

NAVIGATING ETHICAL COMPLEXITIES

CHILD PROTECTIVE PROCEEDINGS FOR L-GALS

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.”

—KOFI ANNAN, FORMER SECRETARY-GENERAL OF THE UNITED NATIONS



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Introduction

The Michigan child welfare system strives to serve the families and children within the state at their most vulnerable time. The system is designed to support families and to protect children through an array of services. The lawyers who serve to protect the children within the child welfare system must advocate for the best interests of the child while simultaneously navigating the complexities of the ethical rules within the Michigan Rules of Professional Conduct.

The preamble to the Michigan Rules of Professional Conduct recognizes “conflicting responsibilities” within the “nature of law practice.” Specifically, it states:

Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

These conflicting responsibilities can be even more prevalent for a lawyer serving as an L-GAL.

The following guide provides insight for a lawyer-guardian ad litem (L-GAL)¹ to navigate these ethical complexities while fulfilling their legal and fiduciary responsibilities.

I. THE L-GAL’S OVERALL DUTIES²

A. L-GAL’s Duty

Controlling Legal Authority: MRPC 1.6; MCL 712A.17d(1)(i) and (2).

An L-GAL’s role is critical within the child welfare system. However, the L-GAL’s specific role can become confusing—sometimes for the L-GALs themselves and other times for the judges, attorneys, and social workers working with the L-GAL within the child welfare system. Therefore, the question of to whom an L-GAL owes fidelity comes down to whether the L-GAL’s duty is to the child, the child’s best interest, or the court. For example, it may be unclear for a lawyer which statute(s), court rule(s), case law, and/or rules of professional conduct govern the lawyer’s obligations in a child protective proceeding. Court Rules, the Rules of Professional Conduct, etc. are mainly based on a litigious system, but what happens when the proceedings are geared towards protection?

MCL 712A.17(d)(1) states, “a lawyer-guardian ad litem’s duty is to the child,³ and not the court.” An L-GAL’s powers and duties include, inter alia, the duty to

- “serve as the independent representative for the child’s best interests [§ 17d(1)(b)]”; and
- “make a determination regarding the child’s best interests and advocate for those best interests [§ 17d(1)(i)].”

1. As used herein, “lawyer-guardian ad litem (L-GAL)” means an attorney appointed under MCL 712A.17d and for purposes of applying the Indian Child Welfare Act, 25 USC § 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, an attorney appointed to represent Indian children with the powers and duties as set forth in MCL 712A.17d. The provisions of MCL 712A.17d also apply to a lawyer-guardian ad litem appointed for the purposes of the MIFPA under each of the following: (a) MCL 700.5213 and 700.5219; (b) MCL 722.24; and (c) MCL 722.630. See MCR 3.002.

2. See Appendix A for a discussion on the difference between the L-GAL and the GAL.

3. A child is a “party” in a proceeding brought pursuant to Chapter XIIA of the Probate Code. See [MCL 712A.2\(i\)\(ii\)](#). See Appendix B for historical research prior to the enactment of MCL 712A.17(d).

The appointment of an attorney under MCL 712A.2(b) to represent the child’s “wishes” or “stated interests” is governed by MCL 712A.13a(1)(c):

an attorney serving as the child’s legal advocate in a traditional attorney–client relationship with the child, as governed by the Michigan Rules of Professional Conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child’s expressed wishes as the attorney would to an adult client. For the purpose of a notice required under these sections, attorney includes a child’s lawyer-guardian ad litem.

Further, section 17d(2) contemplates a child possibly having up to two lawyers: an L-GAL, who represents the child’s best interests as set forth in section 17d, and an appointed attorney, who represents the child party’s “expressed wishes” as set forth in MCL 712A.13a(1)(c). Ethics opinion [RI-140](#) provides that a lawyer representing a client who is a minor should seek to have a guardian ad litem appointed when the interests of the child’s parents directly conflict with those of the child, and the lawyer reasonably believes that the minor client cannot adequately act in their own interest. While [RI-140](#) provides for a case in which a minor is represented by counsel in a medical malpractice case, the same rings true in the alternative where a lawyer guardian ad litem finds that the child’s expressed wishes also need to be represented as provided in section 17d(2).

An L-GAL’s duty to “the child” under section 17(d)(1) requires the L-GAL to:

1. conduct an independent investigation in order to determine the facts of the case;
2. consider the child’s wishes according to the child’s competence and maturity and make a determination respecting the child’s best interests; and
3. inform the court of the child’s wishes and preferences and the L-GAL’s determination of the child’s best interests regardless of whether the L-GAL’s determination reflects the child’s wishes.

Under the L-GAL’s first duty to conduct an independent investigation in order to determine the facts of the case, an L-GAL’s duties and powers include, but are not limited to, determining the facts of the case by “interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information.” See § 17d(1)(c). In order to conduct this investigation, it is imperative for an L-GAL to speak with caseworkers for the child(ren), but if the caseworker for the Department of Health and Human Services is represented by counsel, how does a lawyer speak with the caseworker and not violate Michigan Rule of Professional Conduct 4.2? Under [RI-316](#), the Professional Ethics Committee reviewed this issue and found that a lawyer may communicate with a caseworker for the Family Independence Agency (FIA; now known as the Department of Health and Human Services or DHHS) in a case in which the DHHS is a petitioner in family court, notwithstanding an appearance by an attorney indicating that the DHHS is represented by counsel. Further, the opinion distinguishes discussions with the caseworker by noting that “MRPC 4.2 prohibits only direct contacts that are not authorized by law. MCL 712A.17d, for example, requires the attorney for the child to consult with the important parties in the case, and this would include the [caseworker and the parent].”⁴

Under the L-GAL’s second duty to consider the child’s wishes and preferences according to the child’s competence and maturity and to make a determination respecting the child’s best interests, the L-GAL must:

- “meet with or observe the child and assess the child’s needs and wishes with regard to the representation and the issues in the case” (see § 17d(1)(d));
- “explain the L-GAL’s role to the child in accordance with the child’s ability to understand the proceedings” (see § 17d(1)(f)); and
- “make a determination regarding the child’s best interests” (see § 17d(1)(i)).

