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Feature

The Changing American Family and the Law

***13 BEST PRACTICES FOR BEST INTEREST ATTORNEYS**

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Representing children in custody proceedings has often been the mental safe harbor for family law attorneys who are regularly exposed to the worst side of their adult clients in custody litigation. In the last several years, however, litigation and the legislative process have transformed the child counsel landscape, and the attorney who accepts appointment as a Best Interest Attorney is well-advised to develop a distinct set of protocols to insure that he or she provides quality representation to the minor client in accordance with these changes.

***14** This article will briefly highlight areas of concern and certain practices that have proven effective over time, but will only discuss representation provided pursuant to appointment as a Child's Best Interest Attorney under [Maryland Rule 9-205.1](#), not Child's Advocate Attorney nor Child's Privilege Attorney.

[Maryland Rule 9-205.1](#) became effective in July 2007, and since that date all appointments of counsel for children must comply with the provisions of that Rule. So when you accept an appointment as Best Interest Attorney carefully review the Court Order. While some courts now issue standardized Orders that reflect [Rule 9-205.1](#), others continue to use their old Orders (one of the authors recently received an Order of Appointment, apparently not updated, which called for a *report* at least 15 days before trial). If there is any ambiguity or error in the Order contact the court *and* counsel for guidance. The prohibitions on *ex-parte* communication apply, however. If you are new to practice or unsure as to how you should proceed, consult with experienced counsel.

The Best Interest Attorney has no allies in the case. All parties will seek to influence your position, and all parties are potential adversaries if they detect or perceive bias, unfairness or a lack of diligence in your work. It is a good practice to begin your involvement with a letter to both counsel, or to a party *pro se* if that party is unrepresented, outlining your methodology and requesting that you be contacted. Request a set of pleadings and a copy of any discovery completed to date.

The appointment of the Best Interest Attorney is often made deep into the litigation, thus, some care must be taken to get up to speed. The booklet "Representing Children in Contested Custody Cases in Maryland," produced by the Administrative Office of the Courts and provided to all attorneys who accept appointments as counsel for children in conjunction with the required training, includes a fine example of just such a letter.

It is a good practice to maintain contact with all counsel as you proceed with your investigation. Keep in mind that

all lawyers are paranoid to some extent (as we tell our clients, we are paranoid so that you don't have to be ...) and each counsel will likely assume at some point that opposing counsel "... has your ear ...," so it is imperative that each also be made to feel that you have taken their client's concerns seriously.

Be greedy for data. It is said that a Best Interest Attorney only sees a snapshot of the family, so get plenty of snapshots. You don't have the luxury of obtaining a detailed family history from your client, but you can get an edited history from each party provided that their counsel allows you a one-on-one meeting. Your initial letter referenced above should request such a meeting. When the party calls for that appointment they will ask you what they should bring. Tell them everything!

Everyone wants to make a good first impression and this is your opportunity to obtain report cards, photos, work commendations, what we call "good deed documents." Facts are wonderful things. Use that first meeting to establish home, work and school schedules and lock in significant dates. Get names and telephone numbers for all collateral witnesses at this meeting and, if the party does not have this information readily available, make arrangements to have this information sent to you by a date certain. Again, at this state of your representation everyone wants to help you, so let them. If the children are school age, be sure to get teacher and guidance contact information.

Block out a significant amount of time for that first meeting. No one likes to feel rushed when they have points to make.

Care must be taken when speaking with the collateral witnesses because non-family members usually do not want to be seen as taking sides. Just be certain that you call every name provided to you by either party. Counsel will surely find out if you do not. Consider meeting with teachers, therapists and the like on-site, where they may be most comfortable and where records may be handy. Ask all knowledgeable collateral witnesses for the names of additional witnesses who have knowledge of the situation: while the parties may think that their problems are known to a select few, the reality is usually far different. Leave no stone un-turned so as to reduce the odds of your being second-guessed.

First Meeting with your Client: Opinions vary as to where and when the first meeting with your client should take place. We suggest that the first meeting take place as soon as possible after your appointment as Best Interest Attorney and certainly before your impression of your client is colored by the reports and evaluations of others. Make your own assessment of your client and then fill in the gaps. You are of little value to the Court if you merely "piggyback" onto the conclusions of others.

