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CRAFTING AN ADVOCATE FOR A CHILD: IN SUPPORT OF LEGISLATION REDEFINING THE ROLE OF THE GUARDIAN AD LITEM IN MICHIGAN CHILD ABUSE AND NEGLECT CASES

Albert E. Hartmann*

Michigan's current statutory system leaves the role of the child's attorney unclear. In this Note, Hartmann advocates the adoption of a legislative proposal that will redefine the role of the child's attorney. The proposal specifies that the child's primary legal representative should be a guardian ad litem who will represent the best interests of the child. Hartmann begins by describing the current system and then analyzes how the proposal will modify the role of the child's attorney. Hartmann argues that the proposed changes would be highly beneficial and identifies specific points of improvement. Hartmann concludes by suggesting several reforms to improve the child welfare system in Michigan.

Come away, O human child!
To the waters and the wild
With a faery, hand in hand,
For the world's more full of weeping than
you can understand.¹

INTRODUCTION

The role of the child's attorney in child protection proceedings² in Michigan is unclear under the current statutory

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2. The term "child protection proceedings" refers to child abuse and neglect proceedings. Unless otherwise specified, all general references to legal proceedings in this Note refer to child abuse and neglect proceedings.
scheme. The law instructs the attorney to represent both the child and her best interests. These contradicting mandates create confusion and give little guidance to attorneys faced with the difficult ethical dilemmas that arise in child protection cases. The Michigan Rules of Professional Conduct also do not provide proper guidance. This confusion requires an attorney to choose between the role of the traditional attorney and the role of the guardian ad litem (GAL).

A legislative proposal (the proposal) currently before the Lieutenant Governor of Michigan clarifies this role. This

3. See MICH. COMP. LAWS ANN. § 712A.17c(7) (West 1995) (providing that in child abuse and neglect cases, "the court shall appoint an attorney to represent the child" (emphasis added)).

4. Throughout this Note, I refer to the child client as "she" or "her," and to the guardian ad litem (GAL) or child's attorney as "he" or "him." I use the masculine pronoun for the attorney roles because of my own experience representing children as an attorney.

5. See MICH. COMP. LAWS ANN. § 722.630 (providing that "the court, in every case filed under this act in which judicial proceedings are necessary, shall appoint legal counsel to represent the child. The legal counsel, in general, shall be charged with the representation of the child's best interests." (emphasis added)).

6. The confusion arises because an attorney is typically bound by the client's directions. See MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1994) (stating that the client has the ultimate authority to direct the representation). The attorney should counsel the client about her best interests, but the attorney must allow the client to direct the representation. See id.

7. See MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.14 & cmt. (addressing clients under a disability). The rule's comment mentions that a minor may have difficulty "maintaining the ordinary client-lawyer relationship." Id. The comment goes on, however, to state that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Id. The rule, though, does not give concrete guidance on how much weight to give the opinion of a child. Overall, the Michigan Rules of Professional Conduct do not adequately address the problems faced by a child's attorney. See ANN M. HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES 24–25 (1993) (commenting on the inadequacy of the Model Rules of Professional Responsibility).

8. This Note uses the term "guardian ad litem" to refer to a lawyer appointed to represent a child's best interests. A GAL is not bound by the attorney-client privilege and can advocate a position contradicting the child client's expressed wishes. See infra notes 18-28 and accompanying text for further definitions of these roles.

9. See Legislative Proposal (Mar. 14, 1997) (on file with the University of Michigan Journal of Law Reform) [hereinafter Legislative Proposal]. See infra app. A for the full text of the legislative proposal. Donald N. Duquette, Director of the Child Advocacy Law Clinic at the University of Michigan Law School, and Rachel Lokken and Kristin Schutjer, students in the Child Advocacy Law Clinic during the Winter 1997 Term, drafted the final version of the legislative proposal. Many other students and professionals also contributed to the legislative proposal.

The legislative proposal would amend multiple sections of the Michigan Compiled Laws concerning juveniles. This Note focuses on those sections regulating child abuse and neglect cases. Specifically, this Note discusses proposed section 13a (defining the
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proposal defines the primary representative of the child as a guardian ad litem\textsuperscript{10} who will represent the best interests of the child,\textsuperscript{11} even if that determination runs counter to the express wishes of the child.\textsuperscript{12} The GAL, however, does have a duty to inform the court of the child's wishes.\textsuperscript{13} This clear mandate, along with several other provisions,\textsuperscript{14} alleviates some of the confusion over the proper role of the child's attorney in child protection cases.

This Note argues for adoption of the legislative proposal to clarify the role of the child's attorney. Part I describes the traditional differences between the guardian ad litem and the attorney. Part II describes the current Michigan system and the legislative proposal, and highlights some of the specific points of improvement over the current system. Part III recommends adoption of the legislative proposal, as well as additional training and ethical standards for GALs, increased communication among child welfare professionals, and empirical studies of the child welfare system.\textsuperscript{15}

\begin{itemize}
  \item[10.] See Legislative Proposal, infra app. A § 17c(7).
  \item[11.] See Legislative Proposal, infra app. A § 17c(10)(a)(1).
  \item[12.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[13.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[14.] See infra notes 89-112 and accompanying text for a full discussion of these provisions.
  \item[15.] This Note does not address the complex issue of judging the competence of a child client. For an excellent discussion of child competence, see Peter Margulies, \textit{The Lawyer as Caregiver: Child Client's Competence in Context}, 64 FORDHAM L. REV. 1473 (1996). See also DONALD N. DUQUETTE, \textit{ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES} 29–33 (1990) (discussing how the advocate can give "voice" to the child's preferences).

