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Guardians Ad Litem in the Criminal Courts

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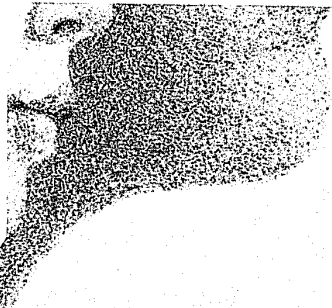
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James K. Stewart

Director

U.S. Department of Justice
National Institute of Justice
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Guardians Ad Litem in Criminal Courts

by

Debra Whitcomb

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Issues and Practices in Criminal Justice is a publication series of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion in the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

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Foreword

Child abuse cases present special difficulties for judges. Judges must balance the child's needs against the interests of the family and society, and make the correct decision. The complexity of these cases has led virtually every state to establish a role for special advocates or guardians *ad litem* to represent the best interest of the child. Traditionally, these advocates have only operated in juvenile dependency proceedings which involve suspension or termination of parental rights. However, a few states now provide for guardians *ad litem* to represent the best interests of children who must appear in criminal court as witnesses.

Social service and criminal justice professionals are beginning to recognize that the well being of a child victim may be even more at stake in a criminal proceeding than it is in a juvenile dependency proceeding. Yet no tradition or provision exists for independent representation of a witness in an adversarial system. Does the criminal court have the authority to make such an appointment? What are the limits of a guardian *ad litem's* role in a criminal trial? What are the implications for the defense and prosecution of adding a third party to the proceeding?

This report takes a critical look at the legal and pragmatic issues surrounding the appointment of independent representatives on behalf of child victims in criminal court. Children are our future. We hope that by provoking some serious thought about the potential impact on children of criminal justice intervention, this report can stimulate further action to improve the public response to these most vulnerable and valuable members of our society.

James K. Stewart
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Acknowledgments

This report represents a synthesis of theory and practice that I gleaned from the experience and expertise of many individuals, each carrying his or her own perspective on this unusual and relatively unexplored issue.

The practical concerns surrounding a guardian ad litem in the criminal justice system were conveyed to me through extensive interviews with numerous prosecutors, defense attorneys, judges, victim advocates, child protection workers, mental health counselors, and, of course, the guardians ad litem themselves. I am deeply grateful for the time they spent with me and for their dedication to the continuing task of devising the "best" way to handle these sensitive cases.

For guidance in the theoretical controversies and uncertain "propriety" of a guardian ad litem in the criminal system, I was most ably served by my esteemed Advisory Panel. The cumulative wisdom of these individuals helped to elucidate the critical points and gave focus to my study. I am especially indebted to Mark Hardin, Esq., of the National Legal Resource Center for Child Advocacy and Protection, whose diligent research and insightful comments laid the foundation for much of my thinking on this subject.

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Debra Whitcomb
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Table of Contents

	<i>Page</i>
Foreword	iii
Acknowledgments	v
Preface	xi
Chapter 1: What is a Guardian Ad Litem?	1
Legal Definitions	1
Legal Authority for the Guardian Ad Litem in Abuse and Neglect Cases	2
Legal Authority for the Guardian Ad Litem in Criminal Cases	4
Endnotes	9
Chapter 2: Potential Functions of a Guardian Ad Litem in Criminal Court	11
The Guardian Ad Litem as Counselor and Interpreter	12
The Guardian Ad Litem as Protector Against System-Related Trauma	15
The Guardian Ad Litem as "Linchpin" Connecting Several Agencies	17
The Guardian Ad Litem as a Voice for the Child	19
The Guardian Ad Litem as Advocate for the Child's Legal Rights	22
Endnotes	26

	<i>Page</i>
Chapter 3: Legal Issues Surrounding the Use of a Guardian Ad Litem in Criminal Court	29
Does the Guardian Ad Litem Have Legal Standing?	29
To What Extent Does the Guardian Ad Litem Function as a "Private Prosecutor"?	31
Does a Guardian Ad Litem Threaten the Defendant's Right to a Fair Trial?.....	32
Does the Guardian Ad Litem Enjoy Privileged Communications with the Child?.....	33
Endnotes	35
Chapter 4: Assessing the Need for a Guardian Ad Litem Program	37
Research Legislative and Judicial Authority	38
Survey the Scope, Depth, and Quality of Existing Services for Child Victims	38
Track Cases Through the Child Protection and Criminal Justice Systems	40
Specify Appropriate Roles for the Guardian Ad Litem	42
Endnotes	45
Chapter 5: Considerations for Starting a Guardian Ad Litem Program	47
Identify Organizational Placement.....	47
Determine Appropriate Staffing Configuration.....	52

	<i>Page</i>
Establish Procedures for Appointment of Guardians Ad Litem	57
Explore Potential Funding Sources	59
Endnotes	60
Appendix Sample Statutes and Court Rules Providing Independent Representation for Child Victims In Criminal Proceedings	65

Exhibits and Tables

Exhibit 1.1 Sample Guardian Ad Litem Appointment Order in Criminal Case.....	8
Table 4.1 How to Identify Appropriate Roles for a Guardian Ad Litem in Criminal Proceedings	43
Table 5.1 Comparison of Alternative Organizational Structures ...	53

Preface

Background for the Study

Until recently, child abuse and neglect cases were almost exclusively civil proceedings, and there was rarely a need for a child victim to testify against a parent or caretaker in criminal court. Today, however, with increased emphasis on prosecution of child molesters, regardless of their relationship to the child, more and more children are being asked to take the witness stand and undergo all the ordeals associated with a criminal trial.

