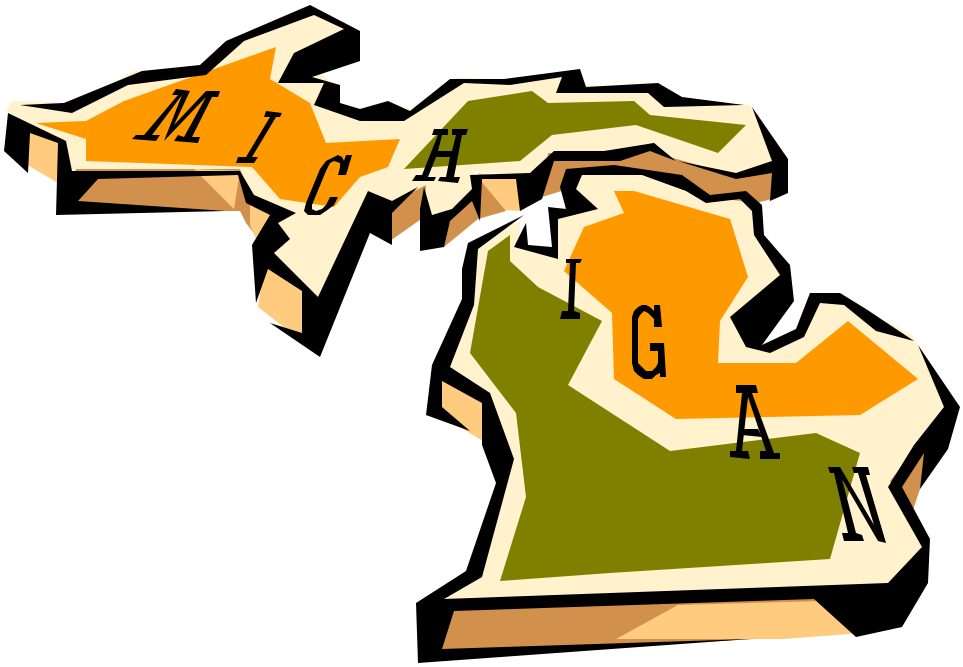
A CHALLENGE FOR CHANGE:
IMPLEMENTATION OF THE MICHIGAN LAWYER-GUARDIAN AD LITEM STATUTE

FINAL REPORT



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Center on Children and the Law

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DISCLAIMER

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In three court circuits, dedicated court staff, lawyer-guardians ad litem, caseworkers, parents, foster parents, and foster children, generously gave their time, shared experiences, and provided detailed descriptions of their evaluation of the Michigan lawyer-guardian ad litem statute during focus group discussions. We also want to thank those individuals who attended the focus groups from neighboring circuits. We give special thanks to these individuals, who are unable to be named due to promised anonymity, for granting to project staff time for interviews and case-related information.

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CHAPTER 1: BACKGROUND, SCOPE OF THE INVESTIGATION AND EVALUATION METHODOLOGY

Introduction

As documented in the ABA's national summary of state court self-assessments conducted in the late 1990s, many states have serious, pervasive problems in the representation of children in child protection cases.[i] To address this problem in its own dependency proceedings, the State of Michigan recently enacted one of the nation's most detailed sets of mandatory guidelines for representing children. Through 1998 legislation (MCL 712A.17d) and court rule (Probate Court Rule 5.915(B)(2), Michigan has specified key duties and responsibilities for lawyer-guardians ad litem.

With regard to the quality of representation of children, we know that performance is very uneven throughout the United States. In many states, if attorneys meet with their child clients at all, they first meet before each hearing in the hallways of the courthouse, leaving little opportunity for private or quality discussion.[ii] To help eliminate such poor practice, the Michigan statute and rules are quite directive. For example, before each hearing lawyer-guardians ad litem must not only meet the child and assess the child's needs, but also review the case file and confer with the foster parents and caseworker.[iii] Further, the law directs lawyer-guardians ad litem to play a very active role in many aspects of the child's case. They must: file necessary pleadings and papers; independently call witnesses; attend all hearings; in most cases, continue representing the child until the case is closed; and monitor the implementation of case plans and services and inform the court of problems. They are expected to conduct independent investigations of each case. Where appropriate, they must ask the court to permit them to advocate for the interests of the child in legal proceedings separate from the child protection case.[iv]

To determine whether the requirements of this statute were in fact being met, the State of Michigan commissioned an independent study. In the summer of 2001, the State awarded a contract to the American Bar Association's Center on Children and the Law to evaluate implementation of the lawyer-guardian ad litem statute. One basic question was behind the evaluation: are attorneys doing the job that is prescribed by the statute? Using a multi-method approach, the ABA set out to answer that basic question, and several other more detailed questions.

What follows is a report on that study conducted by the American Bar Association's Center on Children and the Law. This chapter describes the background of the evaluation, the reasons the State of Michigan enacted additional responsibilities for lawyer-guardians ad litem, and some of the support for and critique of the statute. It further describes the key research questions behind the study, and the methods used to answer those questions.

A final issue to be aware of is that the findings of this report represent a baseline of information for the State of

Michigan from which they can proceed to continually improve the representation of children. There has been no assessment of these requirements prior to this report, and therefore there is nothing available against which to gauge any progress. At times, however, the perspective of individuals who have been involved in the system for several years is included to present some sense of whether or not things have actually changed in the State of Michigan with regard to the representation of children.

Overview of Major Evaluation Issues

There are several major issues that this evaluation focuses on that are clearly enumerated in the research and in the statute itself. These issues include: to what extent the L-GAL represents the "child's wishes versus best interests"; professional responsibility of the lawyer-guardian ad litem; training; budgetary impact of added responsibilities; and general support and criticism of the statute. Each of these areas is covered briefly in the paragraphs below.

Child's Wishes Versus Best Interests

Many attorneys nationally face confusing circumstances in representing children, and often do not have clearly defined roles. Laws may not be clear as to whether the attorney's role involves determining and presenting the child's best interests, serving as a traditional attorney representing the child's expressed wishes, or functioning as a blend of the two. In many states, individuals appointed to "represent" and "protect" a child in a protection proceeding face the conflicting responsibility of representing the child's "wishes" and advocating for the child's "best interests". The dual role of counsel and guardian ad litem leads attorneys to look to the courts and state statutes for assistance in determining which role takes priority. Such attorneys are usually offered minimal guidance from court rules or laws.

The Michigan Lawyer-Guardian Ad Litem statute (MCL 712A.17d) is intended to alleviate some of this confusion and to redefine the role of the guardian ad litem and traditional legal counsel in child protection proceedings.[v] The Michigan statute establishes and defines the role of "lawyer-guardian ad litem" in representing children.[vi]

Earlier legislation required Michigan to appoint legal counsel for children in abuse/neglect cases -- but the role of the legal counsel was unclear and confusing. Many lawyers were uninvolved and inactive in the role. Some represented what the lawyer saw as the child's *best* interests while still others represented the child's *stated* wishes. The new legislation attempts to clarify the role of the child's legal representative. The new statute requires courts to appoint a lawyer-guardian ad litem who would be a licensed attorney obliged to represent the child's best interests.[vii] In determining the child's best interests, the lawyer-guardian ad litem is to recognize the developing competence of a child to direct his or her legal counsel by giving weight to the child's wishes according to the child's competence and maturity. That is, the statute directs the lawyer-guardian ad litem to determine and advocate for the child's best interests while simultaneously obligating him or her to also take the child's wishes into consideration.[viii] In addition, when the LGAL's determination of the

child's best interests differs from the child's, the lawyer-guardian ad litem is to inform the court of the child's wishes and preferences except when the child asks that the wishes and preferences remain confidential. Thus, the lawyer-guardian ad litem must determine what is in the child's best interest and advocate that position to the court regardless of whether the determination reflects the expressed wishes of the child.[ix]

Under the traditional model of legal counsel, by contrast, an attorney would not be permitted to present the court with information that differs from the client's wishes.[x]

In the event that the wishes of an older and mature child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian is to notify the court of the disagreement. It is then up to the court to decide whether to appoint a separate attorney to represent the child's wishes, based on the child's age and maturity and the nature of the inconsistency between the views of the lawyer-guardian ad litem and the child.

Upon appointment of a separate attorney to represent the child's wishes the newly appointed attorney is to perform the same duties as a traditional attorney of vigorously advocating for the expressed wishes of the child. The lawyer-guardian ad litem continues to advocate for what the L-GAL sees as the child's best interests.

Advocates for this legislation believe that allowing the lawyer-guardian ad litem to be forthcoming with a judge and to relay any facts that the court might need to know in making the final determination of the case will assist the judicial system in obtaining the best outcome for the child.[xi] The statute is meant to ensure that the child's voice is heard by the court, as the lawyer-guardian ad litem is obligated to present the child's wishes to the court even if they differ from the guardian ad litem's determination of best interests.[xii]

Studying the impact of the statutory delineation of the responsibilities of attorneys representing children presents unique challenges. The understanding attorneys and judges have of these roles is critical to the statute's success. Understanding the practicalities of how the simultaneous representation of best interests while taking into account the wishes of the child is key to the implementation of the statute. When and how often do lawyer-guardians ad litem actually raise these differences, and why? When and how often do judges appoint separate attorneys to represent children's wishes and why? How much has practice changed so far and why?

It is important to note that the law includes other important requirements affecting the role of the child's court-appointed legal representative. As indicated above, the lawyer-guardian ad litem is to safeguard the attorney-client privilege and reveal information about the child's wishes only when consistent with that privilege.

Key to assessing the privilege issue is determining whether or not attorneys are having difficulty in keeping the child's confidence when faced with the possibility of having to air conflicts between the child's best interests and the child's expressed wishes. The lawyer-guardian ad litem must

explain to the child the limits of the client-child relationship under the statute, and the child's understanding of this relationship is important. Further, due to the lawyer-guardian ad litem's expanded role and increased responsibilities, court appointed attorneys might be more likely to also represent the child more in other judicial proceedings (e.g., domestic relations cases) after implementation of the statute. Does this present any particular problems or conundrums?

Professional Responsibility

Another provision affecting counsel's role is that the lawyer-guardian ad litem is to identify common interests among the parties and promote a cooperative resolution of issues in the case. These duties are to be performed "consistent with the rules of professional responsibility." We determined the extent to which this is taking place, including whether the statute has changed practice and, if not, why not.

In summary, there are many issues surrounding the Michigan Lawyer-Guardian Ad Litem statute that have presented challenges for its evaluation.

The fundamental question is, of course, whether there has been value added to child protection proceedings by individuals accepting and adhering to the new roles and responsibilities of the lawyer-guardian ad litem, including better representation, improved information made available to the court, judges making better decisions, and children being better served.

Training

Essential to any major change in policy or in the roles and responsibilities of individuals providing services to children is the training that must accompany that change. One issue, for example, is whether training provided to lawyers addresses all critical aspects of the statute, including, legal representation, factual investigation, and helping the child access services. The parties affected by the statute must be trained to adequately fulfill all their new roles and responsibilities. The issue of training is addressed in this evaluation.

Budgetary Impact

Finally, does the legislation have a financial impact? This could include training costs, the need for new office space, the need for additional attorneys, increased compensation for attorneys because of expanded duties, and other projected and unanticipated costs. The legislature may or may not have provided adequate funding to fulfill all aspects of the statute for effective implementation, and there may or may not have been a satisfactory funding mechanism in place at the time of the bill's passage.

Support and Criticism of the Statute

There has been both support and criticism of the statute since its implementation. In 2000, Frank Vandervort wrote about the perceived strengths and weaknesses of the lawyer-guardian ad litem statute.[xiii] In 1997, Albert Hartmann highlighted several policy issues related to the legislation and analyzed four components prior to its passage.

In Hartmann's article supporting revision of the Michigan statute, he

expressed the view that a new statute was necessary to more clearly define the rights and duties of attorneys representing children.[xiv] He argued that the role of lawyer-guardian ad litem provided flexibility, allowing the child to make some decisions regarding the case. He saw training as essential for the lawyer-guardian ad litem to properly perform his or her function of counseling the client and having the child help set the goals of the representation.

In contrast to the traditional child representation model, the lawyer-guardian ad litem would be obliged to determine the goals of the representation but must not ignore the client's wishes. Training would help make "best interests" decision-making less subjective, helping eliminate racial or class prejudices and stereotypes. Lastly, he suggested that such new legislation would send a message that the outcome of cases should be objectively determined by the child's best interests with respect to the facts, yet balanced with information on the expressed wishes of the child.[xv]

Frank Vandervort has likewise described the strengths of the lawyer-guardian ad litem statute, suggesting that the new statute has improved the quality of legal representation children receive.[xvi] He concludes that Michigan lawyers believe that representing a child in child protection proceedings is a complex and difficult job, and is as serious as representing adults. He reports that attorneys claim that they are striving to meet with their clients, are more actively involved in proceedings, are following investigation requirements, and are asserting strong positions in court.

He further suggests that the statute now assures access to all relevant information regarding the child, access to records relating to the parents (e.g., mental health records to ensure services are being provided), and access to all records possessed by public and private child welfare agencies (e.g., records access can help monitor whether referrals were made for drug treatment). He applauds efforts to resolve cases cooperatively, which has potential to reduce unnecessary adversarial posturing and litigation.

Vandervort also noted some shortcomings in the statute. Foremost, he noted a lack of funding to support the proper implementation of new responsibilities for the lawyer-guardian ad litem. For example, the legislation provided no additional funding to counties to support increased attorney workloads. The flat fee that many counties pay attorneys was not raised even though additional responsibilities were placed on them. The statute did not provide resources to train lawyer-guardians ad litem in the proper methods of interviewing child clients. Without such training, he suggests, lawyers may upset an already fragile child.

Vandervort also points out that the current statute does not recognize differences between urban and rural caseloads. He says that attorneys in some areas will be unable to meet statutory requirements because there are simply not enough attorneys available. He also notes that some courts are entertaining parents' attorneys' objections if the lawyer-guardian ad litem has not complied with each statutory requirement, despite case law establishing that a parent lacks standing to raise ineffective assistance of counsel claims

against the child's legal representative.[xvii] He also contends the statute does not sufficiently guide the lawyer-guardian ad litem or the courts regarding factors for determining the child's best interests. This contrasts with the Michigan Child Custody Act, which lists 12 criteria that must be assessed when determining best interests in domestic relations proceedings.[xviii]

Vandervort also notes several weaknesses with the best interests and expressed wishes provision in the statute. For instance, he argues, it provides for an attorney-client privilege yet allows it to be violated so the lawyer-guardian ad litem can tell the court the child's wishes. In addition, the statute contains no provision as to how the lawyer-guardian ad litem is to communicate to the judge that a conflict exists. Will the lawyer-guardian ad litem stand in open court and declare a conflict, or is it to be accomplished through an *ex parte* communication? Finally, he observes that the statute does not define or limit when the lawyer-guardian ad litem should seek and obtain the court's permission to pursue other issues for the child.[xix]

Scope of the Investigation and Evaluation Methodology

Not only does this assessment evaluate whether the requirements of the statute are being met, it also examines information from counties and circuit courts about the fiscal impact the statute has had since its enactment. Any legislative amendments or changes in implementation strategies should carefully evaluate the fiscal impact of the statute and the availability of needed funding. This must include considering both the statutory requirements for legal representation and funding resources (e.g., public and private dollars) available and needed to meet those requirements.

Several different research methods are used to evaluate the implementation and success of Michigan's lawyer-guardian ad litem statute. The ABA examines each specific aspect of the statute using multiple primary methods. These include LGAL compensation survey, written surveys of groups of individuals involved in child welfare cases, telephone surveys of selected members of those groups, focus groups, and reviews of selected case files. The evaluation also examines the financial impact of the statute to the degree possible based on reported information.

In order to fulfill this contract, the ABA has now completed a thorough evaluation of the Michigan Lawyer-Guardian Ad Litem statute, MCL 712A.17d including applicable court rules. The ABA established processes and methods in conjunction with the project Advisory Committee to accomplish the following objectives:

- Establish the extent to which the specific elements of the statute and court rule have been implemented.
- Identify which elements are not fully implemented and the key reasons for lack of implementation.
- Identify the primary barriers to successful implementation.
- Indicate general perceptions regarding the impact of the law on the child welfare system from various stakeholders' perspectives (e.g., does it promote permanency, child safety, etc.)

The evaluation methods were intended to answer the following questions. To what extent do counsel actually fulfill these duties as intended by the law? Where counsel falls short of meeting these responsibilities, why does this occur? How much has changed since the law took effect? Where counsel fulfills their new responsibilities under the law, what is the added value to the courts in the form of better and more complete information? Is this new system of representation cost effective? What is its impact, ultimately, on children and their families? More specifically, the following areas are addressed by this evaluation:

- How lawyer-guardians ad litem are appointed
- How and when separate attorneys for the child are appointed
- The extent to which lawyer-guardians ad litem receive increased access to information.
- The extent to which the lawyer-guardians ad litem conduct an independent investigation regarding the case.
- The extent to which lawyer-guardians ad litem meet with the child and appropriate parties.
- The extent to which lawyer-guardians ad litem explain their role to the child.
- The extent to which lawyer-guardians ad litem independently present a case on behalf of the child, including calling witnesses, and filing necessary pleadings.
- The extent to which representation is consistent throughout various stages of court proceedings.
- The extent to which lawyer-guardians ad litem are present at all hearings.
- The extent to which there are conflicts between the child's best interest and the child's wishes and whether or not these conflicts are reported to the court.
- The extent to which the lawyer-guardians ad litem monitor case plans, court orders and services.
- The extent to which the lawyer-guardians ad litem promote cooperative resolutions among the parties.
- The barriers to any or all of the above and to the overall implementation of the statute.
- The financial impact of the statute especially upon courts and court-appointed attorneys.
- Opportunities for training, and how training has impacted implementation.
- Assessment of the overall context of the environment in which the statute is being implemented, including court organization, the socio-economic climate and the service delivery system.

Compensation Survey

During December 2001, ABA project staff designed a compensation survey for distribution to Michigan counties. The survey was designed to poll counties about the manner in which they pay lawyer-guardians ad litem, how much they pay LGALs, and the amount of county funds that have been spent over the past few years. The instrument was sent to the SCAO, which provided comments and suggestions.

There were delays in mailing the compensation survey due to another survey on a different topic being sent at the same time to many of the same people. At the end of January 2002, the SCAO disseminated our compensation survey to county officials. In addition, we requested a list of attorneys handling child protective cases. The project team made second and third requests until the project team was satisfied with the results.

Ultimately, we received compensation surveys from 59 of the 83 counties in Michigan. At least one county from 47 circuits was represented, out of the total 57 circuits.

Mail Surveys

The ABA evaluation team developed separate mail survey instruments for judges, lawyer-guardians ad litem, and child welfare agency personnel. The distribution process for each group differed. The ABA assured that the surveys were kept anonymous upon their return, and identifying information was kept only for the purpose of second mailings or telephone surveys, if needed. No identifying information is presented in this report. The ABA project team further assures that all aspects of privacy and anonymity are respected.

There were several difficulties experienced at the beginning of the project with regard to the mail surveys in general. There were anthrax scares in the Washington, DC area mail delivery service that led the ABA to decide to prepare compensation survey packets and send those packets to the SCAO for mailing from Michigan. The ABA and the SCAO agreed that a postmark from Michigan would lessen any potential problems with mail being discarded unopened. It was also believed that the SCAO letterhead would increase response rates from the courts.

The project team attributes initial difficulty in achieving a response rate to several factors, including the anthrax contamination of federal buildings. The ABA's mail is processed through the Brentwood mail distribution facility in Northeast Washington that was closed after contamination with anthrax. Although the mail surveys were disseminated months after the initial scare, we received several surveys irradiated by the US Postal Service during the duration of the project, indicating that the surveys were arriving at the facility as heightened security measures were implemented. While some of the mail processed through Brentwood may simply be lost, the facility may still be holding mail and it is likely that the response rate is lower as a result. The impact that heightened security measures and increased public scrutiny of personal mail had on this research method is impossible to measure.

These difficulties were overcome, however, and the ABA project team believes the results that were finally achieved are representative of counties and circuit courts across Michigan, both in size and geographic location.

Mail Survey to Lawyer-Guardians Ad Litem.

The cover letter for the compensation survey also requested a list of court-appointed lawyer-guardians ad litem.

These lists formed the base for the attorney mail survey. We received attorney lists from 37 counties out of the 83 counties in Michigan. At least one county from 30 circuits was represented out of the total 57 circuits.

Our 11-page survey was disseminated to 220 lawyer-guardians ad litem. Standard research methods were used to ensure as high a response rate as possible. First, a cover letter explained the importance of the study and urged its completion. Second, a self-addressed stamped envelope was included and participants were given the option of faxing the return survey. Third, the project team made a second request with a postcard for those who did not return the survey by the requested date. Fourth, a second mailing of the survey, with another self-addressed stamped return envelope, was sent with another request to complete the survey. We also made the instrument available to attorneys electronically.

The lawyer-guardian ad litem response rate was 29 percent (63 responses/220 disseminated). Only eight were returned with bad addresses. The low response rate is attributable to the unwillingness of lawyer-guardians ad litem to share information that might cast their work in a less than exemplary light, and was not entirely unanticipated. The responses received are geographically representative, and are supplemented by information from the focus groups.

Mail Survey to Judges.

Surveys to judges across the State of Michigan were made available to them by electronic mail. The SCAO provided the ABA with a list of electronic mail addresses. Surveys were sent to the Chief Judge (or presiding Family Judge where indicated) of each circuit or, where no email address was available, to the family division administrator. Each of the judges and administrators was also asked to provide copies of the instrument to their referees or judicial officers who also handled child protection cases. An initial electronic mail message was sent to each Chief Judge with the survey and cover letter attached. When responses were not received, subsequent emails were sent seeking a completed questionnaire and stressing the importance of the study.

It is difficult to ascertain the exact response rate, not knowing how many referees and judicial officers handle child protection cases in each circuit or county. We received a total of 66 mail surveys from judges and referees. Twenty-seven of 57 circuits responded. Of the judges that responded, 15 indicated they were chief judges.

Mail Survey to Caseworkers.

During July 2002, a survey designed for caseworkers was disseminated to both public and private caseworkers across the State of Michigan. The ABA project team worked closely with Luci Stibitz of FIA and Bill Long and Verlie Ruffin of the Michigan Federation of Private Child and Family Agencies in disseminating the survey instruments. Using a conservative sampling determination, 252 (of 762) FIA foster care workers and 256 FIA protective services workers were needed for the sample. A relative distribution of existing staff carried across FIA "zones" produced the needed

sample. A response rate of 353 surveys returned of the 508, or 69 percent, was achieved.

A similar sampling strategy was used for private agency foster care workers across Michigan. The ABA project team surveyed 208 of 455 private foster care workers. A response rate of 45 percent (93 surveys returned) was achieved.

Telephone Interviews

In order to secure more in-depth information, telephone interviews were conducted with judges, lawyer-guardians ad litem, child welfare personnel, and foster parents. The telephone interviews varied in length from 5 minutes to 15 minutes. The respondents interviewed were chosen based on their responses to the mail surveys. Follow-up telephone interviews were conducted if the project team deemed it necessary to clarify information received during the focus groups or in the mail survey responses.

Telephone Interviews with Foster Parents.

The original foster parent mail survey reviewed by the advisory board members was culled for the most pertinent questions, resulting in a 6-page telephone survey instrument. The ABA project staff felt the streamlined instrument was much more "user-friendly" to foster parents. The ABA project team worked closely with the Michigan Foster and Adoptive Parent Association (MFAPA) in revising the instrument. The telephone survey was administered via telephone by MFAPA staff.

The ABA project staff detailed a sampling plan for MFAPA to use in completing the telephone survey with foster parents to ensure a geographic representation of foster parents and type of placement.

For sampling purposes, foster parents in all types of placements were interviewed. The size of the counties were placed in small, intermediate, medium, and large categories. Ninety-nine foster parents' telephone interviews were conducted by MFAPA, and the respondents are geographically representative.

Focus Groups

Focus groups were conducted after preliminary analysis of the mail surveys, with a greater focus on the major issues under consideration. We chose to visit a small, medium, and large county to ensure diverse perspectives. Focus groups included participants from contiguous counties at one of the sites. In June 2002, the ABA evaluation team convened focus groups in three courts: Bay, Saginaw, and Oakland Counties.

The focus groups were comprised of like individuals to minimize bias and pressure. The focus groups included: judges and court administrators; lawyer-guardians ad litem; child welfare agency personnel; parents; foster parents; and youth in foster care. A face-to-face focus group was held with the foster care review board in Oakland County. A telephone conference was held with foster care review board members from the Bay and Saginaw county areas. Each focus group lasted approximately one and one-half hours.

Discussion with each of the focus groups focused on those areas of the evaluation pertinent to each group. For example, judges and court administrators were asked for their perspectives on the positive and negative aspects of the statute, what they felt were the greatest barriers to implementation of the statute, and what improvements they would like to see, if any. The focus groups provided much more depth than the mail and telephone surveys.

Case File Review

The ABA evaluation team sought the assistance of Saginaw, Bay, and Oakland counties during our site visits to identify cases for file review. The ABA evaluation team was primarily interested in those cases where the conflict between the child's best interests and the child's wishes was so great that the court was asked, or otherwise decided, to appoint an attorney in addition to the lawyer-guardian ad litem. The ABA evaluation team did not anticipate and did not receive a large number of these cases.

Where appropriate, the ABA evaluation team focused on the nature of the attorney's conflict, the decision-making process leading to the appointment of a separate attorney, continuity of representation, and how the parties involved viewed the outcome as being affected by the new appointment (as compared to cases wherein appointments are not granted). Files that contained affidavits or filings describing the nature of the conflict between the child's interests and wishes were reviewed in detail. Sites reported only two such cases. Because of this low number, additional files were reviewed to determine how courts were able to monitor the activities of lawyer-guardians ad litem. Approximately 10 case files were reviewed at each site.