This Note also does not address the new Unified Family Court in Michigan. Because the new statutes creating the Unified Family Court do not amend Michigan Compiled Laws section 712A.17c or Michigan Compiled Laws section 722.630, the role of the attorney for the child is presumably unchanged. Thus, this Note applies equally to the new and old family court systems. For convenience, I will address comments to the existing system.

\end{itemize}
I. THE TRADITIONAL ROLES OF ATTORNEY AND GUARDIAN AD LITEM

Guardians ad litem and attorneys traditionally fulfill different roles in court proceedings involving children. In Michigan, these roles are defined by statutes and court rules.

A. The Guardian ad Litem

"The traditional charge to the child's guardian ad litem is to ascertain and advocate for the child's best interests." The GAL should listen to the child's preferences, but is not bound by them. "A thorough investigation of the case is the cornerstone of the guardian ad litem's representation of a child's best interests." During this investigation, the GAL should interview all of the parties involved. After this investigation, the GAL makes a determination regarding the best interests of the child and advocates that position.

16. This section provides a general description of the roles of attorney and GAL. For a fuller description of these roles in Michigan child protection proceedings, see infra notes 29-42 and accompanying text.

17. See infra notes 29-42 and accompanying text for a description of the current Michigan statutes and court rules governing appointment and duties of GALs and attorneys.

18. HARALAMBIE, supra note 7, at 29; see also MICH. COMP. LAWS ANN. § 722.630 (West 1995) (instructing the court to appoint a GAL to represent the best interests of the child); Kathryn E. Stryker & Gregory G. Gordon, Representing Children, NEV. LAW., Oct. 1995, at 13 ("Traditionally, a guardian ad litem is a person appointed by the court to protect a child's best interests.").

19. See Stryker & Gordon, supra note 18, at 13; see also HARALAMBIE, supra note 7, at 6 (stating that "[t]he attorney [acting as a GAL] need not be bound procedurally or substantively by the child's expressed desires").

20. Stryker & Gordon, supra note 18, at 13; see also Patricia S. Curley & Gregg Herman, Representing the Best Interests of Children: The Wisconsin Experience, 13 J. AM. ACAD. MATRIMONIAL LAW. 123, 128 (1995) (stating that the investigatory aspect of the GAL's role is more important and difficult than the advocacy aspect).

21. See Curley & Herman, supra note 20, at 127 (stating that in Wisconsin the GAL should interview "the parents, the children (if practical), and other appropriate references" (footnote omitted)); see also HARALAMBIE, supra note 7, at 30 (stating that obtaining information from different sources is a "necessary component[] of determining the child's best interests").

22. See Curley & Herman, supra note 20, at 128, 129–32; see also HARALAMBIE, supra note 7, at 6.
B. The Attorney

“In contrast [to the role of the GAL], the role of an attorney for the child . . . is to represent the expressed desires of the client zealously within the bounds of the law.” Thus, the attorney is solely obligated to represent the wishes of the client and is not obligated to represent the best interests of the child if the two conflict. This role encompasses all of the traditional attributes of the attorney-client relationship. A child’s attorney owes his client the same duties of “undivided loyalty, confidentiality, and diligence as any other client,” with some minor modification because of the age of the child client. The attorney’s role with respect to a child, however, is not identical to the attorney’s role when representing an adult. Because a child client is more susceptible to persuasion and manipulation than an adult client, “the attorney owes a special fiduciary duty not to overreach in forcing his or her opinion on the child client” when counseling the child. The older the child client is, though, the more similar the roles become.

II. THE LEGISLATIVE PROPOSAL

A. The Current Michigan System

In Michigan, courts are required to appoint counsel for children at every hearing. Furthermore, “[t]he child shall not waive the

25. Stryker & Gordon, supra note 18, at 13; see also Haralambie, supra note 7, at 12 (“The attorney appointed as an attorney for the child therefore owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child’s expressed wishes as he or she would to an adult client, with a few modifications.”).
27. Id.
28. See id. at 12–14. When there is confusion as to whether the attorney is a GAL or a traditional attorney, “as a general rule of thumb, the older the child, the more likely the court’s appointment of the attorney was intended to be in the traditional role of attorney” Id. at 12.
30. See Mich. Comp. Laws Ann. § 712A.17c(7) (West 1995) (“In a proceeding under section 2(b) or (c) of this chapter, the court shall appoint an attorney to represent the child.”);
assistance of [the] attorney." The child's attorney is appointed to represent the child and her best interests. The attorney has a duty to investigate the case and actively "participate in the proceedings to competently represent the child." The attorney also has a specific mandate to observe and interview the child. When the attorney represents a child in foster care, the attorney must, before each hearing, review the child's case file, talk to the child's foster parents, and consult with the child's caseworker.

Only one court rule addresses the function of the GAL in child protection proceedings. This rule allows the court to appoint a guardian ad litem "if the court finds that the welfare of the party requires it." The GAL does not have to be an attorney, but he does have to file a written appearance. The GAL has access to the petitions, motions, and orders filed or entered in the case. The GAL also has the right "to consult with the attorney of the party for whom the guardian ad litem has been appointed." The GAL is appointed to represent the best interests of the child client, and this role encompasses both advocacy and investigation.

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MIC. COMP. LAWS ANN. § 722.630 ("The court, in every case filed under this act in which judicial proceedings are necessary, shall appoint legal counsel to represent the child."); MIC. CT. R. 5.915(B)(2) ("The court must appoint an attorney to represent the child at every hearing."); MIC. CT. R. 5.965(B)(2) ("The court shall appoint an attorney to represent the child at the [preliminary] hearing.").

31. MIC. COMP. LAWS ANN. § 712A.17c(7); see also MIC. CT. R. 5.915(B)(2) ("The child may not waive the assistance of an attorney.").

