

Lawyer-Guardian Ad Litem
Protocol
Revised Edition (08/20/15)
State Bar of Michigan
Children's Law Section

1. Introduction

In 1998,¹ because of its concern for the protection of children who are abused or neglected by their parents, the Michigan Legislature enacted a statute that delineates the role and responsibilities of the Lawyer-Guardian ad Litem (L-GAL). This statute, MCL 712A.17d, read in conjunction with other statutes, court rules, case law, and the Michigan Rules of Professional Conduct, gives guidance to lawyers who are appointed to this important role. This protocol is intended as another tool to help assure competent, effective representation in every case in which the court appoints a L-GAL.

This protocol recognizes that the fees paid by courts to L-GALs and the services that courts will pay the L-GAL to perform vary throughout Michigan, and that many feel that L-GALs are not fairly compensated. However, a court's policy with regard to L-GAL fees does not alter or abrogate a L-GAL's responsibilities under MCL 712A.17d. This protocol is intended to help L-GALs comply with MCL 712A.17d; it contains recommendations for reasonable compliance with that statute. Any deviation from the explicit language of the statute should be read only as a recommendation. Most importantly, it is recognized that a L-GAL provides an invaluable service to the child, court, and community and should be supported.

Depending upon the circumstances of the case and available resources, several representatives of the child or the court may be appointed. The following definitions are provided to help distinguish between a L-GAL and other representatives of the child or court who may be appointed by the court in a case:

- **Lawyer-guardian ad litem:** A lawyer-guardian ad litem must be appointed for a child in every child protective proceeding instituted under the Juvenile Code.² The lawyer-guardian ad litem has some responsibilities derived from the attorney-client relationship, and some responsibilities that are derived from the guardian ad litem's position. A L-GAL's purpose is to determine and advocate for a child's best interests and to inform the court of the child's wishes. The L-GAL's powers and duties are explained in this protocol.
- **Attorney:** In addition to appointment of a L-GAL, an "attorney" may be appointed to represent a child's expressed wishes where the L-GAL's determination of the child's best interests conflicts with the child's expressed wishes. The procedure for appointing an "attorney" is discussed in this protocol. "Attorney" means, if appointed to represent a child in a [child protective proceeding under the Juvenile Code], 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 . . . 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."³

¹ MCL 712A.17d was most recently amended in 2012. This revised edition incorporates the amendments to MCL 712A.17d made by 2012 PA 115.

² MCL 712A.13a(1)(g), MCL 712A.17c(7), and MCL 722.630.

³ MCL 712A.13a(1)(c).

- **Court Appointed Special Advocate:** If available in the jurisdiction and appropriate in a given case, the court may appoint a Court Appointed Special Advocate or CASA. A CASA is a volunteer who investigates the child’s circumstances and makes recommendations to the court concerning the best interests of that child. A CASA does not need to be an attorney. A CASA must maintain regular contact with the child, investigate the background of a case, collect information regarding the child, provide written reports to the court and parties before a hearing, and testify when requested by the court.⁴
- **Guardian ad litem:** Like a CASA, a guardian ad litem (GAL) may be appointed to investigate the child’s circumstances and make recommendations to the court regarding the child’s best interests. A guardian ad litem’s duty is to the court, not the child. “‘Guardian ad litem’ means an individual whom the court appoints to assist the court in determining the child’s best interests. A guardian ad litem does not need to be an attorney.”⁵

2. Protocol Contents

This protocol describes the authority and responsibilities under MCL 712A.17d of the Juvenile Code of a L-GAL appointed to represent a child in child protective proceedings. A L-GAL must be appointed for a child who is the subject of child protective proceedings.⁶ A L-GAL may be appointed in guardianship proceedings, proceedings under the Safe Delivery of Newborns Law, and child custody proceedings, and MCL 712A.17d also applies to L-GALs appointed in those proceedings.⁷ A L-GAL’s role in those specific proceedings may differ from the L-GAL’s role in child protective proceedings.

This protocol contains the following parts:

- A. **Text of MCL 712A.17d.** The complete text of MCL 712A.17d, the statute that contains the duties and authority of L-GALs. The statute also provides for appointment of an attorney to advocate for a child’s expressed wishes where the L-GAL’s determination of the child’s best interests and the child’s determination of his or her own interests conflict.
- B. **Discussion.** This portion of the protocol contains a discussion of the duties and authority of L-GALs under MCL 712A.17d. It contains sections on the role of the L-GAL, explaining that role to the child, conducting an independent investigation of the facts of the case, duties pertaining to hearings in the case, and determining and advocating for the child’s best interests. Throughout the discussion, the reader will find recommendations intended to facilitate reasonable compliance with the dictates

⁴ MCR 3.917.

⁵ MCL 712A.13a(1)(f).

⁶ MCL 712A.17c(7) and MCL 722.630.

⁷ MCL 700.5213(5), MCL 700.5219(4), MCL 712.1(2)(j), MCL 712.2(1), and MCL 722.24(2).

In guardianship and custody proceedings, a L-GAL may file with the court a written report and recommendation, which may only be admitted into evidence upon stipulation of all parties. The parties may also use the report and recommendation at a settlement conference.

of MCL 712A.17d, including the requirements for meeting with or observing the child and reviewing the case file. Statutes, court rules, ethics rules and opinions, and case law relevant to performance of a L-GAL's duties are also noted.

- C. **Appendix.** Attached to this protocol as an appendix is the Forensic Interviewing Protocol (FIP). The FIP may assist L-GAL's in interviewing their clients and in evaluating interviews of their clients conducted by others, such as a children's protective services worker.