Advisory Group

The ABA worked closely with the project advisory board throughout the duration of the project. The advisory board included the following individuals.

- Brenda Baker, Program Representative, SCAO Foster Care Review Board
- Jim Beougher, Director of Child & Family Services Administration, FIA
- Nannette Bowler, Director, Chance at Childhood Program, MSU School of Social Work
- Honorable Sue Dobrich, Chief Judge, Cass County Probate Court
- Don Duquette, Director, Child Advocacy Law Clinic, University of Michigan Law School and Chair of the Governor's Task Force Subcommittee on the L-GAL Evaluation.
- Cheryl Gilbert, Communications Training Specialist, Michigan Foster and Adoptive Parent Association
- Linda Glover, Coordinator, Court Improvement, Michigan Supreme Court, SCAO
- Robert L. Goldenbogen, Esq., St. Clair County
- Rod Johnson, Program Representative, SCAO Foster Care Review Board
- Tom Kissling, Manager-Retired, SCAO Foster Care Review Board
- William Ladd, Attorney, Staff Attorney, Legal Aid and Defender Association
- Alexander Luvall, former Court Administrator, 3rd Circuit Court

- Myrna McNitt, Executive Director, MFAPA
- Honorable Eugene Moore, Judge, Oakland County Probate Court
- Ernestine Moore, Governor's Task Force on Children's Justice
- Katha Moye, Office Assistant, SCAO
- Honorable Frederick R. Mulhauser, Chief Judge, Emmet/Charlevoix Probate Court
- William Newhouse, Assistant Director, SCAO Trial Court Services
- James Novell, Program Representative, SCAO Foster Care Review Board
- Gayle Robbert, Program Representative, SCAO Foster Care Review Board
- Kevin Sherman, Program Representative, SCAO Foster Care Review Board
- Frank Vandervort, Program Manager, Michigan Child Welfare Law Resource Center
- Dee Van Horn, SCAO Regional Administrator, Region I

The first scheduled advisory group meeting was held November 13, 2001. The ABA evaluation team provided and presented members of the Advisory Group with outlines of proposed survey instruments, interviews protocols, use of focus groups, and information concerning other research issues.

The purpose of that initial meeting was to also address the following issues:

- To solidify the goals and the objectives of the evaluation plan;
- To discuss the proposed evaluation plan and to address the concerns of Advisory Group members;
- To discuss and agree upon a sampling plan for data analysis and surveys to ensure adequate representation of courts and the Michigan population;
- To discuss the nature and method of documenting and/or measuring change since implementation of the statute;
- To discuss the proposed direction of survey instruments and use of focus groups;
- To inform the ABA evaluation team as to what specific information the Advisory Group wished to elicit from the focus groups and groups to be surveyed; and
- To reach agreement with Advisory Group members as to how the evaluation plan and methods were to be amended or revised.

The advisory group was divided into subcommittees and each of those subcommittees was asked to provide input on the various instruments. The committees submitted their comments to ABA project staff two weeks after the meeting. The ABA evaluation team used these comments to continue the revision process. Based upon the discussion at the initial meeting, the ABA revised the evaluation plan as agreed upon and submitted a final protocol and proposed instruments to the Advisory Group.

There were periodic telephone conferences and e-mail correspondence between ABA project staff and members of the Advisory Group during the duration of the project. This evaluation report was prepared in draft form for the Advisory Board meeting scheduled for Thursday, August 29th. This meeting was held near the end of the project to discuss tentative

findings and recommendations. The presentation of the draft evaluation report and findings was used to solicit input from the Advisory Committee for inclusion in the final report.

Structure of This Report

A variety of research methods were employed to conduct this evaluation, providing for a wealth of information from many sources. The ABA project team decided that the most efficient presentation of that information was not by the method used but rather by subject area.

This report is structured to address major topics individually. Chapter 2 will discuss the administration of the statute and the compensation of lawyer-guardians ad litem. Chapter 3 will discuss information regarding the experience of lawyer-guardians ad litem, knowledge about their role, and the availability of training. Chapter 4 will discuss the extent to which lawyer-guardians ad litem conduct independent investigations. Chapter 5 addresses issues associated with representation such as visiting the client before each hearing and proceeding, and being involved in case plan development and monitoring. Chapter 6 discusses access to case-related information. Chapter 7 examines issues related to the "best interests versus wishes" debate. Chapter 8 will focus on implementation issues. Finally, Chapter 9 will present the report's findings and recommendations in detail.

CHAPTER 2: ADMINISTRATION OF THE STATUTE AND COMPENSATION OF LAWYER-GUARDIANS AD LITEM

Introduction

Among the most contentious issues concerning the role and practice of lawyer-guardians ad litem in Michigan are the manner in which they are appointed and the level of their compensation. Surveys were sent to presiding judges and administrators of all circuit courts in Michigan to determine which methods are generally used for appointing children's representatives and which issues are most pressing in this area.

Methods of Appointment

Counties and circuit courts in Michigan report various methods of selecting lawyer-guardians ad litem, ranging from random selection to contracting with law firms and individuals. Counties and circuits also report varying experience with requiring specific qualifications from these individuals.

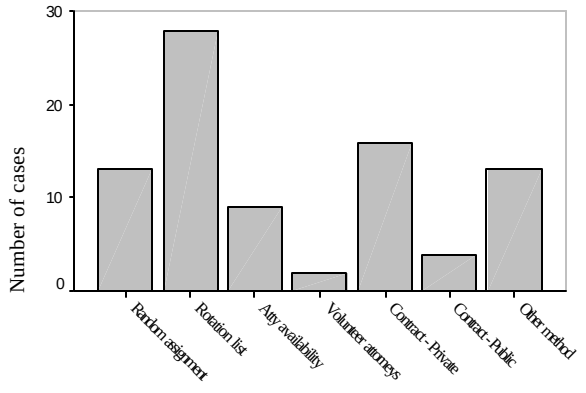
The Appointment Process[xx]

Exhibit 2-1 shows the responses received by the project team. Counties and circuits were asked to indicate their primary method of appointment. However, some respondents may be counted in both "lists" categories or in both "contract" categories.

The most common method of appointment of LGALs is to draw from a list of eligible or interested attorneys. Fifty

Exhibit 2-1

Appointment of LGAL's



percent of reporting courts make rotating appointments from such a list, and 23 percent appoint from a list randomly. Sixteen respondents (nearly 29 percent) indicate they have contractual arrangements with private firms, which appears to be a growing practice in Michigan based on other evidence collected in the study.

Nearly one-fourth (23 percent) of the respondents indicate they use some "other" method of appointing lawyer-guardians ad litem. These other methods include: monthly rotating appointment by the judge; rotation or random assignment from a list after an attorney has completed training from the local bar association; a panel of attorneys assigned to each family division judge with a managing attorney for each panel; a Public Defender Contract managed by a local attorney; and judicial assignment based on complexity of case. There is little variation in the reported methods of appointment when the size of the reporting county or circuit was considered.

The vast majority (89 percent) of the courts reported that the method of appointing lawyer-guardians ad litem is governed by court rule or court preference. Very few courts indicate that they rely on any guidance from the state statute on appointing lawyer-guardians ad litem. Again, there is little variation when population was considered.

The vast majority (80 percent) of courts report that their method of paying LGALs has not changed since the implementation of the Binsfeld legislation. However, transitional or suburban circuits (100,000 to 400,000 in population) report having changed their method of paying LGALs at a rate of 40 percent, versus 6 percent for rural circuits (under 100,000) and 25 percent for urban circuits (over 400,000).[xxi] Those who report they have changed methods of payment indicate that fees have increased, or that they now pay for out-of-county attorney travel, or that they have moved from a flat per hour fee to a case fee or that they have initiated a hourly fee to encourage visiting with the child client.

Attorney Background and Special Requirements

The majority of respondents (nearly 80 percent) indicate that a lawyer's past performance and background are taken into account when the lawyer is considered for appointment as a child's lawyer-guardian ad litem. Transitional and urban circuits report such consideration at higher rates than rural circuits. Surveys and evidence from focus groups indicate that courts tend to use a core group of attorneys, many with years of experience and who understand the local process. Some courts report that judges' frequently apply their personal criteria in selecting attorneys to act as lawyer-guardians ad litem, and frequently meet with them in face-to-face interviews. Many judges state that they are willing to remove, and have removed, attorneys from eligibility rosters.

Less than one-half (41 percent) of the responding courts state that they have specific requirements for appointment as a lawyer-guardian ad litem. Such requirements include attending appropriate training, shadowing an experienced child protection lawyer, having county residency, and having specific child protection

experience. The likelihood of making specific attorney requirements appears to increase with the population of the reporting jurisdiction.

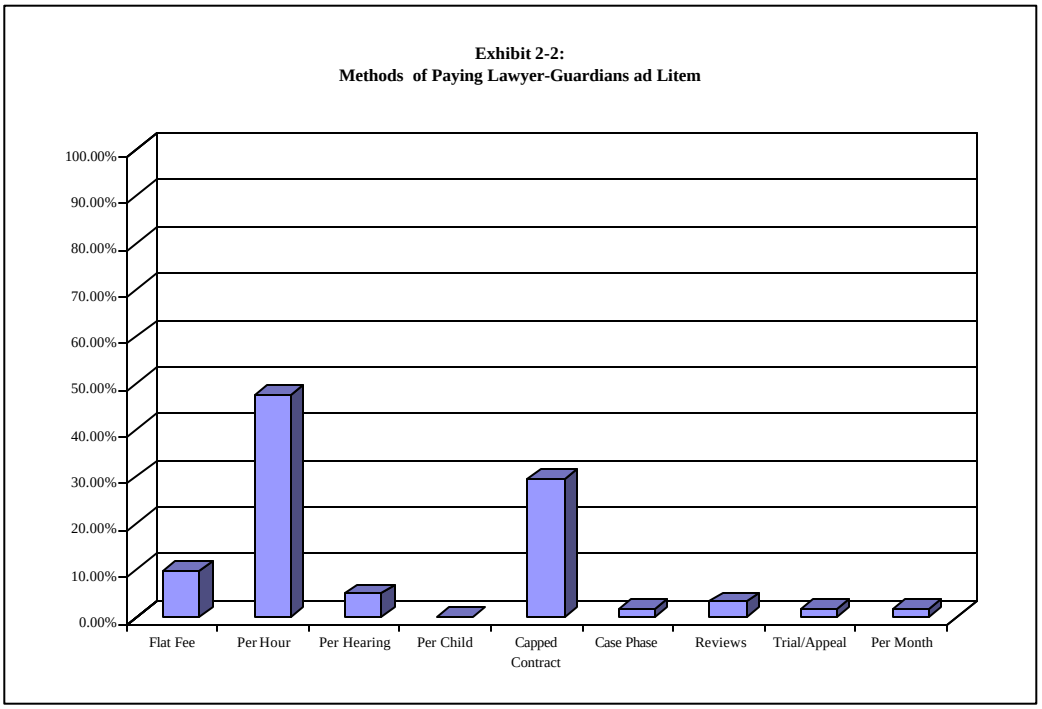
Methods of Payment

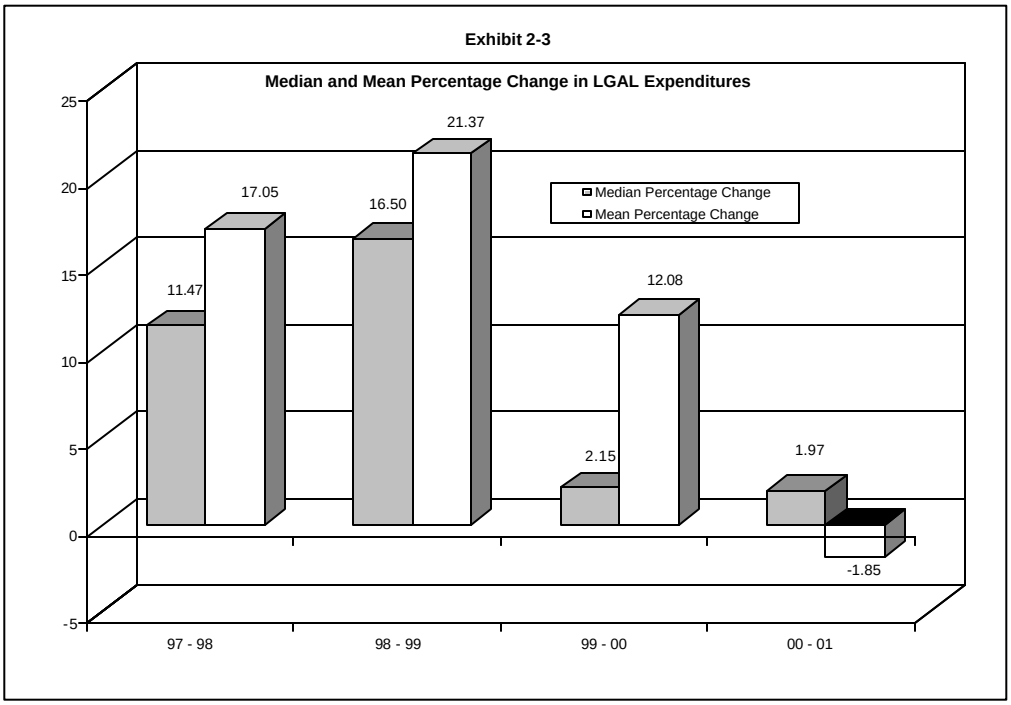
Counties and circuit courts in Michigan also have various methods of paying LGALs. Exhibit 2-2[xxii] details the methods used across Michigan to reimburse lawyer-guardians ad litem. Ten of the responding courts indicated that they used a mixture of two of the listed methods. Nearly one-half (47 percent) of courts said they use a per-hour basis to reimburse LGALs, and nearly a third (30 percent) reported that they have capped contracts in place. Capped contracts are more often than not on an annual basis. Per hour rates ran from the low end at $35 per hour to a higher rate of $60 per hour. Two courts reported paying for review hearings at separate rates.

Annual or capped contracts are reported as being very diverse. Some courts contract with the public defender; others contract with private law firms. At times, the contract is for inclusive legal services, at other times for specific activities. Some counties use the same contract to provide representation for both children and parents.

Payments to Lawyer-Guardians ad Litem

Assessing the financial impact of payments to lawyer-guardians ad litem proved to be a somewhat difficult task for the project team. Of the 54 unduplicated circuit responses, only 20 or nearly 37 percent are able to furnish any information about payments to LGALs. The remaining 34 or nearly 61 percent indicated that they are unable to separate out LGAL costs from

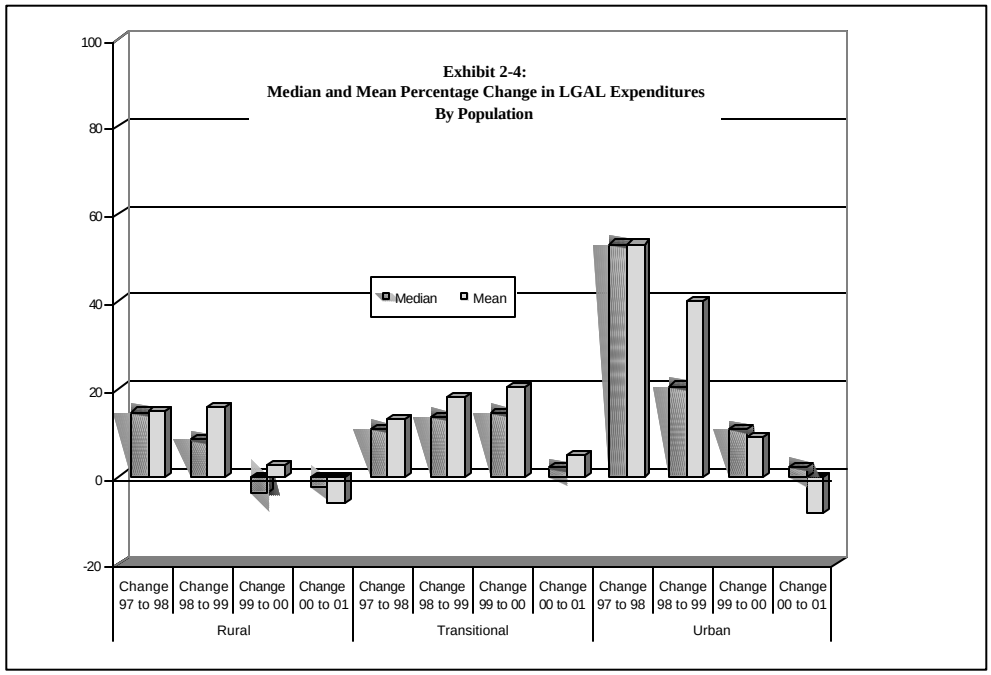




all other attorney and proceeding costs or furnished no information at all. Some reported costs, for example, include juvenile delinquency proceedings, parent representation and other payments.

In order to provide any information on resources that are used to pay lawyer-guardians ad litem, the ABA project team examined only those circuits where it is clear that the information provided is specifically on child protection matters. Twenty circuits were included in this analysis, a fact that should be kept in mind when reviewing the analysis. However, the project team is comfortable in that those circuits reporting are geographically representative. Rural circuits represent 35 percent of the respondents, transitional or mixed circuits comprise 50 percent of the results, and urban circuits represent 15 percent of the total respondents.

As Exhibit 2-4 indicates, from 1997 to 1998, and again from 1998 to 1999, those circuits reporting expenditure information experienced rather large increases in payments for lawyer-guardians ad litem. From 1999 to 2000 and from 2000 to 2001 increases in expenditures associated with the representation of children appear to slow in their growth.



The trend varies when payments are disaggregated based on a circuit's size. Circuits were categorized into rural (100,000 or less), transitional (100,000 to 400,000), and urban (over 400,000) circuits. These disaggregated trends are shown in Exhibit 2-4. Transitional or suburban circuits experienced the smallest initial change in expenditures (11 percent), while urban circuits experienced the largest increase (53 percent). Rural circuits experienced the smallest second period growth, followed by two periods of reduced expenditures. Transitional circuits experienced a progressive growth in expenditures followed by reduced growth, while urban circuits experienced an initial growth followed by a steady pattern of reduced growth and even reductions in spending.

The increases, in and of themselves, even presented in current dollars (no adjustment for inflation) are not surprising, but given the lack of data the project team was able to collect on expenditures, we can only offer some conjecture. There are any number of reasons behind the increases and the slowed growth in expenditures. Additional responsibilities assigned by the statute might have truly resulted in increased billings from attorneys, and thereby initially increased spending for the circuits. The slowing growth can also be attributable to the possible "plateauing" of billing and expending – specifically, expenditures for LGALs have or are reaching their new levels, and future growth will be minimal. Attorney billing could now have accounted for all of the additional responsibilities, thereby stopping growth. Or, conversely, courts have done what they can about the increased expenditures and can provide no more additional revenues and expenditures have been limited.

Further, there are differential experiences based on the size of the circuit. Rural or smaller circuits may have been particularly affected by the addition of these new LGAL responsibilities without the benefit of new state funding. Smaller circuits are less able to respond to new revenue demands, especially in an environment of budgetary shortfalls, therefore forcing them to keep increases in check or to eliminate them completely. Transitional or suburban circuits are generally wealthier than rural communities and consequently more able to take on additional demands. Large urban circuits, with significantly larger caseloads, face greater initial increases due to the addition of these new LGAL responsibilities.

A final contributory explanation may be that the decrease in expenses is partially related to termination of parental rights proceedings. Under other aspects of the Binsfeld legislation, TPRs occur more quickly and parents are thus no longer parties requiring county-provided representation.

However, information collected from other sources during the evaluation suggests that the reason for all of this might be a combination of these and other factors. During a three-county site visit to the state it was apparent that, like most other states, Michigan is experiencing state budget shortfalls. Judges and administrators spoke about compliance with aspects of the Binsfeld legislation driving costs up. Some responded that the financial impact has been great enough in their location that they have had to switch tactics and come up with different arrangements, particularly moving from an hourly fee to a contractual relationship with attorneys.

Perceived Sufficiency of Payments to Lawyer-Guardians ad Litem

Judicial representatives and lawyer-guardians ad litem were both asked if they found compensation of LGALs to be adequate given the increased responsibilities mandated by statute. Seventy-seven percent (77.8%) of lawyer-guardians ad litem responding to the mail survey state they found compensation to be inadequate. As shown in Exhibit 2-5, only 19 percent of court representatives believe that current compensation is sufficient to achieve the level of representation mandated by the Binsfeld statute. Responses from LGALs and judicial representatives do not differ

Exhibit 2-5:
Judicial and Administrative Perception of Sufficiency of Payments to Lawyer-Guardians ad Litem

Current compensation is not sufficient or more funding is needed to achieve the level of representation for children required by the Binsfeld legislation	81%
Current compensation is sufficient to achieve the level of representation for children required by the Binsfeld legislation	19%

when population is considered.

Interestingly enough, answers from the administrative and compensation mail survey provide a somewhat different perspective. Fifty percent of respondents (which included a range of individuals from chief judges to administrators to accounting managers) feel payments to LGALs are sufficient. Forty-one percent (41%) indicated that payments are not sufficient, while 7 percent answered both "yes and no" or "not relevant." Over three-fourths (77.3%) of circuits asserting that payments are not sufficient are rural areas. Individuals who believe payments are sufficient indicate that their ability to seek additional funding for additional hours, keeping such items in the budget, and/or the dedication of the pool of available or contracted lawyers on contract as things muting the payment amount issue.

When asked why they believe funding is insufficient, both judicial representatives and lawyer-guardians ad litem presented similar basic arguments. Essentially, all agreed that the statute created additional responsibilities without providing funding for LGALs. More specifically, courts responded that they have cut payments to lawyers-guardians ad litem in areas such as travel and attending foster care review board meetings.

The following are typical responses from lawyer-guardians ad litem to mail surveys:

- I am asked to do work for which I am not compensated.
- Court appointed rates in the county are outdated.
- It's not even close to being sufficient. The travel involved and all other court issues that come up – the time isn't even close to what I would bill them.
- A lot more time is required to accomplish the same goal. And with budget cuts we are never fully reimbursed for our time.
- Our county has recently implemented a new contract with only eight attorneys or firms handling the entire docket. We now have more cases and less time to devote to each one.
- If one is to perform at least adequately for the child client, there are many duties to perform outside the courtroom for which there is never any payment.

The following are typical responses by judges to the mail surveys:

- There is not enough money to pay for representation as prescribed by statute.
- The LGAL is underpaid for the work required to really do the job right. Since most counties cannot afford more pay, we need state funding to assist.
- The statute puts demands on the counties to pay lawyers more because they are expected to do more to represent the best interest of the child. It sounds good, but without more money being provided to the counties, full implementation won't be possible.

A General Discussion Regarding Issues of Payment and Public Interest Attorneys

Work has been conducted on compensation for public interest attorneys, specifically on defense of the indigent, which is a reasonable point of comparison for court-appointed attorneys handling child

protection proceedings in Michigan. There is also information available on the fees and salaries of private attorneys. Further, while available information primarily covers public criminal defense, the argument can be made that similar issues surround the payment and appointment of all public interest attorneys. The information provided below is offered to place the compensation for LGALs in Michigan into perspective, and not to offer advice or guidance as to which comparison is the most favorable or which method previously discussed is preferred or more effective.

As reported, counties in Michigan pay LGALs from $35 to $60 per hour. In reporting on compensation for defense of indigent criminal defendants in Michigan, Bruce Necker states:

> Counties that pay by the hour vary from a disgracefully low $40 per hour in some counties to $80 per hour in others. To be sure, the compensation scheme for our prosecutors is also county-based and in many respects parallels that for criminal defense in arbitrariness and inadequacy. But, unlike our prosecutors, lawyers appointed to represent indigent clients must bear all the overhead costs themselves.[xxiii]

The Michigan Bar Association conducted a poll in 2000 that assessed practices of attorneys in private practice across the state. The results of that study indicate that median hourly billing rates for attorneys in private practice range from $135 to $180 per hour based on experience.[xxiv]

As the use of contracting for the services of public interest lawyers has grown, so has the attention focused upon it become more intense. Robert Spangenberg recounts an Arizona Supreme Court case that dealt with the issue.

In *State v. Smith*, the Arizona Supreme Court found this type of system, which was in use in several Arizona counties, unconstitutional for the following reasons:

(1) The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants;
(2) The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks;
(3) The system fails to take into account the competency of the attorney. An attorney, especially one newly admitted to the bar, for example, could bid lower in order to obtain a contract, but would not be able to adequately represent all of the clients assigned …; and
(4) The system does not take into account the complexity of each case.[xxv]

A special report released by the Bureau of Justice Assistance provides an overview of deficient and effective contract systems for providing indigent defense. Again, while focused on indigent defense, many of the arguments are certainly applicable to LGALs and the provision of services to children in Michigan.

Deficient contracting systems have the following characteristics according to critics:

- Place cost containment before quality.