4. Discussed further in Section II.C of this Guidebook.

As stated earlier, [RI-316](#) provides that the attorney for the child must consult with important parties of the case, and that includes the child, especially as they are a party to the case in accordance with MCL 712A.2(i), (ii). Following that observation and explanation to the child, the L-GAL must make a determination regarding the child's best interests; advocate for those best interests according to the L-GAL's understanding of those best interests, regardless of whether the L-GAL's determination reflects the child's wishes; and communicate the child's position to the court. Through these recommendations, the L-GAL may be required to divulge information learned through their meetings and observations of the child. Under [RI-318](#), a lawyer appointed as lawyer-guardian ad litem for a minor in a child protective proceeding may prepare a written report to the court as long as the lawyer does not reveal the child or client's confidences and secrets. However, this report must only be drafted as long as the lawyer complies with MRPC 1.6. The opinion provides:

Although what constitutes privileged information is a question of law and beyond the scope of the Committee's jurisdiction, the procedures for responding to such requests are clear.

See [JI-32](#). A lawyer who is asked to produce information that is covered by the attorney-client privilege or that contains confidences and secrets within MRPC 1.6, and with regard to which the client does not consent to disclosure, must await a subpoena, exercise the attorney-client privilege, and await the presiding judge's instruction of whether to release the information. See [RI-261](#), [RI-54](#), [RI-111](#), [RI-106](#); [JI-32](#).

B. Confidences

Controlling Legal Authority: MCL 712A.17d(3) and MRPC 1.6

A large issue that causes confusion within the child welfare system is the protection of client confidences when serving as the L-GAL for minor children. Many attorneys understand they are bound to protect information they have gained through their professional relationship with their client in accordance with MRPC 1.6. Specifically, MRPC 1.6 states, in relevant part, that:

- (a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (b) Except when permitted under paragraph (c), a lawyer shall not knowingly
 1. reveal a confidence or secret of a client;
 2. use a confidence or secret of a client to the disadvantage of the client; or
 3. use a confidence or secret of a client for the disadvantage of the lawyer or of a third person, unless the client consents after full disclosure.
- (c) A lawyer may reveal:
 1. confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
 2. confidences or secrets when permitted or required by these rules, or when required by law or by-court order.

While the attorney-client privilege applies to an L-GAL and minor child relationship, an L-GAL may reveal certain "confidences or secrets" to the court. MRPC 1.6(c)(2) provides that confidences or secrets may be revealed when required by the rules of professional conduct, by law, or by court order. When representing a minor child as an L-GAL, section 17d requires that an L-GAL must reveal communications in two specific instances:

1. An L-GAL is required to communicate a child's "wishes and preferences" to the court. See § 17d(1)

- (i).
2. An L-GAL is required to communicate a child’s “position” (see § 17d(2)) or “stated interests” [see MCR 3.915(B)(2)(b)] to the court whenever a conflict arises between the L-GAL and the child regarding the child’s best interests.

These allowances should be noted to the minor child when discussing their wishes and preferences as well as the child’s position or stated interests.

While the aforementioned instances of disclosure under section 17d may be clear, uncertainty still arises between the L-GAL’s ethical duties as set forth in MRPC 1.6(c) and disclosing client confidences or the work product underlying findings that an L-GAL is required to report to the court in accordance with section 17d(j), which mandates that an L-GAL “inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.” However, absent an exception in MRPC 1.6(c), and apart from informing the court as to the “child’s wishes and preferences,” “position,” or “stated interests” as required by section 17d(2) and MCR 3.915(B)(2)(b), communications between a child and an L-GAL are protected by the attorney–client privilege.⁵ Ethics opinion [RI-318](#) further analyzes this issue by stating that a lawyer appointed as a lawyer-guardian ad litem for a minor in a child protective proceeding may prepare a written report to the court as long as the lawyer does not reveal the child/client’s confidences and secrets. Further, an L-GAL’s file of the case is not discoverable, and neither the court nor a party can compel an L-GAL to testify regarding matters related to the case. See § 17d(3).

C. Taking Protective Action

Controlling Legal Authority: MCL 712A.17d(1); MRPC 1.14, 1.2(d), 1.6(c)(3), 3.3(a), and 3.3(c).

When representing a minor client, attorneys are faced with the issue of whether the minor client understands the legal options presented to them. However, what compounds this issue is that a minor client is not seen as having the requisite capacity⁶ to assist in their own advocacy. To provide assistance to an incapacitated individual, attorneys often look to MRPC 1.14, which specifically states as follows:

A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.

The comments to MRPC 1.14 state, “[w]hen the client is a minor ... maintaining the ordinary client–lawyer relationship may not be possible in all aspects.” The commentary recognizes that even though a child client may lack legal competence, the child often has the ability to understand, deliberate upon, and reach conclusions about matters affecting his or her own well-being.

Furthermore, the comments acknowledge the increasing extent to which the law recognizes “intermediate degrees of competence.” *Id.* It should be noted that MRE 601 addresses the issue of capacity, stating as follows:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence].

5. See § 17d(1)(a) and (i); MCL 722.631; and MCR 3.901(A)(3).

6. See [MCL 722.52](#).

7. Therefore, any requirement or ultimatum placed upon the child in light of the child’s wish to recant may constitute “an extreme and detrimental choice, which could be used in future criminal proceedings [as well as subject the child to perjury charges].” See *In re Blakeman*, 326 Mich. App. 318, 336 (2018).