3. Text of MCL 712A.17d

(1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

- (a) The obligations of the attorney-client privilege.
- (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
- (c) 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, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.
- (d) To 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 in the following instances:
 - (i) Before the pretrial hearing.
 - (ii) Before the initial disposition, if held more than 91 days after the petition has been authorized.
 - (iii) Before a dispositional review hearing.
 - (iv) Before a permanency planning hearing.
 - (v) Before a post-termination review hearing.
 - (vi) At least once during the pendency of a supplemental petition.

(vii) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.

(e) The court may allow alternative means of contact with the child if good cause is shown on the record.

(f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(h) To attend all hearings and substitute representation for the child only with court approval.

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall 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.

(k) 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.

(l) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(m) To participate in training in early childhood, child, and adolescent development.

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable.

4. Role of the L-GAL

Nature of the representation. A L-GAL's duty is to the child, not the court. A L-GAL owes the child the duties of competent and zealous representation⁸ that an attorney owes to an adult client. A L-GAL's duties, like those of any attorney, include a duty to investigate the facts of the case, appear at hearings on the client's behalf, and examine witnesses. The child is entitled to the effective assistance of counsel.⁹ Failure to comply with statutory and other requirements may result in sanctions.¹⁰

However, as noted in the introduction to this protocol, the L-GAL's role is unique. A L-GAL is required to serve as the independent representative of the child's best interests, not as the representative of the child's wishes or preferences. Although the L-GAL is required to consider the child's wishes and preferences when determining the child's best interests, the L-GAL is not bound by them as in the traditional attorney-client relationship. Nonetheless, to the extent possible, the L-GAL must maintain a normal attorney-client relationship with the child. If there is a conflict between the child's expressed wishes and the L-GAL's perception of what is in the child's best interests, the L-GAL must notify the court, and the court may appoint an additional "attorney" who will advocate for the child's wishes.¹¹

A L-GAL must provide the child with competent representation.¹² Before accepting appointment, a L-GAL should have an understanding of the procedural and substantive law governing child protective proceedings, child development (including the effect of abuse or neglect on development), and the agencies that provide services to children and families. In any given case, a L-GAL may need to gain knowledge, through consultation with others or study, in a specialized area, including medical aspects of child abuse and neglect, child sexual abuse, substance abuse, mental illness, domestic violence, foster care regulations, funding issues, governmental benefit

⁸ See *In re Shaffer*, 213 Mich App 429, 436 (1995) (under a previous version of MCL 712A.17c(7), a child who is the subject of a child protective proceeding is entitled to zealous representation). MCL 712A.17c(7) now states in part: "*In addition to any other powers and duties*, a lawyer-guardian ad litem's powers and duties include those prescribed in section 17d." (Emphasis added.)

⁹ To constitute effective assistance of counsel, a child's attorney's conduct must comply with "applicable statutes, court rules, rules of professional conduct, and any logically relevant case law." *In re AMB*, 248 Mich App 144, 226 (2001). (Footnotes omitted.)

¹⁰ Attorneys and certified social workers may be deprived of their professional licenses or certifications for violations of law and applicable ethical rules. See *Grievance Administrator v Carson*, Case No. 02-53-6A (September 5, 2002) (revocation of license to practice law for failure to visit child, consult with social worker, visit foster parent, establish a permanency plan for the child, or make reasonable efforts to expedite the proceedings) and *Becker-Witt v Dep't of Consumer & Industry Services*, 256 Mich App 358 (2003) (revocation of social worker's certification for failure to report suspected sexual abuse of the client's child).

¹¹ See MCL 712A.17d(2).

¹² See MRPC 1.1 and Comment.

programs, applicable federal law (including the Indian Child Welfare Act), evaluation of psychological reports, education law, and social and cultural issues related to child-rearing practices.¹³ When necessary, the L-GAL should request appointment, at public expense, of an expert witness. To help ensure that a L-GAL provides children with competent representation, the L-GAL and court should keep caseloads at a reasonable level.

A L-GAL must be diligent and prompt, and expedite the case consistent with the child's needs and interests.¹⁴ The L-GAL must be familiar with the time requirements in the law governing child protective proceedings.¹⁵ Adjournments should be granted only for good cause, after taking the child's best interests into consideration, and for as short a period as necessary.¹⁶

When a child is removed from his or her home, a L-GAL must seek to reduce the trauma resulting from separation of child and parent. This may be done by objecting to removal in an appropriate case, advocating for placement with a relative, seeking an early return of the child home, and helping to maintain, to the extent possible, a child's normal school and other activities.

Confidentiality and the attorney-client privilege. MCL 712A.17d(1)(a) states that a L-GAL's duties include "[t]he obligations of the attorney-client privilege." The obligations of the attorney-client privilege include those imposed by the rules of professional conduct governing confidentiality and by the common-law attorney-client privilege. The relevant rule of professional conduct, MRPC 1.6, states as follows:

(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 likely 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 a client; or
- (3) use a confidence or secret of a client for the advantage 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;

¹³ A good overview of many of these issues is contained in Baker, et al., *What I Wish I'd Learned in Law School: Social Science Research for Children's Lawyers*, ABA Center on Children and the Law, 1997.

¹⁴ MRPC 1.3 and 3.2.

¹⁵ *Child Protective Proceedings Benchbook: A Guide to Abuse & Neglect Cases*, Appendix B, for a table containing time and notice requirements.

