

NOTICE OF COMMENT PERIOD

Proposed standards for Attorneys and Court Appointed Investigators for Children in District Court were submitted to the Nebraska Supreme Court by the Subcommittee on Children in District Court of the Supreme Court's Commission on Children in the Courts. On June 11, 2014, the Supreme Court determined the proposed standards shall be published for public comment.

The proposed standards apply to the appointment and performance of lawyers, serving as advocates for children or their interests, and of Court Appointed Investigators 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, paternity, parentage, domestic violence, contested adoptions, and contested private guardianship cases. These proposed standards were developed to address the subcommittee's findings that there is currently a lack of clarity and uniformity regarding representation of children in the specified case types. These standards do not apply to lawyers representing children in abuse and neglect, law violation, or status offense cases.

The Nebraska Supreme Court invites interested persons to comment on the proposed standards. Anyone desiring to comment on the proposed standards should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, Nebraska 68509-8910, or via e-mail to jill.machacek@nebraska.gov, no later than August 15, 2014.

The full text of the proposed standards is below, or a hard copy may be obtained from the office of the Clerk of the Supreme Court and Court of Appeals upon request.

Proposed Standards for Attorneys and Court Appointed Investigators for Children in District Court

Nebraska Supreme Court Commission on Children in the Courts
December 15, 2006
Revised June 11, 2013

I. Scope and Definitions

A. Scope

These Standards apply to the appointment and performance of lawyers, serving as advocates for children or their interests, and of Court Appointed Investigators 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, paternity, parentage, domestic violence, contested adoptions, and contested private guardianship cases. These standards do not apply to lawyers representing children in abuse and neglect, law violation, or status offense cases.

B. Definitions

1. “Best Interests Attorney”: 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.
2. “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.
3. “Court Appointed Investigator”: A lawyer, not acting as a lawyer, or a non-lawyer appointed by a court seeking expert or lay fact or opinion testimony or written reports.

COMMENTARY

A lawyer should be either a Child's Attorney or a Best Interests Attorney. The duties common to both roles are found in Part II of these Standards. The unique duties of each are described separately in Parts III and IV. The essential distinction between the two lawyer roles is that the Best Interests Attorney 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.

These Standards also define a non-attorney role entitled the Court Appointed Investigator. These Standards do not use the term “Guardian Ad Litem.” The role of Guardian Ad Litem has become too muddled through different usages, 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 non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving as a lawyer, and is not a party. The Court Appointed Investigator can be either a non-lawyer, or a lawyer who accepts the appointment to serve in a non-lawyer capacity. The duties of the Court Appointed Investigator are described in Standard V.

II. Duties of All Lawyers for Children

In addition to their general ethical duties as lawyers, and the specific duties set out in Parts III and IV, Best Interests Attorneys and Child's Attorneys also have the duties outlined in this section. The duties outlined in this section are not necessarily applicable to the Court Appointed Investigator.

A. Accepting Appointment

The lawyer shall accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer shall (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 Best Interests Attorney or a Child's Attorney shall not play any other role in the case, and shall not testify, file a report, or make recommendations.

COMMENTARY

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

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 his or her position, the Child's Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.

C. Nebraska Parenting Act

The Best Interests Attorney and Child's Attorney shall represent the child or the child's best interests consistent with the principles of the Nebraska Parenting Act.

COMMENTARY

The Parenting Act emphasizes the primary importance of the child's best interests. Among the relevant provisions of the Parenting Act are:

1. § 43-2921. Legislative findings. The best interests of each child shall be paramount and consideration shall be given to the desires and wishes of the child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning.

2. § 43-2923. Best interests of the child requirements. That certain principles provide a basis upon which education of parents is delivered and upon which negotiation and mediation of parenting plans are conducted. . . . To ensure that the child's voice is heard and considered in parenting decisions

3. § 43-2929. Parenting plan. (5) In the development of a parenting plan, consideration shall be given to the child's age, the child's developmental needs, and the child's perspective, as well as consideration of enhancing healthy relationships between the child and each party.

