

**AMICUS ATTORNEY: PRACTICING PRACTICALLY
UNDER THE NEW STATUTE**

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AMICUS ATTORNEY: PRACTICING PRACTICALLY UNDER THE NEW STATUTE

I. MISLEADING MONIKERS

My step-daughter, Stephanie, is seventeen, and is about to sit for the SAT. During her time with us this summer, I learned that there are now mystery novels that have SAT vocabulary words highlighted in the text, as a means of making studying a bit less painful. In seven days, it appeared that she had read approximately seven pages of the SAT mystery novel. I suggested one evening that we review some vocabulary words, scooped up the novel, and began quizzing her. All went relatively well, until I hit upon the word “**pugilist**.”¹ Clearly, our Miss Ma’am had never come across this word. I tried to give her a hint, by telling her **pugilist** was an old pulp fiction word, not often used, and putting the word in context, said “Mohammed Ali was a pugilist.” I then asked what Mohammed Ali did, and for those of you who are fans of Sandra Bullock, in pure “Miss Congeniality” fashion, Steph responded “He tried to bring about world peace.” For those of you who know me, and my desire to put things in historical perspective, you will not be surprised that I responded to this observation with a diatribe about Cassius Clay, being a conscientious objector in a time of war, and how Ali contended that he was devoted to peace. I then renewed my inquiry as to what a pugilist was – we went back and forth several times, and seemed further and further away from Steph recognizing that pugilist = noun for boxer. I finally asked her what Ali wore when he practiced his profession, to which Steph replied “umm, a diaper thing?” Steph was under the misapprehension that Mohammed Ali was a nickname for Mahatma Gandhi!

We are no longer safe to presume that when representing a child that we are known as an *ad litem* or *attorney ad litem*. Chapter 107 of the Texas Family Code was revised in 2003. You, my fellow pugilists, may now have the following monikers:

ATTORNEY AD LITEM (AAL)	An attorney appointed by the Court. YOU HAVE A CLIENT.
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Role: to provide legal services to a person, including a minor, and who owes that person “undivided loyalty, confidentiality and competent representation.”²

Powers and Duties (subject to Rule 4.04 Texas Disciplinary Rules of Professional Conduct):

- A. *Within a reasonable time following appointment, interview:*
 1. the child (if the child is aged 4 or older);
 2. each person with significant knowledge of the child, including foster parents;
 3. the parties.
- B. *Investigate the facts TO THE EXTENT THE ATTORNEY DEEMS APPROPRIATE;*
- C. *Obtain and review the child’s relevant records;*
- D. *Participate in the litigation to the same extent as any party’s advocate;*
- E. *Expedite the proceedings;*
- F. *Encourage settlement through ADR and*
- G. *Must be trained in child advocacy.*³

Entitlement:

- a. To receive a copy of each pleading filed with the Court;
- b. To receive notice of every hearing;
- c. To participate in agency staffings;
- d. To attend all legal proceedings.⁴

CAVEAT: the “going rate” may not be commensurate with your normal hourly rate.

Additional Duties of AAL FOR CHILD:

1. elicit the child’s objectives;
2. advise the child;
3. provide guidance to the child;
4. follow the child’s objectives if the AAL determines that the child is competent to understand the attorney-client relationship and has formed such a relationship;
5. consider the impact on the child of the child’s objectives in presenting the child’s desires to the Court;
6. have a working knowledge of the American Bar Association’s standards for attorneys who represent children in abuse and neglect cases and the suggested amendments to those standards promulgated by the National Association of Counsel for Children.

Protection/Exception to Protection: See Amicus Attorney.

¹ Swannell, Julia, ed. *The New Little Oxford Dictionary*, 6th ed., 436 (Clarendon Press, 1986).

² Tex.Fam.Code §107.001(2).

³ *Id.*, §107.003(1)-(2).

⁴ *Id.*, §107.003(3).

Discretionary appointments in non-governmental entity cases: See Amicus Attorney.

AMICUS ATTORNEY An attorney appointed by the Court in a case filed by someone OTHER THAN a governmental entity. You are the ARM OF THE COURT, providing legal services to assist the Court, rather than providing legal services to a child.

Role: to provide legal services necessary to assist the Court in protecting a child's best interest.

CAVEAT: An Amicus Attorney DOES NOT provide legal services to the child.⁵

Powers and Duties: See Powers and Duties, Attorney Ad Litem.

Entitlement: See Entitlement, Attorney Ad Litem.

Additional Duties of Amicus Attorney:

- a. to review the facts and circumstances of the case, and to advocate the best interest of the child. Not bound by the child's expressed objectives.

Mandatory Duties of Amicus Attorney:

1. to get a handle on the child's desires;
2. with the child's consent, to assure that the child's desires are revealed to the Court;
3. to consider the impact on the child in making the child's desires known;
4. to review, sign, or decline to sign an agreed order regarding the child;
5. to explain the basis of any opposition to the agreed order;
6. to explain the amicus attorney's role to the child (yes dear, I am a pugilist for the Court, but serve you in the long run);
7. to explain that certain information disclosed by the child may be shared with the Court, PROVIDED that the amicus attorney first determines that the disclosure of other wise confidential communications from the child to the Court re necessary in order to serve the best interests of the child.⁶

Protection: An Amicus Attorney may **not** be:

1. compelled to produce work product developed in the course of working as the arm of the court;
2. required to disclose the source of information;
3. compelled to submit a report into evidence;
4. forced to testify other than as authorized by Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct.⁷

Exception to Protection:

The foregoing protections do not give us license to avoid reporting abuse. It remains the duty of a court appointed attorney to report child abuse or neglect as required by Tex.Fam. Code §261.101.⁸

Discretionary appointments in non-governmental entity cases:

Court is to consider whether to appoint an amicus attorney, an AAL, or a GAL, giving due consideration to the ability of the parents to pay the person appointed, balancing the child's interests against the parties' ability to pay versus other alternatives for resolving the conflict without making such an appointment.⁹

DUAL ROLE You are not schizophrenic simply because you choose to continue practicing law.

Role: to provide services both as an ATTORNEY AD LITEM and GUARDIAN AD LITEM, per TFC §107.0125 in a suit initiated by a governmental entity.

CAVEAT: a *guardian ad litem* need not be an attorney.¹⁰

Protection/Exception to Protection: See Amicus Attorney.

⁷ *Id.*, §107.007(a).

⁸ *Id.*, §107.007(b).

⁹ *Id.*, §107.021.

¹⁰ A Guardian Ad Litem (GAL) may be a qualified non-lawyer, including a volunteer advocate or some other trained professional, or some layperson whom the court feels displays special competence, or an attorney who serves in a dual role in CPS cases. An attorney may volunteer for CASA, so long as the attorney does not practice law while serving in that volunteer capacity. See Sampson & Tindall's commentary to Tex.Fam Code §107.001.

⁵ *Id.*, §107.001(1).

⁶ *Id.*, §107.005.

What's in a name? If you are appointed in the dual role, you may ask that the Court appoint another individual to act as GAL for the child – and if you are successful in the request, or if the Court differentiates on its own motion, the attorney will then only serve as AAL for the child.¹¹

A rose by any other name: Unless another individual is appointed as GAL in a CPS case (read that as a suit by a governmental entity), then such an appointment is by implication an appointment to serve in the dual role.¹²

In non-CPS cases, an attorney may NOT be appointed to serve in a dual role, nor may the court appoint a volunteer advocate to serve as GAL UNLESS “the training of the volunteer advocate is designed for participation in suits other than suits filed by a governmental entity.”¹³

GUARDIAN AD LITEM Not necessarily an attorney. Not a party to the suit.

Role: to represent the best interests of a child.

Powers and Duties:

- May conduct an investigation to determine the best interests of the child
- May obtain and review copies of the child’s relevant medical, psychological and school records per TFC§107.006

Reasonable acts following appointment include:

A. *interviewing:*

1. the child in a developmentally appropriate manner
2. each person with knowledge of the child’s history and condition, including foster parents
3. the parties to the litigation.

B. *ascertaining the child’s objectives while not being bound by what the child articulates;*

C. *encouraging settlement through ADR; and*

D. *performing any specific task as directed by the Court.*¹⁴

Entitlement:

- a. to receive copies of pleadings;
- b. to receive notice of hearings;
- c. to participate in agency staffings;
- d. to attend all legal proceedings BUT NOT TO INTERROGATE UNLESS appointed in a dual role;
- e. to review, sign, or decline to sign an agreed order;
- f. to explain to the Court what may be objectionable about a proffered order;
- g. unless appointed as an attorney in the dual role, to appear at a hearing or trial to provide testimony as to the best interests of the child and basis of any recommendations the GAL makes to the Court.¹⁵

Trial to the Bench: A party may call the GAL as a witness for the purpose of cross exam regarding the GAL report without the GAL being listed as a potential witness. If not called by a witness, the Court is to allow the GAL to testify in a narrative.¹⁶

Contested Cases: Timing of report: to be provided to attorneys for parties as directed by the Court, but not later than the first of the following: (1) the date established by the Court’s scheduling order, or (2) the 10th day before the start of the trial.¹⁷

CAVEAT: GAL may include:

1. a volunteer advocate;
2. a professional, OTHER THAN A LAWYER, who has special training or licensure that relates to the concept of “determination of a child’s best interests;”
3. an adult (fairly broad concept even for family lawyers) with “competence, training, and expertise” to “represent the best interests of the child;” and
4. an attorney ad litem appointed to serve in the DUAL ROLE.¹⁸

When you get your appointment:

In a suit by a governmental entity seeking termination of the parent child relationship, or the appointment of a conservator for a child, the GAL is to

¹¹ *Id.*, §107.0125.

¹² *Id.*, §107.0125 (c-d).

¹³ *Id.*, §107.022.

¹⁴ *Id.*, §107.002(a).

¹⁵ *Id.*, §107.002(b) and (c).

¹⁶ *Id.*, §107.002(f).

¹⁷ *Id.*, §10.002(g).

¹⁸ *Id.*, §107.001(5)(A)-(D).

be appointed by the Court “after the filing of the petition but before the full adversary hearing.”¹⁹

Restrictions on your advocacy:

If you are appointed ONLY as GAL, you may take only those actions allowed a non-attorney guardian ad litem, and you may NOT perform legal services in the case or take action that is in the purview of a licensed attorney, such as taking discovery other than as a witness, making opening and closing statements, or examining witnesses.²⁰

Discretionary appointments in non-governmental entity cases: See Amicus Attorney.

One more concept to beware of when grappling with the foregoing titles: regardless of title, we must assure that our actions take regard of what is DEVELOPMENTALLY APPROPRIATE: i.e. demonstrating an understanding that we have dealt with a case to take into account a child’s age, educational level, cultural background, and communication skills.²¹

Chapter 107 also allows for the preparation of a social study into the circumstances and condition of the child made the subject of the litigation and of the home of any person seeking conservatorship of the child.

II. WHO’S ON FIRST, WHAT’S ON SECOND

Chapter 107 does not stand alone. If a professional learns of abuse or neglect, there may be a need to breach the child’s confidences, and report that abuse. Chapter 261 defines abuse, mandates reporting of same, and creates certain immunities regarding the reporting of abuse or neglect of children.²² “A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report.”²³ The report should include the reporter’s belief that the child has been or may be abused or neglected, and should be made to the appropriate agency, including:

1. any local or state law enforcement agency;
2. the department if the alleged or suspected abuse involves a person responsible for the care, custody, or welfare of the child;
3. the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect has occurred; or

4. the agency designated by the court to be responsible for the protection of the children.²⁴

Such a report should include the name and address of the child, the name and address of the person responsible for the care of the child and any other information pertinent to the report.

In the event of a false report, penalties flow. What type of penalties attach to a false report of abuse or neglect?

- (a) A person commits an offense if the person knowingly or intentionally makes a report as provided in this chapter that the person knows is false or lacks factual foundation. An offense under this section is a Class A misdemeanor unless it is shown on the trial of the offense that the person has previously been convicted under this section, in which case the offense is a state jail felony.
- (b) A finding by a court in a suit affecting the parent-child relationship that a report made under this chapter before or during the suit was false or lacking factual foundation may be grounds for the court to modify an order providing for possession of or access to the child who was the subject of the report by restricting further access to the child by the person who made the report.²⁵

Failure to report also can lead to penalties – criminal penalty in that a conviction for failure to report abuse or neglect is a Class B misdemeanor.²⁶ Employers are prohibited from retaliating against employees who in good faith report abuse or neglect under a new revision to the Texas Family Code, effective in 2001.²⁷ Caps are placed on the damages recoverable against an employer if that employer is a governmental unit (\$50,000 if there are fewer than 101 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed; \$100,000 if the employing governmental unit has between 200 and 501 employees; and \$250,000 if there are more than 500 employees in the state or local governmental entity).²⁸ Affirmative defenses that are allowable under subsection b (which prohibits suspension or termination of the employment of a person who in good faith reports abuse or neglect to the person’s supervisor, administrator, state regulatory agency or

¹⁹ *Id.*, §107.011.

²⁰ *Id.*, §107.011 (d).

²¹ *Id.*, §107.001(3).

²² *Id.*, §261.

²³ *Id.*, at §261.101.

²⁴ *Id.*, §261.102-103.

²⁵ *Id.*, §261.107.

²⁶ *Id.*, §261.109.

²⁷ *Id.*, §261.110.

²⁸ *Id.*

law enforcement agency), are limited, but include the argument that

An employer would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is initiated or cooperated with an investigation relating to an allegation of child abuse or neglect.²⁹

A “professional” for the purposes of Chapter 261 includes:

... an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.³⁰

Do lawyers or other folks get to hide behind “privileged communications?” No. The requirement to report abuse and neglect applies even to those to whom

... personal communications may be otherwise privileged, including an attorney, member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.³¹

- a. What to do when review of negligence doctrine is something you thought only PI lawyers needed to worry about.

III. THE GREAT DEBATE

In her Special Supplement to Texas Family Law Practice and Procedure,³² the Hon. Debra Lehrmann tracks the historical background to current law on court appointed counsel. The focus of the debate

centered upon whether the attorney should advocate according to the child’s directions

²⁹ *Id.*, at (k).

³⁰ *Id.*, §261.101(b).

³¹ *Id.*, §261.101(c).

³² Lehrmann, Debra. Court Appointed Legal Representation of Children in Texas Family Law Cases, at 2-3 (Lexis Nexis 2004).

or whether the lawyer should determine the goal of representation and advocate what is in the child’s best interests.³³

Prior to 1984, the general consensus was that an advocate appointed to represent a child should be **best interest directed**.

CAPTA. In 1974, Congress passed the Child Abuse Prevention Treatment Act, known as “CAPTA.”³⁴ As a precursor to qualifying for Federal assistance regarding child abuse prevention and treatment programs, the state was to assure appointment of a guardian ad litem or some type of special advocate for the child in abuse and neglect cases.³⁵ CAPTA was amended 22 years later, in 1996, to require the guardian ad litem to “make recommendations to the court concerning the best interests of the child.”³⁶

Child Directed. Beginning in 1984, with the publication of Martin Guggenheim’s *The Right to be Represented But Not Heard: Reflections on Legal Representation of Children*, there was a new focus – that ethical canons mandated that the attorney’s function was to **fight for legal objectives chosen by the child**.³⁷

Impact of Texas Disciplinary Rules of Professional Conduct. We are forced to balance competing directives; the foremost of which provides that a: “lawyer shall abide by a client’s decisions . . . concerning the objectives and general methods of representation.”³⁸ Overlaid this mandate is the responsibility to “take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”³⁹

Best Interest Model— derives from English Common Law and the feudal property system. As Judge Lehrmann notes, “proponents of the best interest. . .