- Result in lawyers with fewer qualifications and less training doing a greater percentage of the work.
- Offer limited training, supervision, or continuing education to new attorneys or managers.
- Reward low bids rather than realistic bids.
- Provide unrealistic caseload limits or no limits at all.
- Do not provide support staff or investigative or expert services.
- Do not provide for independent monitoring or evaluation of performance outside of costs per case.
- Do not include a case-tracking or case management system and do not incorporate a strategy for case weighting. [xxvi]

Characteristics of effective contract systems include:

- Minimum attorney qualifications.
- Provisions for support costs such as paralegals, investigators, and social workers.
- Independent oversight and monitoring.
- Workload caps.
- Limitations on the practice of law outside the contract.
- Provisions for completing cases if the contract is completed but breached or not renewed.
- Caseload caps.
- Case management and tracking requirements.
- Guidelines on client contact and notification of appointment.
- A mechanism for oversight and evaluation. [xxvii]

The American Bar Association also expresses some of the same concerns about public defense of juveniles. In its 1995 report *A Call for Justice* the authors report the concerns of a juvenile judge:

> As the presiding juvenile court judge in a large California metropolitan area, …noted that advocacy for children frequently loses out in the competition for scarce public dollars. Budget constraints result in high caseloads, which, in turn, leave children's lawyers with insufficient time to investigate and prepare their cases. …[C]hildren's attorneys often have the least experience and the lowest status in the legal community. [xxviii]

That same judge goes on to state that lack of training, lack of commitment, and inadequate allocation of resources has a direct and significant impact on the representation of children. [xxix]

Finally, abuse and neglect and juvenile justice standards issued by the American Bar Association both call for the adequate compensation of attorneys representing children. [xxx]

Summation of Key Findings Concerning Administration of the Statute and Compensation of Lawyer-Guardians ad Litem

The multiple sources of information used in the evaluation (e.g., focus groups, mail surveys, phone surveys, etc.) revealed several common issues concerning administration of the statute and payments

made to lawyer-guardians ad litem. Those issues include:

- While appointment from an existing list or pool, randomly or otherwise, appears to be the most common among Michigan circuit courts and counties, there is no consistency among the counties and no statewide standards.
- The majority of individuals providing input into the evaluation do not perceive compensation to LGALs as being adequate.
- Although the LGAL statute specified additional duties and responsibilities for LGALs, no additional state funding is attached to the LGAL statute.
- With no additional funding supplied, counties and circuits must find their own methods to deal with increased financial requirements for paying LGALs. Responses from counties and circuits are based on their differential ability to handle increased expenditures.
- Counties have responded to increased expenditures in several ways. Some counties no longer pay LGALs to travel or to travel out of county to see their child clients. Other counties do not reimburse for LGAL attendance at foster care review board meetings. Some counties have moved toward contractual agreements with attorneys as a cost containment measure. Differential ability to respond to the increased requirements can adversely affect the quality of representation by location.
- Judges and attorneys expressed frustration that the Family Independence Agency frequently places children in out-of-county placements. This placement, coupled with lack of reimbursement due to no additional funding, adversely affects the quality of representation provided to children in Michigan.

CHAPTER 3: EXPERIENCE, KNOWLEDGE, AND AVAILABILITY OF TRAINING

Introduction

To successfully enhance the performance of any professional, the new performance expectations must be clear, there must be universal training to explain the change and provide any new needed skills, and there should be the expectation that the professionals have the necessary skills to accommodate the change. This chapter examines the experience of lawyer-guardians ad litem, the delivery of training, and how respondents' rated themselves on their knowledge and ability to meet statutory requirements. Also included are recommendations for enhancing the knowledge and performance of lawyer-guardians ad litem.

Exhibit 3-1:
Child Protection Proceeding Experience of LGALs in Michigan (n=63)

Experience	
Less than 1 year	3%
1 to 2 years	6%
3 to 5 years	24%
6 to 8 years	10%
9 to 11 years	16%
Over 12 years	41%

Exhibit 3-2:
Child Protection Caseload Experience of LGALs in Michigan (n=61)

Number of Child Protection Cases accepted ----	*Before Binsfeld*	*After Binsfeld*
0 to 10 cases	16%	20%
11 to 20 cases	10%	8%
21 to 30 cases	7%	15%
31 to 40 cases	5%	10%
41 to 50 cases	5%	1%
Over 51 cases	57%	46%

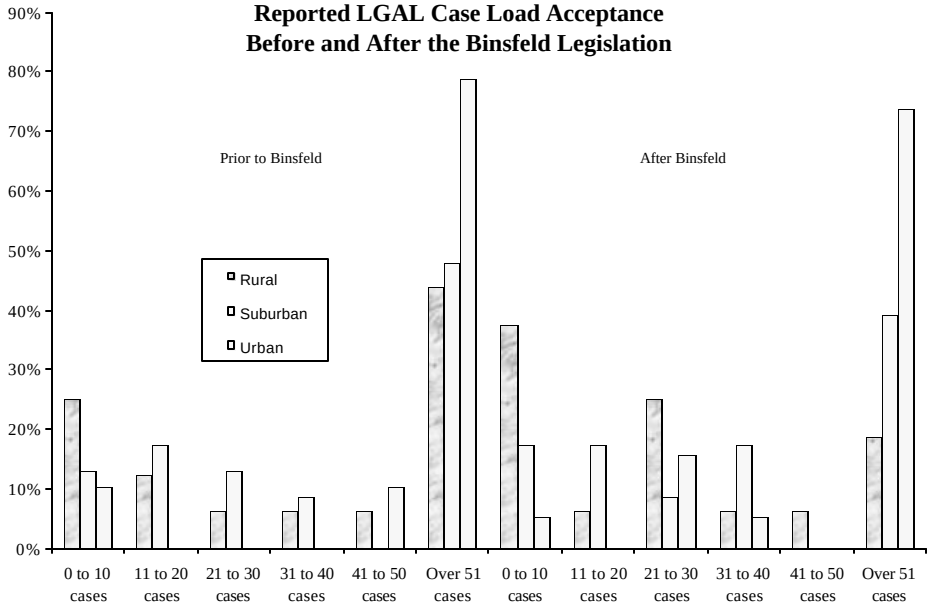
Again, the readers of this report are asked to keep in mind the observation made in the first chapter. This evaluation represents the first time the State of Michigan has attempted to collect information about the implementation of the LGAL statute. This information is to be viewed as a baseline of information from which policy change can be initiated.

Experience of Lawyer-Guardian Ad Litem Representing Child Clients

There are two pertinent factors in evaluating attorney experience in a specific area of law: how long they have practiced in that area and how much of their time they have devoted to that area of law. Attorneys responding to the ABA survey, report a diversity of experience and caseloads. Over one-half (57%) of the attorneys indicate they have represented child clients in the state of Michigan for over nine years (see Exhibit 3-1). Urban circuits report the greatest level of experience overall (70% having 9 or more years), followed by rural circuits (62.6%), and transitional or suburban circuits (41.7%).

As shown in Exhibit 3-2, attorneys responding to the survey appear to be fairly experienced in child protection proceedings in Michigan. Nearly one-half of those responding indicate that they have accepted caseloads of over 50 child protection cases both *before* and *after* implementation of the LGAL statute. LGAL caseload acceptance does not appear to have changed since implementation of the statute. Exhibit 3-3 clearly shows that the numbers of cases attorneys accept, by circuit population, are similar before and after 1998.

Exhbit 3-3:
Reported LGAL Case Load Acceptance
Before and After the Binsfeld Legislation



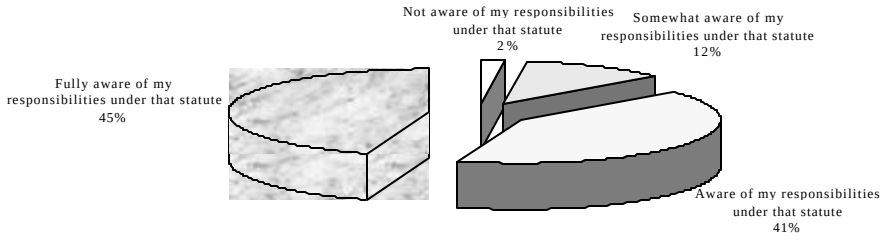
Lawyer-Guardian Ad Litem Knowledge of the Requirements of the Binsfeld LGAL Statute

Any attorney handling child protection cases in Michigan should do so with full knowledge of their powers and duties as outlined in statute. Knowledge of that statute is essential in ensuring children are represented as intended. Attorneys serving as LGALs were asked how knowledgeable they believed they are about their responsibilities under the Binsfeld statute. Only forty-five percent of lawyer-guardians ad litem state they are fully aware of their responsibilities under the statute (see Exhibit 3-4). Fourteen percent were somewhat aware, or not aware, of their responsibilities as a lawyer-guardian ad litem. Forty-one percent indicate they are "aware" of their responsibilities.

Attorneys responding to the mail survey were asked if they are aware of changes in state statute specifically regarding the role of lawyer-guardian ad litem in child protection cases. Almost all (98%) say they are aware of the changes in the law. A few of these attorneys indicate they learned of the change of the statute through training. Respondents indicate that the trainings are conducted by the Family Independence Agency, their local court staff (e.g., Tuscola County and Wayne County held seminars), circuit education programs and seminars,, CLE, and educational and informational sessions.

However, most of the attorneys indicate on the mail survey that they became aware of the changes by conversations and through committee work. They also state they pick up the information from judges, referees, administrators, other attorneys,

Exhibit 3-4:
Lawyer-Guardian Ad Litem Awareness of Responsibilities Under Statute



child welfare agency personnel, and legal aid. In addition, other attorneys received notice through e-mail, websites, literature written by court personnel, legislative bulletins, independent research examining the statute, mailings (e.g. letter from judge, SCAO), and through journals or newsletters (e.g., Lawyers Weekly).

Attorneys were asked to briefly describe their duties and responsibilities as an attorney in child protection cases. The responses are diverse, ranging from some attorneys who described in detail their responsibilities as they are outlined in the statute, to others who had limited and/or vague descriptions. Their responses are very informative regarding the ability of lawyer-guardians ad litem to articulate their duties and responsibilities.

Below are typical attorney descriptions of duties from the survey. These responses are demonstrative of attorneys articulating a well-founded knowledge of their duties and responsibilities:

- I review the petition; interview protective services worker, caseworker, and police officer; meet with petitioning attorney; attempt to interview parents if possible; attend preliminary hearing if possible; attend all other hearings involving the matter (including pretrial, adjudication hearings, dispositional hearings, review hearings, permanency planning hearings and termination hearings); interview child if age appropriate; interview foster parents; go to foster parents' home; review each and every report concerning the child and the parents.
- It is my responsibility to be a zealous advocate for the best interests of the child with my advocacy to be based upon competent investigation of the facts of the case, filing necessary pleadings and documents, attending hearings, considering the wishes of child but not be bounded thereby, and ensuring court plans are implemented.
- As the LGAL you must serve the child's best interests, determine the facts of case, interview the child and any others as necessary, meet with the client before each court hearing, assess the child's needs and wishes, file necessary pleadings on behalf of the client, attend hearings and make a determination of the child's best interests.
- I am to visit the child, interview the child, visit the caretaker, conduct visits at school depending on the child's age, appear in court, appear at foster care review board hearings, interview and obtain records from FIA and the hospital.
- I represent the best interests of the child; talk with foster parent, review court report; talk with foster care worker, and meet with the child at least once if the child is old enough to discuss his or her preferences and understand what is going on.
- I represent the best interests of the child, I should be involved in all proceedings, have authority per statute to conduct anindependent investigation, have a duty to meet with child before hearings and otherwise to fully involve myself in the case to benefit the child.
- I am to represent the child's best interests in all proceedings, explain those proceedings to the child if he or she is able to comprehend. I am also to attend

all proceedings (except when court allows a substitution). I am supposed to speak to the caseworker, visit with the child, and talk to foster parent before proceedings. I am also responsible to report the child's wishes to the court even if they differ from my perceptions of what is best for the child. I am also to be familiar with all relevant information, reports, and individuals affecting the case.

- It is my responsibility to visit the child in placement, speak to workers regularly, attend all hearings, review medical and school records, communicate with therapists and all other providers, advocate the child's wishes and request other counsel if disagree with child.
- I am to familiarize myself with the allegations and factual background of the case; interview relevant individuals; meet with child(ren) and keep them appropriately advised of the proceedings and ascertain their desires, needs, preferences. I am to advocate for the child's best interest and inform the court if or when the child has a difference of opinion with me. When those differences necessitate, I should request that the court appoint a separate lawyer for the child(ren).

In contrast, below are typical examples of the failure of some attorneys to fully understand their role:

- I am to protect the child's best interests and, when appropriate, inform the child of the proceeding to solicit input from the child.
- I represent the child's best interests and advocate those interests. I make sure that the agency (FIA) is doing its job.
- I have the responsibility to visit the child and advocate his or her best interests.
- It is my responsibility to protect children.
- I visit children prior to all hearings; coordinate with agencies; and form independent judgment as to the best interests of children.
- I meet with the child to determine the child's best interests; conduct an independent investigation; advocate for child; and report to the court.
- It is my responsibility to represent my client.
- I meet with the client and/or the caseworker and foster parent prior to each review. I also advocate as well as look out for the best interests of the child when conflict between the two arises, and inform the court that a new attorney for child might be needed.
- I am to make regular contact with the minor before all court proceedings, discuss issues pertaining to the case, if minor is of a sufficient age and exhibits an adequate maturity level. If the minor is not of a sufficient maturity level or age, I am to make regular contact with the foster parent of child in foster care), or parent (if child placed at home) and discuss issues relevant to the case. These meetings usually take place at my office.

Exhibit 3-5:
Lawyer-Guardian ad Litem Self Rating
On Compliance with Statutory Requirements (n=56)

Ranking	
1	0%
2	2%
3	0%
4	2%
5	2%
6	3%
7	20%
8	46%
9	18%
10	7%

Ninety-one percent of the LGALs who responded rate themselves a 7 or greater in complying with the statutory requirements on a scale of 1 to 10 (see Exhibit 3-5). These "self rankings" are not inconsistent with ratings judges gave LGALs generally during focus groups, and are generally consistent with LGAL input from focus groups.

When considering the self-rankings, one would expect that the more aware a LGAL is about his or her duties and powers, the higher that LGAL would rate themselves in terms of compliance. However, a simple linear regression analysis shows a very weak relationship between the two. While that relationship grows stronger as LGALs report from larger jurisdictions, the relationship is still weak and is not significant.[xxxi] What this possibly indicates is that LGALs may be aware of what they need to be doing but not meeting each requirement. Evidence from the evaluation indicates that LGALs do not meet each of the statutory requirements. For example, they do not conduct independent investigations as contemplated by the law, nor do they meet with the child and other parties as contemplated. As explained elsewhere in this report, part of this failure to meet requirements can be attributable to lack of resources.

Availability of Training for Lawyer-Guardians ad Litem

Although some lawyer-guardians ad litem may not routinely handle child protective cases, they still need to be informed of changes in legislation affecting their role and their practice. Regular training is one means to accomplish such continuing education.

Exhibit 3-6:
Have you ever received any training that addressed the duties and responsibilities of a lawyer guardian ad litem as defined by the Binsfeld legislation? (n=61)

Yes	*No*
61%	39%

Exhibit 3-7:
Rate overall how helpful you found the training you received regarding the Binsfeld legislation. (n=37)

Not at all helpful	*Not very helpful*	*Somewhat helpful*	*Very helpful*
3%	8%	57%	32%

Approximately two-thirds (61%) of the attorneys who responded to the ABA survey indicate that they received training that addressed the duties and responsibilities of a lawyer-guardian ad litem as defined by the Binsfeld legislation (see Exhibit 3-6). Of those who attended training, the training usually occurred 2 or 3 years ago, shortly after the Binsfeld legislation passed. However, a few state that they received training within the past few months.

Attorneys who received training were asked how helpful they found the training. The vast majority of attorneys who received training found the training to be somewhat helpful or very helpful (see Exhibit 3-7). This clearly indicates that attorneys welcome information on LGAL responsibilities.

During the on-site focus groups, judges and LGALs repeatedly indicated that prestige for child protection cases is low. Therefore, they argue, there is limited availability of training, especially specialized training focusing on the roles and responsibilities of lawyer-guardians ad litem under the Binsfeld legislation.

LGALs indicate a variety of sources for the training they received. Many examples included court-sponsored training from Kalamazoo County, Wayne County, Kent County, Tuscola County; Traverse City; Michigan Justice Institute Training; Michigan Child Welfare Law Center; Children's Charters of Courts in Michigan; Family Independence Agency: ICLE: Oakland County Bar Association, and the tri-county conference on children's law advocates for court appointed training. During focus groups, judges quickly noted

that local and state bar associations have been slow to address these issues and CLE credit is not necessarily provided to assist LGALs in how they should approach a neglect case.

Suggestions Offered for Improving the Training of Lawyer-Guardians` Ad Litem

Surveys and on-site interviews show broad support for training enhancement. Lawyer-guardians ad litem, judges, caseworkers, and foster parents across Michigan all suggest changes are needed to improve training availability for LGALs.

Lawyer-guardians ad litem call for improved training on the requirements of the Binsfeld legislation. According to some attorneys, there is a need for more centralized, statewide training.

During one focus group session, a few of the attorneys suggested that the training focus should be legal rather than how to be an investigator, social worker, or witness. However, other attorneys feel that they need training on forensic interviewing. At a minimum, they want written materials concerning forensic interviewing, especially for interviewing children. Some attorneys suggested hands-on training to give them practice in making children comfortable during interviews.

Mail survey and focus group responses from judges also indicate the need for changes to improve training availability for lawyer-guardians ad litem.

Another important issue is the need to take into account the training and experience of lawyer-guardians ad litem in deciding whom to appoint. One judge remarked that appointments are made by judicial staff based on favoritism, political cronyism, and the physical presence of lawyer-guardians ad litem in the courtroom when appointments are made, with little or no regard for the competence, dedication, expertise, and prior service of the individual practitioner. Courts need to take training and experience into account when making appointments or should set demanding training and experience requirements in order to be eligible for appointment. The practicality of these steps, however, is linked to the compensation available for lawyer – guardians ad litem.

Among the specific changes suggested by judges are: 1) require certification in lawyer-guardian ad litem training and annual in-service updates; 2) establish mandatory training that is consistent across the state; 3) training should not fall on the shoulders of individual judges; 4) create a list of desired and qualified lawyer-guardians ad litem for all family division judges to use; 5) create a mechanism whereby ill-prepared, chronically tardy, and/or inadequate lawyer-guardians ad litem are made ineligible for appointments or are placed under supervision for a period of time; 6) increase payment to lawyer-guardians ad litem for their services; and 7) increase the availability of funds at the state level to support training. One judge also recommended that funds should be used to support training on new and difficult issues surrounding lawyer-guardian ad litem responsibilities.

There were mixed opinions from judges during the focus groups on the formation of a Lawyer-Guardian Ad Litem Office similar to the Public Defenders' Office. According to the judges, the hypothetical Lawyer-Guardian Ad Litem Office, could offer centralized training, however, such an office would add bureaucratic red tape.

In mail survey responses and during focus group discussion, caseworkers also indicate the need for improved training for lawyer-guardians ad litem. Suggestions from caseworkers include: 1) training on the requirements of the statute; 2) collaborative training with lawyer-guardians ad litem and caseworkers to cut down on miscommunication (e.g., role-playing, service availability for children); 3) ethical training; 4) "common sense" training; and 5) mandatory training to get on the court appointed list. Caseworkers also recommend establishing a point of contact where case personnel can offer praise or complaints about particular lawyer-guardians ad litem. During a focus group, one caseworker stated that a judge makes it clear to the lawyer-guardians ad litem what her expectations are for handling a case. The caseworker believed that due to this awareness, lawyer-guardians ad litem may misrepresent their actions to the judge about seeing the child and conducting their own investigation.

Foster parents suggest that lawyer-guardians ad litem need sensitivity training. Specifically, they feel LGALs need training on how to talk with children and how to approach children at sensitive times.

The consensus that developed regarding training is that training should have been implemented at the beginning, that training is needed to ensure LGALs understand their role, and that training should be consistent.

Summation of Key Findings Regarding Experience, Knowledge, and Availability of Training

The multiple sources of information used in the evaluation (e.g., focus groups, mail surveys, phone surveys, etc.) reveal several common issues concerning experience, knowledge, and availability of training. Those issues include:

- Lawyer-guardians ad litem have varying levels of experience in handling child protection cases, ranging from a few cases to hundreds of cases. In addition, the experience of attorneys handling cases before and after the implementation of Binsfeld also varies.

  The implication of this varied experience impacts the quality of representation and its impact on case outcome. Courts may wish to focus attention on establishing minimum standards for appointment. Such standards will ensure a threshold of competency.

- Not all lawyer-guardians ad litem fully articulate the range of duties and responsibilities as prescribed by statute. Attorneys offer a range of descriptions of their duties ranging from vague or limited views to more fully expressed views.

An incomplete understanding of responsibilities directly impacts the quality of representation a child receives. Communication of judicial expectations can potentially alleviate this particular problem, as can training.

- Over one-third (39%) of the lawyer-guardians ad litem indicate that they did not receive training that addressed the duties and responsibilities of a lawyer-guardian ad litem as defined by the Binsfeld statute.

  Lack of training leads to attorney inability to fully appreciate and describe their role and their responsibility to their child client. Again, this directly impacts the quality of representation a child receives

- Training is inconsistent across the state and is provided from a variety of sources.

  Non-standardized training potentially leads to varying interpretations of the LGAL's role and responsibilities.

- There appears to be some confusion and some consternation about the roles of LGALs and social workers that might possibly be addressed by collaborative training.

  At a minimum, standardized training can alleviate confusion about specific responsibilities and also confusion about role expectations. Collaborative training can inform both professionals as to expectations, can minimize duplication of efforts, and can reaffirm commitment to information sharing. All of these can lead to improved representation of children in Michigan.

- There is a consensus around the need for standardized training for LGAL's. By "standardized" it is meant that a minimum set of guidelines should be considered for consistent training.

CHAPTER 4: INDEPENDENT INVESTIGATIONS BY LAWYER-GUARDIANS AD LITEM

Introduction

Michigan law requires the lawyer-guardian ad litem to conduct an independent investigation into the child's case. Any lawyer needs to understand the basic facts of a case if he or she is to engage successfully in the problem-solving and legal advocacy required to serve a client. Similarly, the LGAL is expected look into the facts of the case as they are specifically relevant to advocacy for the child. The LGAL will gain a deeper understanding of the child's circumstances and might uncover information missed by others. The intent is that the LGAL obtain personal and independent knowledge regarding their client's needs and thus be able to make more informed recommendations. It also presumes that the possibility exists that the LGAL might reach different conclusions about the case based on the available information.

To assess the extent to which LGALs actually conduct independent investigations of their cases, the ABA project team directly addressed the issue through surveys and during the three-county site visit. The team asked a series of questions of LGAL's, judges and administrators, caseworkers, and, to a lesser degree, foster parents.

During the course of the study, and as will be related in this chapter, there is apparent confusion and/or disagreement as to what exactly constitutes an independent investigation. The *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, adopted in 1996, defines what an independent investigation should entail. According to these standards, "the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

1. Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other

> **(1)** A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:
>
> (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing all relevant reports and other information.
>
> **MCL 712A.17d (1)**

records relevant to the case;
2. Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;
3. Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;
4. Contacting and meeting with the parents/legal guardians/caretakers of the child with permission of their lawyer;
5. Obtaining necessary authorizations for release of information;
6. Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
7. Reviewing relevant photographs, video or audio tapes and other evidence; and
8. Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.[xxxii]

These standards provide the base definition of investigation for the scope of the evaluation. The data collected regarding independent investigations will be analyzed in this particular context.

Lawyer-Guardians ad Litem Perspective on the Independent Invetigation Requirement

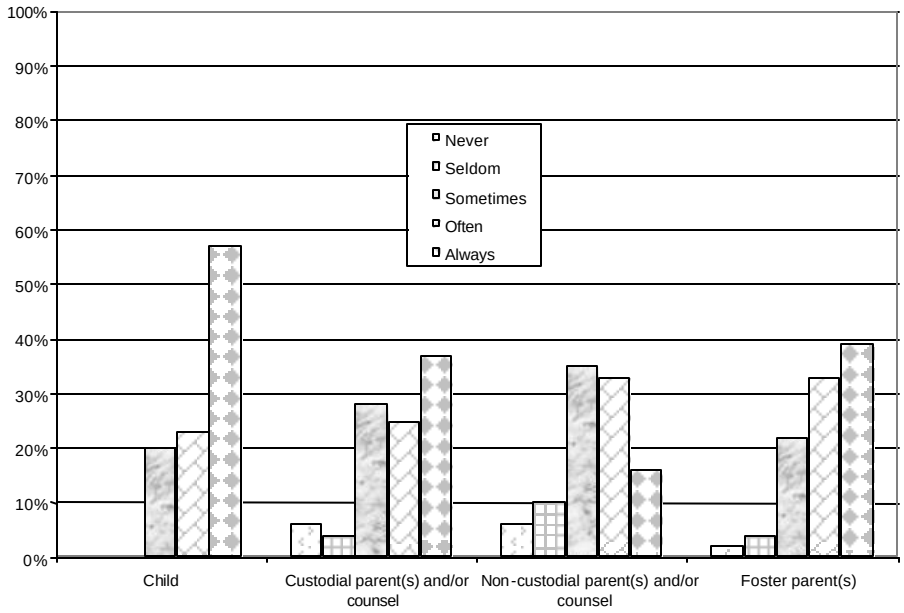
An initial 220 surveys were sent to attorneys across the state of Michigan. Sixty-three responses (29% response rate) were received.

The vast majority of attorneys who responded to the mail survey (88 percent) indicate that they in fact do conduct independent investigations of their cases. However, the written responses to the question of how they conducted independent investigations reveals a diverse scope, sometimes more limited than perhaps intended by the statute.

The sample of responses below is typical of LGAL responses regarding the extent to which they conduct investigations:

- I have a face-to-face meeting with child before the date of the hearing.
- My investigation is limited to telephone inquiries, and meetings with parents and social workers.
- I have not had a case that necessitated investigation. If I have any, I will do what I feel is necessary.
- I do not independently investigate the allegation when representing the child. I read over reports, consult with caregivers and clients as to placement, etc.
- My investigation will include interviews with caseworkers, foster parents, children, where appropriate, and if not at all possible, interviews without the parents and other family members. Additionally, in cases where there are adjudicatory hearings, I will interview witnesses prior to the hearings.