4. § 43-2939. *Parenting Act mediator. The mediator may interview the child if, in the mediator's opinion, such an interview is necessary or appropriate. The parties shall not bring the child to any sessions with the mediator unless specific arrangements have been made with the mediator in advance of the session. The mediator shall assist the parties in assessing their needs and the best interests of the child involved in the proceeding and may include other persons in the mediation process as necessary or appropriate.*

D. Independence

The lawyer shall be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.

COMMENTARY

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.

E. Initial Tasks

Immediately after being appointed, the lawyer shall review the file. The lawyer shall inform other parties or counsel of the appointment, and that as counsel of record he or she is entitled to receive copies of pleadings and discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child. The lawyer shall make all reasonable efforts to obtain copies of pleadings and discovery exchanges.

F. Meeting With the Child

The lawyer shall 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 shall inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer shall elicit and assess the child's views.

COMMENTARY

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.

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, non-suggestive 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.

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

and 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 shall:

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, including any mediation sessions required by the Nebraska Parenting Act. The lawyer shall clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation is 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 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

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. This is necessary even for a Child's Attorney, whose ultimate task is to seek the client's objectives. Best Interests Attorneys have additional investigation duties described in Standard III-E.

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 or Court Appointed Investigator, can obtain information or present the child's perspective, or when the meeting will not be materially relevant to any issues in the case.

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 intimate partner abuse. 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.

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. 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 non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.

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) SSI 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/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

H. Hearings

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

1. Introduce herself or himself to the court as the Child's Attorney or Best Interests Attorney 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 shall 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

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.

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.

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.

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 seek a protective order from the court. The lawyer should seek to minimize the 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.

Questions to the child should be phrased consistently with the law and research regarding children's testimony, 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.

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. 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 it has been decided pursuant to Standard III-G or IV-D that an appeal on behalf of the child is necessary, the lawyer shall 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.
2. The lawyer shall 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 shall explain it to the child.

COMMENTARY

The lawyer should take a position in any appeal filed by a party or agency. 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.

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 shall monitor the implementation of the court's orders and address any non-compliance.

K. End of Representation

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

III. Best Interests Attorneys

A. Ethics

Best Interests Attorneys are to be bound by the Nebraska Rules of Professional Conduct (rev. 2008) 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

Normally siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney, because such a lawyer is not bound to advocate a client's objective. A Best Interests Attorney in such a case should present the relevant views of all the children in accordance with Standard III-F-3, and advocate the children's best interests in accordance with Standard III-F-1. However, if the best interests of siblings differ, it would be unethical for the Best Interests Attorney to represent each sibling. Under the appropriate case, the Best Interests Attorney should ask for separate Best Interests Attorneys for each sibling if confidences have been revealed that would be adverse to the interests of other siblings.

B. Confidentiality

A child's communications with the Best Interests Attorney are subject to the Nebraska ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them.

COMMENTARY

Rule 3-501.6(a) bars any release of information "unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Under Rule 3-501.6(b), a lawyer may reveal confidences "to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm; (2) to secure legal advice about the lawyer's compliance with these Rules; (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (4) to comply with other law or a court order." As for communications that are not subject to disclosure under these or other applicable ethics rules, a Best Interests Attorney may use them to further the child's best interests, without disclosing them. The distinction between use and disclosure means, for example, that 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. Limited Appointments

If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney's tasks may be reduced as the court may direct.

D. Explaining Role to the Child

In a developmentally appropriate manner, the Best Interests Attorney shall explain to the child that the Best Interests Attorney will (1) investigate and advocate the child's best interests, (2) will investigate the child's views relating to the case and will not disclose them if the child requests that they not be disclosed, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.

E. Investigations

The Best Interests Attorney shall 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 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 lawyer'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

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.