To ease the process for child victims, legislators and prosecutors across the country are experimenting with new approaches to handling these cases. Several of the new techniques—like videotaped depositions and closed circuit testimony—are concerned only with the perceived trauma of testifying in open court. But child sexual abuse cases, like most other criminal cases, are far more likely to be settled by guilty plea than at trial, and so these innovations actually apply to a relatively small minority of child victims.

Furthermore, trial testimony is not the only systemic source of stress on child victims. Rather, it is the repeated interviews, delays and continuances, and—especially in intrafamilial cases—intense pressure from the family to recant, that often overwhelm children and damage their cases. Innovative trial techniques arrive too late in the process to help these children.

Research is beginning to suggest that child victims derive greater benefits from efforts made to streamline the adjudication process and provide strong emotional support throughout. NIJ's earlier study of innovative techniques

to help child victims¹ found that providing a support person, or advocate, can be immensely helpful, not only in alleviating the child's discomfort and fears about testifying, but also in keeping the case together for the prosecutor. In fact, children who have a close friend or support person to shepherd them through the entire process may be effective witnesses at trial even without innovative techniques.

Ideally, the role of friend and advocate is filled by a parent, but this is often not possible in cases involving a parental perpetrator. Instead, in many jurisdictions, victim/witness assistants attempt to fill the role. Their predominant activities have been to provide reassurance, transportation, and accompaniment to victims of crime as they traverse the criminal process. Their role at trial is typically limited to their physical presence in the audience (although occasionally victim assistants have been permitted to sit with children at the witness stand).

In recent years, there has been some discussion of expanding and enlarging the victim assistant's role in criminal proceedings:

As an extension of victim and witness protection programs, it is time for prosecuting attorneys to consider using special trial assistants for the specific purpose of protecting the child witness, before, at, and after criminal trials.²

One model for upgrading the function of a victim assistant is that of the guardian ad litem, an individual frequently appointed in civil abuse and neglect proceedings to represent the child's best interests. Some child advocates argue that independent representation is even more critical for child witnesses in criminal proceedings, since the mission of criminal court is not to protect the child, but, rather, to prosecute the defendant.

It is unrealistic to expect the prosecutor, judge, or defense counsel to look out 100% of the time for the interests of a child witness. They have other interests to look out for—the public, the judicial process, or the accused. And in many instances those other interests are in conflict with what is best for the child witness.³

Indeed, the U.S. Attorney General's Advisory Board on Missing Children has recommended that a "next friend", guardian ad litem, or court-appointed special advocate be provided for child victims in criminal proceedings.⁴

To a limited extent, expansion of child advocacy in criminal cases is already underway. During our earlier study of prosecutorial innovations, we learned that individuals who had been appointed to serve as guardians ad litem in civil abuse and neglect proceedings were continuing to represent the children's best interests in concurrent criminal proceedings, despite the absence of specific legislative or judicial authority to do so. In both Orlando, Florida,

and Des Moines, Iowa, attorneys serving as guardians ad litem were taking the initiative to track criminal proceedings and intervene on the child's behalf, if necessary, by filing motions for videotape, for example, or advising the child's parents of ways to minimize the trauma of confronting the perpetrator in court.⁵

Since that study was completed, legislatures in Iowa and in Florida have enacted laws requiring the courts to appoint guardians ad litem in certain criminal cases involving child victims. These are recent developments, and there is little experience with actually implementing a guardian ad litem mandate in criminal cases. This study was commissioned by the National Institute of Justice to examine the potential role of the guardian ad litem in this new arena.

Methodology

When this study began (December 1985), there was nothing to be found in the published literature directly addressing the need for, or role of, a guardian ad litem for child victims in criminal proceedings. There is, however, a considerable body of writing on the appropriate role for the guardian ad litem in *civil* abuse and neglect proceedings.

To ascertain how frequently child victims of sexual abuse are assisted by guardians ad litem in criminal cases, and to understand the nature of the roles fulfilled by guardians ad litem in this context, we conducted a nationwide telephone survey. Most survey respondents were drawn from two primary sources: the Fall 1985 *Directory of the National CASA (Court Appointed Special Advocate) Association*, and a *National Directory of Programs Providing Court Representation to Abused and Neglected Children*, prepared by the National Legal Resource Center for Child Advocacy and Protection, current as of September 1985.

