

What Constitutes Malpractice by a Child Welfare Attorney?

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By **Elisa Reiter and Daniel Pollack** | May 24, 2021 at 06:53 PM



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Attorneys are expected to adhere to high standards of professional conduct and competence and to provide representation in accordance with best practice guidelines. The term legal malpractice implies that an attorney has been negligent or

has breached a fiduciary duty. This can occur in many different ways, often depending on the particular area of law in which the attorney practices. The legal landscape and complex challenges facing today's child welfare attorney are daunting. Simply because children are involved, difficult legal situations demand the guidance of a highly qualified attorney.

Adverse results are not necessarily the result of malpractice. This article provides an overview of some common malpractice mistakes that child welfare attorneys make. Among them are the following:

- Missing a filing date;
- Having a conflict of interest;
- Breaching a fiduciary duty;
- Engaging in fraud or embezzlement;
- Representing a client's wishes incorrectly or without their consent.

[Texas Family Code Section 107](#) addresses special court appointments, including the appointment of an *attorney ad litem* ("AAL") and/or an *amicus* attorney ("AA"). In Texas, the powers of such court-appointed counsel are subject to [Rules 4.02, 4.03, and 4.04, Texas Disciplinary Rules of Professional Conduct](#).

TFC Section 107 mandates that an attorney court-appointed to represent a child must, within a reasonable amount of time after the appointment, interview the child in a developmentally appropriate manner to ascertain the child's desires. In doing so, attorneys may not present themselves as disinterested, as payment by the State or county potentially gives the attorney an interest in the outcome of the case. In addition to interviewing the child, counsel has the right and obligation to be a participant in the case, and further, to access information pertinent to the case.

From the comments to TFC 107.003: “[m]ost challenging is the requirement to ‘interview the parties to the suit’.” Court appointed counsel must remember that they are bound by the rules of ethics; court appointed counsel may not contact other parties represented by counsel without their written consent. Pursuant to the holding in the case of [In re Collins](#), this section does not authorize an amicus attorney to serve as next friend in other lawsuits nor does it authorize such an attorney to expedite a SAPCR by using powers not otherwise conferred by statute. However, the Guardian Ad Litem (“GAL”), AAL and AA have the [right to access](#) information regarding the child, including but not limited to

... social services, law enforcement records, school records, records of a probate or court proceeding, and records for a trust or account for which the child is a beneficiary. . . as well as medical, mental health or drug or alcohol treatment record of a child.

If a court appointed attorney fails to engage in acts consistent with the duties set out in TFC Sections 107.003 and 107.004, said attorney is subject to disciplinary action pursuant to [Subchapter E, Chapter 81 Government Code](#).

The GAL, AAL and AA act as the arm of the Court. The statute builds in [qualified immunity](#), to the extent that such court appointed counsel is not “liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the capacity of guardian ad litem, attorney ad litem, child custody evaluator, or amicus attorney”. What constitutes the disclaimer? If the GAL, AAL or AA takes an action, makes a recommendation or gives an opinion

- (1) with conscious indifference or reckless disregard to the safety of another;
- (2) in bad faith or with malice; or
- (3) that is grossly negligent or willfully wrongful.

In J.R. v. Texas Department of Family & Protective Services, Father appealed a termination, arguing that the attorney ad litem failed to express the child's desire to live with the father, thereby breaching his duty to represent the child's expressed objectives of representation in a developmentally appropriate manner. The Court of Appeals held that the father lacked standing to assert complaints about alleged shortcomings in representation of the child. By contrast, the Fort Worth Court of Appeals held in In Re T.N. that where the record demonstrated that the AAL did not meet with his clients until three days after trial began, there was a violation of the mother's due process and equal protection rights under both the Texas and U.S. Constitutions. The Court noted:

The record demonstrates that the children's attorney *ad litem* did not meet with his clients until three days after trial began. It also demonstrates no evidence of the children's desires about termination. While we do not reach the substance of Mother's complaint, we are appalled that any attorney, much less one appointed to represent the interests of vulnerable children, could fail to meet with his clients, not to mention fail to ascertain his client's trial objectives, until such trial was well underway.

In Strickland v. Washington, cited in Bone v. State, the appellate court held: In order to triumph on an allegation of ineffective assistance of counsel point of error, “appellant must prove, by a preponderance of the evidence, that his counsel's

performance was deficient” and that “this deficient performance prejudiced his defense.”

Why interview the child? Why obtain records? [Atticus Finch](#) would say that “[y]ou never really understand a person until you consider things from his point of view ... until you climb into his skin and walk around in it”. While Atticus Finch may be the role model for 20th century attorneys, John Grisham’s characters provide ample fodder reaching to the 21st century. As Grisham writes in [The Client](#):

Children make lousy clients. The lawyer becomes much more than a lawyer. With adults, you simply lay the pros and cons of each option on the table. You advise this way and that. You predict a little, but not much. Then you tell the adult it’s time for a decision and you leave the room for a bit. When you return, you are handed a decision and you run with it. Not so with kids. They don’t understand lawyerly advice. They want a hug and someone to make decisions. They’re scared and looking for friends.

Be thorough. Be friendly. Be a lawyer.

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