¹⁶ MCR 3.923(G).

- (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
- (3) 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;
- (4) the intention of a client to commit a crime and the information necessary to prevent the crime; and
- (5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

The common-law attorney-client privilege limits the admissibility of the client's confidential communications to his or her attorney for the purpose of obtaining legal advice.¹⁷ "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that the communications are safe from disclosure."¹⁸ The privilege belongs to the client; only the client may waive the privilege.¹⁹ Although it may help the child to feel comfortable to have a person whom the child knows present at the first meeting between a child and a L-GAL, the child's meaningful exercise of the attorney-client privilege requires the L-GAL to meet with the child without other parties present. The presence of a third party during communications between attorney and client destroys the privilege, unless the third party is an agent of the attorney or client.²⁰

A conflict between a L-GAL's duty to preserve the child's confidences and secrets and a L-GAL's duty to advocate for the child's best interests may arise in certain circumstances, such as when the child discloses to the L-GAL that he or she has been subject to additional abuse or neglect, or that he or she is preparing to run away from placement. A L-GAL is not a "mandatory reporter" under MCL 722.623(1) of the Child Protection Law, and running away from a placement is not a criminal offense.²¹ An attorney must not disclose a client's confidential communications without the client's consent unless disclosure is required by law or court order.²² In these

¹⁷ *Alderman v People*, 4 Mich 414, 422 (1857).

¹⁸ *Co-Jo, Inc v Strand*, 226 Mich App 108, 112 (1997).

¹⁹ *Leibel v General Motors Corp*, 250 Mich App 229, 240 (2002).

²⁰ *Grubbs v Kmart Corp*, 161 Mich App 584, 589 (1987).

²¹ It may be a status offense. See MCL 712A.2(a)(2). If the child discloses that he or she intends to commit a criminal offense in conjunction with running away from placement, the L-GAL may be permitted to disclose such information to the court pursuant to MRPC 1.6(c)(4). Courts and supervising agencies are required to institute expedited procedures in cases involving children absent without leave from a court-ordered placement. See Admin Order No. 2002-4, 467 Mich cv (2002), and DHHS policy FOM 722-03A.

²² MRPC 1.6(b)(1) and (c)(1) and (2).

circumstances, the L-GAL should counsel the child and encourage him or her to allow the L-GAL to disclose the confidential information to the court.²³ The L-GAL may also request the appointment of a guardian ad litem or CASA if available in the jurisdiction. Such circumstances exemplify the unique role and responsibilities of the L-GAL. Preservation of attorney-client confidentiality is an important interest; however, a L-GAL may need to strike a balance between traditional attorney roles and responsibilities and the legislatively mandated responsibility to represent a child's best interests. The Advisory Committee for this protocol recognizes that L-GALs must counsel and advise their clients based on the circumstances of individual cases. In doing so, the Advisory Committee fervently hopes that L-GALs will be guided by a recognition of the unique vulnerabilities of abused and neglected children, and a recognition that a fundamental goal of child protective proceedings is that children emerge from the process in safe and permanent home settings.

Pursuant to MCL 712A.17d(1)(i), a L-GAL must inform the court of the child's wishes and preferences, but such communication must be "[c]onsistent with the law governing attorney-client privilege." "A lawyer[-guardian ad litem] 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."²⁴

Neither the court nor another party may call a L-GAL as a witness to testify regarding matters related to the case, and a L-GAL's case file is not discoverable.²⁵

Participation in the proceedings. A L-GAL is "entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child."²⁶ A L-GAL must attend all hearings, including the preliminary hearing.²⁷ If the DHHS is considering filing a petition requesting termination of parental rights at the initial disposition hearing, the L-GAL should consider attending the conference required by MCL 722.638(3) to determine an appropriate course of action. A L-GAL should also consider attending local Foster Care Review Board meetings involving a review of the child's or a sibling's case.

Substitution may occur only for sufficient cause and only with court approval.²⁸ MCR 3.915(D)(2) allows for temporary substitution in certain circumstances. That rule states in part:

²³ A L-GAL may also seek guidance from the State Bar of Michigan. The State Bar of Michigan Attorney Ethics Helpline number is (877) 558-4760. Neither the Michigan Legislature nor Michigan appellate courts have addressed a L-GAL's liability in a subsequent negligence action for injuries to the child. See MCL 691.1407(6) ("A guardian ad litem is immune from civil liability for an injury to a person . . . if he or she is acting within the scope of his or her authority as a guardian ad litem").

²⁴ RI-318 (March 22, 2000).

²⁵ MCL 712A.17d(3).

²⁶ MCL 712A.17d(1)(b).

²⁷ See MCR 3.915(B)(2)(a) (court must appoint L-GAL for child at every hearing, including preliminary hearing) and MCR 3.965(B)(3) (L-GAL must attend preliminary hearing).

²⁸ MCL 712A.17d(1)(h).

The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem at a hearing, if that would prevent the hearing from being adjourned, or for other good cause. Such a substitute attorney must be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file and consult with the foster parents and caseworker before the hearing unless the child's lawyer-guardian ad litem has done so and communicated that information to the substitute attorney. The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule.

A L-GAL should ask the court for permission to withdraw from the representation only if a conflict of interest arises²⁹ or the L-GAL is unable to fulfill their statutory duties.