Though courts should order automatic access to records, the lawyer may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those which pertain to the parties.

Meetings with the children 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 Best Interests Attorney to communicate with the party. Rule 3-504.2 prohibits such contact without consent of the

party's lawyer. In some such cases, the Best Interests Attorney may be able to obtain permission for a meeting with the party's lawyer present. When the party has no lawyer, Rule 3-504.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Best-Interests-Attorney's role.

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

F. Advocating the Child's Best Interests

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

2. Best Interests Attorneys shall bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

3. At hearings on custody or parenting time, Best Interests Attorneys shall, consistent with the rules of evidence and trial practice, present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.

COMMENTARY

*Determining a child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child's interests will generally be stated in Nebraska's statutes including the Parenting Act Best Interests factors, § 43-2923(6), and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child's desires and wishes are factors, **among many others**, in deciding custody and parenting time cases, and the weight given them varies with age, reasoning, and circumstances.*

A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the Nebraska Parenting Act and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on 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.

The lawyer 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 his or her 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.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should present those facts to the court. This should not be done by ex parte communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before advocating against the settlement in court.

G. Appeals

Where appeals on behalf of the child are permitted by Nebraska law, the Best Interests Attorney shall appeal when he or she 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.

IV. Child's Attorneys

A. Ethics and Confidentiality

1. Child's Attorneys are bound by the Nebraska Rules of Professional Conduct (rev. 2008) in all matters.
2. A Child's Attorney appointed to represent two or more children shall 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

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 Rules 3-501.2(a) and 3-501.14.

Rule 1.6(a) imposes a broad duty of confidentiality concerning all "information relating to the representation of a client," but the Nebraska Rules of Professional Conduct also modify the traditional exceptions to confidentiality. Under Rule 3-501.6(b), a lawyer may reveal information without the client's informed consent "to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;" (2) to secure legal advice about the lawyer's compliance with these Rules; (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (4) to comply with other law or a court order," Rule 3-501.6(a) further allows a lawyer to reveal information relating to the representation of a client when "the disclosure is impliedly authorized in order to carry out the representation." Also, according to Rule 3-501.14(c), "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" when acting under Rule 3-501.14 to protect a client with "diminished capacity" who "is at risk of substantial physical, financial or other harm."

Model Rule 3-501.7(a)(1) 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 3-501.7 states: ". . . 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

The Child's Attorney shall:

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.
2. Explain the Parenting Act and the Best Interest provisions to the child and how they interact with the issues for which the Child's Attorney was appointed to represent the child.
3. Explain to the child what is expected to happen before, during and after each hearing.
4. Advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation.
5. Discuss each substantive order, and its consequences, with the child.

COMMENTARY

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.

The Child's Attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning and consequences of the client'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, including the provisions of the Parenting Act, 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.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, and of the best position for the child to take, and the reasons underlying such recommendation, and 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 his or her 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.

The lawyer for the child has dual fiduciary duties to the child, which must be balanced. On the one hand, the lawyer has a duty to ensure that the client 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 client. 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.

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.

The Child's Attorney should consult the child prior to any settlement becoming binding.

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 shall abide by the client'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 shall pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.

COMMENTARY

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 contemplate that a judicial appointment of a Child's Attorney, as opposed to a Best Interests Attorney, would only occur after a determination that the child has the requisite ability to communicate his or her wishes directly to the attorney. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client.

These Standards do not presume that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. The appointment of a Child's Attorney indicates a judicial determination of the child's desire for direct representation, the child's ability to directly communicate his or her wishes to an attorney, and the child's general competence to consider the issues.

1. 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 Best Interests Attorney 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 shall not reveal the reason for the request for a Best Interests Attorney, which would compromise the child's position, unless such disclosure is authorized by Rule 3-501.6.

COMMENTARY

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 he or she 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.

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.