³³ *Id.*

³⁴ 42 U.S.C. §5101 et seq (1974).

³⁵ *Id.*, at §5106a (b)(2)(A)(ix)(II).

³⁶ *Id.*, at §5106a (b)(2)(A)(ix) (1996).

³⁷ Guggenheim, Martin. *The Right to Be Represented but not Heard: Reflections on Legal Representation of Children*, 59 NYU L. Rev. 76 (1984).

³⁸ T.Disc.R.Prof. Conduct, reprinted in Gov.Code, tit. 2, subtitle G app. A at 1.02(a)(1) (2003).

³⁹ *Id.*, at 1.02(g).

model argue that courts must have the ability to appoint lawyers for children who will ensure that sufficient evidence is presented to enable the court to fulfill its responsibility to render a decision that is in the child's best interest without being bound by the child's position."⁴⁰

Attorney Ad Litem/Child Directed Model –creates a standard attorney client relationship between the child and his or her lawyer, with the lawyer serving the child while maintaining client confidentiality and serving the child as a zealous advocate within the bounds of the law. In the process, the child is given a voice in the litigation, and the child's position should be weighed by the Court through a presentation of the child's point of view.⁴¹

HYBRID. Includes aspects of both the best interest and child directed models, obliging such an attorney to “advocate what he or she determined to be in the best interests of the child, which ensuring that the child's point of view was considered and presented to the court, if the child so desired.”⁴²

Means to an End: Judge Lehrmann concludes that “the primary distinction between the various roles of appointed counsel for children concerns the manner and method of determining the objectives of the legal services that are to be provided, rather than when the lawyer is to provide legal services.”⁴³

CHILD DIRECTED MODEL: Texas statutorily mandates that the child's views shall be made known to Court, if the child so desires, subject to certain exceptions.⁴⁴ The AAL, GAL and/or DUAL ROLE appointee may have a child client, and with such a client comes the need to balance advocacy versus not making a recommendation that results in serious injury to a child. Example: the child articulates a desire to return “home,” where mom is a heroin addict and her many boyfriends have abused the child. The AAL/GAL may need to substitute his or her judgment

for that of the child, rather than allowing the child to return to such a home.⁴⁵

IV. BONDING, ATTACHMENT, PAS, AND HOW THEY MIGHT COLOR THE FACTS AND CIRCUMSTANCES OF A CASE

Chapter 107 outlines certain tools; however, let's dig a bit deeper before looking back at the statute. With any case involving children, we need to be aware of the importance of *bonding* and *attachment*, words that are often used interchangeably. Bonds include “close relationships which tend to be formed with teachers, friends, and others who have shared experiences and emotions.”⁴⁶ Attachment describes:

enduring relationships that are formed over time and experience, almost always by members of a family. Losing an attachment figure implies a lengthy and painful grief process.⁴⁷

Psychologists teach us that secure attachments normally form in a child's first year of life. **Caveat: potential interruptions to attachment include:**

1. **Separation from parents through foster care moves.**
2. **Adoption after attachment to another parental figure has occurred.**
3. **Prenatal exposure to drugs and alcohol.**
4. **Traumas like sexual abuse, physical abuse, and domestic violence.**
5. **Major depression, schizophrenia, or manic-depressive illness in the parent figure.**
6. **Drug or alcohol addiction in the parent figure.**
7. **Orphanage care.**
8. **Hospitalization of parent or child, during which children lose access to their parents.**
9. **Neglect.**⁴⁸

Psychiatrist Richard Gardner coined the phrase “Parental Alienation Syndrome (PAS)” in 1985 to describe his clinical impressions of cases he believed involved false allegations of child sexual abuse.⁴⁹

⁴⁰ Lehrmann, Debra at 2-10.

⁴¹ *Id.*, at 2-13.

⁴² *Id.*, at 2-14.

⁴³ *Id.*, at 2-34.

⁴⁴ TFC §107.004(4) mandates that the AAL “represent the child's expressed objectives of representation and follow the child's expressed objectives of representation during the course of litigation if the attorney ad litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem.”

⁴⁵ *Id.*, §107.008.

⁴⁶ Gray, Deborah D. *Attachment in Adoption* 17 (Perspectives Press, Inc., 2002).

⁴⁷ *Id.*

⁴⁸ *Id.* at 21.

⁴⁹ Bruch, Carol, “Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases,” 35.3 FAMILY LAW QUARTERLY 527 (Fall, 2001).

PAS has been extended to cases not involving abuse, but instead, to all cases involving a child who refuses to see the noncustodial parent. Gardner sometimes distinguishes cases involving actual abuse, but has come to focus his attentions at “discerning whether the beloved parent and child are lying, not whether the target parent is untruthful or has behaved in a way that might explain the child’s aversion.”⁵⁰

Gardner’s recommended treatment: “to transfer custody of the child from the beloved custodial parent to the rejected parent for deprogramming. This may entail institutional care for a transitional period, and all contact, even telephone calls, with the primary caregiver must be terminated for at least a few weeks. Only after reverse brainwashing may the child slowly be reintroduced to the earlier custodian through supervised visitation.”⁵¹

Gardner’s recommended treatment has been the subject of great debate in recent years. One such author, Carol Bruch, raises the following criticism of Gardner’s analysis:

First, Gardner confounds a child’s developmentally related reaction to divorce and high parental conflict (including violence) with psychosis. . .

Second, possibly as a consequence of these errors and his tail of the elephant view, Gardner vastly overstates the frequency of cases in which children and custodial parents manufacture false allegations or collude to destroy the parent child relationship. . .

Third, in this fashion, PAS shifts attention away from the perhaps dangerous behavior of the parent seeking custody to that of the custodial parent. . .

Fourth, Gardner believes that, particularly in serious cases, the relationship of an alienated child with the rejected parent will be irreparably damaged, probably ending for all time, unless immediate, drastic measures (custody transfer, isolation from the beloved parent, and deprogramming) are taken. . .

Fifth, . . . Gardner’s proposed remedy for extreme cases is unsupported and endangers children.⁵²

Emphasis added. Bruch continues, suggesting that Gardner might not hold up to a Daubert challenge, in that his work is mostly published through Creative Therapeutics, the firm Gardner established to publish, that his work “lacks scientific rigor,” that he is a self-promoter through his own web site, and that his referrals often stem from fathers for equal access net works. In a recent article published in the *American Journal of Forensic Psychology*, Dr. Richard Warshak writes:

Controversy exists, however, in conceptualizing the problem of alienated children and in using the term PAS. Those favoring the term believe it assists in understanding and treating a well-recognized phenomenon. . . . Critics argue that PAS is either an unnecessary or potentially damaging label for normal divorce-related behavior, that it oversimplifies the etiology of the symptoms it subsumes, and that it may result in custody decisions which fail to promote children’s welfare.⁵³

Often, in cases involving court appointed counsel, we have parents who may not be aware of their own, or their children’s challenges to form trusting relationships where attachment and bonding are possible. Who has not had at least one of the triggering events listed above involved in a case in which you were appointed to serve as an *ad litem*, *amicus* attorney or GAL? What tools are available to try to ascertain where the child is, emotionally, developmentally, physically, etc.?

V. TOOLS TO HELP YOU DETERMINE THE FACTS AND CIRCUMSTANCES OF THE CASE: ACCESS TO CHILD AND TO INFORMATION RELATED TO THE CHILD

With the exception of an attorney *ad litem* appointed to represent an adult or a parent, the Court is obliged to give you tools to work with – subject to other pertinent laws, which will be addressed to some extent hereinbelow. The “attorney *ad litem*, guardian *ad litem* for the child, or *amicus* attorney” should be the beneficiary of a Court Order mandating immediate access to: “(1) the child; and (2) any otherwise privileged or confidential information relating to the child.”⁵⁴

Otherwise privileged or confidential information may include the child’s relevant records regarding:

⁵⁰ *Id.*

⁵¹ *Id.*, at 529.

⁵² *Id.*, at 530-3.

⁵³ Warshak, Richard, Ph.D. “Current Controversies Regarding Parental Alienation Syndrome,” 19.3 *American Journal of Forensic Psychology* (2001).

⁵⁴ Tex.Fam. Code §107.006(a)(1)-(2).

- Social Services
- Drug and alcohol treatment
- Medical or mental health evaluation or treatment of the child
- Law enforcement records
- School records
- Records of a probate or court proceeding
- Records of a trust or account of which the child is a beneficiary⁵⁵

VI. MAY THE FAMILY CODE BE TRUMPED?

YOUR ABILITY TO ACCESS INFORMATION PURSUANT TO THE FAMILY CODE MAY BE TRUMPED BY OTHER PROVISIONS OF LAW.

For instance, the plight of a mental health professional striving to maintain confidentiality was played out in Abrams v. Jones.⁵⁶ Karissa Jones feared counseling following her parents' divorce in 1991. Karissa's parents, Donald and Rosemary, entered into a standard custody agreement, in which they had been appointed joint managing conservators of their two minor children. Karissa's fear may have been provoked by the fact that her father filed a Motion to Modify custody in 1993, in which he sought to be named the children's sole managing conservator. The modification case was settled, with Mr. Jones and his ex-wife, Ms. Droxler, being granted EQUAL access to medical, dental, educational and psychological records for both Karissa and her sister, Katryna.

In 1995, Karissa's mother took her to Dr. Laurence Abrams for counseling. Karissa was resistant to counseling, fearing that the good doctor would betray any confidences she shared, and reveal those confidences to her parents. When the doctor assured Karissa that he would maintain her trust, Karissa began to share her thoughts in counseling, and became an active participant in the counseling process.

Karissa had been engaged in counseling for approximately three months when her father learned that she was in therapy. Mr. Jones contacted Dr. Abrams, requesting a copy of Karissa's counseling records. Dr. Abrams refused to forward any information, explaining that the records were confidential, and further, expounding his belief that disclosure could prove "detrimental to Karissa's emotional and mental well-being." After making additional requests for the records (which were also unsuccessful), Mr. Jones decided to redress his grievances in Court, by filing suit against Dr. Abrams. The trial court concluded that Mr. Jones was entitled to disclosure of his daughter's psychological records from Dr. Abrams, and ordered Dr. Abrams to turn over a

copy of Karissa's records to her father. Undaunted, Dr. Abrams failed to comply with the order, which was held in abeyance pending appeal of the trial court's ruling.

Dr. Abrams apparently felt that he was justified in stone-walling, based on his reading of Section 611.002 of the Texas Health and Safety Code, which provides that, as a general rule, communications between a patient and a professional are confidential. While the Court of Appeals recognizes that **Section 611.0045 of the Health and Safety Code** grants the professional some discretion, to wit:

(b) the professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental or emotional health,

the Court of Appeals recognizes that the statute does not give the mental health professional unfettered discretion, as the statute continues in pertinent part as follows:

(f) the content of a confidential record shall be made available to a [parent of a minor patient] who is acting on the patient's behalf.

The Houston Court of Appeals finds that the language of Section 611.0045(b) is "clear, direct and, when construed as written, not devoid of meaning."

The Houston Court of Appeals holds that subsection (f) is MANDATORY; selective interpretation cannot be used to give a mental health professional the "unqualified right to refuse to disclose a minor patient's records to that patient's parent. The Houston Court looks to Texas Family Code Chapters 151 and 153, which establish that between a parent and child, it is the parent who is responsible for making decisions regarding the child's welfare.⁵⁷ *What did Dr. Abrams do? He appealed to the highest court of the state – successfully.*

The Texas Supreme Court reaches some different conclusions, first noting that "Jones took the position that as a parent, he was unconditionally entitled to see all of Abrams' records regarding his daughter."⁵⁸

The Texas Supreme Court outlined three issues on the final appeal, as follows:

1. whether section 153.073 of the Family Code gives a divorced parent greater rights of access to mental health records than parents

⁵⁵ Id., at §107.006(b).

⁵⁶ Abrams v. Jones, 35 SW3d 620 (Tex. 2000).

⁵⁷ Tex.Fam. Code § 153.

⁵⁸ Abrams v. Jones, 35 S.W.3d 620, 623.

- in general have under chapter 611 of the Texas Health & Safety Code,
2. whether section 611.0045(b) of the Health and Safety Code allows a professional to deny a parent access to portions of mental health records if the professional concludes that their release would harm the child, and
 3. whether a parent is always deemed to be acting on behalf of his or her child when requesting mental health records.⁵⁹

Pursuant to section 153.073 of the Texas Family Code, upon dissolution of the marital relationship, unless the trial court has entered orders to the contrary, a parent who is appointed a conservator of a minor child “has at all times the right . . . as specified by court order. . . of access to medical, dental, psychological, and educational records of the child.”⁶⁰ The Texas Supreme Court **disagrees** with Jones’ interpretation that this section of the Family Code “mandates that a parent who is appointed a conservator has access at all times to all psychological records of the child.”⁶¹

Instead, as to the first issue articulated, the Texas Supreme Court rules as follows:

We interpret section 153.073 to ensure that a court may grant a parent who is divorced and who has been named a conservator the same rights of access to his or her child’s psychological records as a parent who is not divorced. We do not interpret section 153.073 to override the provisions of chapter 611 of the Health and Safety Code that specifically addresses parents’ rights to the mental health records of their children.⁶²

The Texas Supreme Court acknowledges that there are crosschecks outlined in Section 611; if a professional decides not to disclose certain portions of a patient’s mental health record to the patient, the patient may select another professional for treatment of the same or a related condition, and the professional denying access must allow the newly retained professional to examine and copy the records that have not been released to the patient.⁶³ The Court acknowledges that portions of Chapter 611 speak to the mental health records of a minor, **but does not agree that Jones was necessarily speaking on behalf of his daughter** – and here, the Texas Supreme Court agrees with the dissenting opinion to the Houston Court of Appeals

opinion, holding that “unfortunately, parents cannot always be deemed to be acting on the child’s behalf.”⁶⁴ The Texas Supreme Court continues, noting:

... parents embroiled in a divorce or other suit affecting the parent/child relationship may have motives of their own for seeking the mental health records of the child and may not be acting ‘on the patient’s [child’s] behalf’ . . . **we therefore conclude that a mental health professional is not required to provide access to a child’s confidential records if the parent who requests them is not acting ‘on behalf of’ the child.**⁶⁵

Emphasis added. The Texas Supreme Court goes on to note that Section 611.0045(f) in theory stands for the proposition that when a parent seeks records on behalf of a child, the parent steps into the shoes of the child. The Court concludes, however, that the parent’s right, like any other third party, is no greater than the rights of the patient. **The Texas Supreme Court therefore concludes as follows:**

. . . **the court of appeals erred in construing sections 611.0045(b) and (f) of the Health and Safety Code as giving a parent totally unfettered access to a child’s mental health records irrespective of the child’s circumstances or the parent’s motivation.**⁶⁶

The Court notes that Dr. Abrams had committed to Karissa that notes of their sessions would remain confidential – and that only then did Karissa open up and make progress in counseling. Dr. Abrams assured the child that “he would not disclose his notes to her parents unless required to do so by a court.”⁶⁷

The Court also notes that Karissa was a layperson – an eleven year old layperson – who, in the Court’s opinion, was unqualified to decide whether or not the release of her records “would be harmful to her physical, mental or emotional health.”⁶⁸

Ultimately, the Texas Supreme Court rules that Abrams’ denial of access to Jones of his detailed notes was proper, and that

The trial court erred in holding that Jones was entitled to the detailed notes about his

⁵⁹ *Id.*, at 623-624.