A L-GAL should seek the truth, not defend a preordained position; file necessary pleadings and other papers, including appropriate motions; and file a witness list and call witnesses independently from the petitioner. A L-GAL's position may shift during the course of the proceedings. A L-GAL's position regarding the child's best interests may mirror, wholly or in part, a parent's or the agency's position, but the L-GAL must still independently develop a theory of the case and fully participate in the proceedings rather than merely endorsing another party's position. A L-GAL should insist on his or her status as an independent representative of a party. For example, the L-GAL should insist that he or she not be required to sit with either the prosecuting attorney or a parent during a hearing.

A L-GAL should present to the court relevant and admissible evidence and information. A L-GAL may file a motion or petition for review of the child's placement when the L-GAL finds that placement to be inappropriate or unsafe.³⁰ The L-GAL is entitled to notice of the Agency's decision regarding placement of the child. If the L-GAL has not received a Notice of Placement Decision within 91 days from the child's removal, the L-GAL should request the notice from the Agency.³¹ If necessary, a L-GAL may also file a report of suspected child abuse or neglect with DHHS. At trial, at the conclusion of the proofs, the L-GAL may make a recommendation to the fact finder as to whether one or more of the statutory grounds in the petition have been proven by a preponderance of the evidence.³² Before entering dispositional orders, the court must consider any written or oral

²⁹ See MRPC 1.7.

³⁰ See MCR 3.966(A)-(B). A L-GAL may also file a complaint with the Children's Ombudsman pursuant to MCL 722.925. Go to www.michigan.gov/oco for further information. The L-GAL may also file a complaint with the DHHS against a licensed foster care home, agency, or institution. For the complaint form, go to http://www.michigan.gov/mdhhs/0,5885,7-339-71551_27716-80945--,00.html.

³¹ MCL 722.954a(4). The agency must provide the L-GAL with the form DHS-31.

³² MCR 3.972(D).

information concerning the child provided by the L-GAL.³³ A L-GAL may file a petition on behalf of the child seeking court jurisdiction or termination of parental rights.³⁴

A L-GAL may seek review of a decision or order by filing a request for review of a referee's recommended findings and conclusions, a petition for rehearing, or an appeal.³⁵

Child's attendance at a hearing and child's testimony regarding abuse. A child has a right to attend a hearing.³⁶ A child who attends a hearing may understand that the issues surrounding his or her custody are being taken seriously. However, the court may determine, based on the child's age and maturity and the nature of the testimony at the hearing, that the child's interests require that he or she be excused from attending part or all of a trial or a disposition hearing.³⁷ The L-GAL may counsel the child regarding attending a hearing, including informing the child that his or her attendance at a hearing will not invariably result in returning home. A L-GAL must decide whether a child should testify at a hearing regarding alleged abuse. When deciding whether the child should testify, the L-GAL may consider the child's need or desire to testify, the necessity of the child's testimony, the use of a hearsay exception to obviate the need for the child's direct testimony, and the child's ability to provide testimony and to withstand cross-examination. The L-GAL should be familiar with the law governing competence of witnesses. If the child is to testify, the L-GAL should prepare the child prior to his or her appearance in the courtroom by showing the child the courtroom, allowing the child to sit in the witness stand, providing a booster seat if necessary, telling the child where others will sit, and the like. If the L-GAL determines that it is not in the child's best interests to testify, the L-GAL should seek a stipulation from the other parties not to call the child as a witness. If the child will be called as a witness by another party, the L-GAL should explore the use of alternative procedures to obtain the child's testimony in the least detrimental manner.³⁸ The L-GAL may file a motion to ensure developmentally appropriate questions and should make every effort to prevent cross-examination by leading questions. In all cases, the L-GAL should seek direction from the court.

Case plan development and services to family. The L-GAL should be notified of the date and time of a family team meeting³⁹ to allow him or her to participate in constructing a case plan and parent-agency agreement. However, the L-GAL should not be present at the conference with a respondent unless that respondent's attorney is also present or has been made aware that the L-GAL will attend the conference. As required by the Michigan Rules of Professional Conduct, the

³³ MCL 712A.18f(4) and MCL 712A.19(11).

³⁴ MCL 712A.11(1), MCL 712A.19b(6), and MCR 3.977(A)(2)(b)-(d). The L-GAL may seek input from the prosecuting attorney before filing a petition but is not bound by a prosecuting attorney's decision not to file a petition.

³⁵ See MCR 3.991, 3.992, and 3.993.

³⁶ MCL 712A.12 ("... the court in its discretion may excuse but not restrict children from attending the hearing").

³⁷ MCR 3.972(B)(1) and MCR 3.973(D)(1).

³⁸ See MCL 712A.17(7) and MCL 712A.17b. A pretrial motion must be filed before using such alternative procedures. See MCR 3.922(E). A L-GAL may also request that an impartial person address questions to a child-witness at a hearing.

³⁹ See FOM 722-06B.

L-GAL must first contact a respondent's attorney and ask permission to speak with that respondent.⁴⁰ A L-GAL should obtain the attorney's permission in writing or confirm it in writing once permission has been granted. Parents should be informed that they are not obligated to discuss the case with the L-GAL, and that the L-GAL may be required to use the information gained against the parent in representing the child.

A L-GAL must inform the court "if . . . 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."⁴¹ The L-GAL may do so immediately, by motion, or at a scheduled review hearing. The L-GAL may also attempt to remedy the problem by contacting the caseworker, service provider, and parent's attorney.