As such, before adjudication in many child protective proceedings, children have already sworn an oath or reported an abuse and/or neglect to a person or entity authorized to receive a report.

Having sworn an oath or reported an abuse and/or neglect to a person or entity authorized to receive such a report, a child who communicates a desire to recant could thereby incriminate him or herself if called to testify.⁷ Therefore, the L-GAL is left with the question of whether to take protective action by, for example, invoking the child's Fifth Amendment rights against self-incrimination where a child expresses a desire to recant after having sworn an oath or reported an abuse and/or neglect.

MRPC 1.2(d) states:

When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

MRPC 1.6 states:

A lawyer may reveal ... confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used.

Further, the requirements of MRPC 1.6 must be reconciled with MRPC 3.3, which states in part:

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

...

- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures...

...

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Ethics opinion [RI-33](#) opines that "although there is no duty to disclose or to rectify the consequences of the client's testimony, if the lawyer concludes the untruthful testimony amounted to fraud, the lawyer may reveal confidences and secrets to the extent reasonably necessary to rectify the consequences of the fraudulent act, in the furtherance of which the lawyer's services were used, even if the client objects." In order to reconcile MRPC 1.6 and 3.3, an L-GAL must acknowledge the "intermediate degree of competence" (see MRPC 1.14 Comments) that a child may possess with the recognition that many children who are subjects of child protective proceedings have experienced traumatic events, *i.e.*, abuse, neglect, witnessing violence, or being in a natural disaster. These traumatic events often cause children to have strong, upsetting feelings and can potentially disturb their daily life, development, and ability to function.

Therefore, an L-GAL should take protective action. Options to take protective action may include invoking the child's Fifth Amendment privilege against self-incrimination where a child expresses a desire to recant after having sworn to their testimony or requesting from the court additional representation for the minor child to advocate for

the child's wishes under MCL 712A.13a(1)(c).

D. Conflicts of Interest—Between Siblings

Controlling Legal Authority: MCL 712A.17d(1)(d) and MRPC 1.7.

When an L-GAL is appointed to represent a sibling group, conflicts may arise that the L-GAL must analyze to determine whether he/she may continue representation of the entire sibling group. To begin this analysis, the L-GAL must meet with the minor children they are appointed for and determine issues and additional facts regarding the case at hand. MCL 712A.17(1)(d) requires that an L-GAL "meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case." MRPC 1.7 provides:

(b) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
2. each client consents after consultation.

(c) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

1. the lawyer reasonably believes the representation will not be adversely affected; and
2. the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Under MRPC 1.7, the L-GAL may be required to decline or withdraw from the representation of one or more children in a sibling group if (a) the representation of one child will adversely affect the relationship with a sibling(s) or (b) the representation of one child may be materially limited by the lawyer's responsibilities to a sibling(s) or to a third person, or by the lawyer's own interests. A conflict of interest may occur when

- the petition or a child alleges harm or threatened harm by a sibling(s); and/or
- having determined the facts of the case as required by § 17d(1)(b) and (c), an L-GAL ascertains that the wishes, preferences, or legal interests of a child will be directly adverse to a sibling(s).

Absent an inherent conflict, an L-GAL may undertake the representation where each sibling is of sufficient competence, age, and maturity to understand the implications of the common representation and the advantages and risks involved. Additionally, the following must apply:

1. the L-GAL reasonably believes the representation will not adversely affect the L-GAL's relationships with the other sibling(s);
2. the L-GAL reasonably believes the representation will not adversely affect any child in the sibling group; and
3. each sibling consents after consultation.

An L-GAL must not represent a child if the representation of that child will be directly adverse to the interests of a sibling whom the L-GAL also represents. See MRPC 1.7(a) or (b); MCL 712A.17d(1)(i) and (2).

E. Conflicts of Interest—Between a Dual Ward or Respondent Parent

Controlling Legal Authority: MRPC 1.2; MCL 712A.17d(1)(c), (f), (i) and MCL 712A.17d(2).

Additional conflicts may arise when representing a dual ward or when the L-GAL is representing a minor child who may also become a respondent parent after giving birth while in care. Prior to analyzing whether there is a conflict, a lawyer must review the scope of representation. Specifically, MRPC 1.2 must be reviewed, which states as follows:

- (b) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.
- (c) A lawyer licensed to practice in the State of Michigan may limit the scope of a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

DUAL WARD

The United States Supreme Court established a juvenile's right to counsel in delinquency proceedings. See *In re Gault*, 387 US 1, 41 (1967). MCL 712A.4(6) states:

If legal counsel has not been retained or appointed to represent the juvenile, the court shall advise the juvenile and his or her parents, guardian, custodian, or guardian ad litem of the juvenile's right to representation and appoint legal counsel. If the court appoints legal counsel, the judge may assess the cost of providing legal counsel as costs against the juvenile or those responsible for his or her support, or both, if the persons to be assessed are financially able to comply.

The Preamble to the Michigan Court Rules of Professional Conduct informs lawyers that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." A lawyer representing a juvenile accused of an offense is absolutely bound by the attorney-client privilege under MRPC 1.6 and is obliged to ensure that the legal rights of a juvenile accused of an offense are protected.

While the ethical duties of a lawyer appearing on behalf of a juvenile accused of an offense may overlap with an L-GAL's duty to determine the child's best interests, the potential conflict that may exist between these roles renders a dual representation problematic. An L-GAL's ethical and statutory duties to a child in a child protective proceeding may be materially adverse to those of a juvenile accused of an offense. Specifically, the comments to MRPC 1.2 state:

- (a)... The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing

those objectives.

