

Representing Children in Child Welfare Cases

DYLAN MOENCH, CHIEF COUNSEL, TRAVIS COUNTY OFFICE OF CHILD REPRESENTATION

EMILY MILLER, ATTORNEY AND MEDIATOR



Texas Family Code

Scope and Application

Duties of parents' and children's attorneys apply equally to Court Ordered Services/Motion to Participate (COS/MTP) cases as they do to cases where the Department of Family and Protective Services (DFPS) has Temporary Managing Conservatorship (TMC). **Tex. Fam. Code § 264.203(g)-(h)**.



Conduct Interviews

- Interview the client after initial appointment within a reasonable amount of time unless the client's location is unknown (for child client, applies to age four or older). **Tex. Fam. Code § 107.003(a)(1)(A)(i)**.
- Interview each person who has significant knowledge of the case. **Tex. Fam. Code § 107.003(a)(1)(A)(ii)**.
- Interview the parties to the suit. **Tex. Fam. Code § 107.003(a)(1)(A)(iii)**.



Investigate

- Conduct an independent investigation into the facts of the case. **Tex. Fam. Code § 107.003(a)(1)(D)**.
- Obtain and review copies of all court files in the suit during the attorney's course of representation. **Tex. Fam. Code § 107.003(a)(1)(E)**.
- Conduct formal discovery under the Texas Rules of Civil Procedure or a local discovery control plan. **Tex. Fam. Code § 107.003(a)(1)(F)**.

Act

- Take any action consistent with the client's interests that the attorney considers necessary to expedite the proceedings. **Tex. Fam. Code § 107.003(a)(1)(G).**
- Encourage settlement and the use of alternative forms of dispute resolution. **Tex. Fam. Code § 107.003(a)(1)(H).**
- Review and sign, or decline to sign, a proposed or agreed order affecting the client. **Tex. Fam. Code § 107.003(a)(1)(I).**



Advocate

- Meet before each court hearing with the client (for child client, applies to age four or older). **Tex. Fam. Code § 107.004(d)(1)**.
- Abide by the client's objectives for representation (for child client, child must be competent to form an attorney-client relationship and form that relationship). **Tex. Fam. Code § 107.004(a)(2)**.



Participate

- Take any action consistent with the client's interests that the attorney considers necessary to expedite the proceedings. **Tex. Fam. Code § 107.003(a)(1)(G).**
- Encourage settlement and the use of alternative forms of dispute resolution. **Tex. Fam. Code § 107.003(a)(1)(H).**
- Review and sign, or decline to sign, a proposed or agreed order affecting the client. **Tex. Fam. Code § 107.003(a)(1)(I).**



Training and Reporting

- Become familiar with the American Bar Association's standards of practice for attorneys in abuse and neglect cases. **Tex. Fam. Code § 107.004(a)(3).**
- Complete at least three hours of continuing legal education relating to representing parents and at least three hours of continuing legal education relating to representing children in child protection cases as soon as practicable after the attorney ad litem is appointed, unless the court finds that the attorney ad litem has experience equivalent to that education. **Tex. Fam. Code § 107.004(b).**
- Annually report to the Texas Indigent Defense Commission (TIDC) the percentage of practice time dedicated to court-appointed child welfare representation of parents and children in each county. **Tex. Fam. Code § 107.0042.**



Training and Reporting

- Attorneys must complete a training program regarding trauma-informed care and the effect of trauma on children in DFPS Conservatorship.
 - The training may satisfy the three-hour training requirement in a year in which an attorney completes the training.
- Complete the training as soon as practicable. **Tex. Fam. Code § 107.004(b), (b-1)(1)-(2), (b-2), and (b-3).**



Meeting with the Child or Caregiver

- Meet with the child or meet with the person whom the child ordinarily resides if the child is younger than four years of age, with sufficient time before the hearing to allow the attorney to prepare in accordance with the child's expressed objectives and meet in a private setting that allows for confidential communication. **Tex. Fam. Code § 107.004(d)(1)(A),(B); (d-1).**
- Exceptions – If the court:
 - Finds at that hearing that the attorney has shown good cause why the attorney's compliance is not feasible or, in the case of a child, not in the best interest of the child. **Tex. Fam. Code §107.004(e);** or
 - On a showing of good cause, authorizes the attorney to comply by conferring with the parent or child, as appropriate, by telephone or video conference. **Tex. Fam. Code § 107.004(e).**
- Report to the court whether the attorney met with the child prior to each hearing, and if not, request the court to find that compliance was not feasible or not in the best interest of the child. **Tex. Fam. Code § 107.004(d)(2).**



Meeting with the Child or Caregiver

- Interview and interact with the child in a developmentally appropriate manner. **Tex. Fam. Code §§ 107.003(a)(1)(A)(i), 107.004(a).**
- Elicit in a developmentally appropriate manner the name of any adult, particularly an adult residing in the child's community, who could be a relative or designated caregiver. **Tex. Fam. Code § 107.003(b)(4).**
- Advise the child. **Tex. Fam. Code § 107.004(a)(1).**
- Consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court. **Tex. Fam. Code § 107.003(a)(1)(C).**