Cooperative resolution. MCL 712A.17d(1)(k) requires a L-GAL to identify common interests among the parties and, consistent with the rules of professional conduct and to the extent possible, to promote a cooperative resolution of a case "through consultation with the child's parent, foster care provider, guardian, and caseworker." Cooperative resolution prior to trial may allow faster implementation of a case plan and parent-agency agreement. Because the L-GAL represents and advocates for the child's best interests, he or she may be particularly helpful in negotiating a cooperative resolution regarding the permanency plan for the child. The L-GAL may suggest that the case be referred to permanency planning mediation if available.⁴²

On the other hand, a L-GAL should not hesitate to advocate a position contrary to another party's position. The L-GAL should participate in plea negotiations between the prosecuting attorney or other attorney for the petitioner and the respondent's attorney. The court has discretion to allow a respondent to plead to an amended petition "provided that the petitioner and the attorney for the child have been notified . . . and have been given the opportunity to object before the plea is accepted."⁴³ The court may allow amendment of a petition as the interests of justice require,⁴⁴ and the L-GAL should ensure that such amendments are consistent with the child's best interests.

As required by the Michigan Rules of Professional Conduct, the L-GAL must first contact a party's attorney and ask permission to speak with that party.⁴⁵ A L-GAL should obtain the attorney's permission in writing or confirm it in writing once permission has been granted. Parents should be informed that they are not obligated to discuss the case with the L-GAL, and that the L-GAL may be required to use the information gained against the parent in representing the child. However, the L-GAL may contact the caseworker without obtaining the consent of the prosecuting attorney, assistant attorney general, or other attorney representing the agency.⁴⁶ If the prosecuting attorney or assistant attorney general denies access to the caseworker, the L-GAL should seek a court order.

⁴⁰ MRPC 4.2.

⁴¹ MCL 712A.17d(1)(j).

⁴² Go to <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/default.aspx> for further information.

⁴³ MCR 3.971(A).

⁴⁴ MCL 712A.11(6).

⁴⁵ MRPC 4.2.

⁴⁶ RI 316 (December 13, 1999), citing the commentary to MRPC 4.2, which allows

Requesting court authorization to pursue other issues on the child’s behalf. MCL 712A.17d(1)(l) requires a L-GAL “[t]o request authorization by the court to pursue issues on the child’s behalf that do not arise specifically from the court appointment.” The L-GAL should pursue issues related to the child protective proceeding, such as custody, guardianship, paternity, termination of parental rights, adoption, and appeals. In addition, the L-GAL may request court authorization and payment by the court to pursue issues on behalf of the child that do not arise specifically from the court appointment. Those issues include:⁴⁷

- child support;
- delinquency or status offender matters;⁴⁸
- social security and other public benefits;
- personal injury;⁴⁹
- school/education issues, especially for a child with disabilities;
- mental health proceedings;
- name change;
- medication issues;
- abortion;
- estate planning;
- tribal membership; and
- employment.

Depending upon the particular need and the resources available in the community, a L-GAL may seek assistance to pursue such issues on the child’s behalf. For example, a L-GAL may seek support and assistance from a CASA, a member of the private bar who offers appropriate services pro bono, a Legal Aid office, or a local tribal services office.

Length of L-GAL appointment and L-GAL duties. A L-GAL must serve until discharged by the court, and the court shall not discharge the L-GAL “as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan children’s institute or

communications authorized by law, including “the right of a party to a controversy with a government agency to speak with government officials about the matter.”

⁴⁷ This list of issues is based in part on American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996), D-12.

⁴⁸ A L-GAL representing a child in delinquency or status offender matters may cause practical problems. For example, the L-GAL may be required to confer with parents regarding the delinquency or status offender matters, but the parents may be represented by counsel in the child protective proceeding. Attorneys are forbidden from talking directly to a represented party. MRPC 4.2. It should also be emphasized that a L-GAL and an attorney functioning as defense counsel for a juvenile in delinquency proceedings have very different goals and may be advocating contradictory positions in the two proceedings.

⁴⁹ See CI-1016 (July 9, 1984) (it is not unethical for a court-appointed guardian ad litem to represent a child in a separate action alleging a violation of the mandatory reporting requirements of the Child Protection Law).

other agency, unless the court discharges the [L-GAL] for good cause shown on the record.”⁵⁰ In most cases, this will entail representing the child in appeal proceedings.⁵¹ Following termination of parental rights, a L-GAL must ensure that reasonable efforts are made to finalize a child’s adoption or other permanent placement.⁵² If the child has been committed to the Michigan Children’s Institute (MCI), the L-GAL may consult with the MCI superintendent regarding that commitment, the child’s placement, and permanency planning for the child. If the L-GAL has an objection regarding these issues, the L-GAL and MCI superintendent must consult with one another.⁵³

Building relationships with others. Building good working relationships with child protective services workers, foster care workers, foster parents, and mental health or other professionals involved with the child may help the L-GAL to efficiently and competently perform his or her duties.

5. Explaining the Role of the L-GAL to the Child

Establishing rapport with and explaining your role to the child. A L-GAL is required to explain his or her role to the child, “taking into account the child’s ability to understand the proceedings.”⁵⁴ The L-GAL should meet with and explain the L-GAL’s role to the child as soon as possible after appointment. A L-GAL must attempt to establish rapport with the child. The initial meeting should occur in surroundings that are comfortable for the child. A person whom the child knows may be present to make the child more comfortable and allow the L-GAL and child to become familiar with one another. A caseworker may facilitate meaningful communication between the L-GAL and child. However, others should only be present when nonconfidential information is discussed.⁵⁵

The L-GAL should use developmentally appropriate language and concrete examples illustrating the L-GAL’s role in the proceedings. The L-GAL should consider the child’s age, education level, cultural context, and degree of language acquisition when providing this explanation. After explaining the L-GAL’s role, the L-GAL may ask the child to state his or her understanding of what the L-GAL has said to ensure that the child understands. The L-GAL should also allow the

⁵⁰ MCL 712A.17c(9).