MCL 712A.17d requires an L-GAL to reveal communications that they had with their child client to the court in two specific instances:

1. An L-GAL is required to communicate a child's "wishes and preferences" to the court under section 17d(1)(i).
2. An L-GAL is required to communicate a child's "position" or "stated interests" to the court whenever a conflict arises between the L-GAL and the child regarding the child's best interests under section 17d(2) and MCR 3.915(B)(2)(b).

Section 17d(1)(i) requires an L-GAL to advocate for the child's best interests "regardless of whether the [L-GAL's] determination reflects the child's wishes." Therefore, the L-GAL's duty to the child's best interests may run counter to the juvenile's constitutionally protected rights. An L-GAL appointed to represent a child in a child protective proceeding should not represent the same child in a juvenile delinquency proceeding where the L-GAL's ethical and statutory duties to the child are materially adverse.

RESPONDENT PARENT

If an L-GAL's child client is or becomes a parent while in care, he or she may become a respondent parent in a separate companion child protective proceedings petition. In these instances, if indigent, the child respondent has the right to appointed counsel at any hearing (including the preliminary hearing) under MCL 712A.17c(5) and MCR 3.915(B)(1)(b), and as reiterated in *In re Williams*, 286 Mich. App. 253, 276-277 (2009). Balancing the representation of the minor and the minor respondent parent, the strategic decisions that the child respondent's lawyer will need to make while in a child protective case may be substantively different from and run counter to an L-GAL's powers and duties in relation to the child client's representation as set forth in section 17d.

Therefore, the same caution should be exercised by an L-GAL appointed to represent a dual ward and must be exercised in the representation of a child client who is also a respondent parent.

Reviewing the duties of the L-GAL and the duties of a lawyer to their client, there is a potentiality that an L-GAL's ethical and statutory duties to the child in the child protective case will be materially adverse to the child respondent's constitutionally protected rights as a respondent in the separate companion proceedings. Therefore, the L-GAL should, after reviewing potential conflicts, strongly consider requesting separate counsel for one of the proceedings to represent the minor child, whether that be as the child's L-GAL or as the child respondent's lawyer.

II. The L-GAL's Communications with Represented Parties

A. Communications with Represented Parties

Controlling Legal Authority: MRPC 4.2 and MCL 712A.17d(1)(k).

When performing their duties as an L-GAL, it is the L-GAL's responsibility to observe and meet with interested persons of the minor child. Specifically, MCL 712A.17d(1)(k) provides:

Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and caseworker.

As the statute recognizes the rules of professional conduct, the relevant rule when analyzing whether an L-GAL may speak with parties that are represented within the child protective proceeding is MRPC 4.2(a), which states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

B. Communications with Respondent Parents

Controlling Legal Authority: MRPC 4.2 and MCL 712A.17d(1)(k).

An L-GAL appointed in a child-protective proceeding may be required to communicate with a respondent parent if the child is placed within the home or there are issues surrounding the minor child where the respondent parent may need to be consulted. In fact, under MCL 712A.17d(1)(d), an L-GAL is required to meet with or observe a child prior to specific hearings as outlined within the statute. The required meetings per statute contemplate communication about the subject of the representation with a respondent parent whom the lawyer knows to be represented in the matter by another lawyer.

MCL 712A.17d(1)(c) empowers an L-GAL to “determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary.” Reading sections 17d(1)(c) and 17d(1)(d) together provides the legal authorization contemplated by MRPC 4.2.⁸

However, it may be argued that the enactment of the statute did not contemplate the restrictions of MRPC 4.2. Therefore, the best practice for an L-GAL is to arrange to meet with or observe the child at a neutral location away from the respondent parent(s). Alternatively, an L-GAL should seek prior consent to speak with the respondent parent. Should the lawyer for the respondent parent refuse access to the respondent parent in order for the L-GAL to meet with the minor child, the L-GAL should inquire with the court as to how to gain access to the minor child while living with the respondent parent.

C. Communications with Supervising Agency Caseworkers and Staff

Controlling Legal Authority: MRPC 4.2 and MCL 712A.17d(1)(k).

Ethics opinion [RI-316](#) provides, “[a] lawyer may communicate with a caseworker for the [Michigan Department of Health and Human Services (DHHS)] in a case in which the [DHHS] is a petitioner in family court, notwithstanding an appearance having been filed by an attorney indicating that [DHHS] is represented by counsel.” This ethics opinion is guided by MCL 712A.17(5), which states as follows:

In a proceeding under section 2(b) of this chapter, upon request of the family independence agency or an agent of the family independence agency under contract with the family independence agency, the prosecuting attorney shall serve **as a legal consultant** to the family independence agency or its agent at all stages of the proceeding. If in a proceeding under section 2(b) of this chapter **the prosecuting attorney does not appear on behalf of the family independence agency or its agent**, the family independence agency may contract with an attorney of its choice for legal representation [emphasis added].

Therefore, the goals of the Child Protective Law and the plain language of MCL 712A.17 provide the basis for the L-GAL to conduct an “independent investigation” which includes, but is not limited to, speaking with agency workers and MCI (see also MCL 400.204(2)). Should the lawyer for any interested person or party prevent the L-GAL from speaking with and conducting the required “independent investigation,” the L-GAL should inquire with the court as to

⁸ See Vandevort & Sankaran, *Protocol for Attorneys Parents in Child Protective Proceedings* (Lansing, Michigan, 2013).

how to gain access to the necessary information from the supervising agency.