In most cases the ethical conflict involved in asserting a position which 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 that child's trust. While the lawyer should be careful not to apply undue pressure to a 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.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a Best Interests Attorney. 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 Best Interests Attorney may never learn of the disclosed danger.

Rule 3-501.14 provides that "[w]hen 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 . . . 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."

If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps which would be 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. The Child's Attorney may have a duty to report child abuse or neglect under the Nebraska Child Protection Act.

2. 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 which 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

Decisions about the child's testifying should be made individually, based on the circumstances. If the child has a therapist, the 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

The Child's Attorney shall consider and discuss the possibility of an appeal with the child. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child's Attorney shall appeal. If the Child's Attorney determines that an appeal would be frivolous or that he or she lacks the expertise necessary to handle the appeal, he or she shall notify the court and seek to be discharged or replaced.

COMMENTARY

The lawyer 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. End of Representation

The Child's Attorney shall 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. Court Appointed Investigator

A. Appointment

In situations in which the judge believes that an independent neutral investigation may be necessary to fully develop the facts and/or that the testimony of the investigator may be necessary to fully develop the record, the court may appoint an investigator. The appointment shall clearly specify the issues to be investigated.

COMMENTARY

In most cases, the parties, who in a custody case are usually the parents, through their lawyers can marshal the facts, present relevant witnesses, and engage in settlement negotiations. Thus, in most cases, there is no need for a court appointed investigator. However, in some cases, the judge may have good reason to believe that certain issues will not be adequately developed by the parties and that it may be important for a neutral third party to testify as to certain facts. Examples might include the presence of domestic intimate partner abuse or neglect of the child, the parenting ability of the parties, the nature of the home in which the child might live, the appropriateness of various parenting time arrangements, and the ability of the parties to cooperate and make mutual decisions in a joint custody situation.

B. Qualifications

The person appointed shall be someone whom the judge believes has the necessary education, expertise and skills to carry out the investigation, including knowledge and experience in applying the Parenting Act requirements. The court appointed investigator shall approach the investigation objectively and in a culturally-sensitive manner and shall apply widely accepted standards in finding facts and making evaluations and not use the investigator's personal moral, cultural, or religious values.

C. Role

The Court Appointed Investigator's role is to investigate the facts relevant to the issues specified by the court, and to report those facts to the parties, the attorneys, and to the appointing court if the parties agree. The investigator need not be an attorney, but if an attorney is appointed that person does not serve in the role of an attorney.

COMMENTARY

The investigator is not serving in the role of attorney. The investigator is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings or briefs. See Betz v. Betz, 254 Neb. 341, 575 N.W.2d 406 (1998) (describing role of guardian ad litem).

D. Reports and Evidence

1. The reports of the Court Appointed Investigator, whether in written form or testimony, shall be subject to the Nebraska rules of evidence including the rules concerning hearsay.
2. The opinion testimony of the Court Appointed Investigator is admissible only as provided by Neb. Rev. Stat. § 27-701 unless the witness is testifying as an expert.

3. The Court Appointed Investigator may qualify as an expert witness if qualified under Neb. Rev. Stat. § 27-702 and appointed in accordance with Neb. Rev. Stat. § 27-706.

4. The Court Appointed Investigator, whether qualified as an expert or not, shall not be permitted to testify as to the investigator's opinion about what custody arrangement is in the child's or children's best interest.