⁵¹ Check local court practice.

⁵² See MCL 712A.19c and MCR 3.978, which contain the procedures for post-termination review hearings. In addition, a L-GAL may participate in a hearing under section 45 of the Michigan Adoption Code, MCL 710.45. *In re AEG*, unpublished opinion per curiam of the Court of Appeals, decided November 7, 2013 (Docket No. 316599).

⁵³ MCL 400.204(2).

⁵⁴ MCL 712A.17d(1)(f). The Forensic Interviewing Protocol, attached as an appendix to this protocol, contains several general recommendations regarding talking with children. See also Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 3d ed, ABA Center on Children and the Law, 1999.

⁵⁵ The presence of a third party during communications between attorney and client destroys the privilege, unless the third party is an agent of the attorney or client. *Grubbs v Kmart Corp*, 161 Mich App 584, 589 (1987).

child ample time to ask questions. The L-GAL should also explain his or her role to the child's foster parent or guardian.

The L-GAL's explanation should include the following:

- that the L-GAL's purpose is to decide and advocate for the child's best interests, and that the L-GAL will take into account the child's wishes but is not bound to follow them;
- the procedure for addressing conflicts between the child's wishes and the L-GAL's assessment of the child's best interests;
- that the child's statements will be kept confidential unless the child consents to allow the L-GAL to tell others or an exception to confidentiality applies;
- the issues to be considered by the court, and the possible outcomes of the court proceedings; and
- the substance and effect of dispositional orders and other orders entered in the case, and whether the orders may be challenged or modified in the future.

6. Conducting an Independent Investigation of the Case

Importance of independent investigation. A L-GAL must “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, and reviewing relevant reports and other information.”⁵⁶ An independent investigation is necessary to competently represent a child and formulate a conclusion as to the child's best interests. Although the DHHS is charged with conducting an investigation of the case, the L-GAL must conduct his or her own independent investigation, interviewing persons and reviewing the petition and reports. Nonetheless, the L-GAL may wish to contact the caseworker at regular intervals to help the L-GAL stay informed regarding events in the case. A thorough independent investigation requires time, and the L-GAL should commence his or her investigation to allow time for its completion prior to a hearing.

Interviewing the child regarding the allegations in the petition and using a forensic interviewing protocol. Multiple interviews of the child regarding the allegations in a petition must be avoided. The L-GAL should encourage the use of videotaped interviews. Law enforcement personnel, DHHS personnel, L-GALs, attorneys for respondents, and others must cooperate with one another to ensure that they are all present during a single interview of the child in a neutral location regarding the allegations. When a child is interviewed regarding the allegations in the petition, the interviewer must use a forensic interviewing protocol based on the model Forensic Interviewing Protocol.⁵⁷

⁵⁶ MCL 712A.17d(1)(c).

⁵⁷ See MCL 722.628(6). A L-GAL should determine if the county in which he or she practices has developed a forensic interviewing protocol pursuant to MCL 722.628(6).

Court-Appointed Special Advocates (CASAs). Where a CASA has been appointed, the L-GAL may interview the CASA. A CASA must consult with a L-GAL.⁵⁸ L-GALs should collaborate with CASAs. Because they conduct investigations and submit reports to the court, CASAs may serve as a useful source of information regarding the child, thus helping to meet the L-GAL’s statutory obligation to conduct an independent investigation of the case. When appropriate, the L-GAL may call the CASA as a witness.

Reviewing reports. When appropriate, the L-GAL should review reports necessary to effectively advocate for the child, including a parent’s and the child’s social services, psychiatric, psychological, drug, medical, law enforcement, school, court, and other records. The L-GAL must resolve discrepancies or conflicts in written information and prepare to present evidence in support of the L-GAL’s position. That position may be contrary to a determination contained in a report.⁵⁹

Obtaining access to a child’s confidential records. A L-GAL is “entitled to . . . access to all relevant information regarding the child.”⁶⁰ The L-GAL may obtain access to the child’s confidential records via access to a caseworker’s file or pursuant to court order. The relevant information the L-GAL is entitled to access includes, but is not limited to the following:

- CPS case file;
- foster care case file;
- service provider reports;
- adoption case file.

Requesting Court Order for Information. If necessary, the L-GAL should use subpoenas, discovery under MCR 3.922, or the procedures set forth in MCR 3.923(A) to obtain records or other information regarding the child, a sibling, or a parent. MCR 3.923(A) allows the court to order production of other evidence “at any time the court believes that the evidence has not been fully developed” A parent may also consent to release of information to the L-GAL via the DHHS form 1555-CS. The L-GAL should consult the case worker to determine if parental consent has been obtained.

A L-GAL may also ask the court to order an examination or evaluation of a child, parent, guardian, or legal custodian. MCR 3.923(B) allows the court to order an examination or evaluation of a minor, parent, guardian, or legal custodian, and MCR 3.973(E)(1) and MCR 3.975(E) provide that privilege may not be used to prevent the receipt and use of materials prepared pursuant to a court-ordered examination, interview, or course of treatment at a disposition or review hearing.