32. See MIC. COMP. LAWS ANN. § 712A.17c(7) (providing that in child abuse and neglect cases, "the court shall appoint an attorney to represent the child" (emphasis added)).

33. See id. § 722.630 ("The legal counsel, in general, shall be charged with the representation of the child's best interests.").

34. Id. ("To [represent the best interests of the child], the attorney shall make further investigation as he deems necessary to ascertain the facts, interview witnesses, examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court, and participate in the proceedings to competently represent the child.").

35. See id. § 712A.17c(7) ("The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child.").

36. See id. ("If the child is placed in foster care, the attorney shall, before representing the child in each subsequent proceeding or hearing, review the agency case file and consult with the foster parents and the caseworker.").

37. MIC. CT. R. 5.916(A).

38. See DUQUETTE, supra note 29, at 105.

39. See MIC. CT. R. 5.916(B).

40. See MIC. CT. R. 5.916(C).

41. Id.

42. See supra notes 18-22 and accompanying text for a discussion of the role of the GAL.
B. The Legislative Proposal and the Current System

Like the current system, the legislative proposal contemplates two types of representation for children in abuse and neglect cases. The two types of representation for the child are the guardian ad litem and the legal counsel. Like the current system, the legislative proposal charges the GAL with representing the best interests of the child and requires the legal counsel to maintain an attorney-client relationship with the child. Under the proposal, both the legal counsel and the GAL are attorneys appointed by the court.

Unlike the current system, however, the proposal requires that the child's primary legal representative under the proposed system would be the GAL. The proposal requires the judge to appoint a GAL to represent the best interests of the child in all abuse and neglect cases. The proposal also details the rights and responsibilities of the GAL representing the child. While the GAL would represent the best interests of the child, he would also have an obligation to inform the court of the child's wishes. If the child and the GAL did not agree about the best interests of the child, the GAL would ask the court to appoint legal counsel for the child. The child's legal counsel would be bound by the traditional attorney-client relationship and would represent the child's wishes to the court, regardless of the GAL's determination of the child's best interests.

43. See Legislative Proposal, infra app. A § 13a(1) (defining the roles of the legal counsel and the GAL under the legislative proposal).
44. See Legislative Proposal, infra app. A § 13a(1)(c) (defining the role of the GAL).
45. See Legislative Proposal, infra app. A § 13a(1)(d) (defining the role of the child's legal counsel).
46. See Legislative Proposal, infra app. A § 13a(1)(c)-(d).
47. See Legislative Proposal, infra app. A § 17c(7) (directing the court to appoint a GAL for the child in all abuse and neglect cases).
48. See Legislative Proposal, infra app. A § 17c(7).
49. See Legislative Proposal, infra app. A § 17c(10)(a)(1)-(10).
C. General Commentary on the Legislation

This section details some of the general policy concerns supporting the adoption of the legislative proposal.

1. Defining the Role of the Guardian ad Litem—One of the key goals of the legislative proposal is to give attorneys representing children a clear idea of their role. Unlike the current system, the legislative proposal clearly defines the rights and duties of attorneys representing children. Under the legislative proposal, the GAL must:

(1) Serve as the independent legal representative of the child's best interests entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(2) Determine the facts of the case by conducting an independent investigation including interviewing the child, social workers, family members, and others as necessary, and by reviewing reports and other information.

(3) Before each proceeding or hearing, meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the parents, the foster care providers and the caseworkers.

(4) Explain to the child according to the child's ability to understand the proceedings, the guardian ad litem's role

54. See E-mail Letter from Donald N. Duquette, Clinical Professor of Law and Director of the University of Michigan Law School Child Advocacy Law Clinic, to the Author (Sept. 22, 1997) (on file with the University of Michigan Journal of Law Reform). Prof. Duquette states:

I think the motive to create standards for representation rests on two grounds, not just one: First, as you say, to give lawyers a clear idea of their role, but Second, to set standards as expectations of the lawyer's role so others—judges, parents, social workers, other lawyers and the children themselves—can reasonably expect certain behavior of the lawyer.

Id.

55. See supra notes 3-8 and accompanying text (describing the role ambiguity in the current Michigan system).
and those circumstances under which the guardian ad litem may disclose information to the court.

(5) File all necessary pleadings and papers and independently call witnesses on behalf of the child.

(6) Attend all hearings and substitute counsel only with court approval.

(7) Make a determination as to the best interests of the child and advocate for the best interests as the guardian ad litem sees them regardless of whether that determination reflects the wishes of the child. The wishes of the child are relevant to the guardian ad litem’s determination of best interests and shall be weighed according to the competence and maturity of the child. In any event, the guardian ad litem shall inform the court as to the wishes and preferences of the child.

(8) If, after discussion between the child and the guardian ad litem, the child’s interests as identified by the child are inconsistent with the guardian ad litem’s determination of the child’s best interests, communicate the child’s position to the court and ask the court to appoint legal counsel to represent the child.

(9) Monitor the implementation of case plans and court orders and determine whether services ordered by the court for the child or the child’s family are being provided in a timely manner and are accomplishing their purpose. The 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 these services, or if the services are not accomplishing their purpose.

(10) Consistent with the rules of professional responsibility, identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.  

The proposal also specifies that the "[a]ttorney-client or any other privilege shall not prevent the guardian ad litem from sharing all information relevant to the child's best interests with the court." This detailed instruction is much more specific than the guidance given under the current system.