Exhibit 4-1
Frequency of Interviews LGAL's Have With Child, Parents and Foster Parents
(n=51)



- Phone calls mostly, occasional site visits; client and parent interviews, and second requests for information.
- I review all my reports, and I interview witnesses.
- I would like to conduct investigations, but I do not have the necessary resources.
- The extent of the investigation depends on the case.
- Investigations are ongoing in all my cases and include interviewing the child, finding foster parents, interviewing school officials and researching records, if released. I also interview other family members, therapists of child or parents, FIA caseworkers, etc., anyone I know about who has information on subjects related to the case.

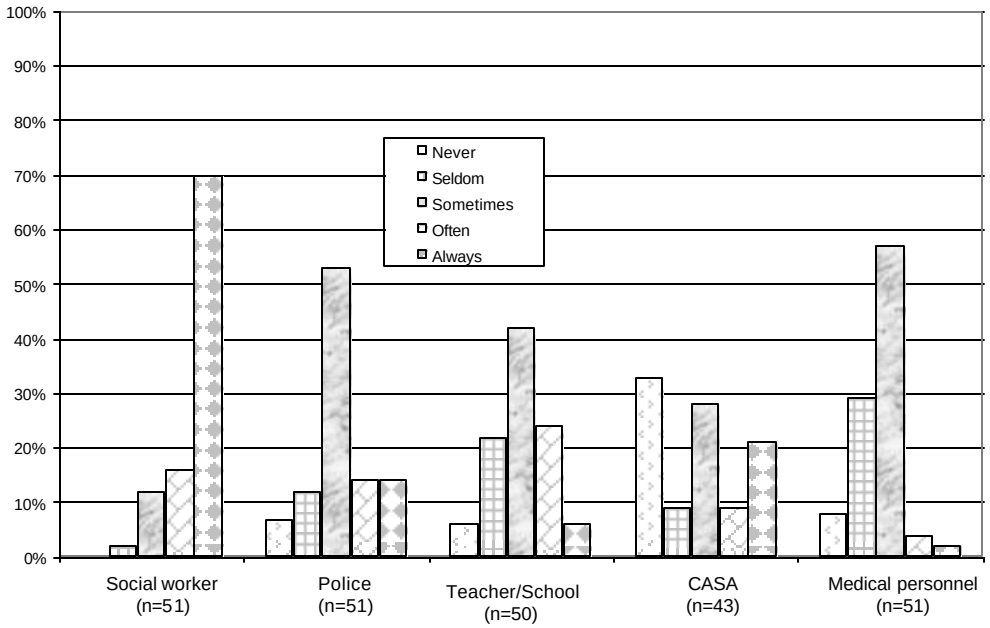
Among the frequently used words in these responses are "depends," "appropriate" and "relevant" when the respondents indicate whom they speak to or which records they review. Exhibit 4-1 indicates the frequency with which LGALs interview the child, the child's parents, or the child's foster parents during the course of the required investigation. Over one-half (57%) of the responding LGALs indicate that they always interview the child during the investigation, depending of course on the child's ability to speak. Over one- third (39%) indicate they always spoke with the foster parents. Custodial parent(s) and/or counsel are interviewed at a lesser rate (37%), as were non-custodial parent(s) and/or counsel (16%).

Exhibit 4-2 indicates the frequency with which responding LGALs say they interview various professionals as part of their investigation. The majority of the attorneys (70%) indicate they interviewed the social worker or caseworker as part of their investigation, more than any other group. Police (14%), teacher or school personnel (6%), CASA (21%), and medical personnel (2%) are not interviewed as frequently. In addition, the lawyer-guardians ad litem note that they interview others, including extended family, friends, siblings, probation officers, classmates, counselors, and parenting instructors.

Because quality investigations often necessitate the calling of independent witnesses, lawyer-guardians ad litem were also asked the extent to which they called these same individuals as independent witnesses on behalf of the child. The majority of the responses fall into the NEVER to SOMETIMES range with one exception. Respondents indicate that they often or always call the social worker as an independent witness over fifty percent of the time (59%). When looking at responses from LGALs who say they conduct independent investigations, only 12 percent of them indicate a *greater* need to call independent witnesses since the implementation of the LGAL statute.

Whether or not LGALs state they conduct independent investigations was examined with respect to different variables. The receipt of training, perceived adequacy of compensation, and knowledge of statutory responsibilities did not impact an

Exhibit 4-2
Frequency of Interviews LGAL's Have With Professionals



LGAL's conducting an independent investigation. However, the larger the circuit a LGAL practices in the more likely a LGAL is to respond that he or she conducts independent investigations.

Caseworker Perspective on the Extent to Which Lawyer-Guardians ad Litem Conduct Independent Investigations

As shown in Exhibit 4-3, over one-half (56%) of caseworkers indicate that LGALs rely on the reports that caseworkers prepare and that they do not conduct their own investigations. One-third (32%) of caseworkers report that LGALs rely on their reports and then conduct a partial independent investigation. As many private sector caseworkers are employed in child protection proceedings in Michigan, the project team reviewed responses based upon whether caseworkers are employed by the public sector or the private sector. Caseworker perspectives on the extent to which LGALs conduct independent investigations do not differ based on their employment.

Caseworkers who selected "other" LGAL involvement in investigation indicate the following:

- The majority of caseworkers state that it is attorney dependent, and attorneys seldom conduct independent investigations.
- Many caseworkers indicate that LGALs become familiar with the case, clients, and interested parties just prior to the hearing.
- Many caseworkers indicate that LGALs have little or no contact with their clients and they rely solely on caseworker reports.
- Many attorneys do not even read the reports, and in court many simply agree with the recommendations.
- LGALs rarely meet with the children.
- The LGAL comes to like or dislike the parent(s) and judges the case

Exhibit 4-3:
Caseworker Statement Describing Their Sense of the Extent to which Lawyer-Guardians ad Litem Conduct Independent Investigations
(n=454)

Response	
Lawyer-guardians ad litem generally rely solely on the reports that I and other caseworkers prepare, they conduct no independent investigation	56%
Lawyer-guardians ad litem generally rely on the reports that I and other caseworkers prepare, and then conduct some independent investigations	32%
Lawyer-guardians ad litem rely on the reports I and other caseworkers prepare and then conduct their own independent investigations, frequently talking with the same individuals	7%
Other	5%

accordingly.

- LGALs will review case reports and talk with the child.
- Some attorneys do conduct an independent investigation and may have information that is helpful to the case.

On the mail survey, caseworkers were asked about their initial contact with the child's lawyer guardian ad litem. Over fifty percent (56%) of caseworkers state that initial contact with the child's LGAL occurs the day of the hearing. Five percent of caseworkers report that initial contact with the LGAL occurs when he/she initially gets the case or receives the caseworker's report. Again, caseworkers do not report a difference in initial contact with LGALs based upon their employment.

Those who chose "other" state:

- The majority of caseworkers state that they first make contact with a child's LGAL at court right before their hearings begin, during the hearing, or at the preliminary (emergency) hearing.
- Many caseworkers indicate that they have limited or no contact with LGALs.
- Many caseworkers state when foster care is originally assigned to a child's case, that caseworker will contact the LGAL. LGALs usually do not call.
- If a crisis occurs, the LGAL will contact the caseworkers.
- The point of initial contact varies depending upon the initiative of the attorney.
- A few attorneys make contact ahead of time, prior to the hearings.
- I try to never make contact with them if possible. They are not friendly and often misrepresent my comments in court.
- The day before the hearing, if that.

Exhibit 4-4:
Caseworker Statement Describing
Initial Contact with Lawyer-Guardian ad Litem
(n=455)

Response	
The child's lawyer-guardian ad litem generally contacts me when he or she initially gets the case and before he or she has received and read my report	5%
The child's lawyer-guardian ad litem generally contacts me when he or she gets my report before court	11%
The child's lawyer-guardian ad litem generally contacts me the day of the hearing	56%
Other	28%

Exhibit 4-5:
Frequency of Caseworker Contact with Lawyer-Guardians ad Litem
(n=441)

Response	
Once a week	2%
Twice a month	4%
Once a month	5%
Every two months	8%
Only at court	81%

Likewise, when caseworkers were asked how frequently they have contact with the child's LGAL, eighty-one percent state that they only have contact in court. There is little difference based on caseworker employment. Corroborating that detail is the fact that 71 percent of caseworkers say that they seldom or never meet with the LGAL to discuss the case.

Caseworkers were further asked where they and the child visit most frequently with the LGAL. Over fifty percent (55%) of caseworkers state that the child client, caseworker and LGAL most frequently visit outside the courtroom at the hearing.

Caseworkers who marked "other" with reference to where they meet with the LGAL (36 percent) state:

- Outside the courtroom, prior to the hearing.
- Most caseworkers do not participate in meetings between the LGAL and the child.
- They sometimes have lunch if the child is old enough.
- At the caseworker's office.
- At the child's placement. We do not meet if the child is placed out of state.
- The foster parent/relative brings the child to the LGAL's office.
- Has not occurred.
- During scheduled visitation.
- In the courtroom.
- Primarily independent contact.
- Never.

When asked how often the child's LGAL visits the child in foster care, eighty-two percent of caseworkers state that the LGAL never or seldom visits the child (92 percent of private caseworkers indicate this, as opposed to 80 percent of public caseworkers). Ninety-five percent of caseworkers report that the LGAL never or seldom accompanies the caseworker on visits to the child's foster care, whereas three percent state that the LGAL often or always accompanies them on visits. This perspective does not differ based on caseworker employment.

Judicial Perspective on the Extent to Which Lawyer-Guardians ad Litem Conduct Independent Investigations

Judicial mail surveys did not contain specific sections regarding independent investigations conducted by lawyer-guardians ad litem. The reason underlying this decision is that the team felt that while judges and referees would certainly know if LGALs appear informed, they would not necessarily know if investigations have actually been conducted. However, judges and referees were asked to address the issue during the focus groups.

Discussion among the judges and referees included their stating that the extent to which independent investigations are conducted is dependent upon the particular LGAL, and that not all LGALs merely rubber-stamp the FIA or caseworker reports without some challenge. This was reiterated by some of the judges who feel that among the changes brought about by the statute is the tendency for LGALs to feel that they can challenge FIA. Still, other judges and referees feel that if LGALs conduct independent investigations that would an exception to the rule. Some feel that LGALs sit as 2nd chair to the prosecutor

Exhibit 4-6:
Frequency of Lawyer-Guardian ad Litem Visits
With the child in the child's foster home or placement
(n=444)

Response	*Never*	*Seldom*	*Sometimes*	*Often*	*Always*	*Don't Know*
	40%	42%	13%	2%	1%	2%

Exhibit 4-7:
Frequency of Lawyer-Guardian ad Litem Accompaniment of Caseworker
On Visits with the Child
(n=456)

Response	*Never*	*Seldom*	*Sometimes*	*Often*	*Always*	*Don't Know*
	84%	11%	3%	1%	--	1%

much of the time, and that 25% to 30% of the LGALs do not do their job when it comes to independent investigations. One judge expressed concern that LGALs do not have investigative backgrounds, which limits their ability to investigate cases. LGALs in focus groups complained that they are expected to be investigators and that investigation is not part of their proper role.

Foster Care Review Board Perspective on the Extent to Which Lawyer-Guardians ad Litem Conduct Independent Investigations

Foster Care Review Board members reiterate the fact that the extent of investigation is based on the initiative of the LGAL in question. Foster Care Review Board members estimate that two-thirds of LGALs do not conduct independent investigations. Some Foster Care Review Board members suggest a greater utilization of CASA programs could assist the attorney in completing the required investigation, as would more intensive training on the requirements of the LGAL statute.

Summation of Key Findings Regarding Independent Investigations

A variety of issues arose concerning independent investigations during the course of the evaluation.

- All sources of information produce a consensus that independent investigations are generally not being conducted as the statute intends.

  Michigan statute clearly states that independent investigations are to occur, and the ABA has issued standards that establish parameters for such investigations. Caseworkers claim LGALs rely too heavily on their reports, and judges tend to reiterate that concern. LGALs themselves admit their investigations are limited, hampered by lack of time and resources, and hampered by a need for clarification of expectations and lack of training. The lack of or extent of the independent investigations directly impacts the quality of the representation a child receives. The concerns raised during the evaluation support clarification of statutory language and collaborative training between LGALs and caseworkers.

- Individuals participating in the evaluation express concern that the extent of an independent investigation, if one is conducted at all, depends upon the lawyer-guardian ad litem.

  Differential effort directed across child protection cases clearly impacts the quality of representation. Further, without the LGAL conducting an independent investigation, greater objectivity about the case is impossible and some information can be left unturned.

- Attorneys candidly spoke about the lack of resources needed to conduct investigations.

- There is disagreement concerning the required extent of the investigation. Some LGALs view their role as

investigator in a police sense and state such a role is not appropriate for the LGAL representing a child client.

Professional disagreement over the appropriateness and extent of this responsibility will no doubt lead to differential acceptance of responsibility. If LGALs are expected to conduct investigations, those expectations must be clearly communicated. Collaborative training between LGALs and caseworkers could serve as a vehicle to communicate these expectations and clarify roles.

- Attorneys need training in the kind of investigation required to adequately represent a child if they are to function as investigators. As mentioned previously, both attorneys and judges believe LGALs need specific training on interviewing children.

- Attorneys express some concern at the lack of more specific guidelines that might frame what constitutes an independent investigation by the lawyer-guardian ad litem.

  The Michigan statute is fairly clear about its intentions regarding independent investigations. However, attorneys indicate they would prefer more specificity about the things required with regard to the extent of the investigation (e.g., which records *should* be reviewed at a minimum).

- Caseworkers and foster parents in particular express concern over the fact that lawyer-guardians ad litem do not generally meet with the child as frequently as they believe is necessary to be informed about the case.

  If LGALs do not visit the child in the child's environment, it is difficult for the LGAL to have a comprehensive understanding of what the child needs. A lack of visiting the child in the home environment also deprives the LGAL of valuable information that can assist in the processing of the case.

- Caseworkers express concern over the fact that LGALs frequently wait until the day of the hearing to make initial contact, thereby increasing LGAL sole reliance on the caseworker report(s).

  LGALs run a great risk of losing objectivity on the case and increasing the risk of poor representation if they do not spend time with the child client away from the courthouse. Court appearances are often harried and compressed, not allowing the LGAL ample opportunity for discussion with the caseworker, the child, or other appropriate persons who might be attending the hearing or proceeding.

CHAPTER 5: REPRESENTATION ISSUES

Introduction

The overall goal of the Michigan lawyer-guardian ad litem statute is to improve the representation of children across the state by requiring independent investigations and consistent and meaningful advocacy for the child. Lawyers are expected to investigate the veracity of the facts of a case, make their independent determination of those facts, meet regularly with their child client and pertinent parties, and pursue other issues when necessary. In fact, the LGAL statute as repeated on this page lists a number of duties and powers of the LGAL that pertain specifically to the quality of representation of children.

This chapter discusses what the ABA evaluation learned about various aspects of representation of child clients in Michigan. The chapter is arranged by specific duties as charged by the LGAL statute for clarity. Within each of those specific duties, responses to a variety of questions from a variety of sources will be discussed.

(1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

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

(b) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(c) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(d) To attend all hearings and substitute representation for the child only with court approval.

(i) To monitor the implementation of case plans and court orders and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-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 the services, or if the services are not accomplishing their intended purpose.

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

(k) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

MCL 712A.17d (1)

Meeting with the Child-client, other Pertinent Parties, and Reviewing Agency Files

The LGAL statute clearly indicates that LGALs are to meet with the child client before each hearing or proceeding. There is also the expectation that LGALs will meet with foster parents. As shown in Exhibit 5-1, One-third (35%) of the responding LGALs indicate they always meet with the child before each proceeding. Slightly more than another one-third (36%) indicate they meet with the child before each proceeding. Nearly one-half (46%) of the LGALs say they often meet with foster parents before each hearing or proceeding. LGALs indicate that the age of the child may be a factor in assessing a need to meet. The argument can be made, however, that the LGAL should opt to meet with the foster parent in such circumstances. However, 62 percent of foster parents state that they do not meet with the child's LGAL before each hearing or proceeding. For those foster parents who indicate they do meet with the LGAL, at court just prior to the hearing (48%) and the home (31%) were the most frequent responses.

Exhibit 5-1:
LGAL Stated Frequency of Meeting With Child Client and Foster Parents

How frequently do you meet with these parties before each hearing?	*Child (n=58)*	*Foster Parents or Caregivers (n=59)*
Never	2%	2%
Seldom	12%	12%
Sometimes	15%	25%
Often	36%	46%
Always	35%	15%

Exhibit 5-2:
Foster Parent Stated Frequency of Meeting With LGAL

Does your foster child meet with the lawyer-guardian ad litem before each hearing (n=96)	
Yes	38%
No	62%

Foster parents were also asked general questions about their interaction with their foster child's LGAL. As shown in Exhibit 5-3, approximately one-half of responding foster parents indicate limited interaction with the child's LGAL. This is made somewhat more important by the fact that one-fourth (25%) of these foster parents report their current child being in their care seven months to one year, and 40 percent report having a current child in their care for more than one year.

Exhibit 5-4 continues to document the level of meeting and interaction between foster parents and LGALs. Again, nearly one-half or more of foster parents indicate a low level of interaction and information sharing with the LGAL.

Focus groups covered these issues as well, and lent support to the survey findings. Typical responses from the groups are reflected in the bulleted items below.

Exhibit 5-3:
Foster Parent Responses to General Questions About Interaction With LGAL

	Yes	*No*	*Yes/No*
Do you know who your foster child's lawyer-guardian ad litem is? (N=99)	57%	42%	1%
Has your foster child's lawyer-guardian ad litem ever contacted you? (N=99)	36%	62%	2%
Have you met your foster child's lawyer-guardian ad-litem? (N=99)	48%	50%	1%

Exhibit 5-4:
Foster Parent Responses to Specific Questions About Interaction With LGALs

Does your foster child's lawyer-guardian ad litem…	*Yes*	*No*	*Yes/No*	*N/A*	*Don't know*
Discuss the progress of the child with you before each hearing? *(n=93)*	5%	73%	2%		
Return your telephone calls in a timely manner? *(n=88)*	39%	47%	2%	12%	
Honor your requests for meetings? *(n=80)*	29%	51%		20%	
Discuss your foster child's court orders with you? *(n=88)*	30%	69%			1%
Discuss your foster child's case plans with you? *(n-89)*	4%	65%			1%

- Foster children reported they have met their lawyer on occasion, but generally to say hello and then returned to what interested them.
- Caseworkers in one focus group indicated that there is little or no contact between lawyer-guardians ad litem and their clients until the day or evening before a hearing. In one instance, a caseworker claimed, an attorney refused to see the child even though the caseworker had transported the child to the attorney.
- Caseworkers all stated that the very young child and the older child have less contact with their attorney than other children. They further indicated even if the child is a "failure to thrive", or very young, the lawyer-guardian ad litem should still see the child in his or her placement environment. A caseworker during one session stated that older children complain that the lawyer-guardian ad litem does not visit them, but that these same children are intimidated in court and do not tell the judge that they have not seen their lawyer.
- One foster parent during a focus group stated, "[my child] on paper is different than [my child] in real life." According to the foster parents in the focus groups, reading the files is different than seeing a child in the foster home, especially when considering termination of parental rights and adoption, and that attorneys ought to make better practice of visiting the child in the foster home.
- During one of the focus groups, caseworkers stated that some attorneys go out of their way to visit with a child while others do not. For instance, one lawyer-guardian ad litem flew to Pennsylvania.
- One group of caseworkers stated that lawyer-guardians ad litem do not bother visiting the child if the child is placed at a relatives home.
- One caseworker stated that a particular referee orders the lawyer-guardian ad litem to see the child before next hearing. Such judicial oversight was corroborated during focus groups with judges and referees.
- The judges and referees feel that the lawyer-guardians ad litem meet with the children about 50 percent of the time during the quarter. Some of the judges and referees ask the attorneys on the record whether or not they have visited with the child client. Judges and referees understood the LGAL failing to visit the client as they are frequently not compensated for mileage or time.
- Attorneys indicate that with no reimbursement, they should not be required to visit the child in an FIA placement that is out of the county.
- Judges and referees during one of the focus groups feel that it should not be mandatory to visit the child unless you pay the attorney for their time and mileage. There are certain cases where there should be face-to-face contact. During one of the focus groups, lawyer-guardians ad litem stated that they feel insulted if a judge or referee asks if they have visited with the child.
- Some judges indicated that since the implementation of the statute there has been more contact with the children. They believe that even the attorneys that were average are becoming more engaged with the case.

- Parents during the focus groups stated that they generally do not know who the lawyer-guardian ad litem is for their child. When they have concerns about a foster home (e.g., bite marks and stories of running around the house as a form of punishment), or medical needs (e.g,. hearing, eye exams), they feel the lawyer-guardian ad litem is not responsive to those concerns. Parents feel the lawyer-guardian ad litem only listens to FIA workers. The parents also felt that if the lawyer-guardian ad litem is actually representing the child, the lawyer-guardian ad litem needs to spend time with the child and form his or her own opinion.
- Foster Care Review Board members indicate that LGAL attendance at their meetings is important, but that enforcement of attendance is due to judges and not the statute itself. Some members estimate that about 20 percent of LGALs attend meetings at all, but that attendance has improved since enactment of the statute. The cite lack of funding and no consequences for non-attendance as factors.

Explaining the LGAL's Role to Child Client and Foster Parents

The Michigan LGAL statute recognizes that the age and maturity of the child-client be considered on many levels. For one, the statute requires that the LGAL explain his or her role to the child-client based on the ability of the child to understand the conversation. Considering that the child might be an infant or extremely young, one could argue that the LGAL should explain his or her role to the foster parent or guardian.

During the telephone interview, foster parents were also asked if the lawyer-guardian ad litem explained her/her role to the child. Less than one-third (29%) of foster parents said that the LGAL had described his or her role to the child. However, some of these foster parents stated the child was either too young or mentally handicapped to understand the role of the lawyer-guardian ad litem, or the foster parents only had contact with caseworker. Less than one-half (42%) of foster parents indicated that the LGAL explained his or her role to them. However, it should be noted that LGALs may in fact be providing the

Exhibit 5-5:
LGAL Explanation of Role to Child-Client

	Yes	*No*	*Yes/No*	*Don't Know*
Has your foster child's lawyer-guardian ad litem explained his or her role to YOU? *(n=98)*	42%	57%	1%	
Has your foster child's lawyer-guardian ad litem explained his or her role to your foster child? *(n=96)*	29%	69%	1%	1%

explanation of their role to the child, but that explanation may take place outside the presence of the foster parents.

When asked to discuss how they explain their role to their child-client, LGALs offered responses such as those below.

- I tell the child I am his lawyer and try to engage in a dialogue with the child from that point.
- I explain what an attorney is, tell them I represent them, describe court hearings, ask them what they want to happen.
- Refer to myself as a helper to the judge. I can tell the judge things that the child wants her to know. Also, I am available to answer questions or get help for child if needed.
- I tell them that it is my job to look out for them and to talk to the judge on their behalf and to make sure that no one takes advantage of them. Depending upon the nature of the hearing I explain the court process to them and answer their questions
- This really depends on the child and whether it is a delinquency or abuse and neglect case. I tell them I treat them like adult clients
- I tell them who I am and what I'm here for and then I try to explain the nature of the case. I tell them I am there for them and if there is anything or want anything to tell me what that may be. I try to get them at ease, and make sure they have an understanding of the court process
- I tell them that the court may talk to them, and to not be afraid. Also, I tell them that no one is going to go to jail or hurt them, and if they want someone with them, then they can sit with them in the witness stand. I tell them I am there to help them and to make sure that no one makes them tell the child to do something that is not true or didn't happen
- I am an attorney who talks to the judge, worker, witnesses and other lawyers to try and help you and your family. Judge makes ultimate discussion, but it is important, how you feel how you're doing and what you want. We are working out for you so you can be safe and your parents can learn better ways to be good parents; my job is to also recommend to the judge what I think is best for you
- I describe my role as one who will work to ensure that they live in a loving supportive family of permanence. I explain where appropriate, that I must do more than advocate their wishes – I must recommend what is best given the unique circumstances of the case.
- Depending on the age I identify myself as their attorney. I let them know what if there is something they want the court to know and they don't want to speak that I will for them. I also let them know that what we discuss is "secret" or "private" and unless they tell me, I will not discuss it with anyone else.
- My job as counsel for the child is to find all the info. I possibly can in regards to the petition. I believe I am independent from the petitioner's attorney and I conduct myself independently. I am not always sold on the fact the FIA has acted appropriately in all cases involving children in neglect and abuse cases. At all times I believe my duty and responsibility is to represent the child's

interest as best I possibly can all during the court proceedings, and in the event there is termination, it is my job to continue representing the child in post termination proceedings up to the time of adoption.

- I tell them that I inform the court as to how the children are doing.
- I tell them that I am their own personal lawyer. What would you like me to tell the judge for you? How are you getting along where you are living?
- My role is to represent the child's best interests. I seek the truth as does the prosecutor. If parents admit or are found responsible to allegations, then I must seek out what is the best environment for the child to live and to remain safe. I look for services that can help the child and parents
- I explain to the child that I am their voice in the court system and that they should feel free to ask me questions or voice their concerns to me- I also explain that I inform the child of services that may be offered to them or their parents and what purpose those services may be set up to accomplish. I also tell them that I need to make sure the court understands what I believe to be in the child's best interests

Filing All Necessary Pleadings And Papers And Calling Independent Witnesses on the Child's Behalf.