7. L-GAL Duties Before Hearings

Reviewing the agency case file. MCL 712A.17d(1)(c) states in part as follows:

⁵⁸ MCR 3.917(E). See also www.abanet.org/child/clp/Court Appointed Special Advocates/Top Ten Tips for Attorneys Working with CASA Volunteers.htm.

⁵⁹ MCL 712A.17d(1)(c).

⁶⁰ MCL 712A.17d(1)(b); MCL 722.627(2)(j).

“The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.”

“Agency case file” is defined in MCL 712A.13a(1)(b) as “the current file from the agency providing direct services to the child, that can include the child protective services file if the child has not been removed from the home or the department of human services or contract agency foster care file as defined under 1973 PA 116, MCL 722.111 to 722.128.” The L-GAL should contact the assigned case worker to ensure they have a copy of all relevant documentation contained in the agency file. The L-GAL should also explicitly request the worker provide them with timely copies of any new documentation relevant to the child that is received during the pendency of the case.

Meeting with or observing the child. Meeting with or observing the child is a very important element in providing the child with competent representation and in protecting the child from further abuse or neglect. MCL 712A.17d(1)(d) requires a L-GAL “[t]o 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 in the following instances:

- before the pretrial hearing.
- before the initial disposition, if held more than 91 days after the petition has been authorized.
- before a dispositional review hearing.
- before a permanency planning hearing.
- before a post-termination review hearing.
- at least once during the pendency of a supplemental petition.
- at other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.”⁶¹

“The court may allow alternative means of contact with the child if good cause is shown on the record.”⁶² The following are practice suggestions aimed at both meeting the L-GAL’s duties to the child and ameliorating possible financial or practical problems of compliance with MCL 712A.17d(1)(d).

- Meetings with or observations of the child should occur in the child’s living environment or in a place where the child is comfortable.

⁶¹ MCR 3.915(B)(2)(a) requires a court, “at each hearing,” to “inquire whether the [L-GAL] has met with the child, as required by MCL 712A.17d(1)(d)” This court rule also requires the court to make the L-GAL state, on the record, his or her reasons for failing to meet with the child as required by MCL 712A.17d(1)(d).

⁶² MCL 712A.17d(1)(e).

- A L-GAL may meet with or observe the child in his or her home environment early in the case and outside that environment later in the case. If the child remains in his or her home or has been returned home, interviewing the child in that environment may inhibit the child from disclosing information to the L-GAL.⁶³
- Although meetings with or observations of a child should not occur in the hallway outside of the courtroom just prior to a hearing, the court may require the person with custody of the child, an agency caseworker, or a DHHS caseworker to make the child available to the L-GAL at the courthouse several hours before a hearing.
- A L-GAL may ask the child’s foster parent or foster care worker to take the child to a comfortable meeting place “half-way” between the child’s foster home and the court.
- If a child has been placed in another county, the court may appoint co-counsel located in the other county to meet with or observe the child in the child’s living environment. Co-counsel would then file a report with the L-GAL.
- A L-GAL may visit with or observe the child during parenting time sessions, especially where the child’s siblings will also be present.
- A L-GAL may meet with the child at his or her school, after school hours but before the child goes home.
- A L-GAL may meet with the child at the agency to avoid distractions and to assure that the meeting will occur in private.
- A L-GAL may meet with the child at a psychologist’s or counselor’s office after the child’s appointment with the psychologist or counselor.
- The L-GAL must meet with or observe a very young or non-communicative child as required by MCL 712A.17d(1)(d). In addition to allowing a L-GAL to become familiar to and gather positive information about the child, an in-person visit may protect the child from being abused or neglected while in foster care. In conjunction with an in-person visit, the L-GAL should consult with the child’s foster parents to gain information about the child.

Adjourned or continued hearings. “Adjourned or continued hearings do not require additional visits unless directed by the court.”⁶⁴

Maintaining communication with the child. The L-GAL must maintain communication with the child.⁶⁵ Although the caseworker is not required to arrange meetings between the child and L-GAL, a caseworker may be very helpful in arranging such meetings and in other ways. DHHS and child-placing agencies must assure that a L-GAL is kept informed regarding any change in the child’s placement.⁶⁶

⁶³ See also MCL 722.628c, which prohibits interviewing a child in the presence of the person suspected of abusing or neglecting the child.

⁶⁴ MCL 712A.17d(1)(d)(vi).

⁶⁵ MRPC 1.4 and Comment.

⁶⁶ MCL 712A.13b(2)(d).

Importance of investigation. Before making a determination regarding the child’s best interests, the L-GAL must gather detailed information regarding the child’s needs, development, and behavior, and whether the child is benefitting from or being harmed by his or her current living arrangement.

Defining a child’s best interests. At a termination hearing, the Agency must prove by a preponderance of the evidence that termination is in the child’s best interest.⁶⁷ The Juvenile Code does not contain a definition of the “best interests of the child.” Although not directly applicable to child protective proceedings, the Child Custody Act and Adoption Code contain lists of factors that courts use to determine a child’s best interests in custody and adoption proceedings, and a L-GAL may refer to those factors to guide his or her determination of a child’s best interests in child protective proceedings. Factors relevant to determining whether termination of parental rights is in a child’s best interests include, but are not limited to:

- The parent’s parenting ability⁶⁸
- The child’s bond to the parent⁶⁹
- The child’s safety and well-being⁷⁰
- Whether the parent can provide a permanent, safe, and stable home⁷¹
- The advantages of the child’s foster home over the parent’s home⁷²
- The child’s need for permanency, stability, and finality⁷³
- The possibility of adoption⁷⁴
- Whether the child is placed with a relative at time of the termination hearing. *This factor is mandatory.*⁷⁵

When making placement and permanency decisions, courts have broad discretion “regarding how to determine what is in the child’s best interests depending on the case-specific circumstances.”⁷⁶ When determining whether appointing a juvenile guardian is in a child’s best interests, a court may rely on the “best interest” factors in the Child Custody Act, the Adoption Code, or any other relevant factor.⁷⁷ Placement stability and continuity of care are important factors to consider in any placement or permanency decision.⁷⁸

⁶⁷ *In re Moss*, 301 Mich App 76, 90 (2013).