COMMENTARY

Reports of the investigator are subject to the Nebraska rules of evidence. See Betz v. Betz, 254 Neb. 341, 575 N.W.2d 406 (1998) (describing role of guardian ad litem). For the investigator to qualify as an expert witness the investigator needs to be appointed in a writing filed by the court, § 27-706, and to have "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence and to determine a fact in issue" and must qualify as an expert "by knowledge, skill, experience, training, or education." § 27-702. See Heistand v. Heistand, 267 Neb. 300, 673 N.W.2d 541 (2004) (practicing attorney holding master's degree in maternal-child nursing not properly appointed as an expert and never properly qualified as an expert with respect to the subject matter of her opinion testimony). While "[t]estimony in form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," Neb. Rev. Stat. § 27-704, "no recognized area of general expertise with regard to 'custody' or 'child placement' exists. The legal standard for determining child placement is the best interests of the child. While there are many factors that may be considered in making that decision, no widespread scientific standard has evolved that can be applied in assessing all those factors." Heistand v. Heistand, 267 Neb. 300, 310-11, 673 N.W.2d 541, 550 (2004)(quoting Raven C. Lidman & Betsy R. Hollingsworth, The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition, 6 Geo. Mason L. Rev. 255, 275-76 (1998)). See also Coffey v. Coffey, 11 Neb. App. 788, 801, 661 N.W.2d 327, 342 (2003) ("Those who are experts in the field of child psychology or child development generally limit their expertise to the specifics of their training and experience. Rarely is someone competent to render an expert opinion on which parent's custody is in the best interest of the child." (Quoting Lidman & Hollingsworth, supra.))

E. Investigations

The Court Appointed Investigator shall conduct thorough, continuing, and independent investigations, which could include, depending on the issues the investigator has been asked to investigate:

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 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 non-lawyer representatives or court-appointed special advocates (CASAs);

4. Contacting and meeting with the parties.

5. Interviewing individuals significantly involved with the child, who may 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

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.

VI. Courts

A. Appointment of Lawyers or Investigators

A court shall appoint a lawyer as a Child's Attorney or Best Interests Attorney as soon as practicable if such an appointment is necessary in order for the court to decide the case. A court shall appoint a Court Appointed Investigator at any point in a case that an objective investigation of relevant facts is needed by the court.

1. Discretionary appointment.

In deciding whether to appoint a lawyer, the court shall consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:

- a. Credible allegations of child abuse or neglect or domestic intimate partner abuse;
- b. Credible evidence of abuse inflicted on any family or household member;
- c. Questions regarding each parent's ability to cooperate, communicate, and make mutual decisions in the child's best interest;
- d. Questions regarding the ability of each parent to perform parenting functions as defined in the Parenting Act;
- e. Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;
- f. Relocation that could substantially reduce the child's time with a parent or sibling;
- g. The child's concerns or views;
- h. Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;
- i. Disputed paternity;
- j. Past or present child abduction or risk of future abduction;
- k. Past or present family violence;
- l. Past or present mental health problems of the child or a party;
- m. Special physical, educational, or mental health needs of a child that require investigation or advocacy;
- n. A high level of acrimony and unresolved parental conflict;
- o. Inappropriate adult influence or manipulation;
- p. Interference with custody or parenting time;
- q. A need for more evidence relevant to the best interests of the child;
- r. A need to minimize the harm to the child from the processes of family separation and litigation; or
- s. Specific issues that would best be addressed by a lawyer or investigator appointed to address only those issues, which the court should specify in its appointment order.

COMMENTARY

a. No general duty of appointment. This section does not require a court-ordered investigation or the appointment of a Best Interests Attorney or Child's Attorney in every case. It gives the court discretion to make such an order or appointment when the court has concerns about whether the child's welfare can be protected by the parties before the court.

That is not to say that a case cannot be made for appointing a Best Interests Attorney or a Child's Attorney or for ordering an independent investigation in every dispute involving a child. Children are the innocent victims of family disruption, usually unable to protect or advocate effectively for themselves. Parents can be distracted at the time of separation or divorce, their judgments clouded by their own problems. The purpose of a court-ordered investigation is to ensure that the court be able to make its decisions based on complete information. A Best Interests Attorney or Child's Attorney can act as a buffer against bad decision-making by parents and ensure that the child's best interests receive focused attention.