The evaluation team got no indication within the scope of the project that there were any problems with LGALs filing all required and necessary pleadings and papers.

Exhibit 5-6 details the frequency with which LGALs report calling specific individuals as independent witnesses on behalf of the child. Some caution is urged at making conclusions based on this exhibit, as the need to call these witnesses may not always be necessary, that being offered in defense of LGALs.

Only ten percent of judges and referees state that they found LGALs calling more independent witnesses on behalf of the child since enactment of the LGAL statute. Nearly three-fourths (71%) say LGALs are calling the same number of independent witnesses. Over three-fourths (78%) of LGALs questioned indicate they do not feel a greater need to call individuals as independent witnesses on the child's behalf since the statute's enactment. Exhibit 5-6 shows the frequency with which LGALs call specific individuals as independent witnesses. Judges and referees report no difference in LGAL frequency of calling specific individuals prior to the law and since that time. A large percentage (82%) of caseworkers indicate that LGALs seldom or never all independent witnesses on behalf of the child. This high rate could easily be attributable to a disconnect between caseworkers and LGALs as to which individuals might be considered "independent witnesses." For example, a LGAL might consider a foster parent an independent witness whereas a caseworker may not.

The results are not surprising. LGALs tend to call the caseworker more frequently than anyone else as an independent witness. The low rates at which they call certain individuals as independent

Exhibit 5-6:
Frequency With Which LGALs called Specific Individuals as Independent Witnesses on Behalf of the Child

Overall, how frequently do you call the following individuals as independent witnesses on the child's behalf (not because they should have been called by someone else)? n=63	*Never*	*Seldom*	*Sometimes*	*Often*	*Always*	*Not Applicable*
Child (n=56)	18%	45%	23%	5%	2%	7%
Custodial parent/or counsel (n=57)	18%	33%	32%	11%		7%
Non custodial parent/ and/or counsel (n=59)	17%	31%	39%	7%		7%
Foster parent (n=58)	14%	38%	29%	10%	2%	7%
Social worker (n=56)	2%	21%	16%	23%	30%	7%
Police (n=57)	18%	40%	21%	7%	7%	7%
Teacher/school personnel (n=59)	14%	41%	29%	9%	2%	7%
CASA (n=52)	29%	25%	25%	10%	4%	7%
Medical Personnel (n=55)	13%	42%	27%	9%	2%	7%

witnesses may indicate that these persons are not being consulted to the extent that they should be consulted. If that is the case, then the LGAL is not getting as complete a portrait of the as sought by the independent investigation requirement of the statute. For example, 52 percent say the seldom or rarely call foster parents as independent witnesses, and 55 percent rarely or seldom call medical or school personnel.

Consistency in Representation: Attending All Hearings and Substitute Representation for the Child only with Court Approval

Consistency of representation in child protection proceedings is essential as it can expedite the achievement of permanency. High turnover rates for caseworkers in particular can make the relationship with the lawyer-guardian ad litem pivotal for the child. Attending each and every hearing personally on the behalf of the child is essential to the child's representation.

Nearly one-half (49%) of LGALs say they *often* attend each hearing for a child, and another one-half (47%) state they a*lways* attend each hearing. As shown in Exhibit 5-8, nearly three-fourths of the responding LGALs indicate that the primary reasons for not being able to attend each hearing are either scheduling conflicts (62%) or being held up in another courtroom (12%).

As shown in exhibit 5-9, judges and referees state that approximately one-fourth of LGALs are *always* present at each hearing, and nearly one-half are *often* at each and every hearing for a child. Some improvement has been noted since the statute was enacted.

Exhibit 5-7:
Frequency With Which LGALs Attend Every Hearing

	Never	*Seldom*	*Sometimes*	*Often*	*Always*
How often do you personally attend each and every hearing on behalf of a child client? (N=61)	2%	2%	0%	49%	47%

Exhibit 5-8:
Circumstances Most Often Preventing LGALs From Attending Each and Every Hearing for a Child (N=50)

Reason for Not Attending Hearings	
Not notified of hearing	4%
Held up in another courtroom	12%
Scheduling conflict	62%
Unexpected personal conflicts	8%
Other	8%
All of the above	2%
Not notified of hearing/unexpected conflicts	2%
Held up in another courtroom/scheduling	2%

Exhibit 5-9:
Judicial Perspective of LGALs Attending Each Hearing for a Child

How frequently was/is the same legal counsel present at each and every hearing on behalf of the child?	*Prior to Enactment (n=64)*	*Since Enactment (n=66)*
Not Applicable	6%	
Seldom	6%	5%
Sometimes	11%	5%
Often	53%	64%
Always	24%	27%

Attendance at each and every hearing, barring emergencies, is not the only characteristic of consistent representation that should be considered. There is also the frequency with which LGALs ask to be relieved of their duties, and the law also mandates that LGALs do not provide a substitute LGAL in their stead unless they receive permission from the court.

Over three quarters (77%) of LGALs surveyed indicate they have *never* asked the court to relieve them of their LGAL duties, and 86 percent indicate that they continue to represent the child until the court's jurisdiction has ended. Nearly one-half (43.5%) of the judges and referees surveyed indicate they have received such a request.

When asked on the mail survey for descriptions of circumstances under which they might seek to be relieved of their duties, lawyer-guardians ad litem provided scenarios such as those excerpted below:

- If the child's preference differs from what's in his/her best interest. If I felt I could no longer advocate effectively due to the conflict of interest.
- Only if some sort of conflict of interest arose, such as discovering that I previously represented a parent in a prior proceeding.
- If I found it impossible to communicate with a child after exhausting all means. Communication is essential in representation. If I am unable to communicate with the child effectively, it may hinder my ability to determine the child's best interests. A child may refuse to speak to their lawyer-guardian ad litem.
- If I'm particularly disgusted with the kind of case.
- I may represent a sibling also and there is a conflict of interest.
- If a child becomes violent
- I was appointed to represent an individual who was also a tenant. Another case involved a neighbor in my neighborhood.
- When a referee ordered me to visit a 17-year-old placed more than 100 miles away.

Judges and referees mirror those reasons, adding the following: an LGAL leaving community, LGAL's had more lucrative work to choose, refusing to visit a child in the "projects"; a change in occupation or move to a firm that does not handle child protective proceedings; and nonpayment for visiting a child.

Judges and referees report seeing less change in a child's LGAL since enactment of the statute with 75 percent saying they seldom or never see a change in counsel (up from 60 percent reflecting on times prior to the statute). Two-thirds (64%) of the foster parents state that their foster child has had the same lawyer-guardian ad litem during his/her entire case. Three-fourths (77%) of caseworkers state that there is consistency in a child's representation until the court's jurisdiction has ended.

Seventy percent of LGALs responding to the survey said they knew of LGALs substituting for each other during child protection proceedings. Exhibit 5-10 provided insight as to how frequently substitution may occur. Nearly three-fourths (72%) said they have rarely or seldom substituted for another LGAL, and the same

Exhibit 5-10:
LGAL Substitution and Court Approval

	Never	*Seldom*	*Sometimes*	*Often*	*Always*
How frequently have you substituted for another lawyer-guardian ad litem at a hearing? *(n=61)*	16%	33%	39%	12%	
How frequently have other lawyer-guardians ad litem substituted for you at a hearing? *(n=61)*	23%	49%	23%	3%	2%
How often does the court give approval for such substitution at a hearing? *(n=56)*	2%	23%	18%	34%	23%

number said another LGAL rarely or seldom substitutes for them. The occurrence of substitution appears to grow with the size of the jurisdiction in which the LGALs practice.

Judges and referees were also asked to respond to the issue of consistency in representation. Nearly all respondents (91%) say that the same legal counsel is often or always present at every hearing, compared to 77 percent prior to enactment of the statute. Three-fifths (59%) of the judges and referees indicate that lawyer-guardians ad litem have improved consistency, and substitution has not been a problem since the statute took effect. Sixty-two percent state the LGALs current never or seldom substitute for one another. Judges and referees, as do LGALs, report that courts generally grant permission for substitutions when requested. Mirroring what was said by LGALs, judges and referees say that scheduling conflicts and being held up in another courtroom were the primary reasons LGALs could not attend hearings.

Caseworker turnover makes it difficult to assess their perspective on LGAL attendance at hearings. However, since enactment of the LGAL statute, two-thirds (66%) of caseworkers report that LGAL's are always present at the hearings that they themselves attend. Caseworkers also indicate that LGAL's sometimes, often or always substitute for one another sixty-eight percent of the time. One-third (32%) of the caseworkers indicate LGAL's never or seldom substitute for one another.

However, the issue of substitution changes when considering the size of the jurisdiction. The larger the jurisdiction, the more substitution of LGALs occurs and the greater perception by judges that substitution is a problem. Twice as many urban lawyers as suburban or transitional lawyers report “sometimes” having had someone substitute for them (40% versus 17%). One-half (50%) of urban judges report they have seen no improvement in substitution since the LGAL statute was enacted (as opposed to 32% of transitional judges and 36% of rural judges). Sixty-three

percent of urban judges report LGALs sometimes or often substitute for one another (as opposed to 27% of transitional judges and no rural judges).

The issues of consistency of representation and substitution were also addressed in the focus groups. The comments provided below are indicative of what groups felt about the issue.

- Caseworkers indicated that when substitutions occur someone from the same firm usually attends the hearing and is knowledgeable about the case.
- Judges concur that there is not a lot substitution among LGALs. For example, one of the law firms under contract has three attorneys who are appointed to handle child protection cases, and they will send one of the other two if necessary. Some judges ensure that the substitution is officially recorded.
- One lawyer-guardian ad litem stated anecdotally that when substituting for another attorney the referee asked him to leave and conducted the hearing without a lawyer-guardian ad litem present. This attorney spoke to the chief judge about the situation, however nothing was done, and the referee continues to conduct his hearings like that.
- Caseworkers in one group indicated that the lawyer-guardians ad litem substitute approximately, 25-50 percent and that the substituting lawyer-guardian ad litem generally agrees with the FIA report.
- Foster parents at one site stated that the LGALs are always on vacation.
- Judges at one site stated that the legislation has made a remarkable difference on consistency and substitution at hearings.
- During one of the focus groups, judges stated that it is crucial that the attorneys be involved throughout the life of the case because there are problems with continuity with FIA. The lawyer is generally the one individual the child can recognize throughout the life of the case, and hopefully grow to trust.
- Foster Care Review Board members indicate that consistency of representation of the child by the LGAL is good, and that it is often the point of consistency for the child as the turnover for FIA caseworkers is so high.

LGAL Involvement in Case Plan Development, Court Order Monitoring, and Provision of Services for the Family

The lawyer-guardians ad litem were asked to indicate how they involve themselves in the development and monitoring of the child's case plan, court orders, and provisions of services for the family. All of the lawyer-guardians ad litem indicated that they receive and review reports about the child's and parents' progress. However, less than half (48%) indicated that they attend case conferences or periodic assessment meetings (see Exhibit 5-11). Eighty percent make inquiries with child's caretakers directly or make inquires about status of court order implementation. A few lawyer-guardians ad litem also indicated that they indirectly inquire with the child's caretaker, contact counselors, psychiatrists, caseworkers, child, probation agents, parent interviews, try to observe child interaction with parents and their peers, talk with medical personnel and

Exhibit 5-11:
LGAL Involvement in Development and Monitoring of Case Plans, Court Orders, and Services

Please indicate how you are involved in the development and monitoring of the child's case plan, court orders, and provision of services for the family. I…	
Am not involved in the development and monitoring of case plan, court orders, and provision of services *(n=61)*	8%
Attend case conferences/periodic assessment meetings *(n=61)*	48%
Receive and review reports about child's progress *(n=61)*	100%
Receive and review reports about parents' progress *(n=61)*	100%
Make inquiries about status of court order implementation *(n=61)*	80%
Inquire with child's caretakers directly *(n=61)*	80%
Inquire with child's case worker directly *(n=61)*	92%
Inquire with school or other educational personnel *(n=61)*	51%

counselors, observe visits, make phone calls, and ask for specific services.

Approximately three-quarters of the judges and referees stated that lawyer-guardians ad litem appear to be as knowledgeable on their child's case plan (73%), court orders (77%), and provision of services (73%), since the implementation of the Binsfeld legislation. Only one-fourth say LGALs are more knowledgeable since the enactment of the statute.

During a focus group, Foster Care Review Board members indicated they felt that LGAL involvement in case plans and service monitoring is crucial. They expressed their concern, however, that LGALs are generally not actively involved in these areas, that case plans are not as individualized as they should be, and that standard "boilerplate" plans are used frequently.

According to caseworkers (85%), LGALs do not normally attend case conferences or periodic assessment meetings about the child (Exhibit 5-12). Instead, LGALs are more likely to review written reports about the child's and family's progress or inquire directly with the caseworker about the case.

Lawyer-guardians ad litem were asked to describe what they do when services are not being provided in a timely fashion to your client, services are being refused by the family, services are not accomplishing the intended goals, or services are not available. Below are a few responses.

- I make appropriate calls to expedite resolution of the problem.
- I file a motion with the court requesting a court order to compel action or compliance, which usually results in

some action being taken to achieve compliance.

- I recommend action at review hearings.
- I contact the parent's attorney.
- I call the situation to the attention of the referee or judge.
- I speak with the family and service providers directly. I must understand the problem before I can solve it. This usually works, although it is particularly difficult with families who feel powerless and victimized by the process.
- Motion the court – little can be done these days because of lack of funding, too few capable workers, and a lack of qualified therapists and facilities. Mental health and child welfare does not seem to be top priority. Special education is often non-existent.
- I agitate the caseworker when things are not being done in timely manner. Refusal of services may precipitate a new preliminary examination if children are not removed and there's a risk of harm. If the child is already removed, I wait until the review hearing, and then begin discussion of long-term permanency. When services do not work, I explore new services with those involved.
- I attempt to make the court reconsider the timeliness of attempts at compliance and mitigate the adverse consequences to the parent-child relationships

Exhibit 5-12:
Caseworker Perception of How LGALs are Involved in Case Plan Development and Court Orders and Service Monitoring

In what ways have lawyer-guardians ad litem been involved in the development and monitoring of the child's case plan, court orders, and provision of services for the family?	*Yes*	*No*
Case conferences/periodic assessment meetings *(n=426)*	15%	85%
Receive and review reports about the child's progress *(n=441)*	71%	29%
Receive and review reports about the parents' progress *(n=434)*	67%	33%
Make inquiries about status of court order implementation *(n=428)*	29%	71%
Inquire with child's caretakers directly *(n=427)*	25%	75%
Inquire with you directly *(n=431)*	56%	44%

Exhibit 5-13:
Caseworker Perception of LGAL Notification of Court of Service Problems

Do lawyer-guardians ad litem notify the court when requested services …	*Yes*	*No*
are not being provided in a timely fashion *(n=397)*	40%	60%
are being refused by the family *(n=392)*	37%	63%
are not accomplishing the intended goals *(n=393)*	38%	62%
are not available *(n=385)*	34%	66%

- I advise the family to use the services before the consequences suggest different alternatives.
- I transfer calls to the caseworker or source provider if necessary. I address the issue with the judge; and work with parents' attorneys to attempt persuasion. We don't often run into this problem. We seem to be a resource-rich country, with a large variety of services for parents for children
- I first speak with the caseworker who is the liaison with all service providers. Our FIA caseworkers are generally very dedicated and can produce results. If that is unsuccessful, I would address the matter with the judge and request a show cause hearing
- I try to persuade first FIA to provide without court orders. I try to work within FIA framework and hierarchy (e.g.; caseworker, supervisor etc.). I then try to persuade parents' attorneys and prosecutor to prepare for court. I then persuade the court after securing others' support.
- I ask for a case conference with the social worker and FIA as soon as possible.
- I attempt to secure services myself; or file motions with court. If the family refuses that is the parents' problem to an extent. We will try to accommodate them. If services are not available we make them up; as in create our own "service."

The lawyer-guardians ad litem stated in the mail survey that they generally become aware that there is a problem with services from caseworkers or their reports or from their child client. In addition, lawyer-guardians ad litem indicate that they may hear about problems through the child's parents, foster parent, teacher, therapist, CASA, and other attorneys. However, one lawyer-guardian ad litem said that s/he usually calls the caseworker in-between hearings, and only rarely receives a call from the caseworker unless there is a problem. Others say they find out about problems through the caseworker immediately prior to hearings when reviewing the case reports.

According to the judges and referees, since the enactment of the LGAL statute, the lawyer-guardians ad litem often or always notify the court when requested services are not being provided in a timely fashion (46%), being refused by the family (35%), are not accomplishing the intended goals (42%), or were not available (40%). A higher percentage of judges and lawyers indicate LGALs seldom or sometimes inform the court of these matters.

Foster parents were asked during telephone interviews what the lawyer-guardians ad litem do when their foster child is NOT receiving services that were ordered by the court or are being refused by their foster child. Foster parents indicate that they never had to deal with this type of problem, or if they do, they contact the caseworker. Nearly one-half (49%) of foster parents said that LGALs advocate for visitation plans that are good for the child, and 43 percent said that the LGALs do NOT advocate for suspension of visitation that is NOT good for the child.

Foster Care Review Board members do not believe that LGALs are as involved as they need to be in the monitoring of services.

There were other comments offered during the focus groups that were held. Typical thoughts included:

- The judges in one of the focus groups stated that the lawyer-guardians ad litem should be considered the supervisor of the case. They should be able to help review and make suggestions to caseworkers.
- The lawyer-guardians ad litem stated that if something is brought to their attention in a school or neighborhood they will deal with it but they will not be proactive.
- One of the lawyer-guardians ad litem during a focus group stated that caseworkers usually hate it when the lawyer-guardian ad litem attends a case planning or case conference.
- During one of the focus groups with lawyer-guardians ad litem, they stated it was more the parents' attorney's responsibility to make sure parents are following their service plan. They indicated they use FIA reports to determine parents' compliance.
- Lawyer-guardians ad litem during one focus group stated that they believe attending Foster Care Review Board meetings is a waste of time, and that they usually go about 50 percent of the time. They feel that the Foster Care Review Board members do not have an accurate sense of what is going on with the child and do not completely understand the child's service needs.
- The caseworkers in one focus group stated that the lawyer-guardians ad litem are helpful when there is an emergency.

Identifying Common Interests Among the Parties and., to the Extent Possible, Promoting a Cooperative Resolution of the Matter

Over half (57%) of lawyer-guardians ad litem say the usually work with the parties informally to achieve a resolution when disagreements between parties arise. A few lawyer-guardians ad litem indicate that they act as an informal mediator, argue the disagreement in court and have judge issue an order, refer the matter to therapist or other mediator, or refer the situation to a

Exhibit 5-14:
Actions Taken by Lawyer-Guardians ad Litem When Disagreements Arise

When disagreements between parties arise what, if anything, do you most frequently do to help the parties achieve consensus? (n=58)	
Involve the judge in the disagreement	28%
Act as a formal mediator among parties	5%
Work with the parties informally to achieve resolution	57%
Involve a separate mediator	10%

mediation pilot project. One lawyer-guardian ad litem stated it was not their role to perform mediation. Exhibit 5-14 summarizes their responses.

Seventy-three percent of caseworkers indicate that sometimes, often or always situations arise in a case wherein interested parties disagree on significant issues such as placement and services. According to caseworkers, most often LGAL's such resolve disagreements between parties by involving a judge (45%), working with the parties informally to achieve a resolution (28%), or by other means (14%). Those who marked other indicated that:

Requesting Authorization from the Court to Pursue Issues on the Child's Behalf That do not Arise Specifically from the Court Appointment

The Michigan LGAL statute promotes the best interests of the child. In essence, this means that the LGAL should be aware of problems the child might be experiencing that are not directly related to the immediate reason for the LGAL's appointment. Such circumstances might include immigration matters, special education issues, and social security benefits.

Slightly more than one-half (54%) of 56 lawyer-guardians ad litem answering the question said that they have had to pursue other issues on behalf of the child. Over two-thirds (38%) sometimes pursue matters of delinquency or special education). School discipline matters, and general benefits and social security issues were less frequently pursued. Some lawyer-guardians ad litem

Exhibit 5-15:
Issues Pursued by LGALs Not Directly Related to Their Appointment

How frequently do you pursue issues on behalf of the child that do not directly arise from your court appointment?	*Never*	*Seldom*	*Sometimes*	*Often*	*Always*
Immigration matters *(n=59)*	85%	10%	3%	0%	2%
School discipline matters *(n=60)*	37%	27%	27%	8%	1%
Delinquency cases *(n=60)*	19%	13%	38%	15%	15%
Special education issues *(n=61)*	33%	16%	38%	10%	3%
Social services/general benefits *(n=60)*	32%	33%	22%	10%	3%
Social security/disability claims *(n=60)*	58%	25%	13%	2%	2%
Actions against FIA *(n=59)*	72%	20%	7%	0%	1%

stated that they also pursue issues concerning name changes, regular school matters, medication issues, placement issues, hearings in lawsuits, divorce, adoption, abortion, kinship, guardianship, environmental issues, estate, and Indian tribal membership.

Below are examples from a few of the lawyer-guardians ad litem as to what issues they might find themselves pursuing on behalf of the child.

- I have to take the action necessary to solve the problem, with court's approval. Probably one – third of the cases require some extra steps
- There is often a companion divorce, custody or child support order.
- Child victims have requested to change their last name to their mother's last name from the perpetrator/father's name. This is a separate case. Children have also sought assistance for an adoption or abortion. Sometimes a guardianship is commenced in an abuse and neglect case.
- I've had to get involved with individual education plans at schools. I help with housing issues and job searches. I investigate relatives or extended family members who might assist the family, thus assisting the child, or who might be sources for the child's placement.
- Child injuries, funding issues, and special services (i.e., mental health, Americans with Disabilities Act issues, Social Security issues).
- Depending on the case, I might have contact with their attorneys not involved in case, or contact with referral sources (outside of court). I have made independent purchases on behalf of client.
- I consider all aspects of the child's life part of my representation
- If a parent dies, there may be property in which the child has an interest.
- I might get involved in the collection of outstanding child support from orders from other courts; and have to inquire about or explore potential courses of civil action.

Caseworkers were asked in the mail survey, how frequently they see LGAL's pursuing issues on behalf of the child that do not directly arise from their court appointment. The majority of caseworkers stated that LGAL's never pursue issues such as immigration (88%), school discipline matters (67%), delinquency cases (49%), special education (58%), social services/general benefits (64%), social security/disability claims (68%), and actions against FIA (65%). It is not surprising that caseworkers would give such responses. If the matters pursued were not directly related to the case, the interaction between the LGAL and the caseworker would be limited.

The Binsfeld legislation requires that lawyer-guardians ad litem seek authorization from the court to pursue such issues. Lawyer-guardians ad litem were asked in the mail survey to discuss the barriers, if any, they encountered in seeking authorization from the court. The lawyer-guardians ad litem generally stated that the need to purse these matters rarely arises, or the agency worker/foster parent handles these matters. However, a few attorneys, for example, offered the following scenarios:

- On a rare occasion the court might deny payment, but the court has never denied permission to proceed. Sometimes work must be done pro bono.
- Courts don't want to spend money on this type of issue. The court doesn't order such things because the court can't pay.
- Courts don't seem interested nor do they provide assistance or resources to pursue these matters. Also, there is a need for court supported independent psychological services such as evaluations and counseling.
- However, I can tell you the biggest barrier I encounter has nothing to do with the authorization of the court, but it has to do with the lack of services available for the child.
- If a need is very pressing, and caseworkers and/or parties involved have done nothing, the court might request an attorney's assistance. Usually in that case there are no barriers.
- Red tape and a "bean counting" mentality. Many times my aggressive advocacy and my understanding of my obligations and responsibilities cause me to butt heads with others that do not understand or appreciate my obligations.
- When I look to obtain educational assessments, the school policies often do not match with court orders and there are often long delays or refusals to do assessments by school authorities.
- During one of the focus groups, judges were asked about lawyer-guardians ad litem aggressiveness with ancillary issues (e.g., special education, IEPs, school). The judges stated that they do not pay them to do look into such issues. A couple of the judges stated that LGALs may go to an IEP meeting, but it is unlikely.
- During one of the focus groups with lawyer-guardians ad litem, they stated that they deal with ancillary issues if necessary. For instance, one lawyer-guardian ad litem assisted an Indian family with immigration issue.

Summation of Key Findings Regarding Representation Issues

The following paragraphs highlight the key findings and points of interesting regarding representation issues uncovered by the evaluation.

Meeting with the Child-client, other Pertinent Parties, and Reviewing Agency Files

- LGALs do not meet with their child-client or the child's foster parents as required by the statute. LGALs themselves admit they do not meet with their child-client or foster parents as often as required by the statute claiming that in many cases it is not necessary and that there is a lack of funding.

  The implication is that the LGAL proceeds in the case without having adequate knowledge of the child and the child's environment, which impacts on his or her ability to represent the child. Evidence also suggests that there is a great reliance on caseworker reports and little interaction with foster parents, again which undermines the independent investigation requirement.

Explaining the LGAL's Role to the Child-Client and Foster Parents

- Based on information provided by foster parents, it appears that LGALs do not adequately explain their role to their child client or the child's foster parents.

  Engaging the foster parents through thoroughly explaining his or her role can provide benefits to the LGAL. Establishing such a relationship can easily provide the LGAL access to better information.

Filing All Necessary Pleadings and Papers and Calling Independent Witnesses on the Child's Behalf

- There was no evidence to suggest that LGALs did not file all necessary pleadings and papers in their cases.

- LGALs, judges and referees report that there has been no increase of LGAL calling independent witnesses on behalf of the child. LGALs strongly suggest that there is no greater need since enactment of the statute to call such witnesses. Still, foster parents, school personnel, and medical personnel are called as witnesses at a very low rate.