It is essential that the role of the child's attorney is made clear to all parties involved in the case. The proposal

58. See supra notes 29-42 and accompanying text for a description of the current Michigan system.
59. See Ann M. Haralambie, The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process, 71 N.D. L. REV. 939, 947 (1995) ("However the child's attorney's role is defined, it is crucial that both the attorney and the child, to the extent possible, understand what that role is."). Haralambie goes on to list the information that is necessary for the attorney to understand his role in the litigation process. According to Haralambie:

The attorney must know: 1) who determines the position to be advocated, 2) whether the child has full party status, 3) whether there is an attorney-client privilege between the child and attorney, 4) whether the attorney has full access to discovery, procedural motions, and trial participation, 5) whether the attorney must prepare a report and/or testify, and 6) what other specific duties are required.

Id. at 948 (footnotes omitted); see also E-mail Letter from Donald N. Duquette to the Author, supra note 54 (stressing the importance of setting standards so that those involved can reasonably expect certain behavior of the child's attorney).

Clarity of role is an important issue to many critics of the GAL role in the child advocacy setting. These critics advocate for appointment of an attorney for the child. See Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings, 13 J. AM. ACAD. MATRIMONIAL LAW. 1, 15 (1995) [hereinafter Representing Children] (recommending under Standard 2.3 that "[u]nless controlling law expressly indicates otherwise, counsel's role in representing an impaired child client is the same as when representing an unimpaired adult client"); AMERICAN BAR ASS'N, PROPOSED STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 3, Rec. B-2 (1996) (on file with the University of Michigan Journal of Law Reform) [hereinafter ABA ABUSE & NEGLECT STANDARDS] (advising that an attorney appointed as both an attorney and a GAL should resign the role of GAL and continue to represent the child in a traditional attorney-client relationship); Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 1301 (1996) [hereinafter Conference Recommendations] ("The lawyer [appointed to represent a child] should assume the obligations of a lawyer, regardless of how the lawyer's role is labelled, be it as guardian ad litem, attorney ad litem, law guardian, or other. The lawyer should not serve as the child's guardian ad litem or in another role insofar as the role includes responsibilities inconsistent with those of a lawyer for the child."). This attorney would be bound by the expressed wishes of the child. See REPRESENTING CHILDREN, supra, at 15; ABA ABUSE & NEGLECT STANDARDS, supra, at 3, Rec. B-2; Conference Recommendations, supra, at 1301. Even these critics, however, state that the GAL role is appropriate when it is clearly defined. See Conference Recommendations, supra, at 1314 ("Any law that is intended to provide for the appointment of a lawyer to serve on behalf of a child in a role other than as lawyer (e.g., as guardian ad litem or court-
explicitly defines the obligations and duties of the GAL. The legislative proposal also clearly defines the role of the legal counsel in terms of the traditional attorney-client relationship. The legal counsel is obligated to represent the expressed wishes of the child. In addition to providing clarity to the involved parties, the proposal's designation of roles and specification of duties may also eliminate some of the ethical conflicts caused by the ambiguity in this area of the law.

2. Training is Essential for the Guardian ad Litem—In order for the GAL to properly perform his role, he must receive training. Attorneys are trained to counsel the client and to allow the client to set the goals of the representation. Under this traditional model, and in contrast to the role of a GAL, the attorney is not obliged to determine the goals of the representation and may not argue against the client's wishes.

Training will help make the "best interests" decision less subjective for the GAL under the proposal. The training and experience of the GAL will give him a basis for making a determination of the child's best interests. Similarly, a complete appointed investigator should clearly identify the role in which the lawyer is required to serve, and the attendant responsibilities.

60. See Legislative Proposal, infra app. A § 13a & 17c.
65. See supra notes 23-28 and accompanying text for a description of the attorney's traditional role.
66. See Mich. Rules of Professional Conduct Rule 1.2 (1994) (stating that the client has the ultimate authority to direct the representation).
67. See Margulies, supra note 7, at 1496-98 (discussing the benefits and objectives of properly training attorneys who represent children); see also Duquette & Ramsey, supra note 64, at 356-58 (describing a training project to help advocates "identify the needs and interests of their young clients").
68. See Ann M. Haralambie & Deborah L. Glaser, Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children, 13 J. Am. Acad. Matrimonial Law. 57, 78 (1995) (stating that "with proper training, attorneys can learn some of the more objective criteria for assisting in determining the child's position and how to apply them" to the determination of the child's best interests); see also Duquette & Ramsey, supra note 64, at 354-58 (explaining how an advocate determines
investigation provides the GAL with more facts that help ground the decision in the objective needs of the child rather than the subjective perceptions of the GAL.\textsuperscript{69}

This is not to say that the GAL's biases are never a problem. The GAL should make his decisions based on relevant criteria, not for reasons grounded in racial or class prejudices and stereotypes. Training and experience for the GAL may help to eliminate these biases.\textsuperscript{70} The best interests determination should be made with an eye towards the possible legal outcomes. This determination should not be made lightly, especially when it conflicts with the wishes of the child.

Although the judge will ultimately make the legal decision as to the child's best interests, the GAL must make the initial determination. The GAL's opinion regarding the child's best interests should carry weight because of the GAL's close understanding of his client.

