

Practice Standards

September 26, 2018

Section XXII, Representation of Children in Dependent/Neglect Cases

4. DUTIES OF CHILD'S LAWYER AND SCOPE OF REPRESENTATION:

- A. A child's lawyer shall participate in any proceeding concerning the child with the same rights and obligations as any other lawyer for a party to the proceeding.
- B. The duties of a child's lawyer include, but are not limited to:
 - a. Meeting with the child prior to each hearing and for at least one in-person meeting every quarter;
 - b. Taking all steps reasonably necessary to represent the client in the proceeding, including but not limited to: interviewing and counseling the client, preparing a case theory and strategy, 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 lawyers acting on behalf of children in this jurisdiction;
 - c. Prior to every hearing, investigating and taking necessary legal action regarding the child's medical, mental health, social, education, and overall well-being;
 - d. Visiting the home, residence, or any prospective residence of the child, including each time the placement is changed;
 - e. Reviewing and accepting or declining, after consultation with the client, any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;
 - f. Taking action the lawyer considers appropriate to expedite the proceeding and the resolution of contested issues;
 - g. Where appropriate, after consultation with the client, discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state;
 - h. Where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the best interests advocate;
 - i. Seeking court orders or taking any other necessary steps in accordance with the child's direction to ensure that the child's health, mental health, educational, developmental, cultural and placement needs are met; and
 - j. Representing the child in all proceedings affecting the issues before the court, including, where appropriate, proceedings following parental termination or relinquishment, and hearings on appeal or referring the child's case to the appropriate appellate counsel as provided for by/mandated by law.

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C. When the child is capable of directing the representation by expressing his or her objectives, the child's lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct. In a developmentally appropriate manner, the lawyer shall elicit the child's wishes and advise the child as to options.

D. The child's lawyer shall determine whether the child has diminished capacity pursuant to the Model Rules of Professional Conduct (Rule 1.14). In making the determination, the lawyer should consult the child and may consult other individuals or entities that can provide the child's lawyer with the information and assistance necessary to determine the child's ability to direct the representation.

- a. When a child client has diminished capacity, the child's lawyer shall make a good faith effort to determine the child's needs and wishes. The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the child. During a temporary period or on a particular issue where a normal client-lawyer relationship is not reasonably possible to maintain, the child's lawyer shall make a substituted judgment determination which includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination. The lawyer should take direction from the child as the child develops the capacity to direct the lawyer. The lawyer shall advise the court of the determination of diminished capacity and any subsequent change in that determination.
- b. When the child's lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the child and, in appropriate cases, seeking the appointment of a best interest advocate or investigator to make an independent recommendation to the court with respect to the best interests of the child.
- c. When taking protective action, the lawyer is impliedly authorized under Model Rule 1.6(a) to reveal information about the child, but only to the extent reasonably necessary to protect the child's interests. Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Montana Rules of Professional Conduct.