⁶⁰ Tex. Fam. Code §153.073(a)(2).

⁶¹ *Abrams v. Jones*, 35 S.W.3d 620, 624.

⁶² *Id.*

⁶³ Tex. Health & Safety Code §611.0045(e).

⁶⁴ *Abrams v. Jones*, 35 S.W.3d 620, 625.

⁶⁵ *Id.*, at 625-626.

⁶⁶ *Id.*

⁶⁷ *Id.*, at 627.

⁶⁸ *Id.*, at 627-628.

daughter's conversations with her mental health professional under the facts of this case. Accordingly, we reverse the judgment of the court of appeals and render judgment that Jones take nothing.⁶⁹

What to learn from *Abrams v. Jones*? Document your file. Dig. Seek releases, if possible. Try to use Chapter 107, but realize that a prudent mental health professional may "punt," and use Chapter 611 as a means of attempting to block access by a parent – and conceivably, even by someone acting as the arm of the Court. Thank folks like Dr. Abrams, for clarifying what could have been misleading and potentially contradictory areas of Texas law(s), by devoting the time and resources necessary to litigate. Realize that Chapter 611 of the Texas Health and Safety Code is but one example of an area where other codes may be used to attempt to block your efforts to gain access to the child's records. What other laws could potentially box you in?

VII. APPLICABLE TEXAS STATUTES AND EXCEPTIONS

*Education is the ability to listen to almost anything without losing your temper or your self-confidence.*⁷⁰

There are a number of Texas statutes that impact on your duty, as mental health professionals, to maintain the confidences of your patients. Those statutes include but are not limited to the following privileges (and exceptions thereto):

1. *Physician Patient Communication Under Medical Practice Act: Texas Medical Practice Act. (Tex.Occ.Code Ann §§151.001-165.160 (Vernon, 2000).*
2. *Court or administrative proceedings. (Tex.Occ.Code Ann.§§159.003).*
3. *Non-court or administrative proceedings. ((Tex.Occ.Code Ann.§§159.004).*
4. *Hospital records regarding disclosure of Health Care Information. (§241.152 et seq.)*
5. *Mental Health Records. (Tex.Health & Safety Code §611.01(1).*
6. *Drug and Alcohol Abuse Patient Records from Federally Funded Programs – Certain records restricted. (42 USC §290 dd-2 §543; 42 CFR §§2.12(a) and 2.3(a).*
7. *AIDS/HIV Test Results and Fact of Testing Prohibited Under Communicable Disease*

Prevention and Control Act. (Tex.Health & Safety Code §§81.101(5); 81.103(a).

8. *Waiver of Medical Peer Review Privilege: Must be executed in writing by the committee. (Tex.Occ. Code §160.007(e).*
9. *Medical Liability Insurance Improvement Act. (Tex. Rev. Civ. Stat. Ann. Art. 45909c; §4.01(d) (Vernon Supp. 2001).*
1. *Physician Patient Communication Under Medical Practice Act: Texas Medical Practice Act. (Tex.Occ.Code Ann §§151.001-165.160 (Vernon, 2000).*

Communications between physicians and patients regarding professional services are confidential, and may only be disclosed as provided, to wit:

A record of the identity, diagnosis, evaluation or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided in this chapter.

*The prohibitions of this chapter continue to apply to a confidential communication or record relating to a patient regardless of when the patient receives the services of the physician, except for medical records at least 100 years old that are requested for historical research purposes.*⁷¹

2. *Court or administrative proceedings. (Tex.Occ.Code Ann.§§159.003).*

Exceptions involving court or administrative proceedings include:

- License revocation, medical malpractice
- With written release/consent to release information signed by patient
- In support of a claim for medical services rendered to the patient
- In a civil or administrative proceeding lodged by the patient, or someone acting on the patient's behalf, to recover monetary damages for physical or mental harm
- Criminal investigation or disciplinary investigation of the physician pursuant to the TMPA
- Involuntary civil commitment proceeding regarding court ordered treatment, or a probable cause hearing regarding MHMR or drug rehabilitation services

⁶⁹ *Id.*, at 628.

⁷⁰ Frost, Robert. *Reader's Digest*, April, 1960).

⁷¹ Tex.Occ.Code Ann §§159.002(a)(b) and (d).

- In reference to the execution of a will, when the patient's mental or physical condition is in issue
- If the patient is a victim, witness or defendant in a criminal proceeding
- Satisfaction of a request for medical records of a deceased or incompetent person pursuant to the Medical Liability and Insurance Improvement Act of Texas (Tex.Rev.Civ.Stat. Ann. art 4590i) or
- To a court or a party to an action in response to a subpoena⁷²

3. *Non- Court or administrative proceedings.* (Tex.Occ.Code Ann.§§159.004).

Exceptions involving non-court or administrative proceedings include:

- Governmental agencies as required or authorized by law
- Medical or law enforcement personnel if the physician determines there is a probability of imminent physical harm to the patient, physician or to others, or immediate mental injury to the patient
- Qualified personnel for management or financial audits, program evaluations, or research, although the patient's identity may not be disclosed in any result reports
- In proceedings for collection of fees, but only in regards to those documents delineating charges and specific services rendered
- Individuals, corporations or governmental agencies involved in payment or collection of fees on behalf of physicians
- Other physician and physician-agents participating in the diagnosis, evaluation, and treatment of a patient
- Any person who has the written consent of the patient or persons authorized to act on the patient's behalf
- For records created by a state hospital or school, regarding any official legislative inquiry regarding the state hospital or school, providing that patient-identifying records are not betrayed without consent or
- Health care personnel of a penal or custodial entity for purposes of providing health care to an incarcerated patient.⁷³

4. *Hospital Records.* (§§241.152 et seq). *Hospital records should not be disclosed without written authorization of the patient or the patient's agent unless:*

Exceptions involving hospital records include:

- Court or administrative proceedings, court order, relation to a judicial proceeding in which a patient is a party and disclosure is mandated by a subpoena.⁷⁴

5. *Mental Health Records.* *Tex.Health & Safety Code §611.01(1).*

Exceptions include judicial and/or administrative proceedings. A professional may deny the patient access to mental health records, with a statement, filed in the record and furnished to the patient, that release would be harmful to the patient's physical, mental or emotional health. Full requirements may be found at Tex.Health & Safety Code Section 611.055.⁷⁵

6. *Drug and Alcohol Abuse Patient Records from Federally Funded Programs – Certain records restricted.* (42 USC §290 dd-2 §543; 42 CFR §2.12(a) and 2.3(a).

*Exceptions include court order per 42 CFR §2.61 or communications to law enforcement personnel directly related to a confession of a crime on program premises; limited to circumstances of incident.*⁷⁶

7. *AIDS/HIV Test Results and Fact of Testing Prohibited Under Communicable Disease Prevention and Control Act.* *Tex.Health & Safety Code §§81.101(5); 81.103(a).*

Exceptions include:

- Law enforcement, firemen, EMS, correctional officers exposed under CDP and CACT
- Code of Criminal Procedure authorized persons per section 21.31
- Spouse of person testing positive
- Person tested giving consent or person legally authorized to act for said person giving consent
- Health care personnel with need to know to facilitate their protection in caring for the patient

⁷⁴ §§241.152 et seq.

⁷⁵ Tex.Health & Safety Code §611.01(1) and 611.004 and 611.055.

⁷⁶ 42 CFR §2.61.

⁷² Tex.Occ.Code Ann §§159.003(a).

⁷³ Tex.Occ.Code Ann.§§159.004.

- Release to certain health authorities, physician or authorized person ordering test.⁷⁷

8. *Waiver of Medical Peer Review Privilege: Must be executed in writing by the committee. Tex. Occ. Code §160.007(e).*

- In defense of credentialing claims
- Plaintiff may then “disclose” a record or determination of a peer review board regarding the defense of the credentialing claim as rebuttal⁷⁸

Immunity statutes related to peer review include the following:

Health Care Quality Improvement Act, 42 USCA §11112 regarding standards for professional review action; §11115 regarding construction.

Tex. Med. Practices Act: Tx. Occ. Code Ann. §§151.002; 151.003; 160.001; 160.007 and 160.010. The foregoing respectively apply the Health Care Quality Improvement Act of 1986, and also go to confidentiality and immunity from civil liability.

Tex. Health & Safety Code §161.031-.032 regarding Medical Committee Confidentiality and Immunity.

9. *Medical Liability Insurance Improvement Act. Tex. Rev. Civ. Stat. Ann. Art. 45909c; §4.01(d) (Vernon Supp. 2001).*

All parties entitled to obtain complete and unaltered copies of the claimant’s medical records from the other party within 10 days from the receipt of a written request for such records; provided, however, that the receipt of a medical authorization executed by the claimant herein shall be considered compliance with this section.⁷⁹

VIII. MORE PATIENT PROTECTION: HIPAA REGULATIONS

*Liberation is not deliverance.*⁸⁰

The **Health Insurance Portability and Accountability Act of 1996** (“HIPAA”) sets out requirements regarding insurance portability, accountability for fraud and abuse, and administrative simplifications. Through HIPAA, the Secretary of the Department of Health and Human Services (the “Secretary”) issued proposed security and electronic signature standards (8/12/1998), final standards concerning standard transactions and code sets (8/17/2000), final standard for the privacy of individually identifiable health information (12/28/2000), a final national employer identifier (5/31/2002), and final modifications to the final privacy standards (8/14/2002).

Section 264 of the HIPAA mandated that the Secretary develop and submit to congress recommendations concerning: (1) the rights that individuals should have regarding their own identifiable health information; (2) the procedures that should be used to exercise those rights; and (3) which uses and disclosure of that information should be authorized. Definitions have been created to assist HIPAA covered entities, including the following:

1. **PHI: Protected Health Information.** All individually identifiable health information, including demographic information, collected from an individual that (1) is created or received by a health care provider, health plan, employer, or health care clearinghouse; (2) relates to either the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual, or the future payment for the provision of health care to an individual; and (3) either identifies the individual, or there is a reasonable basis to believe the information can be used to identify the individual. Certain types of information is excepted from the definition of PHI.⁸¹
2. **Business Associates.** The HIPAA Standards have both direct and indirect impact. The Standards directly regulate the use and authorized disclosures of PHI by HIPAA entities, but also regulate any business

⁷⁷ Tex. Health & Safety Code §81.101(5) and 81.103(a).

⁷⁸ Tex. Occ. Code §160.007(e). Irving Health Care System v. Brooks, 927 SW2d 12 (Tex 1996); St. Lukes Episcopal Hosp. V. Agbor, 952 SW2d 503 (Tex. 1997); In re Univ. of Tex. Health Ctr., 33 SW3d 822 (Tex. 2000).

⁷⁹ Tex. Rev. Civ. Stat. Ann. Art. 45909c; §4.01(d) (Vernon Supp. 2001).

⁸⁰ Hugo, Victor. “Fantine,” *Les Miserables* (1862) 2.9, tr. Charles E. Wilbour.

⁸¹ 45 CFR §164.500(a) (definition of PHI) and §164.501 (definition of individually identifiable information).

associate of such an entity, including a contract person who performs:

- A function or activity on behalf of a HIPAA covered entity, other than as part of the workforce of the HIPAA covered entity, involving the use or disclosure of individually identifiable health information (e.g., claims processing or administration, utilization review, quality assurance, billing, benefit management, practice management or repricing); or
- Legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services involving the disclosure of individually identifiable health information to or for a HIPAA covered entity, other than as a member of the workforce of the HIPAA covered entity.⁸²

The contract between the business associate and the HIPAA entity must establish the permitted and required uses and disclosures of PHI by the business associate consistent with the privacy standards, and must provide that the business associate and its agents

- will not use or disclose the PHI except as permitted by the contract or by law;
- will use appropriate safeguards to prevent impermissible PHI use or disclosure;
- will report to the HIPAA covered entity any use or disclosure of the information not provided for by its contract of which it becomes aware;
- will provide access by individuals to PHI⁸³ and allow individuals to amend their PHI;⁸⁴
- will make available the information required for an accounting of disclosures of PHI;⁸⁵
- will make books and records relating to the use and disclosure of PHI available to the Secretary of HHS for compliance audit of the HIPAA covered entity;
- at termination of the contract, if possible, will return or destroy all PHI, or extend the protections of the contract to the PHI to limit further uses and disclosures to those purposes

that make the return or destruction of the PHI infeasible; and

- will authorize termination of the contract by the HIPAA covered entity only if the HIPAA covered entity determines that the business associate has violated a material term of the contract.⁸⁶

Use and Disclosure Requirements. Different criterion are established for levels of permission mandated before a HIPAA covered entity may use or disclose an individual's PHI.

- a. **Uses and Disclosures for Treatment, Payment and Health Care Operations.** Treatment includes providing, coordinating, or managing of health care and related services by one or more health care providers, including coordinating such services with a third party, consulting between health care providers relating to a patient, or referring a patient from one health care provider to another.⁸⁷ A covered entity may use and disseminate PHI for any of these treatment activities without obtaining any form of patient permission.
- b. **Payment.** Reimbursement for providing health care is the broad rubric used to characterize payment.⁸⁸ Without obtaining patient permission, a covered entity may use and disclose PHI for the following purposes:
 - **Determinations of eligibility or coverage including subrogation;**
 - **Review of health care services regarding medical necessity, coverage under a health plan, appropriateness of care or justification of charges;**
 - **Utilization review activities, including preauthorization of services;**
 - **Disclosure to consumer reporting agencies of any of the following protected health information relating to collection of premiums or reimbursement: (A) name and address; (B) Date of birth; (C) Social security number; (D) Payment history; (E) Account Number; and (F) Name of the health care provider and/or health plan.**

⁸² *Id.*, §160.103.

⁸³ *Id.*, §164.524.

⁸⁴ *Id.*, §164.526.

⁸⁵ *Id.*, §164.528.

⁸⁶ *Id.*, §164.502(e)(2).

⁸⁷ *Id.*, §164.501.

⁸⁸ *Id.*, §164.501.

Health Care Operations. A covered entity may use and disclose PHI for any of the covered entity's health care operations noted below without obtaining any form of patient permission:

Conducting quality assessment and review;

Reviewing the competence of or qualifications of health care professionals;

Underwriting, premium rating and other health insurance activities;

Conducting or arranging for medical review, legal or auditing functions, including fraud and abuse detection;

Business planning and development;

Business management and general administration (including sales and mergers with another HIPAA covered entity).

b. Uses and Disclosures Requiring Only the Patient's Oral Agreement.