⁶⁸ *In re Jones*, 286 Mich App 126, 129-30 (2009).

⁶⁹ *In re BZ*, 264 Mich App 286, 301 (2004).

⁷⁰ *In re VanDalen*, 293 Mich App 120, 142 (2011).

⁷¹ *In re Frey*, 297 Mich App 242, 248-49 (2012).

⁷² *In re Olive/Metts*, 297 Mich App 35, 42-43 (2012).

⁷³ *In re Gillespie*, 197 Mich App 440, 446-47 (1992).

⁷⁴ *BZ*, *supra*.

⁷⁵ *In re Mason*, 486 Mich 142, 164 (2010); *In re Olive/Metts*, 297 Mich App 35, 42-43 (2012).

⁷⁶ *In re COH*, 495 Mich 184, 202 (2014).

⁷⁷ *COH*, *supra* at 203.

⁷⁸ MCL 710.22(g)(iv), MCL 722.23(d), and MCL 700.5101(a)(iv); *In re BZ*, 264 Mich App 286, 301 (2004), *In re McIntyre*, 192 Mich App 47, 52-53 (1992), and *In re TK*, 306 Mich App 698, 709-10 (2014); ADM 610, p 2 (“If a child resides with licensed foster parent(s), the psychological attachment of a child to the foster parents must always be considered before replacing the child to a different adoptive home. The child’s age, developmental stage and frequency and number of replacements must all be considered in relationship to the length of time the child has resided in the foster home”).

Using objective criteria to determine the child's needs and interests. When determining the child's best interests, the L-GAL should avoid imposing his or her values when evaluating the child's needs and interests. A L-GAL must be familiar with the cultural norms and values regarding a child's family. The L-GAL may rely on reports by and consult with experts in determining the child's needs and interests, and in weighing those needs and interests against one another. Additionally, the L-GAL should focus on the child's particular needs and interests, not on the needs and interests of all children of similar age or developmental level. A L-GAL should consider the child's needs for food, clothing, and shelter; nurturance, stability, and continuity; physical safety; and maintenance, to the extent possible, of relationships with siblings, extended family members, and non-biological caretakers.

Determining the child's competence and maturity. When determining a child's competence and maturity and deciding how much weight should be assigned to the child's wishes and preferences, the L-GAL may consider the following:

- the child's age (younger children often express the desire to return home regardless of the home's condition);
- the child's developmental stage (cognitive ability, socialization, and emotional development);
- the child's ability to articulate a relevant position and reasons supporting that position;
- the child's decision-making process, including the presence of influence, coercion, or exploitation, the child's conformity to others' positions, and the variability or consistency of the child's position; and
- the child's ability to understand the consequences of the decision, including the risk of harm to the child and the finality of the decision.⁷⁹

The L-GAL may obtain information regarding several of these factors from a psychological evaluation of the child if one has been conducted.

A child may be competent to make some decisions regarding the representation but not others. Moreover, a child's competence may change over the course of a case. A L-GAL's position may come to mirror the child's position, and the L-GAL's role then becomes similar to the traditional attorney's role.

Resolving conflicts between a child's interests and a L-GAL's determination of a child's best interests. A L-GAL must inform the court of a child's wishes and preferences.⁸⁰ MCL 712A.17d(2) gives the court discretion to appoint an attorney for the child where the L-GAL's best interests determination is inconsistent with the child's identification of his or her interests. That provision states:

⁷⁹ This list is taken in part from *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L R 1281, 1313 (1996), Recommendations of the Conference, V.A.8.

⁸⁰ A L-GAL's statements to the court must be "[c]onsistent with the law governing attorney-client privilege . . ." MCL 712A.17d(1)(i). See pages 7-9 for further discussion.

“If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child’s interests as identified by the child are inconsistent with the lawyer-guardian ad litem’s determination of the child’s best interests, the lawyer-guardian ad litem shall communicate the child’s position to the court. If the court considers the appointment appropriate considering the child’s age and maturity and the nature of the inconsistency between the child’s and the lawyer-guardian ad litem’s identification of the child’s interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child’s lawyer-guardian ad litem.”⁸¹

If appointed, the “attorney” serves “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 . . . 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.”⁸²

⁸¹ The following cases have construed §17d(2): *In re Smith*, unpublished opinion per curiam of the Court of Appeals, decided January 15, 2009 (Docket No. 286249); *In re Payne*, unpublished opinion per curiam of the Court of Appeals, decided January 10, 2008 (Docket No. 277035); *In re Arnold*, unpublished opinion per curiam of the Court of Appeals, decided September 27, 2005 (Docket No. 262781); *In re CH*, unpublished memorandum opinion of the Court of Appeals, decided April 24, 2003 (Docket No. 243186, 243208); and *In re Purdy*, unpublished opinion per curiam of the Court of Appeals, decided March 30, 2001 (Docket No. 225936).

⁸² MCL 712A.13a(1)(c).