III. The L-GAL's Role in Corresponding Domestic Relations Matters

A. L-GAL's Role in Domestic Relations Custody Case

Controlling Legal Authority: MCL 600.1021(1)(e), MCL 712A.2(b), MCL 722.24, and MCR 3.205.

The family division of the circuit court has exclusive jurisdiction over child protective proceedings. MCL 600.1021(1)(e); MCL 712A.2(b). Further, when two or more matters within the family division's jurisdiction are pending in the same judicial circuit and concern members of the same family, they must be given to the judge who was assigned the first matter (aka the "one family, one judge" rule), whenever practicable. MCL 600.1023.

If a petition is filed in the family division alleging that the court has jurisdiction over the child under MCL 712A.2(b) and the custody of the child is subject to the prior or continuing order of another court of record of this state, the manner of the required notice and the authority of the family division to proceed are governed by MCR 3.205(A), which states, in relevant part:

If an order or judgment has provided for continuing jurisdiction of a minor and proceedings are commenced in another Michigan court have separate jurisdictional grounds for an action affecting that minor, a waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court.

MCR 3.205(A).

Note also: "under MCL 600.1021, the family division of the circuit court has sole and exclusive jurisdiction over matters relating to both termination of parental rights and custody of juveniles." *In re Foster*, 237 Mich. App. 259, 261; 602 NW2d 610 (1999).

Thus, a judge presiding over a juvenile matter may consider related actions under the Child Custody Act (CCA) ancillary to making determinations under the juvenile code. Specifically, MCL 722.24(2) states:

If, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child. A lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in section 17d of chapter XIIA of 1939 PA 288, MCL 712A.17d. All provisions of section 17d of chapter XIIA of 1939 PA 288, MCL 712A.17d, apply to a lawyer-guardian ad litem appointed under this act.

In doing so, the judge must follow relevant procedural and substantive requirements of the Child Custody Act. The Michigan Court of Appeals stated:

There is no authority to preclude a circuit judge from determining custody pursuant to the CCA ancillary to making determinations under the juvenile code To the contrary, the RJA [Revised Judicature Act], as amended by 1996 PA 388, specifically permits a judge presiding over a juvenile matter to consider related actions under the CCA.

...

If a court presiding over a juvenile proceeding finds itself in a position in which the matter before it has been consolidated with a related custody matter, it must make clear that it is exercising jurisdiction in accordance with MCL 600.1021(3). *In re AP*, 283 Mich. App. 574, 598-599

(2009).

If at any time during the pendency of a child protective proceeding, a party files a motion under the CCA and the court determines that the child's best interests are inadequately represented, the court may appoint an L-GAL to represent the child. In such instances, the same judge presiding over the child protective proceeding should hear the domestic relations motion. MCL 600.1023 and *In re AP, supra* at 578. An L-GAL appointed in such a proceeding has the same powers and duties in relation to that representation as set forth in section 17d.

L-GALs have an ethical duty to "seek the lawful objectives of a client through reasonably available means permitted by law and these rules." See MRPC 1.2(a). This includes ensuring that the provisions of custody as stated in statute and court rule are abided by while also evaluating the best interests of the minor child and articulating that analysis to the appropriate court or tribunal.

B. L-GAL's Role in Domestic Relations Parenting Time Case

Controlling Legal Authority: MCL 712A.17d(1)(c), MCL 712A.17d(1)(i), MCL 600.171, and MRPC 3.3(e).

In a child protective proceeding, MCL 712A.13a(13) governs parenting time from the preliminary hearing stage to adjudication.

If a juvenile is removed from the parent's custody at any time, the court shall permit the juvenile's parent to have regular and frequent parenting time with the juvenile. Parenting time between the juvenile and his or her parent shall not be less than 1 time every 7 days unless the court determines either that exigent circumstances require less frequent parenting time or that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being. If the court determines that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being, the court may suspend parenting time until the risk of harm no longer exists. The court may order the juvenile to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time.

In re Laster, 303 Mich. App. 485, 488 (2013) and MCR 3.965(C)(7)(a).

Following adjudication, a schedule for regular and frequent parenting time between the child and his or her parent must be established no less than once every seven days unless parenting time, even if supervised, would be harmful to the child as determined by the court. MCL 712A.18f(3)(e).

Provisions regarding custody in a case seeking permanent custody at the initial disposition may be found in MCL 712A.2 and MCL 712A.18 and regarding custody following a permanent custody petition filing may be found in MCR 3.977 and MCL 712A.19b.

L-GALs have an ethical duty to "seek the lawful objectives of a client through reasonably available means permitted by law and these rules." See MRPC 1.2(a). This includes ensuring that the provisions of parenting time as stated in statute and court rule are abided by while also evaluating the best interests of the minor child and articulating that analysis to the appropriate court or tribunal.

C. The Child's Preference

Struggles between the child's preference and the court may arise in a child protective proceeding where the court adopts a permanency plan of reunification, or the court orders a child to participate in parenting time over the child's strong objection. The child's objection may stem from unreconciled instances of past abuse or neglect, which, even where there is no evidence of abuse, has led to a complete breakdown in the parent-child relationship.

In *Bowers v. Bowers*, 190 Mich. App. 51, 55-56; 475 NW2d 394 (1991), the Michigan Court of Appeals held that a child who is seven years old or older is presumed to have the capacity to express a preference in a custody or parenting time dispute. It should be noted that the *Bowers* case stated that a seven-year-old can express a preference, which should be relayed to the court by the L-GAL as long as the L-GAL has received consent from the minor child to relay the preference under MRPC 1.6(c)(a). Similar to adults that “may lack the capacity to give competent testimony because of infirmity, disability, or other circumstances, so may a child’s presumed capacity be compromised by circumstances peculiar to that child’s life.” *Maier v. Maier*, 311 Mich. App. 218, 225; 874 NW2d 725 (2015).