Directory Information. HIPAA covered entities may use or disclose directory information without the individual's written consent PROVIDED the individual is informed in advance of the use or disclosure and has the opportunity to agree to or object to that disclosure.⁸⁹ Provided there has not been an oral objection, covered entities may use the following information to maintain a directory of individuals in its facility, and further, may disclose the information to members of the clergy to facilitate the clergy offering counseling services to the individuals:

- The individual's name;
- The individual's location in the facility (such as maternity ward, emergency room, etc);
- The individual's condition described in general terms that does not communicate specific medical information about the individual (i.e. good, poor etc);
- The individual's religious affiliation.⁹⁰

Requirements of Written Authorization.

Must meet the following criterion:

- Describes the information to be used or disclosed;
- Identifies the person or class of persons authorized to make the use or disclosure of PHI;
- Identifies the person or class of persons to whom the covered entity is authorized to make the use or disclosure;
- Describes each purpose of the use or disclosure.
- Provides an expiration date or event;
- Bears the individual's signature and date;
- If signed by an agent or personal representative, a description of his or her authority to act for the individual;
- States that the individual has the right to revoke the authorization in writing, including instructions as to how to revoke;
- States that treatment cannot be conditioned on obtaining the authorization, or if conditioning is permitted by the HIPAA standards, a statement about the consequences of refusing to sign; and
- States the potential for the PHI to be re-disclosed by the recipient.

Individual Rights. The individual seeking care is entitled to notice of privacy practices, written in plain language, with an effective date, containing the following core language: "THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND YOU CAN GET ACCESS TO THE INFORMATION."⁹¹ In addition, the notice must contain information regarding the processing of complaints and other matters as follows:

- a. A contact name, title or office and telephone number to obtain further information;
- b. A statement regarding what the individual can do if he or she feels that his or her right to privacy has been violated;
- c. A brief statement of how to file a complaint with the HIPAA covered entity; and
- d. Assurance that the individual will not be retaliated against for initiating such a complaint.⁹²

⁸⁹ *Id.*, §164.510.

⁹⁰ *Id.*; §164.510 (a)(1)(i)(A)-(D).

⁹¹ *Id.*; §164.520 (B)(1)(i).

⁹² *Id.*; §164.520 (b).

A good faith effort is to be made to insure that the individual is given notice, and procedures must be implemented by the HIPAA entity to assure that effort, with written acknowledgement of receipt of the provider's notice of privacy practices at the time of delivery of first service except in emergency treatment situations. If the provider fails to obtain such written acknowledgment, documentation, including a reason for the failure is required.

Additional individual rights include:

- Additional privacy protection.
- Confidential communications
- Access to PHI within 30 days of request; grounds for denial include: (1) psychotherapy notes; (2) PHI compiled for use in legal proceedings; (3) an exemption as the record is maintained pursuant to the Clinical Laboratory Improvements Act of 1988; or (4) access by inmates.⁹³
- Right to request amendment to incorrect PHI within 60 days after receipt of request, subject to certain restrictions
- Accounting of disclosures⁹⁴

Implementation of Administrative Procedures to Protect PHI from inappropriate access, use or disclosure:

- Personnel designation;
- Training;
- Safeguards (including limitation of incidental uses or disclosures);
- Complaint Process;
- Maintenance and application of Sanctions for failure to comply with criterion;
- Mitigation of any harmful effect of disclosure in violation of the criterion;
- Refraining from retaliatory acts in response to filing of a complaint;
- No waiver of rights as a condition of treatment;
- Policies and procedures reasonably designed to insure compliance.
- Documentation of policies in written or electronic form for six years from the date of its creation.

Certain exceptions to the foregoing exist for certain group health care plans. In addition, while there may be hybrid entities (i.e. an entity that offers covered and non-covered functions that appropriately designates the

health care components), employment records are NOT PHI.⁹⁵

In addition, in the event that health information is redacted and de-identified, such information is not subject to the standards imposed by HIPAA, as such information no longer constitutes PHI. Health information may be redacted through two alternative methods:

- (1) When a person “with appropriate knowledge and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable” assesses the risk is small that the information could be used, on its own or combined with other information that is reasonably accessible, by an anticipated recipient to identify the person who is the subject of the information.
- (2) If an HIPAA covered entity removes the following 18 identifiers from the information:
 1. names
 2. all geographic subdivisions
 3. all elements of dates
 4. telephone numbers
 5. fax numbers
 6. electronic mail addresses
 7. social security numbers
 8. medical record numbers
 9. health plan beneficiary numbers
 10. account numbers
 11. certificate/license numbers
 12. vehicle identifiers and serial numbers
 13. device identifiers and serial numbers
 14. web universal resource locators
 15. internet protocol address numbers
 16. biometric identifiers
 17. full face photographic images
 18. any other unique identifying number, characteristic or code.⁹⁶

The HIPAA covered entity may assign a code or some type of record identifier that will facilitate re-identifying the de-identified information so long as security regulations are followed.⁹⁷

The HIPAA covered entity, and you, may also have to contend with concepts known as “limited data sets” and “hybrid entities.”⁹⁸ For the purposes of a

⁹⁵ *Id.*; §164.501; 67 Fed.Reg. at 14804.

⁹⁶ *Id.*; §164.514(b)(2)(i)&(ii).

⁹⁷ *Id.*; §164.514(c).

⁹⁸ *Id.*, §164.504(a).

⁹³ *Id.*; §164.526.

⁹⁴ *Id.*; §164.528(a).

limited data set, certain information can be disclosed for the purposes of research, public health or health care operations. Direct identifiers would be excluded from a limited data set, although the following patient items may be included in such information: dates of service, admission or discharge; date of birth and date of death, and information related to the town, city, state or zip code of the patient, his or her employer or the patient's household members. A data use agreement must be promulgated, as a form of assurance that the limited data will only be used for limited purposes. A hybrid entity is defined as an entity that is: (1) a covered entity, (2) whose business activities include both covered and non-covered functions; and (3) that appropriately designates health care components.⁹⁹ Firewalls must be erected to protect against the improper use or disclosure of PHI within the hybrid entity. Privacy standards apply to the health component of the hybrid entity.¹⁰⁰ In transmitting information, employers must provide a unique Employer Identifier Number (EIN).¹⁰¹ Health care providers will also have to have a National Provider Identifier (NPI).¹⁰² NPIs will be issued by a National Provider System.

This outline regarding HIPAA is far from exhaustive, notwithstanding the fact that you, fair reader, may feel worn out from this brief introduction! Important factors to remember include:

- A. A covered entity may not use or disclose protected health information unless such use or disclosure is permitted or required by the HIPAA Privacy Rule, AND**
- B. Usually, only the minimum necessary information may be used or disclosed.**
- C. The HIPAA Privacy standards are a baseline, and applicable state codes and cases must also be taken into consideration.**

IX. APPLICATION OF LAW TO REALITY.

In the Tapp¹⁰³ case, after pleading guilty to driving while intoxicated, a Defendant, Tapp, subsequently filed an appeal, arguing that release of results of his blood alcohol tests following an accident violated the procedure established for grand jury proceedings, and that the hospital that rendered service to him (and therefore that created and maintained records on him) was bound by the HIPAA to comply

with medical privacy rules. Tapp was in a motorcycle accident on 11/10/2001, and was presented for treatment at Memorial Hermann Hospital, where Deputy Cantwell noted a pronounced odor of alcohol on his breath. Within one week, the deputy obtained a grand jury subpoena to procure a copy of Tapp's medical records from the hospital – at the time the subpoena was issued, there were no criminal charges pending against Tapp. After a motion to suppress the test results was unsuccessful, as the blood test results proved that Tapp had an alcohol level of .18%, he thereafter pled guilty to the misdemeanor offense of driving while intoxicated. In State v. Hardy, the Court of Criminal Appeals held that there is no Fourth Amendment reasonable expectation of privacy that protects blood alcohol results taken by hospital personnel solely for medical purposes after a traffic accident.¹⁰⁴ In Tapp, the Texas Court of Criminal Appeals held “because there is no expectation of privacy in one’s blood alcohol test results under section 9 of our Bill of Rights, appellant lacks standing to assert that using a grand jury subpoena to obtain his blood results constituted an unreasonable search and seizure.”¹⁰⁵ As the hospital was not yet required to comply with HIPAA regulations, any action “taken during the regulations’ pre-enforcement stage cannot constitute a violation of the regulations as compliance is not required or enforceable.”¹⁰⁶ One cannot argue that pre-emption applies (i.e. that Federal Law pre-empts State Law when there is a conflict of laws) in that compliance with the HIPAA regulations was not yet regulated. One can only suspect that the holding in Tapp would likely have been different had the subpoena been issued on or after April 14, 2003, the date by which actual compliance with HIPAA regulations was mandatory.

Disclosure of Health Care Information in Texas is governed by 1995 amendments to Chapter 241 of the Texas Health & Safety Code, governing the disclosure of patient specific information by hospitals. Like HIPAA, a hospital may be allowed to disclose “directory information” in certain circumstances; however, a hospital may not disclose “health care information without the written consent of the patient or the patient’s legally authorized representative.”¹⁰⁷ For Texas purposes, “health care information” encompasses information recorded in any form or

⁹⁹ Id.

¹⁰⁰ Id., §164.504(b).

¹⁰¹ 67 Fed Reg 38009 (May 31, 2002).

¹⁰² 63 Fed Reg 25320 (May 7, 1998).

¹⁰³ Tapp v. State 108 SW3d 459 (Tex.App. – Houston [14th Dist] 2003)).

¹⁰⁴ State v. Hardy, 963 SW2d 516, 527 (Tex.Crim.App. 1997)

¹⁰⁵ Id.

¹⁰⁶ Id., Cf. Ass’n of Am. Physicians and Surgeons, Inc. v. United States Dep’t of Health & Human Servs., 224 F.Supp.2d 1115, 1123-4 (S.D.Tex.2002).

¹⁰⁷ Tex.Health & Safety Code Ann. §241.152(a).

medium that identifies a patient and relates to the history, diagnosis, treatment or prognosis of the patient.¹⁰⁸ Remedies for unauthorized release of health care information include injunctive relief and damages.¹⁰⁹

A mental health patient may consent to release of records – or revoke such a consent. If a person is wrongly denied access to mental health records, that person may petition the district court for appropriate relief, including injunctive relief and civil damages. The burden of proving that the propriety of the denial of access is on the mental health professional.¹¹⁰

Typically, state law provisions that conflict with federal provisions are pre-empted by the federal provisions. Three categories that are exceptions to this general rule are: (1) fraud and abuse, the state regulation of insurance plans, state reporting on health care delivery; (2) controlled substance; and (3) state laws addressing the privacy of individually identifiable health information that are contrary to and more stringent than their federal counterparts.¹¹¹ In other words, regarding the categories listed, if state law is more stringent than federal law in preserving confidentiality, the state law provisions trump the pertinent federal provisions.

*It usually takes a hundred years to make a law, and then, after it has done its work, it usually takes a hundred years to get rid of it.*¹¹²

The prudent advocate must be aware of laws – both Federal and State – that impact on his or her practice. In the words of Theodore Roosevelt, “no man is above the law and no man is below it; nor do we ask any man’s permission when we ask him to obey it.”

X. THE CHILD’S MIND

Here’s some personal folklore: my brother Bruce (the doctor) is seven years my senior to the day. When Bruce was a little boy, my mother was very concerned, as it seemed that her friend Lois’ son, Warren, was able to do things far more quickly than Bruce. To hear Lois tell it, Warren was walking at 8 and ½ months, reading the paper at 2 and ½ and doing quantum physics at 3. Bruce just did not seem to hit developmental markers as quickly as Warren. My brother always followed our grandmother everywhere. One day Bruce had on a new pair of shoes –which he

had not yet scuffed. When our grandmother went down to the basement to get something out of the freezer, Bruce moved the gate to the basement, and began to scurry after her – but those new shoes went out from under him, and he knocked his head on each of the cellar steps. After an anxious evening fearing a concussion, our parents were amazed – Bruce was accomplishing things that were unprecedented for him. So, when I came along, and seemed not to be hitting markers as quickly as Bruce, you can understand why my grandmother used to say in jest: “push her down the cellar stairs . . .” Fortunately, we never found ourselves the subject of a CPS investigation!

What are developmental markers that we should be aware of in undertaking these types of cases?

It’s well known that young children cannot cope with what they do not understand. Moreover—and this is particularly difficult for parents to grasp—children do not understand about recurrent patterns of behavior. The fact that Daddy hit Mommy several times and then said he was sorry in no way signifies for them that this behavior is likely to reoccur.¹¹³

The Legislature seemed to understand the fact that not every child may “meaningfully formulate the child’s objectives of representation,” by carving out circumstances when an AAL or DUAL ROLE advocate might substitute their judgment for that of the child. Those circumstances include cases where the child:

- (1) lacks sufficient maturity to understand and form an attorney client relationship with the attorney;
- (2) despite appropriate legal counseling, continues to express objectives of representation that would be seriously injurious to the child; or
- (3) for any other reason is incapable of making reasonable judgments and engaging in meaningful communication.¹¹⁴

In her excellent treatise, Court Appointed Legal Representation of Children in Texas Family Law Cases, A Practical Guide for Attorneys, the Hon. Debra Lehrmann, opines that :

Because the concept of ‘best interests’ is subjective, it is not readily subject to

¹⁰⁸ Id., at §241.151(2).

¹⁰⁹ Id., at §241.156.

¹¹⁰ Id., at §611.005.

¹¹¹ 42 USC §1320-d-2(c)(2).

¹¹² Beecher, Henry Ward, *Proverbs from Plymouth Pulpit* (1887).

¹¹³ Wallerstein, Judith, et al. The Unexpected Legacy of Divorce, 91-92 (Hyperion, 2000).

¹¹⁴ Tex.Fam. Code §107.008.

verifiable examination. One of the major criticisms of best interest advocacy is that it allows the lawyer unlimited discretion in determining the goals of the litigation and thus, without the guidance of an active client, permits the lawyer to substitute his or her values for the child. For this reason, the lawyer must take special care to ensure that he or she is not allowing his or her own personal biases and beliefs to influence this determination.¹¹⁵

What do objective criteria include? A “Best Interest Attorney” is not serving in a traditional role. Instead, such an attorney serves a non-traditional role by ascertaining:

*. . . the position to be advocated on behalf of the client. The Best Interest Attorney should base this determination, however, on objective criteria concerning the child’s needs and interests, and not merely on the lawyer’s personal values, philosophies and experiences*¹¹⁶.

