ETHICS IN DEPENDENCY PRACTICE FOR GUARDIAN AD LITEM ATTORNEYS AND ATTORNEYS AD LITEM
Objectives

- Identify ethical issues in dependency practice.
- Know how to avoid ethical problems.
- Know how to attempt to resolve ethical problems.
Definition of Ethics

- Standards of professional conduct applicable to members of the legal profession. Black’s Law Dictionary
- Minimum standards of conduct.
Professionalism

- Definition of Professionalism
  - Competence or skill expected of a professional. Oxford Dictionary
  - Highest standard of conduct.
Ethical Issues for GAL Attorney
Sources of Ethical Standards

- Florida Rules of Professional Conduct.
- GAL Program Attorney Standards.
- GAL Standards of Operation.
GAL Duties

- Conduct an independent investigation.
- Be present at all hearings.
- Make written recommendations to the court regarding the best interest of the children.

*Rule 8.215(c).*
GAL Program Attorney Duties

- Represent the GAL Program and its employees and volunteers.
- Provide Legal Advice to the GAL Program.
- Advocate for the GAL Program and for the best interest of children.
GAL Program is the client. Represent Program through duly authorized constituents. Team includes Attorney and:

- Volunteer and Staff Guardian Ad Litem.
- GAL Coordinator.
- Program Director.
Conflicts between Attorney and GAL Staff – GAL Standards 4.6

- Meet regularly to reach consensus before all proceedings.
- Identify and resolve all disagreements before hearing.
Organization as a Client
(4-1.13)

- Attorney defers to GAL regarding objectives of representation and issues of fact.
- GAL defers to Attorney on issues of law.
- If disagreement is not resolved, Attorney should consult with Supervising Attorney.
Organization as a Client (4-1.13)

- If agreement not reached, then Supervising Attorney and team consult with Program Director.
  - Issue of law: Program Director defers to Supervising Attorney.
  - No issue of law: Supervising Attorney defers to Program Director.
- If still no resolution, can refer issue to State Office.
Violations by Officers or Employees of Organization. – GAL Standards 4.6

GAL is engaged in action, intends to act, or refuses to act in matter that is contrary to the best interest of the child or Program.

GAL is engaged in action, intends to act, or refuses to act in a matter that is a violation of GAL Standards of Operation or violation of the law.
Handling violations

- Ask for reconsideration of the matter.
- Advise that separate legal opinion on matter be sought for presentation to appropriate authority in the organization.
- Refer matter to higher authority in the organization.
Informing Client of Status of Representation.

- Promptly inform client of anything to which their informed consent is required by these rules.
- Reasonably consult with client about the means of accomplishing client's objectives.
- Keep the client reasonably informed about the status of the matter.
Promptly comply with reasonable requests for information.

Consult with the client about any relevant limitation on the Attorney's conduct.
Duty to Explain Matters to Client

Attorney should explain all legal issues and options so GAL can make a decision regarding the issue.
Duty to Explain Matters to Client.

In representing a client, Attorney shall exercise independent professional judgment and render candid advice.

Attorney may refer not only to law but to other considerations such as moral, economic, social, and political factors.
Duty to Explain Matters to Client.

- Must abide by client's decisions regarding objectives of representation.
- Reasonably consult client as to the means by which objectives are pursued.
- Must abide by client’s decision whether to settle matter.
Attorney shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comply with all relevant state and federal statutes, regulations, policies, rules, and case law. – GAL Attorney Standards – 2.5.
Diligence (4-1.3)

- Attorney shall act with reasonable diligence and promptness in representing a client.
Expediting Litigation (4-3.2)

- Must expedite litigation.
- Permanency is always in the best interest of the child.
Confidentiality (4-1.6)

- Do not reveal information unless client gives informed consent.
- Must reveal information.
  - Prevent crime.
- May reveal information.
  - To serve client’s interest.
- Limitation on amount of disclosure.
  - Disclose no more information than is required.
Conflict of Interest (4-1.7, 4-1.8)

- Representing Adverse Interests.
  - Do not represent client if interest directly adverse to another client.
  - Do not represent client if there is substantial risk that representation will be limited by responsibilities to another client, former client or a third person, or by personal interest.
Notwithstanding the existence of a conflict of interest Attorney **may** represent a client if:

- Attorney reasonably believes that she will be able to provide competent and diligent representation.
- Representation is not prohibited by law.
Conflict of Interest (4-1.7, 4-1.8)

- Representation does not involve the assertion of a position adverse to another client.
- Each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.
Conflict of Interest (4-1.7, 4-1.8)

- Conflict exists when Attorney:
  - Represents both minor parent and minor’s children.
  - Represents minor child and GAL previously represented parent when parent was a minor and information can be used to disadvantage of the parent.
Conflict of Interest (4-1.7, 4-1.8)

- Represents two or more children when interests of any child are incompatible with or contrary to the interest of another.