However, despite these potential benefits, the measures discussed here present some significant difficulties, which would make such an automatic appointment inadvisable. First, court-ordered investigations and the appointment of an advocate for the child can constitute undesirable and inappropriate intrusions on the authority of parents. Ideally, parents make good arrangements for their children on their own, by agreement. Courts should not presume that they cannot do so, or distrust them when they try. Indeed, the presence of outside investigators and child representatives may relieve pressure on parents to keep the interests of the child paramount. When someone else has been assigned to protect the child's interests, a parent may feel released from that responsibility and more at liberty to protect his or her own interests. This effect is the opposite of what these Standards are attempting to achieve.

Second, the effort to obtain better information about, or representation for, the child can have a negative effect on the proceedings themselves. While the appointment of a separate representative for the child may sometimes ameliorate the level of conflict generated in the proceedings, it often only heightens conflict. Even the presence of an independent investigator can intensify the strategic behavior of parents, who may seek advantage through alliance with the investigator rather than a collaborative solution with each other. Investigators and representatives can also be expensive for the parents, whose financial resources often are already stretched as a result of the divorce.

In addition, it should not be assumed that an independent, court-ordered investigation will assure an outcome for a child that is "best," in some objective or neutral sense. Disagreements about the best interests of children among child advocates and among academic and clinical professionals are hard to explain apart from the value judgments and policy commitments that underlie them.

b. Discretionary appointment. In some cases the court's capacity to decide the case properly will be jeopardized without a more child-focused framing of the issues, or without the opportunity for providing additional information concerning the child's best interests. Often, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing the child's case or a case for the child's best interests or the ordering of an independent investigation, places additional perspectives, concerns, and relevant, material information before the court so it can make a more informed decision.

An important reason to appoint a lawyer is to ensure that the court is made aware of any views the child wishes to express concerning various aspects of the case, and that those views will be given the proper weight that substantive law attaches to them. This must be done in the least harmful manner--that which

is least likely to make the child think that he or she is deciding the case and passing judgment on the parents. Courts and lawyers should strive to implement procedures that give children opportunities to be meaningfully heard when they have something they want to say, rather than simply giving the parents another vehicle with which to make their case.

The purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented.

Appointment of a lawyer is a tool to protect the child and provide information to help assist courts in deciding a case in accordance with the child's best interests. A decision not to appoint should not be regarded as actionably denying a child's procedural or substantive rights under these Standards, except as provided by state law. Likewise, these Standards are not intended to diminish state laws or practices which afford children standing or the right to more broad representation than provided by these Standards. Similarly, these Standards do not limit any right or opportunity of a child to engage a lawyer or to initiate an action, where such actions or rights are recognized by law or practice.

c. Credible allegations of abuse or neglect of the child or domestic intimate partner abuse of any family or household member. Situations of abuse or neglect are ones in which a Court Appointed Investigator, Best Interests Attorney, or Child's Attorney might most be needed. Sometimes, however, proceedings involving the allegations of abuse or neglect are already proceeding in another court or the judge in the divorce case may send the case to juvenile court. In any event, the divorce court may want to make the appointment to assure that there is coordination between the courts, to assure that safety is being provided for the children, or to help in making appropriate visitation orders while the cases are pending.

2. Appointment orders.

The Court, in its order of appointment, shall specify whether the appointment is for a Best Interests Attorney, a Child's Attorney, or a Court Appointed Investigator. If the appointment is for a Court Appointed Investigator, the court shall specify whether it is seeking expert testimony under Rule 706 or lay fact or opinion testimony under Rule 701.

COMMENTARY

Appointment orders should articulate as precisely as possible the reasons for the appointment and the tasks to be performed. Clarity is needed to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance. A Model Appointment Order is at the end of these Standards.

When the lawyer is appointed for a narrow, specific purpose with reduced duties under Standard VI-A-1(s), the lawyer may need to ask the court to clarify or change the role or tasks as needed to serve the child's interests at any time during the course of the case. This should be done with notice to the parties, who should also receive copies of any new order.