In discussing how much weight to give to a child’s opinion, Richard Gardner writes:

. . . there is no such age. Every child is different. There are some children who will give important information at very young ages and there are others who at much older ages are not to be relied upon. Each child must be evaluated separately regarding competence to provide useful information. Accordingly, no arbitrary age standard should be utilized, but rather the mental development of the child should be assessed. It has been this examiner’s experience that verbalizations made by children under the age of four or five have little credibility. One should, however, give weight to one’s observations of such children’s interactions with each parent. One wants to observe for such things as cuddling, affectionate expressions, glances, gestures, and the general level of tension and anxiety of each parent when with the children. At the other extreme, in the adolescent period, one should

*generally give great weight to what the youngster has to say. . . courts are often impotent to do anything but comply with an adolescent who does not wish to live with the assigned custodial parent if the non-custodial parent is receptive to taking the child in. In the middle period, between ages six and twelve, there is a gradual progression of increasing credibility as the child gets older.*¹¹⁷

XI. GOOD NEWS AT LAST: IMMUNITY

AAL, GAL and AA are not liable for civil damages for a recommendation made when acting in their court appointed capacity UNLESS the recommendation was:

- made with conscious indifference or reckless disregard to the safety of another;
- in bad faith, or made maliciously; or
- grossly negligent or willfully wrongful.¹¹⁸

Note that in their comments to this section, Sampson and Tindall admonish that only opinions and recommendations are covered, so “this section is not a general license to fall asleep at trial or otherwise commit malpractice.”¹¹⁹

XII. LEGAL FEES

For all the rhetoric of the new statute, it appears that legal fees are still defined by “the going rate,” which differs if the appointment is in a private custody battle as opposed to a case involving a governmental entity. The same lawyer could receive his or her normal hourly fee in a private matter (for instance, \$300/hour), but whatever has been defined as appropriate when being paid out of the county coffers in a governmental case (in Dallas, that means submitting an itemized statement for fees and costs, with a cap on fees based on \$80/hour for services rendered out of court, and \$100/hour for services rendered in court). “The going rate” was defined by Judge Jerry Buchmeyer as the fees we’ll take until we get going . . .

Suits Involving Governmental Entities

In suits involving governmental entities, payment for representation of children or indigents is typically from the county fund. Note that if you get any wise ideas, realize that there your ability to procure

¹¹⁵ Lehrmann, Debra. Court Appointed Legal Representation of Children in Texas Family Law Cases, A Practical Guide for Attorneys 5-46 (Lexis-Nexis, 2004).

¹¹⁶ Id., 5-47, citing ABA Custody Standards, Proposed Standards for Representing Children in Abuse and Neglect Cases, 29. Fam.L.Q. 375 (1995).

¹¹⁷ Gardner, Richard. Family Evaluation in Child Custody Mediation, Arbitration and Litigation. 255 (Creative Therapeutics, 1989).

¹¹⁸ Tex.Fam. Code §107.009.

¹¹⁹ Id., annotation to §107.009.

sanctions against an errant state agency has been legislatively undermined, to wit:

*A court may not award costs, fees, or expenses to an amicus attorney, attorney ad litem, or guardian ad litem against the state, a state agency, or a political subdivision of the state under this part.*¹²⁰

CAVEAT EMPTOR: the court **may not** award costs, fees or expenses “against the state, a state agency, or a political subdivision” as immunity is provided by the statute as to private custody matters.¹²¹

A volunteer advocate is not entitled to fees.¹²²

See Exhibit 3, which is the type of “voucher,” or “claim for payment” that lists fees, charges and hours worked, as required by statute.¹²³

Private Custody Cases

In private custody cases, the Court is charged with determining the fees and expenses of an Amicus Attorney, an AAL or a GAL based on “reference to the reasonable and customary fees for similar services in the county of jurisdiction.”¹²⁴ The Court must, in a suit other than a suit filed by a governmental entity, ascertain the fees and expenses of an amicus attorney, AAL or GAL by referring to the reasonable and customary rate for comparable services within the Court’s jurisdiction, and can protect you by ordering “a reasonable cost deposit to be made at the time the Court makes the appointment.”¹²⁵ In addition, prior to a final hearing, the Court may order such additional sums to be paid to the credit of the trust account of such an attorney.¹²⁶ The same provision would allow a GAL who might be a credentialed psychologist or social worker, by way of example, to seek an award of reasonable fees and costs.

Fear not if you are an Amicus Attorney – you may seek an award of fees in a suit other than lawsuits initiated by a governmental entity, by a standard request predicated on Chapter 106 of the Texas Family Code, which allows for judgment for fees and expenses, but under Chapter 107 as well.¹²⁷

¹²⁰ Id., §107.023(c).

¹²¹ Id., §107.023(c).

¹²² Id., §107.031.

¹²³ Id., §107.015(d).

¹²⁴ Id., §107.023.

¹²⁵ Id., §107.023(b)(2).

¹²⁶ Id., §107.023(b)(3).

¹²⁷ Id., §106.002 and 107.023.

“Reasonable and customary fees” commensurate with the “going rate in jurisdiction” may be awarded to an attorney appointed under Chapter 107, “in an amount to be set by the Court, to be paid by the parents of the child unless the parents are indigent.”¹²⁸ How to make like Jerry McGuire’s pal and have the Court “show me the money?” If the Court determines that one or more of the parties is able to pay the fees of the AAL or GAL, the Court may order one or more parties to pay such fees, or “prior to final hearing, to pay the sums into the registry of the Court or into an account authorized for the use and benefit of the payee.”¹²⁹

Exhibit 4 is an example of the type of voucher/legal fee affidavit to be used in a private custody case.

XIII. SOCIAL STUDIES AND GAL REPORT TO THE COURT.

While the Court may require a social study investigation into the circumstances and condition of a child whose custody is in controversy as well as of the home of any person seeking custody, the social study may be by a private entity, a person appointed by the court, or a state agency including the Texas Department of Family and Protective Services – if said governmental entity is a party to the suit, notwithstanding any conflict.¹³⁰

See Exhibits 2, 7 and 8.

XIV. FOOD FOR THOUGHT: INTERESTING CASES

GAL:

Should investigate the circumstances of the case and submit a written report to the court. Holley v. Adams, 544 S.W.2d 367, 369 (Tex. 1976)

Cannot waive any substantial rights of the child. Reasoner v. State, 463 S.W.2d 55 (Tex.App – Houston [14th Dist.] 1971, writ ref.d n.r.e.

Actively presents the child’s case during the legal proceedings (an attorney ad litem should call and interrogate witnesses, submit evidence, make opening and closing statements, make peremptory challenges and argue to the jury. Priest v. Priest, 536 S.W.2d 954, 955 (Tex.App. – Waco 1976, no writ).

The higher burden of proof in termination cases alters the appellate standard of review. A traditional “no evidence” standard does not adequately protect the parent’s constitutional interests. Where both the biological father of the children and the children’s grandparents have interests regarding the parental

¹²⁸ Id., §107.015(a).

¹²⁹ Id., §107.015(b).

¹³⁰ Id., §107.051.

rights termination proceeding against the mother, attorneys for both the father and the grandparents were entitled to make closing arguments in the case. In the Interest of A.J.L., 136 S.W.3d 293 (Tex.App – Ft. Worth 2004, no writ).

Appointment of mother’s counsel only 21 days before hearing did not result in mother receiving ineffective assistance of counsel. In the Interest of J.W.M., Jr. and L. P.M., ---- S.W.3d ----, 2004 WL 609322 (Tex.App. – Amarillo).

Trial courts must appoint counsel for indigent parents in [termination] cases and failure to do so is error. In Re M.J.M.L., 31 S.W.3d 347, 354 (Tex.App. – San Antonio 2000, pet. den’d).

A precise requirement as to when counsel must be appointed in a termination case has not been discussed; where an attorney was appointed to represent an inmate whose parental rights were the subject of a termination case the day of the appointment, and counsel failed to seek a continuance, failed to consult with the inmate prior to the hearing, and never asked to speak with the inmate, there was denial of effective assistance of counsel. Brice v. Denton, 135 SW3d 139 (Tex App – Waco, 2004).

Absent exceptional circumstances, the public and private interest at stake in some cases may not require the appointment of an attorney ad litem – this may be the case where the issues are divorce and custody, as opposed to termination. Travelers Indem. Co., v. Mayfield, 923 S.W.2d 590, 594 (Tex. 1996).

Indigent parents who face termination of their parental rights in the same suit are entitled to non-conflicted counsel. Tex. Fam. Code §107.013(b), In the Interest of B.L.D. and B.R.D., Minor Children, 113 S.W.3d 340 (Tex. 2003, rehearing den’d).

A child has the right to due process in delinquency proceedings. In Re Gault, 387 U.S. 1 (1967).

A GAL is not entitled to compensation for work that exceeds proper responsibilities (here, hiring another attorney to represent the children’s interests). “Few children need two attorneys, one for themselves and another for their guardian, and nothing suggests these children did.” Samara v. Samara, 52 S.W.3d 455 (Tex.App. – Houston [1st Dist] 2001).

Form Letters from TDPRS

Trial Court terminated the respondents’ parent child relationship with infant son; divided court of appeals reversed. Texas Supreme Court holds that although the parents received letters from the department ruling them out as alleged perpetrators, and promising to not only expunge the records, but to assure that the records “will not be available to use for any purpose whatsoever,” as estoppel was never pled, that

. . . equitable estoppel does not apply to governmental entities. . . the TDPRS letters arguably relate only to a report of abuse on the day S.A.P. was born; *they do not promise TDPRS would never attempt termination for conduct that occurred before or after that date or that related to the respondents’ other children . . . the letters promise only to destroy evidence in the agency’s files, not to refrain from using the same evidence from other sources.* . . . But because estoppel was never submitted to the jury, we hold that the letters alone did not (as the respondents claim) require as a matter of law that the agency return S.A.P. to them and ‘wait for them to fail.’

Emphasis added. Is the moral not to mess with Big Brother, even if Big Brother crosses a line? In the Interest of S.A.P., 2005 WL 119935, 48 Tex.Sup.C.J. 368, -- S.W.3d --, (Tex., Jan. 21, 2005) No. 04-0473.

XV. HELPFUL HINTS

Excellent materials may be found in Chapter 10 of the Texas Family Law Practice Manual for Ad Litem Work.

XVI. WEB SURFING AND ON LINE LIBRARY

Dallas County:

<http://www.dallascounty.org/links.html>

Target: Kids In Court:

<http://www.kidsincourt.org>

American Academy of Matrimonial Lawyers:

<http://www.aaml.org>

NACC Child Law and Child Protection Standards of Practice:

www.naccchildlaw.org/training/standards.html

Revised NACC Child Law and Child Protection Standards of Practice:

www.naccchildlaw.org/documents/abastandardsnacc revised.doc

United Nations Human Rights Website:

www.unhchr.ch/tbs/doc.nsf/MasterFrameView/30cb3458d86f92ecc12563e7004b

Texas Bar Online Library:

<http://www.texasbarcle.com/CLE/HOME/ASP>

The Hon. Cheryl Lee Shannon of Dallas, Texas, through the able assistance of Robert Herrera and Felix

Botello, has many forms available at the “Target: Kids in Court” site, including the following:

- Ex Parte Order for Emergency Care and Temporary Custody
- FIS
- Chap 263 Review Hearing Order
- Checklist for Conducting a Mental Illness Hearing or Hearing on Fitness to Proceed or Lack of Responsibility for Conduct Based on MHMR
- Adjudication Order (Child Engaged in Delinquent Conduct)
- Judgment of Adjudication by the Jury and Determinate Sentence Disposition by the Court
- Order of Fitness to Proceed Pursuant to the Juvenile Justice Code and Health & Safety Code
- Order of Transfer Pursuant to §55.44 of the Juvenile Justice Code of 18 Year Old Found Not Fit to Proceed
- Application for Extended Mental Health Services for a Mentally Ill Child
- Status Hearing Order
- Temporary Order

The On-Line Library, offered through the Texas Bar, has a host of materials on this subject. If you perform ad litem work in the Family Courts, you may find ideas in related materials, such as in the Hon. Steven King’s annual treatise on ad litem work in the Probate Courts – see “The Ad Litem’s Toolkit,” GUARDIANSHIP COURSE, Austin, April 1, 2004.

XVII. RING THAT BELL: ACKNOWLEDGEMENTS

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- *The Hon. Cheryl Lee Shannon, Robert Herrera, Esq. and Feliz Botello for their excellent resources at: Target: Kids in Court*
- *Steve Bavousett and Terry Pasqualone for practical tips in their paper “Ad Litem Orders and Pleadings” presented to the Advanced Family Law Drafting Seminar in New Orleans, 12/12/02*
- *Kenneth Fuller, Esq., for being a mentor for all seasons*

- *Bill Connolly, Esq. of Houston, for his excellent materials on Motions to Quash.*

XVIII. EXHIBITS: SEE ATTACHED

As a humble augmentation to the forms located in Chapter 10 of the Texas Family Law Practice Manual, your author submits a number of exhibits to this hand out, as samples only, subject to modification to fit the circumstances of your individual cases.

Those forms include the following exhibits:

- 1. Original Answer;**
- 2. Checklists;**
- 3. Request for Payment in Case Involving Governmental Entity**
- 4. Motion/Voucher in Private Custody Case;**
- 5. Interrogatories to Mom (Publication);**
- 6. Motion to Quash and Response to Motion to Quash;**
- 7. Practice pointers Re Data Compilation:**
 - a. Child Related Data (Posed to Collaterals)**
 - b. Parent Interview**
 - c. Child Interview**
- 8. Tips for GAL Report**

EXHIBIT 1: Model Original Answer**Original Answer of {Amicus Attorney, Attorney Ad Litem, Attorney Appointed in Dual Role}**

Elisa Maloff Reiter, Court appointed to serve as {Guardian Ad Litem, Attorney Ad Litem or Attorney in Dual Role} for the following children, who are made the subject of this suit affecting the parent child relationship, files her Original Answer, and in support thereof would show the court as follows:

NAME DOB HOME STATE SSN

Child 1 _____

Child 2 _____

Child 3 _____

Child 4 _____

1. *General Appearance*

By filing this Answer, the {Amicus Attorney, Attorney Ad Litem, Attorney Appointed in Dual Role} hereby makes a general appearance for the child[ren] who are the subject[s] of this litigation. Discovery will be at level 2 herein.

2. *Temporary Relief*

{Amicus Attorney, Attorney Ad Litem, Attorney Appointed in Dual Role} respectfully requests that the Court grant such temporary orders, as may be deemed necessary, to protect the emotional and physical safety and welfare of the child[ren] made the subject of this suit.

3. *Holley v. Adams*

As set out in Holley v. Adams, 544 S.W.2d 367, 371-371 (Tex.1976), {Amicus Attorney, Attorney Ad Litem, Attorney Appointed in Dual Role} respectfully prays that the Court take into account the following factors in exercising its discretion as to what rulings might serve the best interests of the child[ren] made the subject of this litigation:

1. whether the parents of the children made the subject of this suit failed to support the children within the meaning of applicable law;
2. whether the duty to support the children had been excused by agreement;
3. whether the conduct of the parents of the children made the subject of this suit endangered the emotional well being of the children;
4. whether the conduct of the parents of the children made the subject of this suit endangered the physical well being of the children;
5. the desires of the children made the subject of this litigation;
6. the emotional and physical needs of the children now and in the future;
7. the emotional and physical danger to the children now and in the future;
8. the parental abilities of the individuals seeking custody of the children made the subject of this litigation;
9. the programs available to assist the individuals seeking custody to promote the best interest of the children;
10. the plans for the children by these individuals or the agency seeking custody of the children;
11. the acts or omissions of the parent which may indicate that the existing parent child relationship is not a proper one; and
12. whether there was any excuse for the acts or omissions of the parents.

4. Final Orders

{Amicus Attorney, Attorney Ad Litem, Attorney Appointed in Dual Role} respectfully requests that the Court grant such final orders, as may be deemed necessary, to protect the emotional and physical safety and welfare of the child[ren] made the subject of this suit.