GAL Standards 2.4.
Using Information to Disadvantage of Client.

Attorney should not use information relating to representation to disadvantage of client unless client gives informed consent.
Attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.
Candor Towards Tribunal (4-3.3)

- False Evidence
  - Cannot make false statement of fact or law or fail to correct false statement.
  - Cannot fail to disclose material fact when disclosure necessary to avoid criminal or fraudulent act.
  - Cannot fail to disclose controlling legal authority adverse to attorney’s position.
  - Cannot offer evidence that is false.
Candor Towards Tribunal (4-3.3)

- Criminal or fraudulent conduct. If Attorney knows that client intends to engage, is engaging, or has engaged in criminal or fraudulent conduct shall take remedial measures including if necessary, disclosure to the tribunal.
Ex Parte Proceedings. In an ex parte proceeding Attorney shall inform the tribunal of all material facts known to Attorney that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Fairness to Opposing Party and Counsel (4-3.4)

- Cannot unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that Attorney knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.
Cannot fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except may pay a reasonable witness fee.
Cannot knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

In pretrial procedure, cannot make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.
Fairness to Opposing Party and Counsel (4-3.4)

- Cannot comment on credibility of a witness unless the statement is authorized by current rule or case law.
- Cannot allude to any matter not reasonably believed to be relevant or that will not be supported by admissible evidence.
- Cannot assert personal facts in issue except when testifying as a witness.
Fairness to Opposing Party and Counsel (4-3.4)

- Cannot state a personal opinion as to the justness of a cause or culpability of a civil litigant.
- Cannot request person other than client to refrain from voluntarily giving relevant information to another party unless the person is relative or employee or other agent of the client and it is reasonable to believe that person’s interest will not be adversely affected by refraining from giving such information.
Cannot present, participate in presenting, or threaten to present criminal charges or disciplinary charges solely to obtain advantage in a civil matter.
Communication with Judge or Official.

Cannot communicate on the merits of the cause with a judge except:

- In the course of official proceeding.
- In writing if Attorney provides copies to adverse party.
- Orally upon notice to opposing counsel.
- As otherwise authorized by law.
In the course of representing a client Attorney shall not knowingly:

- Make a false statement of fact or law to a third person.
- Fail to disclose material fact to third person when disclosure is necessary to avoid assisting in criminal or fraudulent act.
Lawyer as a Witness (4-3.7)

- When Lawyer May Testify.
  - Testimony is an uncontested issue.
  - Testimony will relate to a matter of formality and no reason to believe substantial evidence will be in opposition.
  - Testimony relates to nature and value of legal services.
  - Disqualification of Attorney would create hardship.
Communication with Person Represented by Counsel (4-4.2)

- Cannot communicate with person represented by another attorney unless the other attorney consents.
- Must obtain permission from any Attorney Ad Litem prior to speaking with the child.
- Do not need to obtain DCF attorney’s permission to speak with caseworker since they are not clients. However, it is best practice to advise DCF attorney of the communication.
In dealing on behalf of a client with a person who is not represented by counsel, Attorney shall not state or imply that Attorney is disinterested.
Respect of Rights of Third Persons (4-4.4)

- Do not use means that have no substantial purpose other than to embarrass, delay, or burden a third party.
- Do not knowingly use methods of obtaining evidence that violate the legal rights of the person.
- If Attorney receives a document by mistake, promptly notify the sender.
Ethical Issues for Attorney Ad Litem
Sources of Ethical Standards

- Florida Rules of Professional Conduct.
- ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.
Duties of Attorney Ad Litem (ABA Standards B-1)

- Meet with child.
- Obtain copies of all court documents.
- Participate in all proceedings regarding the child.
- Inform other parties of representation.
- Attempt to reduce delays in process.
Duties of Attorney Ad Litem (ABA Standards B-1)