The best interests of the child client are not easy to define. A determination of the child's best interests tends to be very fact specific.\textsuperscript{71} The child's best interests are determined in great measure by what is at issue in the case.\textsuperscript{72} The court system cannot make every family into a perfect family, even if the perfect family could be defined across cultures, value-systems and classes. The determination of best interests needs to be a practical, realistic assessment of what the child needs balanced with what the court system is able to give.\textsuperscript{73}

3. Flexibility of the Guardian ad Litem Role—The GAL role should be flexible.\textsuperscript{74} The GAL can be an investigator, an officer

\begin{itemize}
\item \textsuperscript{69} See Margulies, supra note 7, at 1478. Margulies lists three substantive factors for the determination of the child's best interests. Those factors are: "(1) continuity of caregiving, assessed with reference to the status quo before the commencement of legal proceedings; (2) parents' commitment of time to their child's education; and (3) preventing violence against the child or other family members." \textit{Id}.
\item \textsuperscript{70} See \textit{id.} at 1496–98 (discussing how training and education can help to eliminate bias).
\item \textsuperscript{71} See Duquette & Ramsey, supra note 64, at 354–56 (describing the multiple factors that should make up the best interests analysis).
\item \textsuperscript{72} See \textit{id}.
\item \textsuperscript{73} See \textit{id}.
\item \textsuperscript{74} See HARALAMBIE, supra note 7, at 37 (suggesting that a hybrid role combining the attorney and GAL may be the best alternative for representing children). Haralambie explains:
\end{itemize}

A hybrid role may be the best framework within which to advocate for children. Such an approach attends to both a child's wishes and his or her best interests and integrates them into a recommendation that achieves a meaningful result
of the court, an advocate, or some combination of those three. The GAL even has the flexibility to vary the role within the representation, allowing for the possibility that the child can make some decisions for herself regarding the case but may not be able to make other decisions. Even with this flexibility, however, the proposal sets the outer boundaries of this flexibility, and the GAL must work within those boundaries. Thus, a GAL is not completely free to define his role, but he does have some flexibility within the proposed scheme.

The flexibility inherent in the GAL role indicates trust of attorneys. The system should trust attorneys representing children, and should allow them to use their training and experience to help their clients in the most effective way. This is especially true of attorneys who have special training in the area of representing abused and neglected children. These attorneys have knowledge, ability, and resources to identify and solve problems that may come up during a complicated case.

4. Cost Issues—Costs under the proposal system may not be more than under the current system. Under the current system, an attorney is appointed for every child. Under the proposed system, every child would be appointed a GAL who is an attorney. Thus, the cost of appointing a primary legal representative for the child would not change under the proposed system. Also, the more effective representation provided by the

in a timely fashion. Current ethical rules hinder an attorney's functioning in this manner, but many attorneys blend the roles with the consent of their child clients. Attorneys are always free to act as “counselors” at law, advising their clients about what their legal position should be. . . . More than anything, this role demands significant time to develop a meaningful relationship with a client. Without this time commitment, attorneys for children provide merely the illusion of protection.

Id.

75. See Legislative Proposal, infra app. A § 17c(10)(a)(7) (stating that the wishes of the child are relevant to the GAL's determination of best interests, and that the GAL should consider the competence and maturity of the child when weighing the child's wishes against the GAL's conception of the child's best interests).

76. See Legislative Proposal, infra app. A § 17c(10)(a)(7).

77. See supra notes 64-73 and accompanying text.

78. See supra notes 64-73 and accompanying text.

79. See MICH. COMP. LAWS ANN. § 712A.17c(7) (West 1995) (stating that “the court shall appoint an attorney to represent the child”).

GAL at an earlier stage in the proceedings should be more cost effective overall.\footnote{See In Our Hands: Report of the Binsfield Children's Commission 52 (1996) (on file with the University of Michigan Journal of Law Reform) ("Certainly, in a system that is so complex, highly competent, trained lawyers will help expedite permanency. Savings in obtaining early resolution versus a child languishing in care should finance post-termination representation.").}

Under the legislative proposal, the court may have to appoint both a GAL and an attorney to represent the child,\footnote{See Legislative Proposal, infra app. A § 17c(10)(a)(8); see also infra notes 109-12 and accompanying text.} but this scenario can also occur under the current system.\footnote{See supra notes 29-42 and accompanying text.} Thus, the cost for appointing a GAL and an attorney will not necessarily be greater under the proposed system. Also, the greater flexibility in the legislative proposal should reduce the possibility that the court will have to appoint multiple attorneys for a single child client, and this may save money in the long run.\footnote{More detailed empirical studies are necessary before these savings can be established, but the savings are a definite possibility under the system created by the legislative proposal.}

5. Difficulty of the Role and the Need for a Positive Standard—The legislative proposal sends the message that the resolution of child protection cases should be based on an objective determination of the child's best interests with respect to the facts, balanced with the wishes and interests of the child.\footnote{See Legislative Proposal, infra app. A § 17c(10)(a)(1)-(10) (detailing the responsibilities of the GAL under the new system).} It also sends a message that adversarial advocacy is not always the proper model in child protection proceedings.\footnote{See Legislative Proposal, infra app. A § 17c(10)(a)(10) (instructing the GAL to "promote a cooperative resolution of the matter").} That style of advocacy does not always achieve an adequate resolution, and it may not solve the family's problems.

Fulfilling the role of the GAL does take time. Under both the current and the proposed systems, an attorney who does not spend time preparing the case will not adequately represent his child client.\footnote{See Haralambie, supra note 7, at 37 ("More than anything, this role demands significant time to develop a meaningful relationship with a client. Without this time commitment, attorneys for children provide merely the illusion of protection.").} Rules that specifically define attorneys' duties, coupled with judges who can monitor and enforce compliance, may help attorneys to devote more time to the child. Rules that encourage and allow dedicated attorneys to perform
the role of the GAL to the best of their abilities are desirable rules. Also, rules that encourage improvement by attorneys who do not dedicate adequate time to the representation benefit everyone involved.

Despite the difficulties in representing abused and neglected children, a well-defined role may make representation easier because more guidance keeps attorneys on the right track. A well-defined role will also help the other parties to better understand and form accurate expectations regarding the goals and behavior of the GAL. 88

D. Specific Areas of Improvement

This section analyzes four specific components of the legislative proposal and explains why they are positive reforms.