5. Attorney's Fee and Expenses

The Court's appointment of the undersigned has created a necessity for rendering legal services to the child[ren] made the subject of this litigation. [Petitioner/Respondent/Inter-venor/Dallas County Fund] should be ordered to pay reasonable and necessary fees and expenses [as costs for fees attributable to a claim for child support and paid directly to the {Amicus Attorney, attorney ad litem, attorney appointed in the dual role}], and judgment should be rendered against the [Petitioner, Respondent, Intervenor, Dallas County Fund] in favor of the {Amicus Attorney, attorney ad litem, attorney appointed in the dual role}.

The following options are alternatives that should be added:

(1) in a suit filed by a governmental entity such as CPS of DFPS, add the following:

If the parents of the child[ren] are indigent, the attorney's fees should be paid from the general funds of {name of county}, Texas, pursuant to Texas Family Code §107.015.

(2) in suits NOT filed by a governmental entity, use the following:

As a means of assuring payment of reasonable fees and expenses, the undersigned respectfully requests that the parties should be ordered to make reasonable cost deposits, to be paid to the credit of a trust account, through final trial of this matter for the use and benefit of the {Amicus Attorney, attorney ad litem, attorney appointed in the dual role}.

6. Prayer

{Amicus Attorney, attorney ad litem, attorney appointed in the dual role} prays that he/she be treated as counsel of record for all purposes and that he/she receive Notice of all proceedings in this cause which involve the subject children, including court hearings, permanent placement team planning meetings, and any other pertinent matter, whether in court or out of court.

{Amicus Attorney, attorney ad litem, attorney appointed in the dual role} prays for an award of attorney's fees and expenses as set out hereinabove.

{Amicus Attorney, attorney ad litem, attorney appointed in the dual role} prays that the Court grant appropriate orders for the benefit and welfare of the child[ren] made the subject of this suit.

{Amicus Attorney, attorney ad litem, attorney appointed in the dual role} prays for general relief.

Respectfully submitted,

Caveat: you will need to add a FIAT if you are seeking a temporary hearing and/or to give notice that you are seeking specific relief at a previously scheduled temporary hearing.

Exhibit 2: Checklist

What to do and when to do it?

1. Go to courthouse, and obtain copy of records on file immediately following receipt of order of appointment.
2. Your work is likely to include the following:
 - a. attend permanent planning team review meetings;
 - b. attend hearings;
 - c. attend pertinent foster care and/or social service review;
 - d. attend (supervised) visitations;
 - e. contact biological parents;
 - f. contact foster parents;
 - f. contact/interview children;
 - g. contact collaterals, including teachers, relatives, etc.
 - h. writing reports;
 - i. if advocacy allowing, engaging in discovery, mediation, etc.

Differentiate in your own format the following types of details:

Case #

Date of Appointment:

Case style:

Children's names/ages, dates of birth:

PARENT INFORMATION

Mother: Address: Phone

Father: Address: Phone (for those of you who do this work, you are accustomed to the notion that you may have 5 or more potential fathers for 2 or 3 children)

CAREGIVER INFORMATION:

Name: Address: Phone:

Relationship to children:

Address where children are located and map:

Best time to visit:

Caseworkers:

Allegations:

Family Prior History with DFPS:

CRIMINAL HISTORY:

Mother:

Father:

Other:

Injunctive Relief or Protective Orders:

Criminal Charges/Probation terms:

VISITATION ARRANGEMENTS:

Mother:

Father:

Other:

SCHOOL INFORMATION:

MENTAL HEALTH COUNSELOR INFORMATION:

HEARING DATES:

Concerns on Initial visit with Children/Parents:

Case Name:

Date:

Children seen:

Condition of the children:

Condition of the home:

Sleeping arrangements:

Bathing Facilities:

Doctor(s):

Immunization Status:

Last Doctor's visit:

Children's emotional needs:

Counseling information:

School:

Grade level:

Teacher:

Social Groups:

Religious Affiliation:

Other Services in the Home:

Additional Information:

Chemical evaluation; psychological evaluation: (and is there a need for a supplemental independent exam)

Last DFPS visit:

Areas of concern:

Exhibit 3: Request for Payment
(Presumes Payment at County Rate: \$80/hour out of Court, \$100/hour in court)
{Attorney Ad Litem's/Amicus Attorney's/Attorney Appointed in the Dual Role's} Request for Payment

By separate Order of this Court, entered herein on or about _____, 2005, I, Elisa Maloff Reiter, was appointed to serve as **{Attorney Ad Litem's/Amicus Attorney's/Attorney Appointed in the Dual Role}** for the children made the subject of this suit. In compliance with Texas Supreme Court Miscellaneous Docket Order Number 94-9143, I submit the following information to the Court:

Attached hereto is an invoice dated _____ for services rendered in the following time period: from _____ through _____. The attached itemized statement reflects that I incurred _____ hours for services rendered out of court at the rate of \$80.00 per hour, for a total in fees in the amount of \$_____. I also appeared in Court on the following dates, and incurred an additional _____ hours at the rate of \$100/hour for services rendered in Court, for a total of \$_____ for services rendered in Court. In addition, I incurred expenses for copying and postage (insert other expenses applicable) in the amount of \$_____. I hereby request the total sum of \$_____ in payment of reasonable and necessary services and expenses rendered herein, from the last statement of account tendered to this Honorable Court through the date of the statement attached hereto as Exhibit 1, which includes an itemization of the foregoing time and expenses.

The total compensation requested is approved as submitted, and {Attorney Ad Litem's/Amicus Attorney's/Attorney Appointed in the Dual Role} named above is ORDERED to be paid as follows from the General Fund of Dallas County, Texas:

Amount: \$ _____

Payee: Elisa Maloff Reiter
8226 Douglas Avenue, Suite 550
Dallas, Texas 75225

Tax ID Number: _____

ORDERED ON _____, 2005

_____.

JUDGE PRESIDING

Caveat: Attach an itemization of time and expenses actually incurred – as this document is made part of the Court’s record, caution should be used as to specifics – include enough to sustain a meritorious claim, but not data that you do not wish to share as a matter of public record!

Several judges have a pre-printed form that should be completed in conjunction with this Request for Payment. Always be sure to ask the Court Coordinator for direction as to whether there are any such forms required as a condition precedent to processing of a Request for Payment.

Exhibit 4: Motion/Order for Fees in Private Custody Case

Motion For Payment of Fees in Private Custody Case

Pursuant to Sections 106 and 107.015 [107.023 for additional deposit] of the Texas Family Code, this Motion for Deposit to Secure Fees is brought by Elisa Maloff Reiter, court appointed [AAL/GAL/AA] for the child[ren] made the subject of this suit, _____ (list the children). In support, Movant shows:

This is a suit involving conservatorship of [[a] child[ren]/possession of and access to [a] child[ren]/the best interest of [a] child[ren]], and Elisa Maloff Reiter has been appointed to represent the interests of the child[ren]. Reasonable and necessary fees and expenses will be incurred in representing the child[ren]'s best interests. A projection of fees and costs is attached hereto as Exhibit A. Elisa Maloff Reiter respectfully requests that each party herein be ordered to submit a deposit to the law offices in the amount of \$12,500 to secure payment of those projected fees and costs.

Billing rate for the undersigned [AAL/GAL/AA] is \$300/hour; her paralegal is billed at \$105/hour. The undersigned graduated from SMU School of Law in 1983, is Board Certified in Family Law by the Texas Board of Legal Specialization, and is licensed to practice in Texas, the District of Columbia, the State of New York and the Commonwealth of Massachusetts. Since 1988, the majority of [AAL/GAL/AA]'s practice has revolved around family law matters in the Metroplex, such that the undersigned is familiar with the reasonable and necessary costs incurred in such proceedings. Movant requests a deposit of \$25,000 on or before _____, 2005.

This matter is set for [final contested hearing/entry on agreement of parties] on _____, 2005.

Movant prays that the Court grant this Motion for payment of [AAL/GAL/AA] fees.

[signature block]
 [notice of hearing]
 [certificate of service]

Ex. A. Projection of Fees and Costs

Task	Time Estimate	
	Attorney	Paralegal
Communications with Parties and Counsel	5	5
Preparation for and Attendance at Hearings	2	
Written Discovery Review	2	4
Preparation for and Attendance at Depositions	2	5
Review of Depositions	2	12
Research and Briefing	2	
Interviews of Parties/Children/Collaterals	10	5
Mediation	10	
	35	33
Projected Fees	\$10,500.00	\$3,465.00

Order Granting Motion For Payment of Fees in Private Custody Case

On _____, 2005, the Court considered the Motion for Payment of Fees of Elisa Maloff Reiter, [AAL/GAL/AA].

IT IS ORDERED that _____, Petitioner, pay the sum of \$12,500 to Elisa Maloff Reiter for reasonable and necessary fees and expenses at 8226 Douglas Avenue, Suite 550, Dallas, Texas 75225 on or before 5 p.m. on April 21, 2005 in a cashier's check or money order.

IT IS ORDERED that _____, Respondent, pay the sum of \$12,500 to Elisa Maloff Reiter for reasonable and necessary fees and expenses at 8226 Douglas Avenue, Suite 550, Dallas, Texas 75225 on or before 5 p.m. on April 21, 2005 in a cashier's check or money order.

SIGNED ON _____, 2005.

 JUDGE PRESIDING

***Exhibit 5: Interrogatories
Publication***

1. State your name and present address, the names of all persons presently residing with you, and their ages and relationship to you.
2. State to the best of your ability the whereabouts of T. PAPA, including his address, telephone number, employer, employer's address and employer's telephone number.
3. Do you have any letters or other written communications between you and T. PAPA or between T. PAPA and any other person? If so, describe each such letter or other written communication, its present location, and its contents.
4. Do you have any diaries, calendars, or other documents recording transactions between you and T. PAPA or between T. PAPA and any other person or recording activities of you or T. PAPA? If so, describe each such document, its present location, and its contents.
5. Identify the biological father of each of your children, including for each child that child's father's name, address, telephone number and employer.
6. Describe the time, place and circumstance of your last meeting with T. PAPA.
7. Describe with particularity the most recent information obtained by you as to the whereabouts of T. PAPA. If such information came from another person, state that person's name, address, telephone number and their relationship to T. PAPA.
8. State the name, address, telephone number and employer of any person whom you believe may have information as to the whereabouts of T. PAPA.
9. State any and all information within your personal knowledge as to the following pertaining to T. PAPA:
 - a. His family;
 - b. His friends,
 - c. His prior residences;
 - d. His military service;
 - e. His Social Security Number;
 - f. His Texas Driver's License Number;
 - g. His prior marriages or live in relationships;
 - h. His marriages or live in relationships AFTER your involvement;
 - i. His last known address and telephone number;
 - j. His school history (where he went to school);
 - k. His last known place of employment;
 - l. His union membership;
 - m. His trade or profession;
 - n. The name, address and telephone number of any religious organization with which he is affiliated (i.e. church, synagogue, mosque, etc).
10. Describe in detail any and all efforts made by you to locate T. PAPA. Include names, addresses and telephone numbers of all persons contacted.
11. Have you attempted to serve T. PAPA by personal service:
12. If you have not attempted personal service, state each and every reason why not.
13. Have you attempted to serve T. PAPA under Rule 106(b)(1) or (2) of the Texas Rules of Civil Procedure?
14. If you have not attempted to serve T. PAPA under Rule 106(b)(1) or (2) of the Texas Rules of Civil Procedure, state each and every reason why not.
15. Do you currently have any lawsuit pending in any other Court in the United States or any other country regarding T. PAPA or the children made the subject of this suit? If so, identify the case by: date of filing, style, cause number, county, state and court where pending, as well as disposition, if any.

Exhibit 6(a): Motion to Quash

Comes now Sigmund Freud, M.D., and files this Motion to Quash the Subpoena and Subpoena Duces Tecum issued by Robert Jones (“Respondent”) and in support thereof would respectfully show the Court the following:

1. Facts

On September 15, 2004, Movant was served with a Subpoena to appear and with a Subpoena Duces Tecum to bring documents to (*Court or administrative hearing*) that are confidential and protected by federal and state laws, rules and regulations. Movant seeks protection from the forced disclosure of confidential, privileged and protected health information.

II. Records Pertaining to Alcohol and Drug Abuse Treatment

Movant received a subpoena to produce records related to alcohol and drug abuse treatment which is funded directly or indirectly by the federal government. All such records are confidential and federal regulations require the following prior to the issuance of the subpoena:

- a. Notice to the facility or treatment provider;
- b. Notice to the patient;
- c. A confidential court hearing (unless the patient requests that it be public);
- d. Court approval of the subpoena.

42 C.F.R., Part 2, §2.64

Respondent failed to provide the prior notice or secure the Court approval. The mandatory good cause finding was not made. The required finding that other ways of discovery of the information are not available or would not be effective was not made. The required finding that the public interest and the need for disclosure outweigh the potential injury to the patient, the physician patient relationship and the treatment was not made. 42 C.F.R., Pate 2, §2.63

Since Respondent failed to comply with the foregoing requirements (and actually committed a misdemeanor for not obtaining court approval prior to issuance and service of the subpoena), the subpoena should be quashed.

In addition, prior to disclosure of the information, the Court must:

1. Limit the disclosure to only those portions of the records which are essential to fulfill the objective of the order;
2. Limit disclosure to those persons whose need for information is the basis of the order; and
3. Include such other measures as are necessary to limit the disclosure for the protection of the patient, the physician-patient relationship and the treatment services (i.e. prohibition of re-disclosure, sealing of files, etc). 42 C.F.R., Part 2, §2.64

Since the foregoing has not occurred, the subpoena should be quashed.

[AND/OR]

B. MENTAL HEALTH RECORDS (CH. 611 Tex. Health and Safety Code

Movant has determined that release of information requested in this subpoena would be harmful to the patient’s physical, mental or emotional health. Movant, having made such a determination, cannot be compelled to disclose any such records. §611.045(b); Abrams v. Jones, 35 S.W. 3rd 620 (Tex. 2000).

[AND/OR]

**C. MENTAL HEALTH PROVIDER/PATIENT PRIVILEGE
(Texas Rule of Evidence 510)**

Confidential communications between a mental health professional and client are confidential and shall not be disclosed absent some exceptions to the privilege TRE 510(b). On March 1, 1998 the SAPCR exception to the privilege was repealed. The only applicable exception is if the information is relevant to a claim or defense of litigation. TRE 510(d)(5). The competing public policies of the need for full disclosure and the need for confidentiality have been resolved in favor of the confidential relationship. Gaynier v. Johnson, 673 S.W.2d 899 (Tex.App. – Dallas 1984, no writ); Wade v. Abdnor, 635 SW2d 937 (Tex.App. – Dallas 1982, writ dismissed).

Simply making a claim regarding the condition is not sufficient. Dossey v. Salazar, 808 S.W.2d 146 (Tex.App. – Houston, [14th Dist] 1991, original proceeding).