- Counsel child regarding litigation, child’s rights, court system, lawyer’s role, and what to expect.
- Develop theory and strategy of the case.
- Identify family and professional resources for child.
Duties of Attorney Ad Litem (ABA Standards C-1 – C-2)

- Investigate all relevant records regarding child.
- Contact attorneys for other parties.
- Contact and meet with parents and legal guardians with permission of their attorneys.
- Obtain necessary releases of information from child, agency, or parents.
Duties of Attorney Ad Litem (ABA Standards C-1 – C-2)

- Interview persons involved with the child including school personnel, caseworkers, foster parents, etc....
- Attend all meetings regarding child.
Duties of Attorney Ad Litem (ABA Standards C-4 – C-5)

- Request services for child including:
  - Reunification services.
  - Family visitation.
  - Child Support.
  - Domestic violence prevention
  - Mental health and medical care.
  - Drug and alcohol treatment.
Duties of Attorney Ad Litem
(ABA Standards C-4 – C-5)

- Parenting education.
- Independent living services.
- Educational services including special education.
- Recreational services.
- Social Security.
- Therapeutic services.
- Residential psychiatric treatment.
Duties of Attorney Ad Litem

(ABA Standards D-5 – D-8, D-9, D-11, D-12)

- File appropriate motions.
- Present evidence.
- Ensure that child is present at hearings.
- Decide whether child should testify.
- Prepare child to testify.
Duties of Attorney Ad Litem (ABA Standards D-5 – D-8, D-9, D-11, D-12)

- Ensure that questions to child are appropriate.
- Aid appropriate attempts to establish child competency to testify.
- Make closing argument and ensure a written order is entered.
- Request expanded authority to represent child in other action when appropriate.
Duties of Attorney Ad Litem
(ABA Standards E-1 – E-3)

- Review orders.
- Communicate order to child.
- Monitor implementation of court orders.
Duties of Attorney Ad Litem
(ABA Standards F-1 – F-4)

- Determine whether to appeal.
- Withdraw if frivolous appeal.
- Participate in appeal filed by other party.
- Explain outcome to child.
Informing Client of Status of Representation.

- Promptly inform client of anything to which the client's informed consent is required by these rules.
- Reasonably consult with client about the means of accomplishing client's objectives.
- Keep the client reasonably informed about the status of the matter.
Communication 4-1.4

- Promptly comply with reasonable requests for information.
- Consult with the client about any relevant limitation on Attorney's conduct.
Duty to Explain Matters to Client

- Attorney must meet with child.
  
  ABA Standards C-1.

- Attorney should explain all legal issues and options in developmentally appropriate manner so child can make decision regarding the issue.
  
  ABA Standards D-2.
In representing a client, Attorney shall exercise independent professional judgment and render candid advice.

Attorney may refer not only to law but to other considerations such as moral, economic, social, and political factors.
Objectives and Scope of Representation (4-1.2)

- Attorney must abide by client's decisions regarding objectives of representation.
  - Elicit preference in developmentally appropriate manner. Child may be developmentally able to help make certain decisions but not others.
  - Attorney must understand that child may agree with attorney just because the advice is coming from an adult.
Objectives and Scope of Representation (4-1.2)

- If child cannot or will not express a preference, Attorney shall make good faith effort to determine child’s wishes or request appointment of GAL.
- If child cannot express a preference, request appointment of GAL.
Objectives and Scope of Representation (4-1.2)

- If Attorney finds that child’s preference would be injurious to the child, may request appointment of a separate GAL.

- Attorney has to determine child’s basic needs, needs for placement with known people or relatives, and permanency.

ABA Standards B-3 – B-5.
Objectives and Scope of Representation (4-1.2)

- Reasonably consult client as to the means by which objectives are to be pursued.
- Must abide by client’s decision whether to settle matter.
Attorney shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
Diligence (4-1.3)

- Attorney shall act with reasonable diligence and promptness in representing a client.
Must expedite litigation.

Due to the issue of permanency for child, the Attorney Ad Litem should rarely agree to continuances, unless the continuance is in the best interest of child.

Attorney Ad Litem should try to negotiate settlements to expedite the process.

ABA Standards C-6.
Confidentiality (4-1.6)

- Attorney shall not reveal information unless client gives informed consent.
- Attorney must reveal information.
  - Prevent crime.
- Attorney may reveal information.
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Conflict of Interest (4-1.7, 4-1.8)

- Conflict may exist when:
  - There is a conflict representing all of the siblings.

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