF); Lynch, Miranda (ACF); Litton, Donna (ACF) (CTR); Rothstein, Jan (ACF); Palmer, Allison (ACF); Kelley, Elaine (ACF); Ballas, Emily (ACF); Schipper, Julia (ACF); Sharp, Elizabeth (ACF/ACYF)
Subject: RE: CAPTA question

Good morning JoAnn:

As drafted, Connecticut's proposal does not violate §106(b)(2)(A)(xiii) of CAPTA, which provides that children must have a guardian ad litem ("GAL"), an attorney or a CASA that represents the child in the proceedings and makes a recommendation to the court concerning the child's best interest.

Attorneys that represent children under the age of seven will continue to act dually as a GAL and an attorney for the child. The Connecticut proposal seeks to end the dual role of GAL and attorney for a child who is seven years old or older, so that the child's attorney can represent the child in a client-directed manner. Presumably, there will be occasions where a child's desired course of action is consistent with what the child's attorney believes is in the child's best interests, and the attorney will advocate as such. However, when either the court or the child's attorney believes that the child's best interests and the child's desired course of action collide or conflict, the proposal provides that a separate GAL will be appointed. That GAL then would be responsible for making recommendations to the court that the GAL believes are in the child's best interests consistent with the CAPTA requirement. Doing so would satisfy the CAPTA representation requirement without compromising the attorney's duty to represent the child in a client-directed manner.

It is important to note that determining what is in a child's best interest can be a subjective determination, and reasonable minds can and do disagree. Therefore, it is also possible that an attorney (and the agency, for that matter) can agree with his/her client about what is in the client's best interests and can advocate as such. Under Connecticut's proposal, the court is able to disagree with the attorney's position and is able to appoint a GAL instead. Please also note that Connecticut's proposal is not without precedent in other States.

I hope this is helpful.

Allison Lowery Palmer

-----Original Message-----

From: Vizziello, JoAnn (ACF)
Sent: Tuesday, February 05, 2008 11:43 AM
To: McHugh, Kathleen (ACF); Lynch, Miranda (ACF)
Subject: FW: CAPTA question

Hi Kathy and Miranda,

I hope you are both well. I know our Region is keeping you busy with questions and I'm sorry but I have another (hopefully quick) one. I'm 98% sure I know the correct answer, but just in case I'm missing something I thought I should run this by you.

The Chief Child Protection Attorney in CT, who is head of the agency responsible for providing legal representation to children and parents in child protection matters, has proposed legislation (see Word doc. attached) seeking to remove the current requirement that a child's attorney serve in dual roles as guardian ad litem (appointed to protect the child's best interest without being bound by the child's expressed preferences) and lawyer of record. Instead, she is proposing (for kids 7 and older) that a children's attorney provide only client directed representation, unless Professional Rules of Conduct would dictate otherwise. A separate GAL would generally not be appointed for kids over 7.

It seems pretty clear to me that this would be in violation of the CAPTA requirement for the attorney, GAL, or CASA "to make recommendations to the court concerning the best interests of the child."

What is interesting and causing my 2% hesitation to say this is clearly in conflict with CAPTA is CT's assertion (see email below) that "for children 7 and up there would be an initial presumption that it's in their best interest to have their wishes advocated to the court unless the attorney determines that the child is incapable of understanding and asserting his or her own interests."

I don't think this presumption holds water but for some reason it is giving me reason to hesitate.

Do you agree that this proposed legislation would violate CAPTA requirements calling for recommendations on a child's best interest?

JoAnn Vizziello
ACF Region 1, Boston
617-565-1117

-----Original Message-----

From: carolyn.signorelli@jud.ct.gov [mailto:carolyn.signorelli@jud.ct.gov]
Sent: Tuesday, February 05, 2008 7:06 AM
To: Vizziello, JoAnn (ACF)
Subject: Re: CAPTA question

In CT the best interest requirement is currently met by the dual appointment and if there's a conflict a separate GAL is requested. Under my proposal this would still be the case for children under 7. For children 7 and up there would be an initial presumption that it's in their best interest to have their wishes advocated to the court unless the attorney determines that the child is incapable of understanding and asserting his or her own interests. I believe this is more consistent with the ABA/NACC Model Standards and the current thinking among child advocates about the importance of children having a true voice in these proceedings and the ability to have meaningful input into decisions that effect their lives. My proposal permits the court to also appoint a separate GAL if it deems it necessary. Thank you for your consideration and assistance in this matter. I look forward to your feedback. Carolyn