1. The Guardian ad Litem is Still an Attorney—Appointing a GAL does not mean that the child will be left without legal representation. Under the proposed system, the GAL must be an attorney. 89 This means that the child benefits from the legal training and experience of that attorney. The GAL is not barred from being an advocate. Rather, the GAL simply applies his advocacy skills in a different way. The GAL should act as the child’s advocate because the other parties do not always adequately preserve the best interests and legal rights of the child. 90 Thus, the child needs an active advocate to ensure that her story is properly presented to the judge.

2. Confidentiality—The legislative proposal specifies that the attorney-client privilege “shall not prevent the guardian ad litem from sharing all information relevant to the child’s best interests with the court.” 91 This is not a mandatory disclosure provision. It simply allows the GAL to disclose relevant information to the court, despite the attorney-client privilege that would normally protect confidential information. 92 There is

88. See E-mail Letter from Donald N. Duquette to Author, supra note 54.
89. See Legislative Proposal, infra app. A § 13a(1)(c).
90. See Duquette & Ramsey, supra note 64, at 354-56 (discussing particular areas the child’s advocate should investigate because those areas are likely to be overlooked by the other parties).
92. See MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994) (describing the attorney-client privilege in Michigan).
discretion for the GAL to keep some matters confidential, but
the GAL may reveal all relevant facts to the court when he
feels disclosure is the best course of action.\textsuperscript{93} At the outset
of the representation, the GAL must explain to the child under
what circumstances the GAL may reveal information to the
judge.\textsuperscript{94}

There are important reasons for allowing the GAL to reveal
relevant information to the judge in abuse and neglect pro-
cedings. There is so much at stake in these proceedings,
especially when there are allegations of physical and sexual
abuse,\textsuperscript{95} that modifying the traditional attorney-client confi-
didentiality is warranted.

3. Wishes of the Child Client—The legislative proposal re-
quires the GAL to inform the court of both the GAL’s
determination of the child’s best interests and the child’s
wishes.\textsuperscript{96} The proposal also requires the GAL to consider
the wishes of the child when determining her best interests.\textsuperscript{97} The
GAL weighs the wishes of the child according to her age and
maturity,\textsuperscript{98} and then makes a recommendation as to her best
interests that takes her wishes into account. Unlike a tradi-
tional attorney, the GAL could also recommend a course of
action contrary to the expressed wish of the child.\textsuperscript{99} When the
GAL does disagree with the child, however, the GAL would
still be required to inform the court of the child’s wishes.\textsuperscript{100}
This system would be advantageous for several reasons.

First, the legislative proposal would allow the GAL to give
the judge all relevant information about the case.\textsuperscript{101} The GAL
must form a recommendation from the information, and must
also inform the judge about the wishes of the child.\textsuperscript{102} The GAL
should inform the judge of the child’s reasons for her wishes

\begin{itemize}
  \item[93.] The legislative proposal does not provide a definition for “relevant facts.” This leaves the GAL to determine what should be revealed. Training and experience should make this determination easier, as may the ethical standards for GALs proposed infra in Part III.
  \item[94.] See Legislative Proposal, infra app. A § 17c(10)(a)(4).
  \item[95.] See HARALAMBIE, supra note 7, at 35 (“[When] allegations of abuse are raised during confidential communications between children and attorneys, the judge’s right to be fully informed may conflict with the attorney-client relationship. The judge’s decision can never be better than the information upon which it is based.”).
  \item[96.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[97.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[98.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[99.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[100.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[101.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
  \item[102.] See Legislative Proposal, infra app. A § 17c(10)(a)(7).
\end{itemize}
Crafting an Advocate for a Child

and preferences.\textsuperscript{103} This ensures that the child's voice is heard during the proceedings.

Second, the approach of the legislative proposal is an honest approach. This approach acknowledges that GALs representing children often disagree with the choices of their clients. Rather than accepting the risk that the GAL might drown out the voice of the child, the legislative proposal allows the GAL to be honest with the judge and the client about the disagreement. This does not mean, however, that the GAL should not counsel his client. The legislative proposal mandates that the GAL consult with his client before forming a position,\textsuperscript{104} and that the GAL take her wishes into account.\textsuperscript{105}

This honest approach may also reduce the temptation for the GAL to talk the child into or out of revealing information. When the attorney is the only person who knows that abuse is occurring, for example, there can be a great temptation to talk the child into letting the attorney reveal this information. This may go beyond the bounds of counseling and into the realm of coercion. This temptation would not be as strong under the legislative proposal because the GAL can be honest about his disagreement and can reveal relevant facts to the judge without breaching the responsibilities of the representation.

Disagreement can create a large barrier between the child and the GAL. The legislative proposal allows the GAL to be honest with the child,\textsuperscript{106} and that honesty may help the relationship in some circumstances. The GAL can balance the importance of giving the child her voice with the necessity of honestly giving the judge facts contrary to the child's position. This balance can form the basis of a trusting relationship between the child and her GAL because the child will know that the GAL must disclose the child's wishes. This balance also allows the GAL to respect the desires of his client without being bound by those wishes. The GAL should not advocate a position contrary to the child's expressed desires simply because he disagrees with them. The GAL should have some other reason for advocating a different position, hopefully based on solid reasoning.

\textsuperscript{103} See Legislative Proposal, infra app. A § 17c(10)(a)(7).
\textsuperscript{104} See Legislative Proposal, infra app. A § 17c(10)(a)(3),(7).
\textsuperscript{105} See Legislative Proposal, infra app. A § 17c(10)(a)(7).
\textsuperscript{106} See Legislative Proposal, infra app. A § 17c(10)(a)(7)-(8) (instructing the GAL to discuss the case with the client and establish whether the GAL's determination of the child's best interests agrees with the child's wishes).
Third, the GAL is not prevented from arguing for the wishes of his client. In some cases, the best interests of the child may be congruent with her wishes. The GAL does not need to be adversarial with the child when he does not agree with her. However, even when the GAL agrees with the desires of the child, he should still inform the court about important facts that weigh against the child's wishes.