3. Information access orders.

An accompanying, separate order shall authorize the lawyer's or investigator's reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release, including, but not limited to, social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case; except that health and mental

health records that would otherwise be privileged or confidential under state or federal laws shall be released to the lawyer or investigator only in accordance with those laws.

COMMENTARY

A model Order for Access to Confidential Information appears at the end of these Standards. It is separate from the appointment order so that the facts or allegations cited as reasons for the appointment are not revealed to everyone from whom information is sought. Use of the term “privileged” in this Standard does not include the attorney-client privilege, which is not affected by it.

4. Independence.

The court must assure that the lawyer is independent of the court, court services, the parties, and the state.

5. Duration of appointments.

Appointments shall last, and require active representation, as long as the issues for which the lawyer was appointed are pending.

COMMENTARY

The Child's Attorney or Best Interests Attorney may be the only source of continuity in the court system for the family, providing a stable point of contact for the child and institutional memory for the court and agencies. Courts should maintain continuity of representation whenever possible, re-appointing the lawyer when one is needed again, unless inconsistent with the child's needs. The lawyer should ordinarily accept reappointment. If replaced, the lawyer should inform and cooperate with the successor.

6. Whom to appoint.

Courts shall appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained as provided in Standard VI-B or are qualified by appropriate experience in custody cases.

COMMENTARY

Courts should appoint from the ranks of qualified lawyers. Appointments should not be made without regard to prior training or practice. Competence requires relevant training and experience. Lawyers should be allowed to specify if they are only willing to serve as Child's Attorney or only as Best Interests Attorney.

7. Privately retained attorneys.

An attorney privately retained by or for a child, whether paid or not, (a) is subject to these Standards, (b) shall have all the rights and responsibilities of a lawyer appointed by a court pursuant to these Standards, (c) shall be expressly retained as either a Child's Attorney or a Best Interests Attorney, and (d) shall vigilantly guard the client-lawyer relationship from interference as provided in Rule 3-501.8(f).

B. Training

1. Training for lawyers representing children in custody cases shall cover:

a. Relevant state and federal laws, including the Nebraska Parenting Act, agency regulations, court decisions and court rules;

- b. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;
 - c. Applicable representation guidelines and standards;
 - d. The court process and key personnel in child-related litigation, including custody evaluations and mediation;
 - e. Children's development, needs and abilities at different ages;
 - f. Communicating with children;
 - g. Preparing and presenting a child's viewpoints, including child testimony and alternatives to direct testimony;
 - h. Recognizing, evaluating and understanding evidence of child abuse and neglect;
 - i. Family dynamics and dysfunction, domestic intimate partner abuse and substance abuse;
 - j. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;
 - k. Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;
1. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.
 2. Training for Court Appointed Investigators shall cover, as appropriate:
 - a. Relevant state and federal laws, including the Nebraska Parenting Act, agency regulations, court decisions and court rules;
 - b. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;
 - c. The court process and key personnel in child-related litigation, including custody evaluations and mediation;
 - d. Children's development, needs and abilities at different ages;
 - e. Communicating with children;
 - f. Testifying;
 - g. Recognizing, evaluating and understanding evidence of child abuse and neglect;
 - h. Family dynamics and dysfunction, domestic intimate Partner abuse and substance abuse including screening tools for recognizing domestic violence.

COMMENTARY

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

C. Immunity

Courts shall take steps to protect all lawyers representing children from frivolous lawsuits and harassment by adult litigants. Best Interests Attorneys shall have qualified, quasi-judicial immunity for civil damages when performing actions consistent with their appointed roles, except for actions that are: (1) willfully wrongful; (2) done with conscious indifference or reckless disregard to the safety of another; (3) done in bad faith or with malice; or (4) grossly negligent. Only the child shall have any right of action against a Child's Attorney or Best Interests Attorney.

