

PROPOSED STANDARD XXIII

REPRESENTATION OF COURT APPOINTED SPECIAL ADVOCATES AND GUARDIANS-AD-LITEM IN DEPENDENT/NEGLECT CASES

GOALS:

- A. To actively, professionally advocate for the CASA/GAL appointed to represent the best interest of the child in an abuse/neglect proceeding.
- B. To serve the expressed wishes of the CASA/GAL and be independent from other participants in the litigation, including the child's parents or guardians, and the child's attorney in representing the CASA/GAL.¹
- C. To exercise professional judgment in carrying out the duties assigned and to participate fully in the case on behalf of the CASA/GAL.
- D. To recognize that children are at a critical stage of development and that skilled advocacy on behalf of the CASA/GAL will positively impact the course of the child's life.

TRAINING:²

- A. To be eligible for assignment to represent CASA/GAL in these court proceedings, counsel shall complete all training required of CASA/GAL, or the equivalent of such training in the form of experience and/or other training as is acceptable to OPD.
- B. In addition, counsel shall complete at least four hours of training devoted to the Indian Child Welfare Act.
- C. Counsel shall be knowledgeable in the following areas:
 - a. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children including those with special needs;
 - b. Child and adolescent development;
 - c. Child welfare and family preservation services available in the community and the problems they are designed to address;
 - d. Services and treatment options for youth both locally and statewide;
 - e. Services the state will and will not routinely pay for;
 - f. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services.
 - g. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;

¹ See Appendix: Query 1

² DEFINITIONS: See Appendix: Query 2

- h. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
 - i. Basic knowledge of brain development and the effect of trauma on brain development;
 - j. Basic knowledge of mental health issues
 - k. Substance abuse issues;
 - l. Special education laws, rights, and remedies;
 - m. School related issues including school disciplinary procedures, zero tolerance policies, and IEPs; and
 - n. Basic knowledge of disability rights and issues.³
- D. Case Load
- a. In order for OPD to effectively monitor the assignment of DN cases, counsel for CASA/GAL has an affirmative duty to promptly notify OPD of any time Counsel's case load is excessive and/or affecting Counsel's ability to provide appropriate legal representation.⁴

CASE PREPARATION:

- A. Duties of Counsel for CASA/GAL and Scope of Representation
- a. Counsel for a CASA/GAL shall participate in any proceeding concerning the child and which involves the CASA/GAL with the same rights and obligations as any other attorney for a party to the proceeding.
 - b. The duties of counsel for a CASA/GAL include, but are not limited to:
 - i. Taking all steps reasonably necessary to represent the CASA/GAL in the proceeding including but not limited to preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders and such other steps as established by the applicable standards of practice for attorneys acting on behalf of CASA/GAL in this jurisdiction;
 - c. Communicating with the CASA/GAL prior to each hearing^[WU1]
 - d. Representing the CASA/GAL in all proceedings affecting the issues before the court.⁵
- B. Following appointment counsel shall actively represent the CASA/GAL at all stages of the proceeding. When counsel becomes aware of the assignment, counsel shall communicate with the CASA/GAL as soon as possible and sufficiently before any scheduled hearing or proceeding, including the show cause hearing, to permit effective preparation.⁶
- C. Counsel shall maintain the attorney-client privilege with the understanding that counsel represents the CASA/GAL alone and not the youth, his/her parents or guardians, or the

³ See Appendix: Commentary 3

⁴ See Appendix: Query 3

See Appendix: Legislative Note 2

See Appendix: Commentary 4

⁵ See Appendix: Commentary 5, 6, and 7

See Appendix: Query 4

See Appendix: Commentary 8

⁶ See Appendix: Query 6, 7, 8, and 9

Department of Public Health and Human Services. The potential for a conflict of interest should be clearly recognized and acknowledged. Counsel should inform all parties that he/she is counsel for the CASA/GAL and that in the event of a disagreement between a child, parent or guardian, or the Department of Public Health and Human Services, and the CASA/GAL, counsel is required to serve exclusively the interest of the CASA/GAL.

- D. The Montana Rules of Professional Conduct govern the obligations of counsel for a CASA/GAL.
- E. Duration of Appointment
 - a. Counsel for a CASA/GAL shall continue to represent the CASA/GAL at all stages of the proceeding until appropriately discharged or once the case is dismissed and/or the youth at issue has aged out of the DN process.
- F. Counsel for CASA/GAL may not waive a child's right to counsel at any court proceedings.⁷

HANDLING THE CASE

- A. Counsel for a CASA/GAL should seek the most expedient and timely resolution of the proceeding possible while providing effective advocacy for the CASA/GAL. Counsel should avoid seeking continuances unless it is necessary.
- B. Counsel shall be familiar with the applicable court rules and rules of evidence.
- C. In preparation for any hearing counsel shall
 - a. Review the petition and all other evidence⁸
 - b. Be fully informed of the rules of evidence, court rules, and the law with relation to all stages of the hearing process; be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the hearing.
 - c. Be aware of the substantive and procedural law regarding the preservation of legal error for appellate review;
 - d. Preserve confidentiality in accordance with law;
 - e. Prepare the CASA/GAL for the proceeding, explain the issues involved, and review the alternatives open to the judge;
 - f. Review all statements, documents, reports, and documentary evidence including medical records, if any, and discuss these documents with the CASA/GAL;
 - g. Familiarize himself/herself with relevant law; and,
 - h. Interview all witnesses, favorable and adverse, as directed by the CASA/GAL.
- D. During any proceedings, counsel shall , when it furthers the position and recommendations of the CASA/GAL and is a necessary part of that representation:
 - a. Examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence;
 - b. Offer evidence favorable to the CASA/GAL's case, if available; and
 - c. Determine whether an expert is needed to assist in preparation of the CASA/GAL's case.
- E. If counsel withdraws from representation at any time during the legal process, counsel shall make reasonable efforts to ensure that the CASA/GAL has replacement legal representation by

⁷ See Appendix: Commentary 10 and 11

⁸ See Appendix: Query 10

filing a notice of withdrawal with the applicable court and moving that court to appoint new replacement counsel.

- F. Counsel for CASA/GAL may not engage in ex parte contact with the court except as authorized by the applicable rules of professional conduct, court order, or other law.⁹

ATTORNEY'S WORK PRODUCT AND TESTIMONY

- A. Counsel for CASA/GAL may not engage in ex parte contact with the court except as authorized by the applicable rules of professional conduct, court order, or other law.
 - a. Except as authorized by the Montana Rules of Professional Conduct or court order, counsel for a CASA/GAL shall not:
 - i. Except as otherwise provided by the Montana Rules of Professional Conduct or court order, counsel for a CASA/GAL shall not surrender to any party work product developed during the appointment absent consent by the CASA/GAL.
 - ii. Counsel shall also ensure, whenever necessary and possible, that the CASA/GAL is present and available to provide testimony and/or be subject to cross-examination during hearings[wu2].

⁹ See Appendix: Commentary 13