4. Appointment of Legal Counsel—The legislative proposal allows the GAL to ask the court to appoint legal counsel for the child when necessary. The court can appoint legal counsel when the GAL's determination of the child's best interests is inconsistent with the child's expressed wishes. The GAL can tell the court why the child and the GAL disagree, and this will help the court assess the propriety of appointing legal counsel for the child. This provision allows an older child who disagrees with the GAL to receive her own attorney. Thus, the legislative proposal does not necessarily deprive children of the benefits of a traditional attorney-client relationship.

III. CONCLUSION AND OTHER POTENTIAL REFORMS

This legislative proposal would be an important step forward for children's advocates, and it would greatly benefit many children and their families by altering the way that children are represented in abuse and neglect cases. The proposal offers a positive change, and it would help many children through an extremely traumatic time in their lives.

Along with this change, the child welfare profession should seize the chance to reform other aspects of the child welfare system. Empirical studies that help determine the effectiveness of the representation should be commenced. Child welfare

107. See Legislative Proposal, infra app. A § 17c(10)(a)(7) (stating that the wishes of the child are relevant to the GAL's determination of the child's best interests). The legislative proposal does not prohibit the GAL from advocating for the child's wishes if the GAL determines that such a position is in the child's best interests. See Legislative Proposal, infra app. A § 17c(10)(a)(7).

108. See Legislative Proposal, infra app. A § 17c(10)(a)(7). The legislative proposal contemplates that, in some cases, it will be in the child's best interests for the GAL to argue for the child wishes.


111. See Legislative Proposal, infra app. A § 17c(10)(a)(7).

professionals should also increase communication with others in their field. This communication may bring many issues to light, and may help to solve more problems.

Attorneys and GALs working in the child welfare system also need ethical guidance. This ethical guidance should come from standards written for attorneys and GALs practicing under the proposed Michigan system. The existing standards are designed for the existing system, and thus would not be helpful to attorneys under the proposed system. Along with these new standards should come new GAL training programs. The level of competence among GALs must be raised because of their crucial role under the proposed system.

This legislative proposal should not be the final reform of the Michigan child welfare law. It is, however, an important step in the right direction. The proposed system would improve the immediate situation and would give advocates a chance to collect data about the role of the child’s attorney in the child protection context. This information could help to focus future reforms on the system’s problem areas. Future revisions could then be based on sound empirical data that is currently unavailable.
APPENDIX A: TEXT OF DRAFT LEGISLATION PROPOSAL

Following is the text of the draft legislative proposal. The proposal would amend numerous sections of the Michigan Compiled Laws.

Section 712A.13a. Definitions; petition; release of child into custody; abuse, order requiring a person to leave home; placement of child; visitation; review.

Sec. 13a. (1) As used in this section and sections 17c, 18f, 19, 19a, 19b, and 19c of this chapter.

(a) "Agency" means a public or private organization, institution, or facility responsible pursuant to court order or contractual arrangement for the care and supervision of a child.

(b) "Foster care" means care provided to a child in a foster family home, foster family group home, or child care institution or approved under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, or care provided to a child in a relative's home pursuant to an order by the juvenile division of the probate court.

(c) "Guardian ad litem" means an attorney appointed by the court to represent the best interests of the child.

(d) "Legal counsel" means an attorney who serves as the legal advocate of the child. the child's legal counsel serves in a traditional attorney-client relationship with the child as governed by the Michigan rules of professional conduct. The child's legal counsel owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as he or she would to an adult client.

Section 712A.17c

Section 17c.

(7) In a proceeding under section 2(b) or (c) of this chapter, the court shall appoint a guardian ad litem to represent the best interests of the child when a dependency-neglect petition is filed or when an emergency ex parte order is entered in a dependency-neglect case, whichever occurs earlier. The child shall not waive the assistance of the guardian ad litem.

(9) An attorney appointed by the court under section 2(a) or (d) shall serve until discharged by the court. An attorney
appointed under section 2(b) or (c) as a guardian ad litem shall serve until adoption is finalized, guardianship or permanency is achieved or wardship is discharged for the child.

(10) In any proceeding filed under section 2(b) and (c):

(a) The guardian ad litem shall:

(1) Serve as the independent legal representative of the child's best interests entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(2) Determine the facts of the case by conducting an independent investigation including interviewing the child, social workers, family members, and others as necessary, and by reviewing reports and other information.

(3) Before each proceeding or hearing, meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional conduct, the foster care providers and the caseworkers.

(4) Explain to the child according to the child's ability to understand the proceedings, the guardian ad litem's role, and those circumstances under which the guardian ad litem may disclose information to the court.

(5) File all necessary pleadings and papers and independently call witnesses on behalf of the child.

(6) Attend all hearings and substitute counsel only with court approval.

(7) Make a determination as to the best interests of the child and advocate for the best interests as the guardian ad litem sees them regardless of whether that determination reflects the wishes of the child. The wishes of the child are relevant to the guardian ad litem's determination of best interests and shall be weighed according to the competence and maturity of the child. In any event, the guardian ad litem shall inform the court as to the wishes and preferences of the child.

(8) If, after discussion between the child and the guardian ad litem, the child's interests as identified by the child are inconsistent with the guardian ad litem's determination of the child's best interests, communicate the child's position to the court and ask the court to appoint legal counsel to represent the child.