Private medical and mental health records should not become a matter of public record or public knowledge solely because a person either seeks redress or defends in court. R.K. v. Ramirez, 887 SW2d 836, 839-40 (Tex. 1994). Relevance alone cannot be the test. If it was, the intent of the evidentiary privilege would be circumvented. R.K. v. Ramirez at 842. While a condition

may be relevant, that does not guarantee that the information should be introduced into evidence, and the trial court has the heavy burden to look beyond a mere assertion that a patient's condition is relevant. The Court must use great care when permitting discovery of such sensitive information, should redact or delete matters outside the scope of the exception and prevent any disclosure beyond that which is necessary. R.K. v. Ramirez at 842, 844.

[AND/OR]

D. Discovery Rules and Records of a Party

Movant has asserted and continues to assert a privilege and objects to the disclosure of (*describe records to be protected*) and requests a hearing and in camera inspection. TRCP 193.3; 193.4 (for depositions 199.6).

[AND/OR]

E. Discovery Rules and Records of Non-Parties

Movant is required to protect the confidentiality of these records. TRCP 196 (c)(3). See also Tex. Health and Safety Code §611.002 and §611.003. Notice of Discovery was not served upon the non-party at least ten (10) days prior to the issuance of the subpoena. TRCP 205.2.

[AND/OR]

F. Discovery Limitations

The Subpoena was served later than 30 days prior to the end of the discovery period. TRCP 205.3.

[AND/OR]

Notice of the subpoena was not provided to Movant whose records are being requested. TRCP 205.3.

Accordingly, the subpoena should be quashed.

[AND/OR]

G. State Law Requires Deletions and Potential Distortions of the Records

Movant would show that state law requires the mental health professional to delete from the records all references to other persons who do not consent to the disclosure. Tex. Health & Safety Code §611.0045(g). The deletion of all references to all other persons distorts the purpose, intent and meaning of the records and provides the court with inaccurate and incomplete information.

[AND/OR]

H. Protected Health Information under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

On December 20, 2000, Executive Order No. 13181 imposed the balancing test of 42 CFR, Part 2 §2.63 on all protected health care information. Supported by the Health Insurance Portability and Accountability Act of 1996, 42 USC 1320d, et seq. and the regulations issued there under at 45 CFR, Part 160, and Movant must refuse to honor the subpoena because:

1. There was no court order accompanying the subpoena compelling the disclosure;

[AND/OR]

2. Movant has not received satisfactory assurance that reasonable efforts have been made by Respondent to ensure that the individual who is the subject of the protected health information has been given notice of the request.

[AND/OR]

3. Movant has not received satisfactory assurances that reasonable efforts have been made to secure a qualified protective order prohibiting the parties from using or disclosing the protected information for any purpose other than the litigation and requiring the return to Movant or the destruction of the records (and all copies) at the end of the litigation. 45 CFR §164.512.

While HIPAA does not lessen the more stringent requirements of state law, it does preempt all lesser protections and all other provisions of state law that conflict with state law. 45 CFR, Part 160.201 and 202.

The subpoena is overly broad and seeks psychotherapy notes which have been maintained separately from other records and which are therefore protected under HIPAA (164.501). While federal law restricts the disclosure of psychotherapy notes, this does not exclude medication prescription and monitoring, counseling session start and stop time, the modalities and frequencies of treatment furnished, results of clinical test and any summary of the following items: diagnosis, functional status, the treatment plan symptoms, prognosis, and prognosis to date. This information has been offered and will be provided. However, Respondent asserts the disclosures will be incomplete (164.501).

[AND/OR]

I. Clinical Summaries

Under Tex. Health and Safety Code §611.0045(h) and 45 CFR, Part 164.501, Movant offered to prepare a clinical summary or narrative of the otherwise confidential and protected health information. Movant’s offer was refused. Accordingly, Movant requests that the subpoena be quashed. In the alternative, if some disclosure is ordered, Movant requests that it be made in some summary or narrative form.

III. Fees and Expenses of Mental Health Professional

Furthermore, as a covered entity, Movant is entitled to recover the costs of copying, supplies, labor costs, postage and the cost of the summary or explanation. 45 CFR, Part 164.524. Accordingly, Movant requests an award of reasonable fees and expenses.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the subpoena be quashed, in whole or in part as requested herein. Movant requests an award of reasonable attorney’s fees and expenses. Movant prays for general relief.

Respectfully submitted,

Signature Block

Notice of Hearing

Certificate of Service

Exhibit 6(b): Response in Opposition to Motion to Quash –

COMES now ROBERT JONES, Respondent, (“Respondent”) to SIGMUND FREUD, M.D.’s Motion to Quash and files this Response in Opposition to Motion to Quash, and in support thereof would respectfully show the Court the following:

I. Facts

On September 15, 2004, Respondent served Movant, ROBERT JONES, with a Subpoena. Movant has refused to provide such records, in whole or in part. The records sought are either not privileged and confidential, the confidentiality has been waived, the proper procedures have not been followed and restriction on the availability of these records violates state and federal law.

II. Records Pertaining to Alcohol and Drug Abuse Treatment (42CFR, Part 2)

This disclosure is necessary to protect against an existing threat to life or serious bodily injury, including child abuse and neglect. If the patient intends to take the witness stand and speak to any fact issue or opinion which relates in any way to the confidential information being withheld, the information should be disclosed.

Good cause exists for the disclosure because:

- a. Other ways of finding the information are not available or would not be effective; and
- b. The public interest and need for disclosure outweigh the potential injury to the patient physician relationship and treatment services.

[AND/OR]

B. Mental Health Records (Ch. 611 Tex. Health and Safety Code)

Movant did not follow the procedures set forth in Tex. Health & Safety Code §611.045 or in *Abrams v. Jones*, 35 SW3d 620 (Tex. 2000). Respondent was never contacted relative to the denial of the records.

[AND/OR]

C. Mental Health Provider/Patient Privilege (TRE 510)

The information is relevant to the claims and defenses in this child custody litigation. How could the mental health of the parties not be an issue relevant in a child custody proceeding? Petitioner has been the subject of mental health treatment in the recent past. While the SAPCR exception to confidentiality for a parent child relationship action was repealed from TRE 510 in March, 1998, the comments place the exception into the “relevant to claims or defense” section. Furthermore, the SAPCR exception to confidentiality still exists under Chapter 611 of the Health and Safety Code §611.006(a)(6).

[AND/OR]

D. Discovery Rules and Records of Party

While an in camera inspection is authorized, it should not be used as a method to shield highly relevant information from trier of fact. TRCP 193.3; 193.4 (for depositions 199.6)

[AND/OR]

E. Discovery Rules and Records of Non-Parties

Although Respondent may have inadvertently failed to give the required notice to the non-party, Movant offered her objections in a timely fashion and asserted any privilege she felt proper. Thus, the purpose of the rule has been fulfilled. The interest of justice would not be served by quashing the subpoena and starting all over again. To rule otherwise would occasion unnecessary expense and delay. TRCP 205.2.

[AND/OR]

F. Discovery Limitations

Respondent has diligently pursued discovery in this case. A Request for Production was served on Petitioner pursuant to TRCP 196. No objections to these requests were made. TRCP 193. Even though Petitioner has constructive possession of these records (obtainable by release), the records were not produced. TRCP 192.3(b) and 192.7(b). All objections were waived TRCP 193.2(e). The responses that were made were delayed at Petitioner’s request. Ultimately the disclosures that were made were incomplete and Respondent sought the discovery from third parties. Petitioner should not be allowed to obstruct discovery, then use the law as a weapon through which to exclude relevant documentation.

[AND/OR]

G. State Law Requires Deletions and Potential Distortions of the Records

In previous efforts to grapple with the family’s problems, Respondent actually provided Movant with information about the patient. These records are not confidential. Tex. Health and Safety Code §611.0045(g). Furthermore, if certain information has to be deleted and as a result the meaning of the records becomes distorted, an “in camera” inspection of all of the information is warranted. TRCP 193.3; 194.3. Distortion should not be an excuse for exclusion of otherwise relevant information. The professional can explain all such distortion at deposition and/or trial but should not be allowed to hide information that precludes discovery of information that will guide the court on decisions affecting the best interests of the child.

[AND/OR]

H. Protected Health Information Under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

Respondent secured a court order authorizing and compelling the disclosure and/or believed it to be unnecessary due to Respondent’s compliance with the following sections.

[AND/OR]

Respondent provided satisfactory assurance to Petitioner and to Movant that reasonable efforts have been made to protect confidential information. In this regard, Respondent has provided both Petitioner and Movant with written assurance that the information is being sought for the purpose of this litigation only and that all records would be returned, destroyed or sealed with the District Court if admitted into evidence. Movant has proposed that a qualified protective order be issued pursuant to 45 CFR, Part 164.512 and the offer has been refused.

Because of the length of time needed to secure a hearing, Respondent has pending a request for a qualified protective order. 45 FR, Part 164.512(1)(ii)(B); (iv) and (v).

[AND/OR]

The parent/guardian has the right to this information pursuant to Tex. Health & Safety Code 611(a)(4). This information is not protected by HIPAA. If the protected health information of a minor is sought by a parent, guardian or person acting *in loco parentis* the federal preemption of state law does not apply. 45 CFR, Part 160.202(s).

[AND/OR]

This relationship has been the subject of much controversy within the family. Respondent is seeking conservatorship as a result of incidents of repeated intoxications, domestic violence and/or abuse and neglect of the children. Accordingly, these records are not protected under the provisions of HIPAA. 45 CFR, Part 164.502.

[AND/OR]

The public policy of this state is to allow a state district court to access any and all relevant information that would assist in the determination of what orders would be in the best interest of the child. Psychotherapy notes are frequently the most important source of information and the only method the professional has to provide accurate testimony. The simple assertion of privilege and/or separation is not a sufficient response under 45 CFR, Part 164.501. Respondent requests that Movant be required to prove all elements of the qualified protections under HIPAA.

[AND/OR]

I. Clinical Summaries

Respondent believes there is a valid public policy behind the protection of health information. However, it is inappropriate and incorrect to interpret these protections to allow a professional to protect his or her own client, put a favorable spin on the actual records, create subjective after the fact summaries from contemporaneous objective and subjective entries, and avoid examination on highly relevant subject areas, giving the profession power to usurp the authority of this court and charge Movant money for the ability to distort the evidence. Both Tex. Health and Safety Code §611.0045(h) and 42 CFR, Part 164.501 were designed, in part, to prevent the professional from having to disclose detailed notes to the client. The Court must assess the importance and relevance of all of the records, on a case by case basis, so that the proper decision can be made on the issue.

III. Fees and Expenses of Mental Health Professional

Petitioner failed to object or disclose this information upon proper discovery request. Respondent has been forced to incur a great deal of additional legal fees and costs to attempt to secure information that Petitioner could have provided by signing a Release of Confidential Information. Furthermore, the facts of this case provide exceptions to the applicability of HIPAA. Accordingly, Respondent requests the Court to assess all expenses, if any can be ordered in this case, against Petitioner.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Motion to Quash be denied, in whole or in part, as requested herein. Respondent requests an award of reasonable fees and expenses. Respondent prays for general relief.

Signature Block

Certificate of Service

EXHIBIT 7: Practice Pointers for GAL Report
(Source: Solomon's Sword, A Practical Guide to Conducting Child Custody Evaluations
(Jossey Bass, 1989).

While we are not mental health professionals, whether we perceive ourselves as “best interest” directed or “child directed,” if we take on the role of GAL, that will mean compiling data, and presenting it to the Court in a cohesive fashion.

First, that means collecting data.

EXHIBIT 7 (A)
Child Related Questions:
(note that social worker or pleadings may be only resource)

1. Name:
2. Age: DOB: Sex:
3. Name of biological mother:
4. Name of biological father:
5. Information provider's relationship to child if different from above:
6. Current legal relationship to child:
7. Daycare and or baby sitter information for the child: Name: Address: Phone: Days and Hours daycare/babysitting service provided:
Licensure:
8. If there have been any other day-care providers or sitters in the past three years, provide that information as well: Name: Address: Phone: Days and Hours daycare/babysitting service provided:
Licensure:
9. Name of Child's School:
Address:
Telephone number:
Name of Teacher:
Grade:
Name of counselor:
10. Has the child been diagnosed through the school or any private educational/developmental evaluation as any of the following:
Gifted/Talented yes/no (circle one)
Learning Disabled yes/no
Mentally Retarded yes/no
Emotionally Disturbed yes/no
Physically handicapped yes/no
Developmentally
delayed yes/no
11. Has the child (currently or in the past) received any special education services? Yes or No (circle one) If yes, provide details
12. Has the child (currently or in the past) received any tutoring services? Yes or No (circle one) If yes, provide details
13. Name of pediatrician:
(address, telephone number)
How long has the child been in this doctor's care:
14. Has the child received WIC benefits? If so, where?
15. Has the child (currently or in the past year) been on any medication? Yes/No (Circle One) If yes, provide name of medication, dosage, reason and name of prescribing physician.
16. Has the child ever been seen by any other medical specialists – e.g. ophthalmologist, dermatologist, neurologist, dentist for anything other than routine exams? Yes/No (Circle One)
If yes, provide name, address, dates and reason for consulting each specialist.
17. Has the child ever had any psychological, educational or psychiatric evaluations? Yes/No (circle one) If yes, provide the date of evaluation, name of evaluator, address, phone and reason for evaluation.
18. Has your child ever been in psychotherapy or counseling? Yes/No (circle one)

If yes, provide dates, reason, name of therapist, address and phone.

19. Is there any attorney representing the child? Yes/No (circle one) If so, state name, address and telephone.
20. Has the attorney general's office ever been involved in the case? If so, in what capacity? State name, address and telephone.
21. Describe the current legal custody and visitation arrangement, and indicate whether it is temporary or permanent. When did this arrangement go into effect? What were the prior arrangements/orders, and why were those orders changed?

EXHIBIT 7(B)
PARENT INTERVIEW

Personal History

Family

Describe your relationship with your Mother/Father/Step-parent(s).

How did your parents discipline you?

What problems, if any, did your parents have in their marriage?

Criminal history for parents?

If your parents separated or divorced, with whom did you live? How long? Who had custody? Was child support paid?

If either or both of your parents remarried, what kind of relationship did you have with your step parent(s)?

How do you get along with your parents now?

If an intervention has been filed by your parents/step-parents, do you agree that it would serve the best interests of your child?

How often have you seen your parents/step-parents in the last year?

What do your parents/step-parents think about this emergency proceeding?

If your parents/step-parents had siblings, how did you get along with them growing up? Now?

What kinds of things as a young child did your parents have to discipline you for? As a teenager? Were you ever spanked or hit? Physically, mentally or sexually abused?

Education

What did you like best in school? What were your best classes? What did you like least? Have the most difficulty with?

Did you have any problems in grade school? Junior High School? High school?

How did you get along socially in grade school? Junior High School? High school?

Highest level of education:

Work

Tell me how often you have changed jobs in the last five years? Where did you work?

Describe your current job (income, hours, location)

Does your work require you to travel? Where? When? How often?

What happens if your hours conflict with a special event for the child? If your child is sick? Who takes care of the child if the child is ill?

How do you feel about your current work situation? What would you change about it?

Tell me about your job plans? Any changes over the next five years?

Social Life

Drug use/alcohol use

How do you spend your leisure time? What are your hobbies?

What friends do you see most often (names, addressed, phone number) and do they have children?

Where have you lived since this case began? Have you had any relationships? With whom? When did the relationship begin?