Speaking to the L-GAL’s responsibility regarding parenting time, the L-GAL must focus on the child and the child’s best interests as opposed to those of a parent. MCL 722.27a(3) provides that “a child has a right to parenting time ... unless ... it would endanger the child’s physical, mental, or emotional health.” For this reason, the L-GAL’s independent investigation is critical to the determination of the child’s best interests.

D. Discovery of Influence on the Child’s Preference

An individual’s efforts, whether they be a party or a third party, to influence a child’s testimony are not without precedent. Therefore, special consideration must be afforded to this issue should the L-GAL’s independent determination reveal the existence of such influence.

MRPC 1.2(d) states:

When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

MRPC 1.14(b) states:

A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.

MRPC 3.3(e) states:

When false evidence is offered, a conflict may arise between the lawyer’s duty to keep the client’s revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. The advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not remedy the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

The L-GAL’s powers and duties include the duty

- To serve as the independent representative for the child’s best interests (see MCL 712A.17d(1)(b)); and
- To make a determination regarding the child’s best interests and advocate for those best interests (see MCL 712A.17d(1)(i)).

The L-GAL's foremost best interests duty is to "determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, caseworkers, family members, and others as deemed necessary as well as reviewing relevant reports and other information" (see MCL 712A.17d(1)(c)).

Following investigation, if the L-GAL finds that efforts have been made to influence the child's preference, the L-GAL should seek to persuade the child that the false evidence should not be communicated to the court, or if it has been communicated, the L-GAL must immediately disclose the false character of the evidence to the court. See MCL 712A.17d(1)(c), (1)(i), and MRPC 3.3(e).

E. Parental Alienation

Controlling Legal Authority: MRPC 1.4 and MCL 712A.13a.

When a child freely visits with one parent but refuses to visit the other, a possible argument may be parental alienation.⁹ An ethical dilemma arises when the child's attorney has determined that the child client has diminished capacity due to mental impairment because of parental manipulation. The L-GAL must maintain their role as counselor and advisor, which may include having honest and frank conversations with the child that are also developmentally appropriate for the child's level of understanding. No matter the age or incapacity of a client, an attorney must communicate with the client as reasonably possible regarding the status of the matter in order to receive enough information for the attorney to move forward. See MRPC 1.4. Once the L-GAL discusses the benefits and consequences of the client's preference about custody or visitation, the L-GAL must assess whether the client is processing that information adequately given the client's age and capacity. From that information and the L-GAL's independent investigation, the L-GAL must provide their recommendation as to the best interests of the child while also stating the child's preference. Should the need arise, the L-GAL may motion the court for independent counsel for the minor child under MCL 712A.13a.

IV. Ethical Role of the L-GAL When Handling Childhood Issues

A. Gender and Sexuality Issues

Controlling Legal Authority: MRPCs 1.14 and 1.6(c)(1); and MCL 722.124a.

An L-GAL may have to counsel a child client who may wish to discuss their gender or sexuality. Further, the child client may wish for the L-GAL to assist them in transitioning to another gender and/or be identified as another gender. Identifying as another gender and/or transitioning to another gender is not only a medical decision, but a legal decision as well, especially when counseling children in the child welfare system. The L-GAL must counsel the child client that pursuant to MCL 722.124a(3), "[o]nly the minor child's parent or legal guardian shall consent to nonemergency, elective surgery for a child in foster care." Further, "routine, nonsurgical medical care" does not include contraceptive treatment, services, medication, or devices. MCL 722.124a(4).

It is important for the L-GAL to inform the client of the relevant laws and their options. The L-GAL should encourage the child to speak with a medical professional, including, but not limited to, their pediatrician and their mental health professional, to discuss and explore all medical and emotional options that the L-GAL is not qualified to discuss. Further, the L-GAL should encourage the child client to have a discussion with their parent(s) regarding their gender and/or sexuality issues. Prior to any further discussions between the L-GAL and a third party, the L-GAL must obtain the child's permission to openly discuss this matter on the child's behalf. See MRPC 1.6(c)(1).

9. For further information on parental alienation, please refer to Richard A. Gardner, "Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?" *The American Journal of Family Therapy* vol. 30, no. 2 (2002): 93-115, doi: 10.1080/019261802753573821.

If the child refuses permission, the L-GAL must not inform any third party as to those discussions with the child client, but should continue to encourage open communication and further encourage discussions with a neutral medical professional for appropriate mental health care in order for the child client to understand the child's gender experience. If the child client provides permission to speak with third parties, the L-GAL should work cooperatively with the parent(s)' counsel, therapists, and supervising agency to engage the parents in discussions without any predetermined outcome regarding their child's wishes regarding gender and/or sexuality.

The L-GAL should be a sounding board for the child client and not allow their own beliefs to interfere with providing the child client the appropriate legal counsel. The L-GAL must also continue to assess the child's capacity under MRPC 1.14 and assess the willingness of the child's parent(s) or guardians to participate in an open dialogue. The L-GAL must also continue to conduct their own independent investigation and—if concerns arise regarding the child's needs, their capacity, or their parent(s)' involvement—conduct ongoing discussions with the child regarding their gender and/or sexuality. Further, the L-GAL should be prepared to take protective action as allowed under MRPC 1.14.

V. The L-GAL vs. the Court-Appointed GAL

A. The Difference between the L-GAL and GAL

Controlling Legal Authority: MRPC 1.14.