  The implication is that LGALs may not be presenting enough evidence through witnesses on behalf of the child. However, it is difficult to ascertain from this evaluation the necessity for such witnesses beyond what the LGALs themselves report. The issue itself did not present itself as a major issue during the evaluation and this information should most appropriately be looked upon as establishing a sense of how frequently LGALs do call these individuals on behalf of the child.

Consistency in Representation: Attending All Hearings and Substitute Representation for the Child Only with Court Approval

- The evidence gathered during the evaluation suggests that LGALs attend hearings on behalf of the child as necessary.

  LGALs, caseworkers, judges, foster parents, and Foster Care Review Board members indicate that there is consistency in representation in children. Judges report that consistency has improved somewhat since enactment of the statute. LGALs and judges indicate that scheduling conflicts and being detained in another courtroom are the main reasons for missing hearings.

- Overall, LGALs do not substitute for each other at a rate that impacts or disrupts representation. However, the substitution of LGALs for each other at various proceedings becomes a larger issue as the size of the jurisdiction increases.

LGAL Involvement in Case Plan Development, Court Order Monitoring, and Provision of Services for the Family

- LGALs do not generally attend meetings that would allow them to have more in-depth information about the child's case plan, and, according to some, rely too heavily on reports written by others.

Caseworkers indicate that LGALs do not regularly attend case plan development meetings or staffings. Foster Care Review Board members state that LGALs previously did not attend FCRB meetings, but that has improved somewhat. Both indicate a reliance on existing written reports. LGALs and judges say resources are often an issue as to whether or not LGALs can be reimbursed for their time for attending such meetings.

The implication of limited involvement in case plans and appropriate participation in related meetings is that the LGAL becomes less effective as a voice for the child. The less information an LGAL has, the less the LGAL can advocate for the child's best interests.

- LGALs appear to take appropriate steps when there are problems in services being provided to the child and/or the family.

Identifying Common Interests Among the Parties and, to the Extent Possible, Promoting a Cooperative Resolution of the Matter

- There is no evidence to suggest that LGALs do not seek cooperative resolution of problems as they arise.

Requesting Authorization from the Court to Pursue Issues on the Child's Behalf that do not Arise Specifically from the Court Appointment

- There is little evidence to suggest that LGALs do not pursue issues as necessary when they arise. However, a constant theme in this evaluation has been the lack of funds to pay LGALs for what is required. Participants offered that argument again on this issue, and LGALs indicated that many times work of this nature had to be provided *pro bono.*

CHAPTER 6: ACCESS TO CASE RELATED INFORMATION, PRESENTING INFORMATION TO THE COURT, AND USING SOURCES OF INFORMATION

Introduction

In order to facilitate the completion of an independent investigation, Michigan law gives lawyer-guardians ad litem access to all relevant information about the child. To guide lawyers in determining what information might be relevant, the American Bar Association *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect* Cases details the types of information a lawyer should consult during a case. This includes reviewing all relevant reports regardless of source, contacting individuals for background information, reviewing evidence, and meeting with the child's caretaker.[xxxiii]

However, while the law might guarantee LGALs access to information, such assurances do not necessarily mean LGALs will make extraordinary efforts to collect additional relevant information, or any information outside the scope of the caseworker or otherwise readily available reports.

Level, Breadth and Timeliness of Information Presented

Judges were questioned about their perception of the level, the breadth and timeliness of the information being presented by LGALs to the court, and whether or not they believed the amount and quality of information had changed.

> (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:
>
> (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
>
> (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing all relevant reports and other information.
>
> **MCL 712A.17d**

Thirty-six percent of judges feel that LGALs are presenting more information about the child since the statute was implemented, but almost one half (48 percent) believes LGALs are *not* presenting more information to the court about the

Exhibit 6-1:
Judicial Perception Concerning Amount of Information Presented by LGALs
(n=64)

Since Implementation, Do LGALs Appear To Present More Information To The Court Regarding The Child?	
Yes	36%
No	48%
Not Applicable	16%

Exhibit 6-2:
Judicial Perception of Quality of Information Presented by LGALs
(n=64)

Have You Seen Any Change In The Quality (E.G., Breath And Scope) Of Information LGALs Present In Your Court In Child Protection Cases Since The Implementation Of The Binsfeld Legislation?	
Yes	28%
No	55%
Not Applicable	17%

Exhibit 6-3:
Judicial Perception of Improved Timeliness of Information Presented by LGALs
(n=61)

Have You Seen Any Change in the Timeliness of Information LGALs Present in Your Court in Child Protection Proceedings Since the Implementation of the Binsfeld Legislation	
Yes	41%
No	59%

Exhibit 6-4:
Judicial Perspective of Case Processing Improvements Achieved to Improved Timeliness of Information from LGALs

	Yes	*No*	*Don't Know*
Judicial Decision Making (n=23)	78%	18%	4%
Case Plan Development (n=25)	60%	16%	24%
Case Outcome (n=25)	60%	16%	24%

Exhibit 6-5:
Types of Information Presented to the Court by LGALs

Do you routinely present information about your child client in the following areas to the court?	*Yes, I routinely present this information*	*Sometimes, I present this information when relevant or helpful*	*Yes, when asked by the court to present this information*	*No, I generally do not present this information*
School status (n=59)	37%	39%	7%	17%
Health status/medical records (n=58)	33%	41%	7%	19%
Child's history with FIA (n=57)	29%	37%	17%	17%
Delinquency or Probation history (n=58)	28%	41%	12%	19%
Counseling history (n=52)	39%	31%	11%	19%

child. Further, more than one-half (55 percent) of the judges say they have not seen a change in the quality of the information being presented to the court (see exhibits 6-1 and 6-2).

Fifty-nine percent of judges say they have not seen an improvement in the timeliness of information received. Those judges who have seen an improvement in the timeliness of the information received indicate a positive improvement in judicial decision-making, case plan development, and case outcome. Still, nearly one-fourth (24 percent) of the judges indicate they don't know if there has been a difference in these areas (see Exhibit 6-3 and 6-4).

Attorneys were asked what types of information about the child they routinely present to the court, and judges and referees were asked if they have seen any change in the amount of information being presented in the same areas. A shown in Exhibit 6-5, between one-fourth to almost one-half of the LGALs indicate that they do not routinely present information about the child from particular sources, or present it only when asked to do so by the court. The exhibit also shows that one-third of the responding

Exhibit 6-6:
Judicial Perspective on Specific Types of Information About the Child Being Presented by the LGAL (n=61)

SINCE THE IMPLEMENTATION OF THE BINSFELD LEGISLATION, DO YOU FIND LGALS PRESENTING TO THE COURT LESS, THE SAME AMOUNT, OR MORE INFORMATION IN THE FOLLOWING AREAS RELATED TO THE CHILDREN THEY REPRESENT?	*Less*	*Same*	*More*	*Not Applicable*
School Status	2%	61%	24%	13%
Health Status	0%	64%	23%	13%
Child's history with the FIA	0%	72%	15%	13%
Counseling history	2%	64%	21%	13%
Child's current need for services	2%	44%	41%	13%
Parent's current need for services	2%	61%	24%	13%

LGALs routinely provide a variety of information about the child to the court.

Judges have their own perspectives about the types and quantity of information presented to the court by LGALs. Exhibit 6-6 shows that most judges feel LGALs are providing the same amount of information in specific areas since the implementation of the LGAL statute. On the other hand, at least one-fourth of the judges note LGALs are providing more information in these areas. Forty-one percent of judges indicate they have seen more information provided about the child's current need for services.

LGAL Requests for Information About the Child-client and Difficulty Obtaining Records

Two-thirds (64%) of LGALs surveyed say they generally request the child's history with FIA, and also the child's delinquency or probation records and obtain the information with little or no difficulty. Slightly fewer (56%) request counseling records, and less than one-half request school (46 percent) and health (43 percent) records and obtain those records with no difficulty (see Exhibit 6-7).

LGALs report having the most difficulty in obtaining health, counseling and school records when they request them. That difficulty may most likely arise from the fact that the keepers of those records are external to the child protection process and the court. Interestingly, however, 21 percent

of LGALs indicate they have some difficulty obtaining a child's FIA records.

Even more telling are the records that the LGAL does not routinely request. One-third (33 percent) do not request school records, more than one-fourth (27 percent) do not request health records, and one-fourth (24 percent) do not request delinquency or probation records. The LGAL cannot necessarily develop a complete understanding of the child without obtaining such comprehensive information as intended by the statute.

Many of the lawyer-guardians ad litem who responded to the survey say they also request other types of information about their child client, including family history, out of state records, police reports, witness interviews, and visitation records.

During the focus groups, when asked about lawyer-guardians ad litem requesting records concerning their child client, the ABA evaluation team received a variety of responses:

- Judges indicate they do not routinely require lawyer-guardians ad litem to file a separate, written report. Therefore, they claim, it is most likely LGALs rely on FIA reports. According to some, requiring a mandatory written report summarizing the independent investigation may improve LGAL compliance with the statute.
- One judge noted a case in which a lawyer-guardian ad litem was having difficulty obtaining access to a child's hospital records. The judge also stated that FIA would not give the lawyer-guardian ad litem access to these same records.
- Some judges say that the lawyer-guardians ad litem do have full access to information granted by the statute. They question whether or not LGALs consistently choose to obtain and review that information.
- Judges discussed the lack of cooperation between the LGAL and the caseworker in some cases. In some jurisdictions, FIA does not allow the child's file to be removed from the premises, causing delays in the LGAL preparing subpoenas as needed information is not readily available. The lawyer-guardian ad litem does not always have time to copy the file on the premises.
- On a positive note, lawyer-guardians ad litem state that FIA is often a rich source for information about their clients and cases. They say caseworkers have all reports available prior to court hearings, including reports from therapists and the schools. However, these same attorneys suggest that some caseworkers are more efficient and thorough than other caseworkers, and, of course, caseworkers suggest the same about LGALs.

Exhibit 6-8:
Caseworker Perception of Change in Interaction with Lawyer-Guardians ad Litem (n=462)

Interaction	*Decreased*	*Stayed the Same*	*Increased*	*Not Applicable – Have not been here long enough to determine*
	4%	54%	10%	32%

Exhibit 6-9:
Caseworker Perception of Change in Relationship With Lawyer-Guardians ad Litem

Since the implementation of the Binsfeld legislation, has the child's lawyer-guardian ad litem…	*Yes*	*No*	*Not Applicable*
Contacted you earlier in the case than he/she previously did (n=447)	9%	67%	24%
Asked for more in-depth information about the child (n=445)	18%	61%	21%
Involved you more actively in their investigation (n=447)	10%	68%	22%
Relied on you more heavily during the case (n=445)	30%	49%	21%
Shared more information with you (n=443)	15%	64%	21%
Made you feel more a part of the child's "team" (n=443)	18%	60%	22%

Lawyer-Guardian ad Litem and Caseworker Interaction as a Source of Information

As shown in Exhibit 6-8, over fifty percent (54 percent) of caseworkers stated that since the implementation of the Binsfeld legislation, overall interaction with lawyer-guardians ad litem has stayed the same.

Caseworkers were asked to assess if their relationship with LGALs has changed since implementation of the LGAL statute. By "change" the survey sought to determine if the quality of the relationship had changed with regard to interaction and the sharing of information. Nearly one-third (30 percent) of caseworkers stated that the LGAL relied more heavily on them during the case than previously. However, the majority of caseworkers stated that LGALs did not contact them earlier in the case than before (67 percent), did not ask for more in depth information about the child (61 percent), did not involve the caseworker more actively in their investigations (68 percent), did not share more information with the caseworker (64 percent), and did not make the caseworker feel more a part of the child's team (60 percent). Further, fifty percent of caseworkers indicate that LGALs seek the same amount of information about the child as prior to the implementation of Binsfeld. Only eighteen percent of caseworkers indicate LGALs now request more in-depth information from them.

Exhibit 6-10:
Foster Parent Perception of Lawyer-Guardian ad Litem Review of Information Provided by Foster Parents

Has your foster child's lawyer-guardian ad litem reviewed information that YOU have provided about your foster child in the following areas?	*Yes*	*No*	*Have not provided info in this area*	*Don't Know*
School Records (n=94)	20%	31%	15%	34%
Health Records (n=93)	29%	27%	13%	31%
Child's history with the Family Independence Agency (n=83)	39%	28%	14%	19%
Child's history with the private agency (n=61)	18%	31%	21%	30%
Delinquency Records (n=81)	12%	39%	18%	31%
Counseling Records (n=88)	18%	38%	16%	28%
Permanency Plan (n=89)	27%	29%	14%	30%

Exhibit 6-11:
Foster Parent Perception About Sufficiency of Information Available to Lawyer-Guardian ad Litem

In your opinion, does your foster child's lawyer-guardian ad litem have enough information about your foster child in the following areas to handle the case effectively?	*Yes*	*No*	*Don't Know*	*Not Applicable*
School Records (n=82)	39%	17%	44%	--
Health Records (n=85)	47%	12%	41%	--
Child's history with the Family Independence Agency (n=74)	49%	12%	39%	--
Child's history with the private agency (n=60)	43%	10%	47%	--
Delinquency Records (n=71)	35%	20%	44%	1%
Counseling Records (n=81)	38%	20%	42%	--
Permanency Plan (n=78)	47%	12%	41%	--

Caseworkers were asked on the mail survey if, since the implementation of Binsfeld, LGAL's have less, the same amount or more difficulty obtaining information regarding their child clients from FIA. One-third (33%) of caseworkers state that LGAL have less difficulty in procuring information about their child clients, whereas thirty-seven percent indicate that LGAL's face the same amount of difficulty in obtaining information form FIA. Some caseworkers commented that LGAL's have never had difficulty obtaining information. They state that if LGAL's request information, they will receive it, however, they do not request it.

Lawyer-Guardian ad Litem and Foster Parent Interaction as a Source of Information

Another potential source of valuable information for LGALs are foster parents. Foster parents see the child on a daily basis

and are intimately familiar with the child's behavior and needs.

As shown in Exhibit 6-10, foster parents do in fact generally provide information to the LGAL about their foster child. At the same time, foster parents report in large numbers that the LGAL does not review the information or they have no knowledge of the LGAL reviewing the information. Exhibit 6-11 demonstrates that foster parents generally do not know exactly what kind of information LGALs have about their foster child's case. While one-third to one-half say the LGAL has enough information to handle the case efficiently, the same number indicate that they do not know if the information the LGAL has is sufficient. This is corroborated by data from the previous chapter that indicates a low level of LGAL-foster parent interaction.

Summation of Key Findings Regarding Access to Case-related Information

- One-half or more of judges and referees report they have not seen an appreciable increase in the amount (48 percent), quality (55 percent) or timeliness (59 percent) of information presented to the court by lawyer-guardians ad litem since the implementation of the LGAL statute.

  This information tends to support other sections of this report indicating that LGALs are not consistently conducting independent investigations as required by Michigan law.

- The statutory language concerning the LGAL's obligation to conduct an independent investigation and to comprehensively represent children makes it clear that a LGAL's information about a child should come from a variety of important sources. But the opinions of lawyer-guardians ad litem are divided regarding what information they should obtain and then present to the courts. Approximately one-third of LGALs say they routinely present information about the child including health information, school information, delinquency information, and counseling information. Another third of LGALs report that they present this information only when it is relevant or useful. The remaining third indicate they do not routinely present these types of information or present it only when requested by the court.

  The intent of the LGAL statute is that the LGAL is to present to the court a comprehensive portrait of the needs of the child. Educational, health and counseling information are basic components to this portrait while FIA may provide some of this information in its reports, the point of requiring an independent investigation by the LGAL is to ensure the accuracy and completeness of such information coming before the court. Relying exclusively on FIA for this information undermines the statutory purpose of providing an additional and independent source of such information through independent investigation by the LGAL.

- Overall, two-thirds of judges and referees report that the statute has not increased the amount of information being presented in these same areas. However, judges and referees do report a

marked increase in information being presented about children's current needs for services.

In sum, judges and referees indicate that LGALs are not necessarily presenting complete information to the court on the overall needs of children.

- One-fourth to one-third of LGALs indicate they do not routinely request information about a child's delinquency or probation history, a child's health records, or a child's school records.

  This is consistent with information from other sources. LGALs, while having statutory authority to gain access to these records, do not consistently pursue certain types of important information about their child-clients.

- LGALs indicate that they have the most difficulty in obtaining a child's health (30 percent), counseling (28 percent) and school (21 percent) records. Surprisingly, another 21 percent indicate they sometimes have difficulty obtaining a child's FIA records.

  Confidentiality issues, the inability of the child to grant permission, and unclear court orders may all affect the LGALs ability to get health, counseling and school records, despite the intent of the LGAL statute.

- Caseworkers report no increased interaction with LGALs since the enactment of the statute. Caseworkers further report that LGALs have not necessarily made them feel more of a part of the child's team, share more information with them, or provided them with more information about the child. However, one-third of caseworkers report that LGALs have come to rely more heavily on them during a case.

  Again, this information is consistent with other data throughout this report. LGALs appear to rely heavily on the caseworker and the information that they can provide.

- Foster parents during focus groups generally indicated a low level of interaction with LGALs. This claim is substantiated by foster parent reflections on information LGALs have or review about foster children. Two-thirds of foster parents say that LGALs do not review information they provide about their child or do not know if LGALs review information they have provided. While one-third to one-half of foster parents indicate they believe the LGAL has enough information in key areas to handle the case effectively, nearly one-half indicate that they don't know if LGALs have enough information in these areas.

CHAPTER 7: A CHILD'S WISHES VERSUS A CHILD'S BEST INTERESTS

Introduction

Representing children involves unique problems and unusual dilemmas that are not present in traditional attorney-client relationships. Because this role deviates significantly from a traditional attorney-client relationship, the lawyer for the child may often be uncertain about his or her precise role. For instance, many legal representatives struggle to reconcile their obligation to present to the court a "best interest" analysis, while still operating under their duties as expressed in the Michigan Rules of Professional Conduct.

The Michigan statute was passed in order to clarify some of these issues, creating somewhat of a hybrid model. The statute itself attempts to guide the lawyer-guardian ad litem by setting out the specific powers and duties of the role, making the best interests determination and clarifying the role of confidentiality. Under MCL 712A.17d, the duty of the LGAL is to the child and not to the court, and the LGAL can communicate confidential information only after being released by the child to do so.

One overall goal of the evaluation is to assess whether or not practitioners fully understand their duties under the statute and whether or not they are fulfilling them. Consequently, the evaluation focuses a certain amount of effort on the best interest-wishes aspect of the LGAL's role.

> (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:
>
> (d) The obligations of the attorney-client privilege.
>
> (e) To serve as the independent representative for the child's best interests …
>
> (h) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.
>
> **MCL 712A.17d**

Nature and Prevalence of Best Interests/Wishes Conflict and Appointment of a Separate Attorney

The Michigan LGAL statute sets out a process for giving weight to a child's wishes as part of the best interest determination. The lawyer-guardian ad litem is required to report conflicts between the child's and the LGAL's view of the child's best interests. It also allows the court to appoint a separate attorney to represent the child's wishes depending upon the child's age and maturity and the nature of the conflict. Part of this evaluation is designed to determine the extent to which such conflicts actually occur in Michigan.

Sixty-nine percent of LGALs (40 respondents) indicate that they have had to inform the court of a conflict between a child's wishes and best interests. Of those LGALs, about one-half (47.5 percent or 19 respondents) say they have experienced circumstances when such a conflict resulted in the court appointing a separate attorney for the child. Those circumstances generally involve a disagreement between the child and the LGAL, or situations wherein a child wants to return to an abusive or dangerous situation. Exhibit 7-1 details the issues that tend to bring about separate appointment of attorneys based on the experience of respondents who experienced such a case.

During the focus group sessions, attorneys indicate there are ways to get information revealed to the court when necessary while not violating any privileges of their client. The general consensus is that major conflicts between a child's best interests and wishes requiring the appointment of a separate attorney did not occur frequently.

When asked what issues generally provoked the separate appointment of an attorney, LGALs respond overwhelmingly that placement issues most frequently provoked such appointment, followed by sexual abuse issues and domestic violence issues.

Exhibit 7-1:
LGAL Perspective of Issues Resulting in Appointment of a Separate Attorney
(n=19)

	Yes	*No*
Placement issues	82%	18%
Educational issues	12%	88%
Health issues	12%	88%
Substance abuse issues	18%	82%
Physical abuse issues	18%	82%
Sexual abuse issues	47%	53%
Domestic violence issues	29%	71%

Fifty-six percent of caseworkers indicate that they have not been involved in a case where the LGAL informed the court of a conflict between a child's wishes and his/her best interests; whereas, forty-four percent of caseworkers said they have. Only 14 percent of caseworkers indicate that they have been involved in cases where a separate attorney has been appointed for the child. For those experiencing such conflict, 73 percent cite placement as the source of conflict, 42 percent cite sexual abuse issues, and 40 percent cite physical abuse issues.

Over one-quarter (28 percent) of judges say lawyer-guardians ad litem seldom or never inform the court of conflicts between a child's best interests and wishes. When asked to choose the methods by which LGALs inform the court of conflicts, judges report overwhelmingly (97 percent) that LGALs provide such notification verbally.

Judges overwhelmingly (97 percent) indicate that placement issues are the primary source of conflict between a child's wishes and best interests. Judges also list

Exhibit 7-2:
Judicial Perception of How Frequently LGALs Advise the Court of Differences Between a Child's Best Interests and Wishes When Such Conflicts Are Present (n=60)

Response	
Never	6%
Seldom	22%
Sometimes	32%
Often	13%
Always	27%

Exhibit 7-3:
Judicial Explanation of How LGALs Inform the Court of Differences Between a Child's Best Interests and Wishes (n=60 and judges could choose more than one response)

Method	
Ex parte order from judge	3%
Motion	18%
Verbally	97%
Written communication	23%

educational issues (32 percent) and domestic violence issues (28 percent) as sources of conflict in their courtrooms.

Almost one-half (47 percent) of the judges and referees and nearly one-third (32 percent) of LGALs who responded to the mail survey indicate they have been part of a case where a separate attorney was actually appointed for a child.

Common reasons judges and referees give for appointing a separate attorney include:

- If there is a conflict expressed I appoint a separate attorney for the child to represent their wishes.
- If the child, a teenager, wants to return home to an abusive environment.
- When the positions of an older child and the lawyer-guardian ad litem are in very significant conflict.
- In situations where the ward is a teen, and the lawyer-guardian ad litem has a good rapport with them, we make the lawyer-guardian ad litem the attorney so they may advocate the child's viewpoint, and appoint a new lawyer-guardian ad litem to relay the best interests viewpoint. This works well. In such an occasion the "crisis issue" is past (usually placement), the child often is once again "on the same page" as the assigned lawyer-guardian ad litem and they return to their role and the new lawyer-guardian ad litem is discharged.
- In approximately 3 prior cases the child wanted desperately to go home. It was clearly not in the child's best interest. Also, an additional attorney was needed in some cases where mental health is an issue.
- If the lawyer-guardian ad litem makes it clear that they cannot advocate what the child wants, we appoint another attorney. The lawyer-guardian ad litem is then the "best interest" attorney and the other is the child's "wants and wishes" attorney.
- Usually when the child is older (15 or 16) and wants to go home, and the LGAL does not think it is in the child's best interest.
- If the relationship between the child and the lawyer-guardian ad litem has so severely broken down that it is in the child's' best interest to have a separate attorney.
- When a conflict occurs, we generally dismiss the current lawyer-guardian ad litem and appoint a new lawyer-guardian ad litem and attorney to represent the child's wishes. This eliminates any questions of attorney-client information being misused against the child by the first lawyer-guardian ad litem/attorney.
- In a sexual abuse case where a sibling is the victim.
- Placement issues cause conflict. In one case, a child wanted to be placed at home or in a relative placement. On most occasions, the child is seeking independent status (i.e. emancipation or independent living).
- In situations where the child is older and there are mental health issues, both perspectives are needed.
- When the attorney for the child believes that termination is in the child's best interests and the child is openly opposed to termination.
- The child wanted to return to mother's home and threatened truancy. The mother's drug screens were consistently positive for cocaine and opiates.

- The child was opposed to a placement that attorney believed to be in his bests interests
- Very rarely comes to the point of appointing a separate attorney.
- The child wanted to go home to the family, and the family had not resolved all issues. The home was unsafe.

Fourteen percent (14 percent) of caseworkers state there have been circumstances in their cases when such conflicts have led to the court appointing an attorney to represent the child's wishes. Those who affirmed the practice cited the following circumstances under which attorneys have been appointed to represent the child's wishes:

- When the children are older, or teenage, and can have wishes that are contrary to that of the LGAL or caseworker, both of whom are concerned with the child's best interest.
- When there are adoption issues in the case, such as when the child either wants to be adopted or does not want to be adopted, and that stance is contrary to what the caseworker, LGAL, foster parents or relatives believe is best for the child.
- The child wishes to return home, and the LGAL disagrees, for safety or other reasons.
- When teenagers are recommended for placement in residential or treatment settings, it is not usually representative of the child's wishes.
- There are sometimes issues with placement of the child with a relative. For example, the relatives are sympathetic towards the parents.
- In one situation, a minor child became a parent and a conflict arose over placement for the newborn child and the parent.
- When the child wanted a placement that was not considered appropriate by FIA.
- Conflicts can occur when FIA removes or places children against their wishes.
- Situations where the child is also involved in a delinquency case.
- When the child wishes a parent's rights to continue and the LGAL does not believe it is in the child's best interest.
- When youth refuse to return home to parents after they have completed treatment or service programs.
- When children have physical or mental problems and do not want to be medicated.
- When a teenage child was pregnant and wanted to remain with her common law husband, an attorney was assigned to represent her wishes that were contrary to her best interests.