COMMENTARY

Lawyers and Investigators for children are too often sued by custody litigants. Courts, legislatures, bar organizations and insurers should help protect all children's lawyers from frivolous lawsuits. Immunity should be extended to protect lawyers' ability to fully investigate and advocate, without harassment or intimidation. In determining immunity, the proper inquiry is into the duties at issue and not the title of the appointment. Other mechanisms still exist to prevent or address lawyer misconduct: (1) attorneys are bound by their Nebraska state bar's rules of professional conduct; (2) the court oversees their conduct and can remove or admonish them for obvious misconduct; (3) the court is the ultimate custody decision-maker and should not give deference to a best-interests argument based on an inadequate or biased investigation.

APPENDIX A

IN THE DISTRICT COURT OF _____ COUNTY, NEBRASKA

Petitioner,

v.

Case No. _____

Respondent.

In Re: _____, D.O.B. _____

CHILD REPRESENTATION APPOINTMENT ORDER

I. REASONS FOR APPOINTMENT

This case came on this _____, 20____, and it appearing to the Court that appointing a Child’s Attorney, Best Interests Attorney, or Court Appointed Investigator is necessary to help the Court decide the case properly, because of the following factors or allegations:

- The Court is considering credible allegations of child abuse or neglect
- The Court is considering credible evidence of abuse inflicted on any family or household member
- There are questions regarding each parent’s ability to cooperate, communicate, and make mutual decisions in the child’ best interest
- There are questions regarding the ability of each parent to perform parenting functions as defined in the Parenting Act;
- Consideration of extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent
- Relocation that could substantially reduce of the child’s time with a parent or sibling
- The child’s concerns or views
- Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party
- Disputed paternity
- Past or present child abduction, or risk of future abduction
- Past or present family violence
- Past or present mental health problems of the child or a party
- Special physical, educational, or mental health needs requiring investigation or advocacy
- A high level of acrimony
- Inappropriate adult influence or manipulation
- Interference with custody or parenting time
- A need for more evidence relevant to the best interests of the child
- A need to minimize the harm to the child from family separation and litigation
- Specific issue(s) to be addressed: _____

II. NATURE OF APPOINTMENT

_____, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as Child’s Attorney Best Interests Attorney, for the the child or children

named above the child(ren) _____. A Child's Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child's best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.

_____, a lawyer, not acting as a lawyer, or a non-lawyer, is hereby appointed as a Court Appointed Investigator. The Court is seeking expert testimony under Rule 706 lay fact or opinion testimony under Rule 701. A Court Appointed Investigator presents expert or lay fact or opinion testimony or written reports.

III. FEES AND COSTS

The hourly rate of the lawyer appointed is \$ ____, for both in-court and out-of-court work.

The parties shall be responsible for paying the fees and costs. The parties shall deposit \$_____ with the Court, the appointed lawyer. _____ shall deposit \$ _____, and _____ shall deposit \$ _____. The parties' individual shares of the responsibility for the fees and costs as between the parties are to be determined later are as follows: _____ to pay _____ %; _____ to pay _____ %.

The State shall be responsible for paying the fees and costs.

The lawyer has agreed to serve without payment. However, the lawyer's expenses will be reimbursed by the parties the state.

IV. ACCESS TO CONFIDENTIAL INFORMATION

The lawyer or Court Appointed Investigator appointed shall have access to confidential information about the child as provided in the Standards and in an Order for Access to Confidential Information that will be signed at the same time as this Order.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _____, 20____

JUDGE

APPENDIX B

IN THE DISTRICT COURT OF _____ COUNTY, NEBRASKA

Petitioner,

v.

Case No. _____

Respondent.

In Re: _____, D.O.B. _____

ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION

_____ has been appointed as Best Interests Attorney Child's Attorney Court Appointed Investigator for the child or children named above the child _____, and so shall have immediate access to such child or children, and to all otherwise privileged or confidential information regarding such child or children, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Child's Attorney, Best Interests Attorney, or Court Appointed Investigator only in accordance with such laws.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _____, 20_____