If you are dating, when do you see this person? How often? Under what circumstances? When did the child(ren) meet your special friend(s)? How do they get along? What kinds of things do you do to include the child(ren)? To protect the child(ren) if your friend(s) have acted inappropriately?

What would you expect to be your future involvement with this person?

Whom do you confide in if you have personal problems?

Relationship/Marital History

How did you meet the other parent? What attracted you to him or her?

When did you decide to have children, or was the pregnancy unplanned? If planned, whose idea was it? If unplanned how did you react? How did the other parent react?

How many children did you want? The other parent?

Miscarriages/abortions reactions of parents to same

How long after you decided to have a baby was this child born?

What kinds of problems did you have in the relationship/marriage? When did you notice them? How did you try to resolve them? How did the other parent try to resolve them?

Did you consider counseling? Did the other parent? Did you attempt it? If not, why not? If so, with whom did you counsel? For how long?

Who decided to live apart? When? Who left the house? How was that decided? Is there a protective order? Has there ever been family violence? Where did each of you live following the separation? When does the other parent visit the children? Have there been any court orders regarding access to the children? What schedule have you used regarding the child since you separated?

Parenting

When did the children last see a doctor? Who did they see? Why? The dentist? Who? Who took them?

Do you think the children are in need of any special care or services? Any education problems, health problems or emotional problems? History of counseling or medications?

Do you and the other parent have differences of opinion regarding the children's health care? Education? Emotional status?

To be well adjusted, what do you see as the main needs of a child aged ___?

Daily Routine and Parental Involvement

In the last six months you and the other parent lived together, tell me about how often you observed the other parent:

- get the children up
- get the children dressed
- help the children to the bathroom or to get cleaned up
- give the children a bath
- fix meals
- help with homework
- get the children to school
- pick the children up from school
- put the children to bed
- shop for clothes
- get up at night with the kids if they were sick

- took the children to activities (scouts, music lessons, sports, church or other religious activities)
- Picked the children up from school if sick and needed to come home early
- Go to school for a parent/teacher conference

Estimate the percentage of time in the last six months that the other parent was involved in the these activities.

Describe a typical weekday when the children are with you.

Describe a typical weekend when the children are with you.

Where do the children sleep? What time is bedtime? Do your children sleep with you? When? How do you feel about this?

Tell me about the child's last birthday celebration? What costume did the child wear for Halloween? Where and how do you observe other holidays (Christmas, Hanukkah, Kwanza, Ramadan) With whom?

Description of Child

Do you have a picture in your wallet of the child that I can see?

Can you describe your child's personality? What are his/her strengths? What does the child do well? What are their achievements? Their problems? Are there other things the child has difficulty with?

What does the child like to eat? Dislike?

What is the child's favorite movie? TV program? Color? Who are the children's friends?

How much TV does the child watch in a day? Favorite toys? Activities? Do you and the other parent have differences of opinion about the child's activities, toys, et cetera?

Do you have a day care provider or baby sitter? How often? Where?

How does the child feel about day care/baby sitter?

What does the child worry about?

What is the longest time the child has been away from you in the past? How did the child react to that separation?

Social Adjustment and Neighborhood

Tell me about your home and your neighborhood.

What friends does the child have in the neighborhood? Where do they live in proximity to your home? How old are they? When the kids play, where do they play? What activities does your child engage in with friends? How do they get along?

How do you feel about the child's choice of friends? Do you and the child disagree about these friends?

Does the child play sports? Take any lessons? Belong to any clubs? Are you involved in any of these (coach, driving, watching, volunteering)

Child's Education

Did the child change schools when you separated? Since then?

How does the child get to and from school? Pack or buy lunch? How were the child's grades in school last year? This year?

Are there any learning problems that you are aware of? Does the child like school? Teachers? Who are the child's friends at school?

How much time does the child spend each night on homework? Need help? How much? Who helps?

What extracurricular events and special events did the child have at school in the last year? Did you go?

When was the child's last school conference? Did you go?

Are you a member of the PTA? How many meetings have you attended?

Do you and the other parent have different views on the child's education?

Siblings

How do your child and the other (step/half/ other parents') children in the house get along? What do they fight about? How do you handle their arguments? What do they play together? Are there any times one gangs up on another?

Relationships with Extended Family

Describe the relationship between the child and your mother? Your father? Other parent's mother? Other parent's father?

How often in the past year has the child seen each of them?

Does the child have close relationships with any other member of your family? With a member of the other parent's family?

Pets

Does the child have any pets? What kind? Who takes care of them?

Religion

Does the child go to religious school? When? To services? How often? Where? Who takes the child?

Do you and the other parent have differences of opinion on religious education or experiences?

Sex Education

Describe your relationship with the child

What kinds of challenges did you face in becoming a parent? What was the most difficult thing about becoming a parent? What was the easiest thing about becoming a parent?

How would you describe yourself as a parent? What do you do well? How does the child benefit? What could you improve? How would that help the child?

Describe the other parent. What does the other parent do well? Do poorly? How does the child benefit from what the other parent does well? What would the child gain if the other parent improved the weakness you identified?

What do you like to do to play with the child? What do you do or play that the child likes less than you do?

During the child's life so far, what do you think is the best thing you've done for the child? What's the worst mistake you've made so far? Is there something you wish you had not done?

What concerns do you have about the other parent as a parent?

How do your child rearing views differ?

Would you like to have more children? Why?

Discipline

Does the child have any chores? What are they?

Does the child get an allowance? How much? Conditions on use?

Tell me three things you would like to do to improve the child's behavior?

What does the child do that requires discipline? How do you handle this? Do you ever spank the child? Why?

What does it take for you to teach something to the child? If they have trouble understanding, what do you do?

Are there any rules about when it's okay to watch TV at your house? Control on access to a computer?

What would you do if –

What if the child does it again?

But what if the child still does it?

Examples:

- Child is rude to an adult
- Child interrupts when you are on the telephone
- Child has a temper tantrum after being told no
- Child whines and argues with you for something in a store after being told to put it down
- Child lies to you about taking something
- Child uses curse words
- Child refuses to do homework
- Child's grades go down in direct participation to sporting events
- Child refuses to do homework
- Child argues about going to bed
- Child fights with brother or sister
- Child is found engaged in sexual act with another child

Separation and Custody

Who told the child about the separation/removal? What was the child told? When? How did the child react?

What questions did the child ask? How have you replied? What questions has the child asked the other parent? How has the other parent replied?

What have you told the child about custody? Living arrangements? What do you think the other parent has told the child?

What do you think the child thinks about where he or she wants to live? To what degree should the court consider the child's choices?

Do you think that the child has been affected by this case? How? What would be the most helpful in getting the child through this case?

Custody/Visitation

If something unexpected has come up since this case started, how do you handle it? What caused the change in plans? How did you deal with the change? How did the other parent handle it? How often have there been unexpected developments in the last six months?

Is the child ready when you pick him or her up? Do you go into the house? Does the child have clothes, books, etc packed? Do you have clothing, toys, books etc at your house for the child? A picture of the other parent?

When you and the other parent disagree on something related to the child, how do you resolve the situation?

What are your feelings about the other parent? Do you think your feelings will change in a year?

What custody and visitation arrangement do you think will work best? Any supervision necessary? Why do you think this would be best? How is the child served?

Have you considered joint custody? Why or why not?

If you are primary caretaker, what visits would be best for the other parent? What if the other parent is primary caretaker?

Living arrangements/school/babysitting/ any changes in extracurricular activities?

Is there anything else that should be considered in this case?

EXHIBIT 7 (C) CHILD INTERVIEW

Intro

Age

School

Grade

Where do you live

What's my job?

Family (M/F=parent, step parent or other caregiver)

Who is in your family (names and nicknames)

Who lives at your house? (if there is a live in, how are they addressed?)

What do you like best about your house? The least?

Tell me about your brothers and sisters. What do you play together? How do you get along? When you argue or fight, what is it about? What do your parents do when you argue?

Extended family

Tell me about your grandparents or your M/F parents? When do you see them? What kinds of things do they do when you see them? How do you get along with your grandparents? When did you see them last?

Is there anybody else in the family you really like and spend a lot of time with? Tell me about them.

Celebrations

When was your birthday? What did you do? Did you have a party? Who was there?

What did you do last Halloween (Xmas, Hanukkah, Kwanza, Ramadan . . .) What special things do you do? Who was there?

Pets

Do you have any pets? What kinds? What are their names? Who takes care of them?

Social and Play activities

Who do you play with? Whose your best friend? Where does your best friend live? When do you see him? Where?

Do your friends come to your M/F house? Do you go to your friends' houses? How do you get there?

What do you like to do with your friends? What does your M/F think of your friends? What are your favorite toys? Games? What do your M/F think about these?

Do you like to watch TV? What's your favorite show? Movie?

Do you ride a bike? Where? When? Who taught you?

Do you plan any sports? Take any lessons? Belong to any clubs? How do you get there? M/F involved (coach volunteer etc)

School

How do you get to school? Who is your teacher? What is the teacher like? What do you like best about school? Least? Do you have any problems at school? What kind of homework do you get? How long does it take? Who helps you? What grades do you get?

Do you play with anyone at school? Who?

Did your school do anything special this year (fairs, plays, sports) – did you go? Do M/F?

Day care/Babysitting

When you are with your M/F, who takes care of you if the one you are with has to go out? Where do you go before school? After school? Who else is there? How do you feel about that person? These arrangements? What do you like most about this person? Going there? Dislike?

Medical Care

If you are sick and have to go to the doctor, who takes you? If you get sick and have to stay home from school, who takes care of you? If you get sick at school, who picks you up?

When was the last time you went to the doctor? Why? To the dentist? Who takes you?

Religion

What religion are your M/F? Do M/F go to services?

What religion are you? Do you go to church/
Synagogue, mosque?

Who takes you? Do you go to religious school? When? When did you last go?

Daily Routine/Parental Involvement

What's a typical day like for you at M/F house? Do you get up and get dressed yourself? Who helps you? How do you get to school? Do you pack your own lunch? Who cooks dinner? Who helps with homework? Who cleans up? Who gives you a bath or makes sure you wash up? Who gives you a bath? Washes your hair? Your clothes? Where do you sleep?

Tell me about weekends at M/F house? What happens in the mornings? The afternoons? Night?

Do you ever crawl into bed with your M/F? Sleep with M/F? What happens if you have a bad dream?

If you need something new, who gets it for you? If you need a haircut, who does it or takes you?

Description of parent

What fun things do you do with M/F?

What things does your M/F do well? Have they ever hurt you? Picked on you? Hurt one another?

What things do you wish your M/F did better?

Has anything scary ever happened to you when you were with M/F?

Sex

Who told you about sex and babies? Suppose you had to talk to someone about sex now – who would you ask?

Parent Social Activities and Alcohol Use

Who comes to visit at M/F house? What do you do when they visit? Who are your M/F friends? Who do they like to spend time with? What do they do together? Do you think M/F might marry again? To whom?

Does your M/F drink alcohol? Use drugs? Beer? Mixed drinks? When? Who with?

Discipline and Rules

Do you have any chores? What kinds? When do you do them? What happens if you forget?

Do you get an allowance? How much? How do you spend it? If you need something special, how do you get it?

What kinds of rules are there at M/F house? Are there rules about where you play? About who can come over and when? Where you can ride your bike? What you watch on TV? What programs or movies you can watch? Movies? Are there rules about where you can drive your bike? What friends can you go out with? How late?

What do you do that makes your M/F mad? What happens then? Do you ever get into trouble at your M/F house? How? Then what do you do? What do M/F do? How do you get punished? Do you ever get spanked?

Ask series of questions re what do you do if – see parent interview.

Separation/Custody

What was the longest time you did not see M/F. What was that like?

Why aren't your parents living together? Why aren't you with them? What do you think is really going on? What did they disagree about? Argue about? Ever hit one another? What kinds of problems do they have now? How do they feel about each other now? About you?

How is your life different since this case started? How is it better? Worse?

Does your M/F call when you are at the other parent's house? When? How often? What do you talk about? Do you call the parent you are not with?

When you leave one house to see the other parent, what is that like for you? How does it make you feel?

When your M/F comes to pick you up, are they on time? Are you ready to go? What if you forget to pack something? Do you have extras of things you might need at the other parent's house?

Where do you think your M/F think you should live? What do you think about that?

Who do you think should decide where you live?

If you end up living most of the time with your M/F, what do you think would be best about it? Worst? If you end up living with your M/F how would your other parent feel about it?

What's the best way for a judge to decide what's best for you? The worst way? Do you have any ideas to help the judge decide where you should live? When you should spend time with your parents? Why?

Where would you like to live? Why? Have you told anyone? Is there anything you've told me that you want me to keep private? Not to tell your M/F?

EXHIBIT 8
TIPS FOR GUARDIAN AD LITEM REPORT

In Report, provide: Background information as to players – the children, the parents, third party intervenors or other extended family members. Household composition – who lives where and with whom. Health issues for any of the players? What are the presenting facts that bring the case before the court? What hearings, temporary orders, discovery have occurred? Have there been issues (enforcement, modifications) since the initial orders were entered? What is household composition? Were parenting classes attended/completed? Service plan (if applicable)?

Meetings with Each Parent – by telephone, in person, who present. Involvement of each parent with child. How visits are presently orchestrated. Detail as to any problems with present arrangements. Description of relationship with the child(ren), and any difficulties within the relationship. Details of any criminal cases (pending or adjudicated). Details of any home visit and observations. Are the parents tattooed? Clean? Prone to observable injury? Also note any collateral contacts (therapists, teachers, neighbors, etc).

Review of Medical, Educational, Dental, Psychological and related records. What did you review? With whom did you confer and when? Were there pertinent hospitalization records? Provide synopsis. Prior referrals to CPS? Provide synopsis.

Conclusion. Do your job. Make recommendations as appropriate as to custody, support, visitation and where warranted, supervision and/or termination. Give the Court some direction as to whether your conclusions are “child directed” and/or “best interest directed.”

Your report should provide the court with an assessment that allows the Court to determine the child’s needs based on age, sex, and any special needs arising from any educational/physical/emotional handicaps. Does each parent have the ability and capacity to meet those needs? Discuss abilities/limitations. How do the player’s respective plans lend themselves to meeting the child’s needs? How does each parent’s plan provide for continuity in meeting the child’s needs (See Holley v. Adams – physical environment, supervision of child in absence of parent, educational plan, arrangements for medical, dental, counseling and financial needs of the child). Is the parent’s environment oriented to the child, or does it give the parent top priority? Will the parent allow the child to continue a relationship with other significant people in the child’s life, and how does that impact on your conclusion? What has the parent’s historic involvement been in the child’s life, and what previous parenting responsibility have they borne? What about the child’s feelings, and the quality of the child’s relationship with each parent? Does the concern that each parent expressed about the other demand further conditions on custody?

Recommendation. Give the Court a checklist of how to achieve the goals alluded to in your conclusion, regarding as applicable:

Conservatorship/Visitation

Supervision of exchanges and/or visits

Any pertinent injunctive relief regarding players (alcohol/drugs/paramours)

Information that must be exchanged at times of visits (meds, educational information, routine and unscheduled doctor visits)

Child Support – are collaterals involved, such as Attorney General’s office?

Co parenting issues and/or conflict disengagement

Therapy that may be warranted/Termination