Only 4 percent of the foster parents interviewed by telephone state that their foster child's lawyer-guardian ad litem ever told the court that what the child wanted was very different than what the lawyer-guardian ad litem thought was best for their foster child. None of the foster parents surveyed indicate ever having been told of a difference of opinion between their foster child and the child's LGAL so great that their foster child also needed an attorney.

Based on the evidence gathered during the evaluation, it appears that conflicts between a child's best interests and a child's wishes are frequently raised and addressed in court. However, while 47 percent of judges say they have had

circumstances necessitating the appointment of a separate attorney, they do not appear to appoint such attorneys frequently. This is substantiated by evidence from site visits where judges were pressed to produce more than a handful of cases resulting in a child having a separate attorney.

Balancing the Representation of Both the Best Interests and the Wishes of the Child

Michigan law clearly puts the child's best interests at the forefront, yet it does not ignore the wishes of the child. Again, as a child's wishes may cause conflict over what is perceived as being best for the child, the evaluation attempts to gauge the difficulty LGALs experienced in this area.

Almost all (93 percent) LGALs indicate that they are personally able to effectively mediate conflicts between the best interests and the wishes of their child. Over three-quarters (78%) of the lawyer-guardians ad litem responding to the mail survey state that it was somewhat difficult to effectively balance the best interests and the wishes of the child client (see Exhibit 7-4).

Although only 5 percent of lawyer-guardians ad litem say they find it difficult to effectively balance the child's best interests and the child's wishes, they provide the following reasons for not being able to

Exhibit 7-4:
Perception of Difficulty in Successfully Balancing a Child's Best Interests and a Child's Wishes

	LGALs (n=59)	*Judges* (n=63)	*Caseworkers* (n=446)
Not difficult at all	17%	35%	18%
Somewhat difficult	78%	59%	55%
Difficult	3%	5%	19%
Very Difficult	2%	1%	7%
Impossible to achieve	0%	0%	1%

Exhibit 7-5:
Perceptions of Whether LGALs are Able to Effectively Balance A Child's Best Interests and a Child's Wishes

	LGALs (n=57)	*Judges* (n=62)
Yes	93%	87%
No	7%	13%

do so:

- I have never been provided any clear instruction about everything we are supposed to do under this legislation
- Sometimes the best interest (i.e. removal from home or termination of rights) and wishes of client (desire to remain with family in home despite the problems) are so conflicting that you have to give primary consideration to the best interest.
- I believe the wishes of the client to be a mere component of the overall best interest of my client. I look to the MCL 722.23 best interest factors for guidance. The preference of the child is but one of fourteen factors. That factor is not weighed heavily unless the child is of sufficient age. I believe kids do not know what is "normal". For example, I represented a child that said his home-life was "normal" but then added his house is riddle with gunshots weekly.

Eighty-seven percent of the judges and referees responding to the mail survey state that the lawyer-guardians ad litem are able to effectively consider the best interests and the wishes of the child client(s) as mandated by the LGAL statute. Three-fifths (59%) of the judges and referees responding to the mail survey state that it is somewhat difficult for lawyer-guardians ad litem to effectively consider the best interests and wishes of child clients. Twice as many judges as lawyers do not perceive the task as being difficult. However, judges as a whole express less faith in lawyers' ability to do this than lawyers do in themselves

Common statements from judges and referees about the ability of the LGAL to effectively consider both the best interests and wishes of the child client include:

- That is the job of lawyer-guardian ad litem.
- If the child is old enough, based on the status of the case, and discussions with the child, the determination of what is best can be made.
- Good lawyer-guardians ad litem know what they need to do and how to go about it.
- Most of the lawyer-guardians ad litem understand and agree that a permanent placement is the goal.
- When the child is of a certain age and maturity, the attorney talks to them about what is going on in court, what they "want," what they need and what is best in the long run.
- They routinely state the child's position, ask to have separate lawyer-guardian ad litem appointed in the case of conflict among siblings, and distinguish their position from that of child.
- It is a difficult task when the interests and wishes of the child differ. However, when considering the age of the child and all information available or obtainable the lawyer-guardian ad litem should be able to do what is required.
- Lawyer-guardians ad litem are very clear about what their clients want as well as explaining what they think is in their client's best interest.
- Based on their independent review they are able to advise the court of what they believe to be the child's best interest as well as the stating the child's wishes.
- Our lawyer-guardians ad litem always examine the case for what is in the best interest of the child versus what the child wants. If there is a conflict, this

difference is brought to the court's attention.

- We have very well informed attorneys who do this work. They do other types of family law work and know what to watch out for so that parents or the FIA are not working against the child's best interest.
- If there is a conflict it is usually with an older child. If the child has well-developed, articulate desires an attorney might ask me to substitute another lawyer to represent that point of view. Usually however, attorneys tell me there is a conflict so that the court is aware. I am often asked to then speak to the child (if parents agree, which they usually do) After I talk to the child, the conflict is usually resolved, and most often the lawyer can continue in the case.
- When there is a conflict between the two, all the lawyer must do is identify the distinction to the court.
- I think that most lawyers try to weigh all the circumstances and try to determine what is in the best interest of the child.
- If there is a conflict an attorney advocate can be appointed for the child and the LGAL can determine the best interests focus.
- Usually attorneys are able to represent the best interest of the children and also advocate for them.
- If they converse with the child, know the history and FIA recommendations, then it is easy to be effective and consider all aspects.
- As long as it is made clear to the child, whom under these circumstances is usually older, it is not difficult to consider and communicate both. It is important for LGAL to indicate concerns to child and how best interests may differ from their desires

The judges responding to the mail survey who do not believe that lawyer-guardians ad litem are able to effectively consider both the best interests and wishes of the child client stated the following:

- Inadequate lawyer-guardians ad litem cannot do both. Funding limitations prevent the depth of movement and investigation, which would best serve the child.
- Not enough money is available to pay them to do the job the statute requires. They do the best they can with the limited time and resources available to them.
- There is often a direct conflict between what a child wants and what is in the child's best interest. We ask the attorney to articulate both and use some judgment on which to base decisions, such as the age, maturity, and circumstances of the child.
- Sometimes local resources are not available for helping make the determination, resources such as monies for experts and evaluations.

Caseworkers were asked on the mail survey how difficult it was for the LGAL to effectively balance the best interests and wishes of the child client. Over fifty percent (55%) state that it is somewhat difficult for the LGAL to effectively balance best wishes and interests. Twenty-seven percent find that it is difficult, very difficult or impossible to achieve. Conversely, eighteen percent report that it is not difficult at all.

Court Practice in Making Appointments of Attorneys When a Conflict Arises

Over two-fifths (43%) of the judges and referees who responded to the mail survey state that their court has a formal process for making appointments of attorneys when there is an expressed conflict between a child's best interests and a child's wishes as described by the Binsfeld legislation. These included:

- The process that is described in the statute.
- Using a conflict attorney pool.
- The lawyer-guardian ad litem informs the court and then the court appoints an attorney to represent child's interest.
- The Judge's office is notified and the judge designates additional counsel.
- It is no different from any other attorney appointment or substitution process - the judge has to make the call.
- The judge can make a decision based on the filing of a petition by LGAL.
- The lawyer-guardian ad litem advises the judge who then requests the change in appointment to the case management department who does the paperwork.
- The lawyer-guardian ad litem will advise the counsel on the record.
- One of our public defenders is appointed to represent the child.
- The same process is used as used for appointment of lawyer-guardian ad litem - rotation from court appointment list.
- I only appoint attorneys who work well with kids and who will take the time to meet with them so they can express their preferences.
- We operate on 9 contracts with 3 firms. If a conflict arises one of the other firms is appointed. If there is a conflict with all three firms, an independent attorney is appointed.
- It seldom happens but the court will appoint someone else if needed. I think it is usually enough if the court knows what the conflict is and what preference the child has expressed. I do not see the need to add another advocate to the case.
- When the appointment is requested in writing, and often after consultation with the chief referee.
- When there has been sexual abuse of one child against another within same family.
- I require a form to be completed.
- The hearing officer recommends the appointment to the judge, usually an emergency house counsel
- I require a written report
- Emergency house counsel was appointed. Then I adjourned the case for investigation.

The lawyer-guardians ad litem were asked on the mail survey to describe how the court in which they most often practice makes appointments of attorneys when there is an expressed conflict between a child's best interest and a child's wishes. The attorneys state:

- The same way the court always appoints attorneys.
- I don't know.
- The attorney is appointed after I raise the conflict at regularly scheduled hearing
- The clerks in the case management department appoint attorneys.
- It has never happened to my knowledge.
- The Court appoints an additional lawyer as LGAL maintaining first lawyers as attorney.

- At a hearing if the court finds that there is a need for a separate attorney, then the court simply makes the appointment.
- The court usually appoints a separate attorney to be the child's advocate.
- They assign an attorney and a separate guardian ad litem.
- The same attorney continues to handle the case; although the court may take testimony from older child about his or her wishes.
- An attorney and a GAL are appointed who have separate duties.
- We have a list of attorneys and the court contacts the next available attorney for appointment.
- The court appoints a second attorney.
- We appoint an available counsel who is in the courtroom or assign the case to qualified attorneys on the list.
- The court will usually appoint a new attorney when I tell the court either through letter or at a hearing that there is a conflict. The court usually keeps the old LGAL as the GAL and appoints a new attorney.
- I'm unaware of the process.
- Appoint another attorney as GAL and the original attorney remains with the child.

Although respondents were articulate about when and how a separate attorney should be appointed, the evaluation team again found little evidence to suggest that such separate appointments occurred frequently. While conflicts between a child's best interests and a child's wishes do occur, those conflicts appear to be managed in the court without the need for appointment of a separate attorney. When asked to produce examples of case files where such an appointment had occurred, sites were hard pressed to offer any examples.

Different Case Outcomes or Dispositions after Appointment of Another Attorney to Represent the Child's Wishes

One question flowing from the practice of appointing separate attorneys to represent a child's wishes is whether or not that appointment made a difference in the case outcome.

Lawyer-guardians ad litem were asked if they believe a different outcome or disposition had resulted because a separate attorney was appointed to represent the child's wishes. The majority of the attorneys responded that case outcomes or dispositions were not different as a result of the appointment of a separate attorney for the child. When LGALs perceived outcomes to change due to this appointment, the noted change in outcome was slight as evidenced by the following comments.

- We were able to divert a juvenile petition for a fourteen year old girl by reviewing it in a child protective proceeding and appointing independent counsel.
- Permanent custody was denied based on the child wishes
- An order of protection against abusive boyfriend was achieved through appointment of another attorney.
- In one case, the father molested the older sister; and the younger child did not believe her and sided with the father. The father already had a prior juvenile adjudication. The younger child's attorney prevented the termination of the

father's rights, and destroyed the child's relationship with the mother.
- The petition was held in abeyance and eventually dismissed as to the respondent mother.

Disclosure of Conflict: Does It Infringe Upon the Child's Right to Confidential Communication?

As noted in the beginning of this chapter, a core issue with the dual role of the lawyer-guardian ad litem is whether or not the roles are at conflict when client confidentiality is considered. The statute requires the divulging of conflict between a child's wishes and a child's best interests while also insisting on the maintenance of lawyer-client privilege.

The statute requires the LGAL to inform the court of the child's wishes and preferences only if it is consistent with the attorney-client privilege Nonetheless, one-third (33 percent) of the lawyer-guardians ad litem responding to the mail survey state that the disclosure of a conflict between a child's best interests and a child's wishes, in their opinion, infringes upon the child's right to confidential communication between the child client and the lawyer-guardian ad litem. Statements such as those below are offered as specific insight as to why LGALs thought such disclosure was problematic.

- Good question, I don't know the answer. I mean I've really never thought about it before. Is the right to confidential communication absolute? If yes – it is a clean conflict. Or does the role of lawyer-guardian ad litem by its very nature preclude confidential communication?
- The answer is evident in the question. I also want to state that this issue is most troubling, as parents may learn of child's wishes, thereby causing emotional upset to all involved.
- An attorney should be able to report on both without infringing on confidentiality issues.
- Sharing of personal information could result in change of placement.
- The right to attorney-client privilege is most sacred. However, because of Binsfeld, this privilege is sometimes compromised in the best interest of the child.
- If we are the child's "attorney" then the information should be privileged.
- If lawyer-guardian ad litem does not know his or her responsibilities, then that causes problems with how to describe the role to client/child.
- Such communication is privileged, generally speaking under the code of professional representation.
- It clearly does through a strict reading of the rules on client confidentiality.
- It could, depending on what the child has told the attorney. Some communications cannot be used to explain the conflict.

Summation of Key Findings Regarding the Wishes Versus Best Interests Conflict

As demonstrated by the findings summarized below, while the best interests and wishes debate does not appear to cause LGALs or courts any great concern, the debate does have at its heart a problematic conflict.

- Overall, the best interests-wishes debate does not seem to cause great amounts of concern or consternation in Michigan. As reported, such differences arise and are handled with apparent ease by the LGAL and the court.

  LGALs and the courts handle conflicts of this nature with the appointment of a separate attorney if necessary. This particular aspect of the LGAL statute is procedurally well understood by all involved in child protection proceedings.

- The lack of conflict, however, does not necessarily mean that the intent of the LGAL statute is being met. One-third of LGALs believe that disclosure of a conflict between a child's best interests and a child's wishes infringes upon the child's right to confidential communication. In one focus group, demonstrating some confusion, an LGAL kept reversing the statutory procedure, referring to the appointment of a guardian ad litem in such a conflict, and not the appointment of a separate attorney.

  Specifically, during the focus group sessions conducted by the ABA, we discovered a wide range of views as to how LGALs handle this issue. Some LGALs felt that the confidentiality rules applied to their representation of children, and they would not reveal certain information even if they felt that keeping it confidential might be to the detriment of the client. Others felt that their duty to present to the court what they felt was in the client's best interest overrode the confidentiality provision. This latter group interpreted their role as requiring them to present to the court all relevant information, including statements made by the child.

- LGALs and judges and referees strongly indicate that they believe LGALs are able to effectively balance a child's wishes and a child's best interests. Nonetheless, LGALs believed it was more difficult to successfully balance a child's best interests and wishes than judges.

- LGALs could not provide many examples of cases where the appointment of a separate attorney had a discrete impact on the outcome of a case.

CHAPTER 8: IMPLEMENTATION ISSUES

Introduction

Walter Williams sums the concept of policy implementation by offering the following:

> Implementation may be described most briefly as the stage between a decision and operations. It is the hard next step after the decision, involving efforts to put in place – to make operational – what has been decided. More and more frequently, one is warned to be concerned with implementation – that is the stage in the policy process where so much can go wrong.

When deciding upon a course of action, one must determine what path to take and what tools might be necessary along the way in order to achieve success as an outcome. Part of the evaluation of the Michigan LGAL statute was an investigation into the law's implementation: to determine if the law had been implemented, and what the pitfalls to implementation might be.

In assessing the implementation of the LGAL statute, this report looks at a variety of issues, including the general mandate of the statute and funding arguments, whether or not judges and attorneys believe that the representation of children in Michigan has improved, and the perceived strengths and weaknesses of the LGAL statute.

The General Mandate of MCL 712A.17d and Its Funding

The Michigan LGAL statute enumerates the powers and duties of the lawyer-guardian ad litem as a child's representative. Upon enactment of the statute, there was an expectation that LGALs would understand those powers and

> The advice to be concerned with the implementation of a decision is much like the warning to keep one's eye on the ball in tennis. First, it seems too obvious. Second, doing it does not guarantee success, since, with the eye fixed unrelentingly on the ball, lots of things can still go wrong. Third, there is almost a Cassandra-like aspect to the advice: it is a prediction of problems before the great new idea gets started. But alas, not heeding it is a fundamental error that seems certain to undo any other positive steps. Fourth, and most discouragingly, however simple and straightforward the advice may sound, it is almost always devilishly difficult to carry out in action.
>
> Walter Williams. *The Implementation Perspective: A Guide for Managing Social Service Delivery Programs.* University of California Press. 1980.

duties and accept them in their representation of children.

There are two fundamentally different arguments that can be made upfront regarding the implementation of the statute. First, some believe that the enumeration of powers and duties in MCL 712A.17d simply sets forth expectations of the LGAL and that the specifics of the statute do not represent anything new or surprising. According to this view, the statute simply spells out the duties that LGALs should be performing in the normal course of their representation of children in child protective proceedings.

Conversely, the other view is that the enumeration of these powers and duties does in fact represent a catalogue of responsibilities previously not assigned to lawyers representing children in child protection proceedings. Participants in the focus groups frequently indicated that the powers and duties were "new" or "additional." At a minimum, there was a level of belief that these were at least new expectations.

If the powers and duties are in fact new, then the Michigan State Constitution arguably calls for state financing to cover associated expenses. Michigan's Constitution states:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

New duties, according to this view, should have been accompanied with new funding. No additional state funding was provided, however, when the LGAL statute was enacted, and that lack of funding has been an issue of some concern. Concern over the lack of funding is recounted later in this chapter and is reported in previous chapters of this report.

How Enactment of the LGAL Statute Has Changed the Representation of Children

Overall, neither jurists, attorneys, caseworkers nor foster parents believe that the LGAL provisions of the Binsfeld legislation have had any significant impact on the representation of children in Michigan.

Lawyer-guardians ad litem were asked how the Binsfeld legislation has changed their representation of children. While many of the attorneys stated that there was really no change in their representation of children, others who believe there has been a change offered comments such as those below.

- It has not changed my personal acceptance of my responsibilities. However, I will now only accept court-appointed cases as a compliment to our judge.

- The statute has required more focus on the details of the law instead of the interests of child.
- Cases are handled more thoroughly, and I am spending more time on cases.
- It has made me advocate more forcefully with clients to avoid court jurisdiction in the beginning stage.
- It has become, for one, adversarial and focused on trying to understand the hierarchy, structure, and funding imperatives of the FIA service providers in order to demonstrate to the court what is really driving the decision making process. There is futility and aggravation coupled with racism and gender bias. The inadequacies of addiction and mental health therapies are the focus of virtually every case. This assures additional writing to preserve these issues for review. There is routine unavailability of transcripts, which permits a wholesale rewrite of case history at each review.
- I believe all attorneys involved are now more responsible for development of recommendations and plans. We are better at identifying services best suited to meet the needs of the families, and we are now making good use of permanency planning mediation, which did not occur before.
- I am less likely to obtain a substitute for a hearing
- The law mandates attorneys to be thorough and prepared.
- I see the children more often and I review FIA files more often. I also accept fewer and fewer LGAL appointments.
- The requirements for LGALs are too stringent

Judges were also asked their opinion on how the LGAL statute has impacted the representation of children in Michigan. Many of the judges indicated that there has been a limited impact, if any, on the representation of children. Only a few judges stated that they have always had good people diligently representing children.

Other judges claiming that representation of children has changed since the LGAL statute was enacted offered the following insight:

- The statute has resulted in better advocacy and focuses on specified outcomes.
- There is more client-attorney contact outside of court.
- It has set standards - but it's still primarily the character and work ethic of the particular attorney that dictates the quality of representation.
- It has improved representation by setting higher standards for compliance. However, the courts need to make sure that LGALs are complying with the requirements.
- The legislation has placed greater emphasis on consistent and well prepared attorneys.
- There is no more communication between the lawyer-guardians ad litem and the children.
- There is less substitution of counsel, although there wasn't a lot before.
- There has been very little impact, because LGALs were doing a more than adequate job before Binsfeld.

- Attorneys are more detailed and thorough, and present more informal recommendations.
- It defined values, clarified roles, and defined functions and duties.
- The statute has emphasized the importance of the children being the focus of the case rather than the parent or guardian.
- The individual attorney is key to representation.
- I do not believe that it has made attorneys competently and diligently represent their clients.

Overall, comments made by judges and attorneys indicate that they believe the LGAL statute provides a basis and framework for the improved representation of children. They vary their impressions of its results, but overall they support the notion that the quality of performance largely varies with the competence and diligence of the individual LGAL.

Caseworkers echoed the comments of LGALs and judges and referees. Many caseworkers agreed that the LGAL statute has laid the foundation for better representation, but that quality of representation depends on the individual LGAL. Forty five percent of caseworkers indicate they have seen no improvement in the relationship between caseworkers and LGALs since enactment of the statute, and 54 percent indicate that the level of their overall interaction with LGALs has remained the same.

Strengths of the Binsfeld Legislation

The evaluation sought the perspectives of those involved in child protection proceedings as to what were considered the strengths of the Binsfeld legislation. Many of these comments mirror those offered concerning whether or not the representation of children has been impacted by the LGAL statute.

Lawyer-guardians ad litem offered comments summarized by the following examples:

- Mandates better communication and contact with the child.
- The statute requires more accountability for lawyers.
- There is more specificity of the LGAL's responsibilities.
- It mandates attorneys to be thorough and prepared.
- By requiring certain things and expanding the LGAL role, it also gives the LGAL more credibility.
- Binsfeld treats the child as an equally important person in proceedings with all other parties.

Typical responses from judges and referees included:

- If the requirements are made reasonable, a standard of performance is established. It defines a standard of performance.
- Helps us all to focus on importance of the LGAL job.
- Provides a spokesperson for the child. The lawyer guardian ad litem's duty is to the child, not to the court.
- The LGAL is available statewide.

- The statute results in more and better information, and better services being provided to children.
- There are few strengths. Perhaps providing some increased contact between LGALs and child client.
- Accountability to the same extent as to case timeliness was needed. But attorneys fail to follow the interview provisions at an astounding rate. The provisions themselves, however, are good.

Again, caseworker comments mirrored those LGALs and judges.

Shortcomings of the Binsfeld Legislation

The lawyer-guardians ad litem were asked to describe on the mail survey what they felt are the shortcomings of the Binsfeld legislation.

- The statute fails to take the circumstances of the case (i.e. child's age, nature of allegation, distances involved) into account when mandating duties.
- The requirement of contact with the client seems excessive. I know how much contact I need with a client.
- The requirements are not realistic. Most kids are in placement, and the LGAL rarely has the time to travel to the various placements to see the child. Also, the LGAL has obligations in other courts.
- Not trusting experienced attorneys to do their job. More funding is needed for attorneys and courts.
- Expecting that attorneys must in all cases meet with the child. Often meeting a lawyer may traumatize a young child. It should be at the discretion of a lawyer on a case-by-case basis.
- Binsfeld places too many requirements and takes away discretion from worker.
- It is based upon the naïve system that the problem with the child protective system is the incompetence of the workers, attorneys, and so forth. In fact, it is a little of that, and a great deal of lack of a minimal commitment to funding the system adequately.
- There are not enough resources and funds
- Lots of oversight and monitoring by the courts making inquires of what the attorneys are doing for the child.
- Requiring a meeting with each child before each hearing is often unnecessary and should be more flexible in allowing the judgment of counsel on a case-by-case basis. For example, an infant in good health whose parent is not making any efforts does not need to be visited as frequently as required.
- It is nearly impossible, not practical, nor necessary, to meet with the child client each quarter as mandated.[xxxiv]

Judges and referees were also asked on the mail survey to describe what they feel are the shortcomings of the Binsfeld legislation. Their reactions were similar to those of the LGALs.

- If the legislation is taken literally, the burdens placed upon the lawyer-GAL are overwhelming and unrealistic.
- The state does not fund the added responsibilities required of LGALs. The lawyer-guardian ad litem is underpaid for the work required to really do the job right. Since most counties cannot afford

more pay, we need state funding to assist.

- More procedural impact than substantive.
- It expects LGALs to do additional investigation that I don't feel is required. It assumes FIA is incompetent or hiding things. It assumes all LGALs do nothing unless it is set out in a statute.
- Plopping requirements in a statute book does not transform a lawyer into a thorough guardian ad litem. This is micro-management at its worst.
- The legislation does not emphasize enough the obligations of FIA case workers and their supervisors to comply, to make services available, and to provide reports in a timely manner,
- FIA is not properly trained on the legislation.
- It is putting more demands on the counties to pay lawyers more because they are expected to do more to represent the best interest of the child. It sounds good but without more money being provided to the counties, full implementation won't be possible.

Perception of How the Statute Could be Changed or Improved

Individuals who participated in the study were asked to discuss those things they would change about the LGAL statute in order to correct perceived problems and assist in implementation. Again, the responses are similar regardless of the individual's role in child protection proceedings. The sections below offer examples of common statements.

Lawyer-Guardians ad Litem

- Prepare a booklet to detail and explain the requirements of the statute.
- Rescind the statute.
- Make the statute mandatory.
- Eliminate requirements of visiting prior to every hearing. Do not require lawyer-guardians ad litem to meet with child clients as often. Permit LGAL to only have one visit to the child's home, per home, and the rest of the contacts can be at the LGAL's office or over the phone. Quit whining about attorneys visiting children and make sure that the FIA sees that the visits take place. There should be an age differentiation that reduces the number of contacts when the child is younger.
- More discretion in mandatory filings needed.
- Streamline the cooperation of all workers, attorneys, etc., and give more flexibility in accessing information.
- Repair or fund it. Appropriate more money. Appropriate to fund the function. Make funding available for all counties so that the LGAL would be available in every case. If uniformity is expected, pay for it. Require state to pay fees. We pay but many counties can't afford it – it is getting "iffy" to keep good lawyers at low prices.
- Add funds for training attorneys about specialized or newly developed issues.

Judges and Referees

- *Funding Changes.* Many judges indicated that providing more funding is

essential. They also indicated that attorneys should be compensated for meeting with the children, their teachers, doctors, counselors, and additional services.