A lawyer-guardian ad litem (L-GAL) appointed under MCL 712A.17d is distinguishable from the court-appointed guardian ad litem (GAL) contemplated by MRPC 1.14(b). MRPC 1.14 provides:

- (b) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (c) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The comments to MRPC 1.14 supplement the lawyer's duty to the client who has a disability by instructing, "[i]f the person has no guardian or legal representative, the lawyer often must act de facto as guardian." The powers and duties of the L-GAL set forth in section 17d are expressly limited to those proceedings in which section 17d is specifically invoked.¹⁰ By limiting the application of section 17d to specified proceedings, the L-GAL role is an exception to the rules governing the court-appointed guardian or conservator contemplated by MRPC 1.14.

Section 17d has three distinct parts that enumerate the L-GAL's role:

- (1) An L-GAL represents the best interests of the child and enumerates thirteen specific powers and duties in relation to that representation.¹¹
- (2) An L-GAL communicates the child's position to the court where the child's interests are identified by the child and are inconsistent with the L-GAL's determination of the child's best interests.
- (3) An L-GAL's file of the case is not discoverable, and the L-GAL may not be called on to testify by the court or another party regarding matters related to the case.

By contrast, the appointment of a guardian ad litem (GAL),¹² conservator, or guardian contemplated by MRPC 1.14 arises when a lawyer encounters a client whom the lawyer reasonably believes cannot adequately act in the client's own best interests. There are various scenarios in which a lawyer may encounter a client that may not be able to act in their own best interests.

Ethics opinion [RI-176](#) opines that "a lawyer may not undertake representation which requires a client to possess the requisite competence to execute legal documents and also subjects the client to proceedings which, if successful, would adjudge the client to be incompetent to handle legal affairs."

By extension, in a child protective proceeding—and to the extent that both knowledge and voluntariness are required—this caution would also seem to apply to a party's plea of admission or no contest under MCR 3.971; a waiver of notice, service, or defect under MCR 3.920(B) and (F); and a waiver of a trial by jury under MCR 3.911. Further, both circuit and district¹³ court actions require minors and incapacitated persons to be represented by a conservator, next friend, guardian, or GAL as provided for by MCR 2.201(E).¹⁴

MRPC 1.14 directs lawyers to consider whether the appointment of a GAL, conservator, or guardian is necessary to protect the client's interests. MRPC 1.14(b); *see also* comment 7 to ABA Rule of Professional Conduct 1.14. Ethics opinion [RI-51](#) provides, "there need not be an adjudication that a client is incompetent to stand trial in order for the client to be unable to make decisions about the representation ..." and a lawyer must secure "independent corroboration of the client's condition before contravening a client's request regarding the representation."

In child protective proceedings, it is not uncommon for the court to appoint a GAL for a party who has been diagnosed with a disability to ensure that counsel receives assistance in representing the affected party. The comments to MRPC 1.14 recognize that a client that lacks legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Further, the comments to MRPC 1.14 acknowledge the increasing extent to which the law recognizes "intermediate degrees of competence." While it is rare for a court to appoint a GAL for a minor who already has an L-GAL appointed to represent the minor's best interests, it is not unheard of and, therefore, should be considered, if necessary, by the L-GAL.

10. See § 5213 or § 5219 of the estates and protected individuals code, 1998 PA 386, MCL 700.5213 and MCL 700.5219; Chapter XII Safe Delivery of Newborns MCL 712.1 to 712.20; § 4 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.24; § 10 of the Child Protection Law, 1975 PA 238, MCL 722.630, which implicates § 712A.1 to 712A.32 of the probate code, 1939 PA 288, MCL 712A.1-712A.32; and MCR 3.979(C)(3), juvenile guardianships.

11. Strictly speaking, § 17d(1)(e) is neither an enumerated power nor a duty. Rather, § 17d(1)(e) paves the way for an L-GAL to request that the court exercise its discretion to enable alternative means of contact with the child.

12. Guardian ad litem means a guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor defendant. Also termed *special guardian*. *Cf.* next friend, which is commonly defined as a person who appears in a lawsuit on behalf of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian. *Black's Law Dictionary* (Bryan A. Garner ed., Pocket Edition, West 1996).

13. This does not apply to civil infraction actions.

14. The representation of a child in child protective proceedings is specifically controlled by MCL 712A.17d. in any statute of this state shall be construed to be a reference to the family division of circuit court."}).

APPENDIX A

The Difference between the L-GAL and GAL

Controlling Legal Authority: MRPC 1.14.

As the Court of Appeals noted in *Shaffer, supra*, confusion remains over the use of the roles of the guardian ad litem (“GAL”) and the lawyer-guardian ad litem (“L-GAL”). However, there are distinct differences between the two roles. In this section, I will attempt to distinguish the legal and functional differences between these two roles.

A lawyer-guardian ad litem (“L-GAL”)¹⁵ appointed pursuant to MCL § 712A.17d of the probate code of 1939 (i.e., chapter XIA of 1939 PA 288, MCL § 712A.17d)¹⁶ is distinguishable from both the de facto and the court-appointed guardian contemplated by MRPC 1.14(b). Indeed, MRPC 1.14 offers considerable guidance. It provides that:

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

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.

MRPC 1.14.

Further, the comments to Rule 1.14 supplement the lawyer’s duty to the client suffering a disability by instructing: “If the person has no guardian or legal representative, the lawyer often must act de facto as guardian.” *Id.*

Thus, the term “guardian” contemplated by MRPC 1.14 and used herein (unless otherwise specified) refers to the fiduciary role of guardian for an incapacitated person and for that person’s estate, sometimes referred to as the “conservator.” *Black’s Law Dictionary* 300 (Bryan A. Garner ed., 7th ed., West 1999).