(9) Monitor the implementation of case plans and court orders and determine whether services ordered by the court for the child or the child's family are being provided in a timely
manner and are accomplishing their purpose. The guardian ad litem shall inform the court in the services are not being provided in a timely manner, if the family fails to take advantage of these services, or if the services are not accomplishing their purposes.

(10) Consistent with the rules of professional responsibility, identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.

(b) Attorney-client or any other privilege shall not prevent the guardian ad litem from sharing all information relevant to the child's best interests with the court.

(c) The guardian ad litem shall not be called as a witness to testify and the file of the guardian ad litem shall not be discoverable.

(d) The guardian ad litem is afforded immunity against ordinary negligence for actions taken in furtherance of his or her appointment.

Section 700.427 and 700.437

Section 427:

(4) If, at any time in the proceeding, the court determines that the best interests of the minor are or may be inadequately represented, the court shall appoint an attorney as guardian ad litem to represent the best interests of the minor.

(5) In each case filed under this Act, where the court has appointed an attorney as guardian ad litem to represent the child's best interests:

(a) The guardian ad litem shall:

(1) Serve as the independent legal representative of the child's best interests entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(2) Determine the facts of the case by conducting an independent investigation including interviewing the child, social workers, family members, and others as necessary, and be reviewing reports and other information.

(3) Before each proceeding or hearing, meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the parents, the guardians and the caseworkers.
(4) Explain to the child according to the child’s ability to understand the proceedings, the guardian ad litem’s role, and those circumstances under which the guardian ad litem may disclose information to the court.

(5) File all necessary pleadings and papers and independently call witnesses on behalf of the child.

(6) Attend all hearings and substitute counsel only with court approval.

(7) Make a determination as to the best interests of the child and advocate for the best interests as the guardian ad litem sees them regardless of whether that determination reflects the wishes of the child. The wishes of the child are relevant to the guardian ad litem’s determination of best interests and shall be weighed according to the competence and maturity of the child. In any event, the guardian ad litem shall inform the court as to the wishes and preferences of the child.

(8) If, after discussion between the child and the guardian ad litem, the child’s interests as identified by the child are inconsistent with the guardian ad litem’s determination of the child’s best interests, communicate the child’s position to the court and ask the court to appoint legal counsel [as defined in mcl 712a.13a] to represent the child.

(9) Monitor the implementation of court orders.

(10) Consistent with the rules of professional responsibility, identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.

(b) Attorney-client or other privilege shall not prevent the guardian ad litem from sharing all information relevant to the child’s best interests with the court.

(c) The guardian ad litem shall not be called as a witness to testify and the file of the guardian ad litem shall not be discoverable.

(d) The guardian ad litem is afforded immunity against ordinary negligence for actions taken in furtherance of his or her appointment.

(e) The court may assess the cost and reasonable fees of the guardian ad litem and legal counsel against one or more of the parties involved, totally or partially. All fees paid to such guardian ad litem or legal counsel shall be received and approved by the court.
Section 437

(3) If, at any time in the proceeding, the court determines that the best interests of the ward are or may be inadequately represented, the court shall appoint an attorney as guardian ad litem to represent the best interests of the ward as provided in MCL 427(5).

Section 722.24
Section (4):

(1) In each action now pending or filed after the effective date of the mandatory act that added subsection (2) in a circuit court involving dispute of custody of a minor child, the court shall declare the inherent rights of the child and establish the rights and duties as to custody, support, and parenting time of the child in accordance with this act.

(2) If, at any time in the proceeding, the court determines that the best interests of the minor are or may be inadequately represented, the court may appoint an attorney as guardian ad litem to represent the best interests of the child.

(a) The guardian ad litem shall:

(1) Serve as the independent legal representative of the child's best interests entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(2) Determine the facts of the case by conducting an independent investigation including interviewing the child, social workers, family members, and others as necessary, and be reviewing reports and other information.

(3) Before each proceeding or hearing, meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the parents, the guardians and the caseworkers.

(4) Explain to the child according to the child's ability to understand the proceedings, the guardian ad litem's role, and those circumstances under which the guardian ad litem may disclose information to the court.

(5) File all necessary pleadings and papers and independently call witnesses on behalf of the child.
(6) Attend all hearings and substitute counsel only with court approval.

(7) Make a determination as to the best interests of the child and advocate for the best interests as the guardian ad litem sees them regardless of whether that determination reflects the wishes of the child. The wishes of the child are relevant to the guardian ad litem's determination of best interests and shall be weighed according to the competence and maturity of the child. In any event, the guardian ad litem shall inform the court as to the wishes and preferences of the child.

(8) If, after discussion between the child and the guardian ad litem, the child's interests as identified by the child are inconsistent with the guardian ad litem's determination of the child's best interests, communicate the child's position to the court and ask the court to appoint legal counsel [as defined in MCL 712a.13a] to represent the child.

(9) Monitor the implementation of court orders.

(10) Consistent with the rules of professional responsibility, identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.

(b) Attorney-client or other privilege shall not prevent the guardian ad litem from sharing all information relevant to the child's best interests with the court.

(c) The guardian ad litem shall not be called as a witness to testify and the file of the guardian ad litem shall not be discoverable.

(d) The guardian ad litem is afforded immunity against ordinary negligence for actions taken in furtherance of his or her appointment.

(e) The court may assess the cost and reasonable fees of the guardian ad litem and legal counsel against one or more of the parties involved, totally or partially. All fees paid to such guardian ad litem or legal counsel shall be received and approved by the court.

Section 722.27

Section 7(1):

(e) Appoint an attorney as guardian ad litem for the child and assess the costs and reasonable fees against one or more parties involved, totally or partially. The guardian ad litem's duties are those set out in MCL 722.24.