- *More Reasonable and Practical Legislation*. The other judges stated that the legislation should be more reasonable and practical with regard to specificity of the powers and duties of LGALs.
- *Establish Sanctions*. A few judges stated the need to establish sanctions (e.g., possibly some sort of practical sanction) for not complying with the legislative requirements.
- Eliminate independent investigation requirement
- Eliminate requirement to look at FIA file before each hearing
- A mandatory filing on prior termination cases that would give FIA more discretion.
- I would specify the obligation of the GAL to pursue penalties against FIA caseworker/supervision for failure to provide services, reports, etc., and against parents for failure to comply with FIA (i.e. contempt proceeding).
- *Training.* Some judges indicated a need for state funding for training. One judge stated that Bar associations could do more to recognize/train attorneys who take appointed cases.
- Retention of older, more experienced attorneys is a definite plus in such cases.
- I do not believe the LGAL needs to see the child as many times as the legislation requires.
- Raising the level of awareness of the need to aggressively advocate their client's position.
- I would require FIA to provide their reports to attorneys at least three business days prior to hearings and I would provide for state funding for attorney visits so this would no longer be an excuse.
- There should be sanctions in place for noncompliance.

Caseworker comments about how the statute might be changed focused somewhat on enforcement. Caseworkers tended to cite the need for sanctions against LGALs who do not comply with the statutory requirements. Caseworkers were also prone to comment about LGALs not visiting the child-client as often as necessary, and about LGALs not conducting independent investigations.

Summation of Key Findings Regarding Implementation of the LGAL Statute

The following conclusions can be drawn from the data and evidence collected throughout the evaluation. Some of these may appear in more depth in other chapters and are supported by evidence presented there.

- ❑ Judges, referees, LGALs and caseworkers all agreed that, while the LGAL statute has provided a foundation for improved representation of children, the changes intended by the statute have not completely occurred.

  The extent of improvement, they all state, is dependent upon individual LGALs, some of whom have been doing most of the prescribed work for long periods of time. This inconsistent

practice directly impacts the quality of representation.

- It is clear that funding is an issue greatly affecting the implementation of the LGAL statute. Fundamentally, some argue that the statute enumerates new or additional duties for the LGAL and as such represents an unfunded mandate from the state legislature. Others argue that the enumeration of these duties does not add any responsibilities, and that it merely states expectations of what LGALs should have already been doing at the time of the enactment of the statute.

  State funding did not accompany enactment of the LGAL statute. In response, counties have had to devise their own solutions to new monetary requirements. Counties and courts have a differential ability to respond to such demands, with that ability directly impacting the resulting quality of representation.

- LGALs state that there is not enough funding to cover all of the things they are expected to do, particularly meet with the child frequently and when the child is placed some distance away. Judges concur most activities cannot be funded appropriately. Foster Care Review Boards indicate that although LGAL presence at their meetings has increased, there is a lack of funding to pay for the LGAL's time.

- Respondents were also in agreement regarding the strengths of the LGAL statute. There was concurrence that the statute does indeed provide a framework for quality representation of children.

- Consistent shortcomings of the statute and its implementation were also reported from the respondents. There was agreement that there has not been enough funding to implement the LGAL statute completely, and therefore the degree of change toward meeting the requirements has been limited. Respondents further indicate that, to some degree, the visitation and independent investigation requirements are too strict, particularly in light of budgetary restraints.

- Judges, referees, LGALs, caseworkers and foster care review boards indicate that training is a very important issue. Standardized training was not provided upon enactment of the LGAL statute, and training is neither provided nor received consistently.

  The lack of training potentially leads to the inconsistent interpretation of the duties and responsibilities of the LGAL.

- When asked about what improvements or changes might be made to the LGAL statute, there were again common concerns. Respondents indicate that there is a need for increased judicial oversight and enforcement of LGAL duties, or the creation of sanctions that might be uniformly applied for noncompliance with duties.

- LGALs are not carrying out their duties as prescribed in the statute. Independent investigations are not being conducted. Children are not being met in their

environments frequently enough, if at all. Caseworkers indicate a heavy reliance by the LGAL on FIA reports rather than on independently assessed information.

- LGALs indicate that there needs to be clarification or modification in the statute as to the frequency of meetings with child-clients. They further suggest modifications based on the age and maturity of the client.

  LGALs also indicate the need for clarifying the independent investigation requirement. Some LGALs have suggested that there be specifications about the extent of the investigation and what exactly such investigations might entail.

CHAPTER 9: RECOMMENDATIONS

Introduction

The recommendations presented in this chapter are based upon the evidence and data collected during the evaluation. The data presented in previous chapters presents a baseline of information from which Michigan policymaker can begin to formulate their responses to identified problems. Further, many of the problem areas noted are resource driven, and the extent to which recommendations on these can be implemented are dependent on state resources.

GENERAL RECOMMENDATIONS

1. **In order to achieve the level of representation of children sought by Michigan Compiled Law 712A.17d, the State of Michigan should appropriate and allocate resources to assist counties and LGALs in representing children.**

   Throughout the evaluation, it was noted that no initial state resources were appropriated to achieve the goals of MCL 712A.17d. Counties have responded to their own economies differentially to their own ability. In some jurisdictions, LGALs may be paid to attend Foster Care Review Board Meetings and for mileage, and in other jurisdictions a capped amount for all case-related work.

   Given the differential ability of counties to respond, representation of children in Michigan is threatened by inconsistent approaches across the state. Further, as resources are varied and none were made available initially, the concept of sanctioning LGALs for not meeting certain requirements becomes one necessarily of fairness and equity.

ADMINISTRATION AND COMPENSATION

2. **The State of Michigan should create an administrative structure to facilitate coordination of many issues related to the appointment and practice of lawyer-guardians ad litem.**

   There is a large amount of evidence collected by the evaluation team that suggests a great deal of inconsistency on many issues. There is no coordinated training. Individuals indicate that if they have a complaint about a lawyer-guardian ad litem they do not know where to place that complaint. The team also heard complaints from individuals who stated they had no idea there were requirements for LGALs written in the law.

   An administrative office such as an Office of the Lawyer-Guardian ad Litem need not be an extensive structure. The entity might be housed in the State Court Administrative Office and possibly use existing space and/or staff. To ensure that the office was able to respond, at least one FTE staff person with some support should be minimally considered.

This structure could be responsible for a variety of functions and the creation and dissemination of many types of guidelines as described in detail in the recommendations below. These functions might include: promulgation of training standards; centralized complaint processing; promulgation of standards for activities required by MCL 712A.17d; production and dissemination of information to LGALs, courts, and the general public; offering assistance to courts in the specific areas of representation mandated by the statute, and coordinating the development of appropriate contract requirements for the representation of children..

3. **Regardless of the existence of an administrative structure to coordinate efforts, the State of Michigan should develop methods to routinely assess and address issues concerning the appointment, payment, and practice of lawyer-guardians ad litem.**

This evaluation represents a baseline of information regarding Michigan's LGAL statute. Currently, jurisdictions in Michigan pay lawyer-guardians ad litem to the best of their ability. This ability is often differential, resulting in pay inequities among the jurisdictions. Forms of payment range from hourly rates to full-fledged contracts with private firms. Hourly rates themselves fluctuate between locations. Some jurisdictions are able to pay LGALs for travel and meeting attendance, others are not able to compensate these activities. Methods of appointment also differ from jurisdiction to jurisdiction.

An annual or bi-annual assessment of issues related to the appointment, payment, and practice of LGALs could be conducted through the administration of surveys such as those used in this evaluation. Periodic assessments will allow the state to keep abreast of how individuals involved in child protective proceedings perceive progress in particular areas.

The results of this periodic assessment would greatly benefit jurisdictions. The assessments would provide information on the pros and cons of various methods of appointment, contracting, LGAL-caseworker interaction, and LGAL-foster parent interaction. With such guidance, jurisdictions will have access to information that will allow them to improve their processes with regard to the representation of children.

4. **The State of Michigan should more comprehensively assess the methods of paying LGALs and provide guidance on the variety of methods employed by local jurisdictions.**

As reported, the method and amount of payment to LGALs differs from jurisdiction to jurisdiction. Certain contracting structures and payment methods may carry inherent disincentives to representing children as comprehensively as contemplated by Michigan law. For example, moving from an hourly payment schedule to a contract schedule eliminates the incentive of the individual LGAL to comprehensively represent the child. A contract schedule may demand the same

or a greater caseload, but not account for significant portions of the LGAL's time spent on meeting statutory requirements or even basic tasks.

Using an administrative structure as suggested, the State of Michigan could research and issue contracting and payment guidelines. This approach would enable to state to more strictly enforce adherence to the requirements of the law.

EXPERIENCE, KNOWLEDGE, AND AVAILABILITY OF TRAINING

5. The State of Michigan should systematically enhance the uniform training of lawyer-guardians ad litem.

No consistent or statewide training was provided with the enactment of the lawyer-guardian ad litem statute, nor has any followed enactment of the law. Training has been inconsistent and generally provided at the interest and initiative of local jurisdictions. In at least one case, neighboring jurisdictions developed a local LGAL training initiative to benefit several courts.

The State of Michigan should promulgate minimum standards for the training of LGALs. These minimum standards should address the expectations the state has for each of the requirements outlined in MCL 712A.17d. This training could be developed and delivered with the assistance of courts and local bar associations. An administrative entity responsible for LGAL issues could coordinate the development of curriculum and document the training to ensure the training was made available statewide. Specific issues such as forensic interviewing, investigative skills, and sensitivity training should be considered for curricula as well as general training on the LGAL requirements.

6. Local courts should inform individuals accepting appointments as LGALs of their duties and powers at the beginning of every case.

One method to ensure that individuals understand what is expected of them is to have judges in local jurisdictions inform each and every LGAL of the expectations that are upon them in each and every case, and what consequences may occur if those expectations are not fulfilled. A second method would be to include the powers and duties as enumerated in the statute in the order of appointment and have the judge inform the LGAL that he or she needs to read those specifications.

7. An informational publication for statewide distribution should be produced that outlines and explains the duties and powers of the lawyer-guardian ad litem as outlined in MCL 412A.17d.

An informational publication should be produced that would describe in detail what the powers and duties of the LGAL include. The Governor's Task Force on Children's Justice or one of its subcommittees should oversee this

process. This publication should be made generally available to local courts and jurisdictions, and to FIA and its field offices, and to foster parents. This would provide basic coverage of the LGAL responsibilities to a variety of stakeholders in the child protection process. This publication, of course, would be updated as the law was changed or expectations clarified. In light of the fact LGALs describe their roles with apparent varying levels of comprehension and that caseworkers are often completely unaware of LGAL duties and powers, such a publication could fulfill several purposes and is essentially.

8. **The State of Michigan should ensure that individuals or firms accepting LGAL appointments are completely aware of the requirements and expectations of the law.**

Many lawyer-guardians ad litem cannot accurately or fully articulate the range of duties and responsibilities as prescribed by statute. Attorneys offered a range of descriptions of their duties ranging from vague or limited views to more fully expressed understanding of their responsibilities.

There are several methods by which the state could ensure individuals accepting LGAL appointments understand and accept their responsibilities. First, to encourage LGALs to understand their powers and duties, the state should (as described in the recommendation above) produce a booklet or monograph discussing and describing those powers and duties in detail and distribute the publication statewide.

Secondly, the state could develop a brief course for attorney self-certification on these powers and duties. One approach would be to develop short multiple-choice tests that attorneys might be required to take and pass to be appointed as LGALs. These brief tests would only address their responsibilities as LGALs. This would begin to set a precedent for attorney certification in a highly specialized field of law. Another approach would be to require a process of attorney self-certification in which the attorney attested that he or she had carefully reviewed the powers and duties set forth in the statute (and other statewide materials made available) and agreed to fulfill them in each case. A second monograph could be produced covering all of the issues upon which attorneys would self-certify their competence.

9. **The State of Michigan, in addition to ensuring individuals accepting LGAL appointments thoroughly understand their powers and duties, should also develop an experiential requirement for appointment.**

Findings from the evaluation revealed that there is a great deal of variability in the manner in which LGALs meet their responsibilities. "It all depends on who the LGAL is" was a common statement made during focus groups and in survey responses. Some of this variability, of course, stems from the personal attributes of the individual LGAL. Other sources of the variability

may stem from training issues and the level of experience of LGALs.

Requiring a certain level of prior child and family-related legal experience, in addition to ensuring individuals have knowledge of what is expected of them under the LGAL statute, may reduce this variability to some degree. One method through which attorneys could acquire this experience would be to allow opportunities for them to "second chair" on such cases with a more experienced attorney.

10. The State of Michigan should not only provide uniform training for LGALs, but also provide joint training for LGALs and FIA caseworkers.

As is common in all states, there are tensions that exist between caseworkers and attorneys. Some caseworkers admitted that they were not even aware that Michigan law established the powers and duties of LGALs. Individuals expressed frequent concern that LGALs rely too heavily on caseworker reports, that caseworkers turnover is significantly high putting additional pressures on the LGALs, and that there is little communication between the two.

Enhanced training could be developed that would include team building sessions between caseworkers and LGALs. Such training would serve to alleviate some of the misunderstandings that exist between these professionals. The roles and responsibilities of each would be clearer and expectations could be become more meaningful.

INDEPENDENT INVESTIGATIONS

11. Judicial oversight and sanctions are needed to ensure that the statutory requirement of the independent investigation is met.

Judges and referees doubt the extent to which LGALs conduct independent investigations, as do caseworkers, foster parents, and Foster Care Review Board members. Many LGALs insist that there is frequently no need to conduct a separate investigation, or that they have no resources to conduct such an investigation. Jurisdictions have varied responses as to how they ensure investigations have been conducted.

In order to ensure that investigations are being conducted to the extent contemplated by law, judges and referees should require LGALs to file initial investigative reports with the court and or agency, and imposing sanctions when such reports are not made available. The format of the report should be specified, thereby assuring that LGALs were getting comprehensive information about children. The report should be required with certain provisions that do not allow the report to become testimony or evidence. Specifically, the report could be required as part of both the court and agency files and also be specifically excluded as evidence. Sanctions for noncompliance in conducting the investigation should be graduated sanctions.

An informal opinion from the Ethics Committee of the State Bar of Michigan interpreting the rules of professional conduct lends support to this recommendation. That opinion (RI-318) allows a LGAL to prepare "a written report to the court as long as the lawyer does not reveal the child/client's confidences and secrets." The opinion, however, addresses a situation wherein one court was requiring a report from the LGAL assessing the child, the child's environment, and any concerns the LGAL might have. While focused on that specific situation, the opinion does grant the court some guidance in requesting reports that could provide direction. Consideration should be given to establishing consistent guidelines for statewide application.[xxxv]

12. The requirements for an independent investigation as mandated by MCL 712A.17d should be clarified.

LGALs consistently indicated a need for clarification of what constitutes an independent investigation under the Michigan statute. The statute itself provides general instruction as to requiring an investigation, but lacks in certain specifics.

The *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* outlines in more detail what actions attorneys should take when they conduct investigation. Reference to this document can provide some clarity.

13. In clarifying the elements of an independent investigation, the State of Michigan should also consider the requisite scope of the investigation.

While caseworkers and judges and referees frequently indicate LGAL over-reliance on FIA reports and the lack of independent investigations, LGALs insist that accurate and complete FIA reports frequently make it unnecessary to question individuals or pursue certain information.

It is not always necessary to require an LGAL to obtain the same or similar information from the same source as the caseworker when the veracity of that information is not contested. This can be construed as a waste of public resources. On the other hand, the LGAL should interview the same individuals when further information is needed or warranted. Consequently some thought should be given to focusing independent investigations in specific areas (e.g., mental health, education, immigration) and/or on specific types of information not otherwise available to the FIA.

14. There is a need for specialized training to assist LGALs in meeting the requirement for the independent investigation.

Throughout the evaluation, judges, referees and LGALs commented that it was not the appropriate role of the attorney to be an investigator, specifically if no resources were provided to conduct the investigation. Regardless of that sentiment, Michigan law requires that LGALs conduct an

independent investigation in each and every case. In general terms, attorneys investigate their cases to determine what evidence is available on behalf of the client. That expectation should be no different for attorneys representing children.

The greatest expressed need for training by LGALS and referees was for training in the forensic interviewing of children. Training should address basic methods of investigation, methods of interviewing children, how to write basic investigative reports, and other areas specific to investigations as needed.

REPRESENTATION

15. Judicial oversight is needed to ensure LGALs consistently meet with their client and with the caretaker of the child before each hearing.

Judges and referees report non-compliance with this fundamental requirement, as do caseworkers and foster parents. LGALs themselves state they are not in compliance. Further, foster parents describe limited interaction with LGALs, and Foster Care Review Board members cite low attendance at their meetings.

In defense of LGAL non-compliance, many state that the resources just are not available to compensate the LGAL for their time. When the LGAL does meet with the child and relevant parties, it is generally at the courthouse just prior to the hearing.

Judicial oversight is needed to ensure compliance with this requirement. Oversight can take many forms, including in-court questioning, mandated reports of visits or some other form of documentation from the LGAL.

16. The State of Michigan should more clearly state the expected frequency and necessity of meetings between LGAL and their child-client.

Judges, referees, LGALs, caseworkers, foster parents, and Foster Care Review Board members all shared the opinion that LGALs do not visit with the child frequently enough, and generally do so only at the courthouse before hearings. They further agree that the lack of financial resources is an issue.

The State of Michigan should more clearly define the circumstances under which a LGAL must meet with a child-client. For example, if the child is an infant, LGALs argue that meetings should be less frequent than with older children. Additionally, the State of Michigan should consider whether or not visits should be required prior to ALL hearings or proceedings. Economies of scale might suggest that visits at certain review hearings not be mandated. Instead, LGALs might be mandated to make, at appropriate times, a more substantial visit to the child in his or her own environment. The State of Michigan should also consider clarifying how frequently the LGAL should meet with the child in the child's environment.

17. The State of Michigan and the courts should develop methods of training or providing information that will stress to LGALs the importance of explaining to their child-clients and others their role in the child protection process.

Attorneys who responded to the request that they describe how they explain their role to their child clients frequently indicate the age of the child as a deciding factor in how they explained their role to the child. Given that, one could argue that foster parents should receive the role explanation on behalf of infants or very young children. Again foster parents indicate they do not always get an explanation of the LGAL's role.

LGAL training should help attorneys focus on how to deliver this explanation of their role to children of different ages, foster parents and caregivers. Demonstrations of how to deliver such an explanation should be included in the training. This can be accomplished through such means as CLE presentations or presentations of "best practices" at gatherings of attorneys who also accept LGAL appointments.

18. The State of Michigan should develop and, where appropriate, impose sanctions for inappropriate substitutions of LGALs. Courts should also develop procedures and protocols to improve case scheduling that will maximize LGAL attendance and reduce inappropriate substitution.

The larger the jurisdiction, the more frequently substitution of LGALs in the courtroom was acknowledged. Scheduling conflicts were reported as the primary reason for the LGAL not being able to attend hearings. Judges should impose sanctions when substitution becomes a problem, and the sanctions that are applied should be applied uniformly and consistently across jurisdictions.

19. The State of Michigan should develop and enforce case processing protocols that ensure the active involvement of the LGAL at all stages of the proceedings.

The evaluation revealed that beyond receipt and review of caseworker reports about their child-client's progress, LGALs are not actively involved in case plan development or plan and service monitoring. Further, FIA policy 722-6, *Foster Care – Developing the Service* Plan, describes what input into the plan should be given by parents, caregivers and foster parents, but does not provide guidance to the caseworker on ways to engage the LGAL.

Protocols should be developed that at a minimum require LGAL receipt and acknowledgement of drafts and plans that the caseworker should be required to provide routinely. Further, courts should emphasize the need for LGAL involvement in case planning conferences to be held as soon after initial hearings as possible. Such conferences can take advantage of the proximity of parties and the potential

that early agreement can be reached on case resolution and settlement of issues.

ACCESS TO CASE-RELATED INFORMATION

20. The State of Michigan should reinforce, through its court system, that lawyer-guardians ad litem are to have access to agency and institutional information about the children they represent.

LGALs indicate that they have experienced some difficulty in getting information about a child's medical history. Without such information, the LGAL and court cannot have a complete portrait of the child and his or her needs. The State of Michigan should, through its court system, inform agencies routinely dealing with children that information about a child under the court's jurisdiction should be shared with the child's lawyer-guardian ad litem. This can be done efficiently with a reminder to appropriate parties, agencies, and institutions in writing outlining their responsibilities to provide information to the LGAL. The reminder should also list available sanctions or consequences. As mentioned previously, the state should also stress to LGALs the importance of having their information come from a variety of sources.

ENDNOTES

[i] Mark Hardin, Diane Boyd Rauber & Robert Lancour, *Representing Clients* Volume 1 State Court Assessments 1995-1998: Dependency Proceedings (Veronica Hemrich, ed., American Bar Association, Center on Children and the Law) (1999).

[ii] *Id.*

[iii] MCL 712A.17d(1)(d)

[iv] MCL 712A.17d(1)(k)

[v] Albert E. Hartmann, *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*, 31U. Mich. J.L. Reform 237, 239-255 (1997).

[vi] MCL 712A.17d(2); Frank E. Vandervort, *Representing Children in Protective Proceedings: Learning from Michigan's Experience*, 19 Child Law Practice 153 (2000).

[vii] Jessica M. Eames, *Seen but not heard: advocating for the Legal Representation of a Child's Expressed Wish In Protection Proceedings and Recommendations for New Standards in Georgia*, 48 Emory L.J. 1431, 1449 (1999).

[viii] MCL 712A.17d(1)(h); Jessica M. Eames, Supra note 7, at 1451.

[ix] *Id.*

[x] Supra note 7, at 1451.

[xi] Supra note 7, at 1452.

[xii] *Id.*

[xiii] Frank E. Vandervort, *Representing Children in Protective Proceedings: Learning from Michigan's Experience*, 19 Child Law Practice 153 (2000).

[xiv] Albert E. Hartmann, Supra note 5.

[xv] The information contained therein regarding the Hartmann publication was primarily gained from Albert E. Hartmann, *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*, 31 U. Mich. J.L. Reform 237, 239-255 (1997).

[xvi] Frank E. Vandervort, Supra note 13, at 154-156.

[xvii] Frank E. Vandervort, Supra note 13, at 155, citing in re E.P., 595 N.W.2d 167 (Mich. Ct. App. 1999).

[xviii] Frank E. Vandervort, Supra note 13, at 155, citing MCLA 722.23.

[xix] The information contained therein regarding the Vandervort publication was primarily gained from Frank E. Vandervort, *Representing Children in Protective Proceedings: Learning from Michigan's Experience*, 19 Child Law Practice 153, 154-156 (2000).

[xx] "Random Assignment" means selection of an attorney from a list of eligible attorneys without regard to when the attorney last served. "Rotation list" means selection of an attorney from a list of eligible attorneys with the court moving to the next name on the list when a subsequent selection is made. "Attorney availability" means selection of an attorney merely because he or she is present in court and available to take the case, and there is no systematic method of assignment. "Volunteer attorneys" indicate a situation where the common practice is attorneys offer their services to the court for child protection cases. "Contractual arrangement with private firm" indicates the county or circuit have an existing contract with a local law firm. "Contractual arrangement with public interest firm(s) or organization(s)" means the county or circuit has an arrangement with an organization such as the Legal Aid and Defender Association.

[xxi] Circuits were categorized into rural (100,000 or less), transitional or suburban (100,000 to 400,000), and urban (over 400,000) circuits. This categorization was created using input from analytical staff from the Michigan Judiciary.

[xxii] "Flat fee" indicates the county pays an LGAL a fixed amount for handling the child's case. "Per hour" means the county or circuit pays the LGAL on an hourly basis for his or her work. "Per hearing" means the county or circuit has established a payment schedule based on the LGAL's attendance at a hearing. "Per child" means the same as per case; the LGAL is paid for each case he or she accepts for the duration. "Capped contract," means the county or

circuit has a contractual agreement with an attorney or firm and pays a fixed amount for their services.

[xxiii]Bruce W. Neckers, *It's A Crime: Michigan's System Of Compensation For Criminal Defense Of The Indigent Is Inadequate,* Michigan Bar Journal, January 2002, at 8.

[xxiv] Applied Statistics Laboratory, Inc. (sponsored by the State Bar of Michigan), *The 2000 Desktop Reference on the Economics of Law Practice in Michigan*, Michigan Bar Journal, November 2000, 1545-1573.

[xxv] Robert L. Spangenberg, & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 Law and Contemporary Problems 31 (Winter, 1995) *at* http://www.pili.org/library/access/law_and_contemporary_problems.htm

[xxvi] Robert L. Spangenberg et al, U.S. Department of Justice, Contracting for Indigent Defense Services: A Special Report 13 (2000).

[xxvii] Ibid 13.

[xxviii] Patricia Puritz et al, American Bar Association, A Call For Justice 24-25 (1995).

[xxix] Ibid 25.

[xxx] American Bar Association Juvenile Justice Standards Annotated: A Balanced Approach 71-72 (1996) and American Bar Association `*Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* 24-25 (1996).

[xxxi] The overall relationship has an adjusted R^2=.15 and is significant at the .01 level. This indicates that the awareness of powers and duties explains on 15 percent of the LGAL rating of compliance. For rural jurisdictions, this relationship has an adjusted R^2=-.066 which is not significant, for transitional or suburban jurisdictions the adjusted R^2=.088 and is not significant, and for urban jurisdictions the adjusted R^2=.288 which is not significant. Significance is measured at the .01 level.

[xxxii] American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, approved by the ABA House of Delegates, February 5, 1996, C-2.

[xxxiii] American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, approved by the ABA House of Delegates, February 5, 1996, section C-2.

[xxxiv] It is interesting to note that despite this LGAL comment, the statute does not prescribe a specific time frame in which the child-client must be visited. The statute states that the LGAL must "before each hearing, ... meet and observe the child."

[xxxv] State Bar of Michigan Ethics Committee, Informal Opinion RI-318 (2000) (discussing the preparation of a report by the LGAL at the court's direction).