Conversely, the powers and duties of the L-GAL set forth in § 17d, *supra*, are expressly limited to:

- i. Section 5213 or 5219 of the estates and protected individuals code, 1998 PA 386, MCL §§ 700.5213 and 700.5219;
- ii. Chapter XII Safe Delivery of Newborns MCL §§ 712.1–712.20;
- iii. Section 4 of the Child Custody Act of 1970, 1970 PA 91, MCL § 722.24;
- iv. Section 10 of the Child Protection Law, 1975 PA 238, MCL § 722.630, which implicates Section 712A.1 to 712A.32 of the probate code, 1939 PA 288, MCL §§ 712A.1–712A.32; and
- v. MCR 3.979(C)(3), juvenile guardianships.

By purposely limiting the application of § 17d to specified proceedings, the legislature and the Michigan Supreme Court made the L-GAL an exception to the rules governing the court-appointed guardian or conservator contemplated by MRPC 1.14(b). That is to say, “the express mention ... of [the L-GAL] implies the exclusion of other similar things,” *Bradley v. Saranac Community Schs. Bd. of Ed.*, 455 Mich. 285, 298 (1997), mod. on other grounds by *Mich. Fed. of Teachers v. Univ. of Mich.*, 481 Mich. 657 (2008). Indeed, as mentioned in § 1.1, *supra*, the

15. See MCL 712A.13a(1)(g).

16. Note that per MCR 3.903(A)(4), “[c]ourt’ means the family division of the circuit court” when used in subchapter 3.900 of the Michigan Court Rules, which governs proceedings involving juveniles; MCL § 600.1009 (“[a] reference to the former juvenile division of probate court

Court of Appeals' holding in *Shaffer* drew a clear line of demarcation between a trial court's ability to "appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it" under MCR 3.916 and "the zealous advocacy of an attorney as contemplated by MCL § 712A.17c(7) [and] MCR [3.915(B)(2)]." *Shaffer*, *supra* at 433.

Moreover, the *Shaffer* Court noted the enhanced powers that the L-GAL has under § 17d. *Id.* at 435 and 436. Indeed, § 17d has three distinct parts. First, § 17d(1) asserts that an L-GAL represents the child and enumerates thirteen specific powers and duties in relation to that representation.

Second, § 17d(2) requires the L-GAL to communicate the child's position to the court where the child's interests as identified by the child are inconsistent with the L-GAL's determination of the child's best interests.

Finally, § 17d(3) asserts that the L-GAL's file of the case is not discoverable and that the L-GAL may not be called to testify by the court or another party regarding matters related to the case.

APPENDIX B

"A lawyer-guardian ad litem's duty is to the child, and not the court." § 17d(1). An L-GAL's powers and duties include, *inter alia*, the duty

- "To serve as the independent representative for the child's best interests [§ 17d(1)(b)]"; and
- "To make a determination regarding the child's best interests and advocate for those best interests [§ 17d(1)(i)]."

Historically, an attorney appointed to represent a child in a child protective proceeding (now referred to as an L-GAL) owed a duty to the child's best interests and not to the child as a "party."¹⁷ That is to say, published case law prior to the March 1, 1999, enactment of § 17d¹⁸ paid little attention to a child's right to counsel in a child protective proceeding. Nonetheless, prior to March 1, 1999, the Michigan Court of Appeals had held that a child's right to counsel included the right to "zealous advocacy" under the pre-§ 17d version of MCL § 712A.17c(7), as well as the analogous court rule, MCR 5.915(B)(2),¹⁹ which both provided basic information about the obligations an LGAL had to a child client. *See, e.g., In re Shaffer*, 213 Mich. App. 429, 433, 434, 436; 540 NW2d 706 (1995).

Prior to the enactment of § 17d, MCL § 712A.17c(7) stated, in pertinent part:

The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child. If the child is placed in foster care, the attorney shall, before representing the child in each subsequent proceeding or hearing, review the agency case file and consult with the foster parents and the caseworker. The child's attorney shall be present at all hearings concerning the child and shall not substitute counsel unless the court approves.

Quoted in *In re AMB*, 248 Mich. App. 144, 222; 640 NW2d 262 (2001).

In *In re AMB*, 248 Mich. App. 144, 226 (2001), the Michigan Court of Appeals weighed in on whether a child was denied the effective assistance of counsel. In so doing, the *AMB* Court asserted that in a child protective proceeding, "a child has the right to an attorney who is [a] zealous advocate." *Id.* at 241. Then, drawing a line of demarcation between child protective proceedings before and after the March 1, 1999, enactment of § 17d,²⁰ the

AMB Court told us that:

Courts test whether a child was denied the effective assistance of counsel in a case under the system in place before March 1, 1999, by examining whether the child's attorney's conduct departed from these substantive obligations and whether that deficient performance led to an outcome that was not **in the child's best interests**. [*Emphasis mine.*]

In re AMB, supra at 242.

17. That is, in order to fully apprehend the L-GAL's unique role, we must first recognize that a child is a "party" in a proceeding brought pursuant to Chapter XIIA of the probate code. MCL § 712A.2(i)(ii). When an attorney appears in a child protective proceeding on behalf of a child, such appearance is deemed an appearance by the child. MCR 2.117(B) and MCR 3.915(C). Incidentally, it is noteworthy that the drafters of the subsequent revisions to this provision of the probate code seem to have overlooked the expressed "May 1, 2018" expiration date. (2)(i)(ii).

18. See 1998 PA 480.

19. Formerly, MCR 5.915(B)(2), renumbered to MCR 3.915(B)(2).

20. *I.e.*, for cases after March 1, 1999, MCL § 712A.17c(7), MCL § 712A.17d, MCL § 712A.13a(1)(b), MCL § 722.630, and MCR 3.915 impose substantive obligations on the child's attorney. Relevant case law and the rules of professional conduct are also helpful in defining an attorney's obligations.

AMB, supra at 241.