Investigate the Child's Needs

- Obtain and review copies of relevant records relating to the child, including school, law enforcement, social services, medical and mental health records. **Tex. Fam. Code §§ 107.003(a)(1)(E), 107.006.**
- Determine whether the child's educational needs and goals have been identified and addressed. **Tex. Fam. Code § 107.004(d-2).**
- Review the medical care provided to the child. **Tex. Fam. Code § 107.003(b)(1).**
- Elicit, in a developmentally appropriate manner, the child's opinion on the medical care provided. **Tex. Fam. Code § 107.003(b)(2).**
- Review periodically the child's safety and well-being, including any effects of trauma to the child, and take appropriate action including requesting a review hearing when necessary to address issues of concern. **Tex. Fam. Code § 107.004(d-3).**



If a Child is in an RTC or QRTP

- Review any available information related to the child's needs, including the Child and Adolescent Needs and Strengths (CANS) assessment, psychological evaluations, discharge notes, incident reports, and counseling notes;
- Review information regarding whether the placement is appropriate to meet the child's specific needs;
- Meet with the child to elicit the child's opinion regarding the child's current or proposed placement and prepare for the hearing in accordance with the child's objectives;
- Advise the child regarding DFPS' request for placement and the likelihood of the request being granted; and
- Advocate to the court for the child's specific desires regarding the requested placement. See [Tex. Fam. Code § 107.004\(f\)\(1\)\(E\)](#).



Duties For Children At Least 16 Years Of Age

- Advise the child of the child's right to request the court to authorize the child to consent to their own medical care. **Tex. Fam. Code § 107.003(b)(3)(A).**
- Ascertain whether the child has received a certified copy of their birth certificate, social security card or replacement card, Driver's License (DL) or state identification card, or any other document DFPS determines appropriate. **Tex. Fam. Code § 107.003(b)(3)(B).**



Substituted Judgment

The attorney may only substitute their judgment for their child client's direction if the attorney determines that the child cannot meaningfully formulate the child's objectives of representation because the child:

- Lacks sufficient maturity to understand and form the attorney-client relationship;
- Despite appropriate legal counseling continues to express objectives of representation that would be seriously injurious to the child; or
- For any other reason is incapable of making reasonable judgments and engaging in meaningful communication. **Tex. Fam. Code § 107.008.**



Duties for an Attorney Appointed in a Dual Role

- Conduct an investigation to determine the best interests of the child. **Tex. Fam. Code § 107.002(a)(1).**
- Consider the child's expressed objectives without being bound by those objectives. **Tex. Fam. Code § 107.002(b)(3).**
- Interview each person who has significant knowledge of the case including educators and child welfare service providers. **Tex. Fam. Code § 107.002(b)(1)(B).**
- If substituting judgment, the attorney may present to the court a position the attorney determines will serve the best interest of the child. **Tex. Fam. Code § 107.008.**



Duties for an Attorney Appointed in a Dual Role, cont.

Practice Tip:

- In some Texas jurisdictions, long-standing practice has been to appoint an attorney serving in the dual role of attorney and guardian litem to every child in a child welfare case. However, an attorney who serves in the dual role may face an ethical dilemma when representing a child who is capable of forming an attorney-client relationship and directing representation, if the child's objectives are incompatible with the attorney's assessment of the child's best interest, but the child's objectives do not meet the standard required to substitute judgment.

The dilemma can be resolved by requesting appointment of another person to serve in the role of guardian ad litem for the child. [Tex. Fam. Code § 107.0125](#)



Texas Disciplinary Rules of Professional Conduct

Conflicts of Interest

Rule 1.06 Conflict of Interest: General Rule

A lawyer shall not represent a client if the lawyer's responsibilities to the client reasonably *appear* to be adversely limited by their responsibilities to another client, or reasonably appear to *become* adversely limited by their responsibilities to another client.

However, a lawyer can represent both clients in such circumstances if the lawyer reasonably believes that:

- The representation of each client won't be affected and;
- Each client gives informed consent.



Conflicts of Interest & Confidential Communication

Rule 1.09 Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of **Rule 1.05**;



Conflicts of Interest & Confidential Communication

Rule 1.05 Confidentiality of Information

(b) . . . a lawyer shall not knowingly:

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.



Attorney as a Counselor

Rule 2.01 Advisor

In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.



Attorney as a Counselor

Rule 2.01 Comments

1. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

4. Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts..



NON-CLIENT RELATIONSHIPS

Rule 4.03 Dealing with Unrepresented Person

Comment 1.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows or reasonably* should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.



Communication

Rule 1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Communication

Rule 1.03 Communication

Comment 4. Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.



Diminished Capacity and Substituted Judgment

Rule 1.17. Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.



Thank you

Dylan Moench

Chief Counsel

Travis County Office of Child Representation

(512) 854-7308

Dylan.moench@traviscountytexas.gov

Emily Miller

Attorney and Mediator

(325) 646-7685

Emily@emilymillerlaw.com