We also suggest initially meeting with your client in your office. Children of all ages are going to be nervous at this first meeting but you should be able to exercise greater control of your office environment and thus limit distractions.

Home Visits: Parties often want to schedule a home visit at the conclusion of the first meeting. [Rule 9-205.1](#) does not specifically require a home visit by the Best Interest Attorney nor do most Orders of Appointment. Unless there is an over-riding concern as to the home environment, a home visit may be of limited value (and if there is an *15 over-riding concern as to the home environment then perhaps a formal Home Study is in order). A better practice is to request photographs of the home environment from each party. If either's photographs raise a concern then you will actually have something to investigate during your home visit.

If you do undertake a home visit consider the following: Where does the child sleep? If more than one child, are there sufficient beds? Where does the child play and are there age appropriate toys? Does the child have his own room? Does the child's room have age appropriate furniture? In some of the larger jurisdictions your local Family Support Services will have trained investigators who handle home visits for the Court, and these professionals will often provide you with additional areas to investigate during your home visit.

Trial: If the matter proceeds to trial you must be prepared to advocate and defend your position, particularly if your position differs from *your* client's (and if your position does differ from your client's you should probably review *your* position to determine why inasmuch as you need to present the client's position even while advocating for a different result). That means preparing your proof chart and exhibits, selecting witnesses where appropriate and preparing your witness examinations. The *record* must support your position, so don't expect to "piggyback" upon the trial work of other counsel. Best Interest Attorneys, when appropriate, are expected to ask the questions of witnesses that other parties' counsel, for tactical reasons, may decline to ask and to call the witnesses that neither party, for tactical reasons, may wish to call.

What happens if your minor client discloses the existence of abuse or some other highly damaging information but does not wish for you to reveal this information? The relevant ethical rules are found in Rules of Professional Conduct 1.6 and 1.14, concerning confidentiality and dealing with clients of diminished capacity. Your decision to disclose or remain silent turns on the notion of whether you are representing the actual child (in which case you do not disclose) or merely the concept of "the child's best interest" (in which case you disclose). States that have considered this issue use the term "Guardians Ad Litem" as opposed to our "Best Interest Attorneys," but the title does not appear to effect the result in this context.

The ABA Standards and Colorado's Court of Appeals have taken the position that the attorney for the child represents the child and not simply "the child's best interests" and thus far upheld the confidentiality of the relationship and not permitted the Guardian Ad Litem to testify to the child's confidential statements absent the child's consent. The Virginia State Bar, on the other hand, is tentatively promulgating a regulation which permits a lawyer to reveal privileged information. Their position appears to stem from the fact that lawyers for children are subject to the Rules of Professional Conduct, except when the special duties of a Guardian Ad Litem conflict with such rules.

The Colorado result may not be as clear-cut as first appears, however, as the original Colorado opinion declining to waive the privilege did so in part because counsel did not offer evidence to establish that any of the exceptions to Rules 1.6 and 1.14, which permit a lawyer to reveal client communications in certain limited circumstances, applied. Further, a fair reading of Rule 1.14 suggests that it is not so much a question of conflicting with the rules as dealing with the reality that you are representing a person with ostensibly diminished capacity.

What is clear, however, is that you need, in such instances, to parse through a careful analysis of the Rules, consult with an attorney with experience in interpreting these particular Rules, and come to a considered opinion. This must be memorialized in your file in some fashion. As in many other instances of potential scrutiny, the issue is not always what you did, but what, if any, record you have of your analysis.

Finally, handle your examination of the parties with care. In custody litigation everyone has something to hide, and you as the Best Interest Attorney may be uniquely positioned to develop critical factual testimony. But, keep this in mind: the parties may not long remember any good you do, but if you make their relationship worse with a scorching examination, they will long feel the harm you have done.

Your client has to live with the parties afterwards, and you want to leave him or her in a better situation than existed prior to your appearance. This is not to say that you shirk any responsibilities, but rather, be mindful of the long-term goal of a better life for your client in his or her home environment. Hard questions which must be asked can be asked without sounding antagonistic. It is often better to sound as if the line of questioning were regrettable, but necessary, rather than something you actually relish.

As we stated above, the Best Interest Attorney has no allies in the case. Exercise due diligence, make the telephone calls that you need to make and meet with the witnesses you need to meet and you will have discharged your duties as a Best Interest Attorney, and helped a child in the bargain.

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