There is, however, about 75 percent overlap between these two directories, and seven states were not represented in either. To ensure coverage of the remaining states, we contacted prosecutors in the two largest jurisdictions of each state. We also followed up on a number of referrals from survey respondents, advisors, and others in the field. In total, approximately 83 percent of our 95 respondents represented guardian ad litem programs or had served as guardians ad litem, and 17 percent were prosecutors or other court officials.

To examine the legal questions that surround the notion of appointing a guardian ad litem for child witnesses in criminal cases, Abt Associates subcontracted with the National Legal Resource Center for Child Advocacy and Protection (a program of the American Bar Association). The results

of this research are incorporated by reference throughout this report, and particularly in Chapter 3.

By far the bulk of the material in this report was obtained through extensive interviews with guardians ad litem and criminal justice and child protection personnel in four jurisdictions selected with the help of our Advisory Panel. These jurisdictions emerged from the telephone survey as among the most active in the country with regard to guardian ad litem representation in criminal cases. Not surprisingly, two of the sites—Des Moines (Polk County), Iowa and Sanford (Seminole County), Florida—are in states that have statutorily mandated appointment of guardians ad litem in criminal cases; a third — Manchester (Hillsborough County), New Hampshire—operates under a state supreme court rule that directs judges to consider appointing a guardian ad litem at a pretrial hearing to be held within 45 days of indictment in child sexual abuse cases. The fourth site—Philadelphia, Pennsylvania—was included because the Support Center for Child Advocates, one of three agencies providing guardian ad litem services in civil abuse and neglect cases, had received a grant from the National Center on Child Abuse and Neglect (a division of the U.S. Department of Health and Human Services) to extend its services to selected criminal cases.

The project principal investigator visited each site for two or three days, interviewing judges, prosecutors, defense attorneys, victim/witness assistants (where appropriate), protective services workers and, of course, the individuals who serve as guardians ad litem. All were asked about the role of the guardian ad litem in criminal court, procedures for having a guardian ad litem appointed or obtaining permission for the guardian's participation, perceived strengths and weaknesses of the guardian's services, and the feasibility of institutionalizing guardian ad litem appointments in criminal child abuse prosecutions as they are in civil proceedings in many states. Findings from the site visits underlie this entire report.

Guide to the Report

Chapter 1 introduces the concept of the guardian ad litem, its formal definition and federal and state statutes authorizing appointment of a guardian ad litem for child subjects of abuse and neglect proceedings. It discusses the extent to which these laws apply to child abuse victims in criminal prosecutions, and examines several new statutes that address this issue explicitly.

Chapter 2 describes potential functions of the guardian ad litem in criminal proceedings and presents findings from our telephone survey and site visits to assess the prevalence of guardian ad litem activity in criminal cases. The chapter clearly shows the mix of investigative activities, social

service brokerage, personal support, and legal advocacy services that child victims may require.

Chapter 3 turns to a discussion of legal issues surrounding the use of a guardian ad litem in criminal prosecutions. Because there is little pertinent case law to date and published literature is sparse, the chapter draws largely on a paper prepared under subcontract to Abt Associates by Mark Hardin, Assistant Director of the National Legal Resource Center for Child Advocacy and Protection.

Chapter 4 considers the critical question of whether a guardian ad litem program is actually needed for child victims in criminal proceedings. Chapter 5 addresses some of the programmatic issues that will arise once a decision is made to provide guardian ad litem services: organizational affiliation, staffing configurations, the appointment process, and funding sources. The general guidelines in these chapters were derived from the experiences of the few programs that now operate within the criminal justice system.

Endnotes

1. U.S. Department of Justice, National Institute of Justice, *When the Victim Is a Child: Issues for Judges and Prosecutors*, by Debra Whitcomb, Elizabeth R. Shapiro, and Lindsey D. Stellwagen (Washington, D.C.: Government Printing Office, 1985).
2. Donald C. Bross, "Protecting Child Witnesses," in *Multidisciplinary Advocacy for Mistreated Children*, ed. Donald C. Bross (Denver: National Association of Counsel for Children, 1984), p. 201.
3. Kathleen Dixon, "Attorney Selected by CLOUT to Represent McMartin Witnesses," *News of CLOUT*, July 1987, quoting Gregory Mooney. CLOUT — Children's Legislative Organization United by Trauma — is a special project of the South Bay Center for Counseling in the Los Angeles area.
4. Recommendations of the U.S. Attorney General's Advisory Board on Missing Children, March 1986, p. 23.
5. *When the Victim Is a Child*, supra, note 1, Chapter IX.

Chapter 1

What is a Guardian Ad Litem?

Legal Definitions

The American approach to protecting children and incompetent individuals derives from the common law of England, which conceived the notion of *parens patriae*, an inherent obligation in the King (or the State) to protect persons unable to protect themselves. When any such person needed protection in court, the King issued a letter patent for the appointment of a guardian.¹ Historically, in this country, a guardian ad litem was appointed by the court to represent a child named as a defendant. The guardian ad litem assumed an adversarial role, defending against the allegations made by another party.² Today, guardians ad litem occupy an advocacy position. They represent an independent voice on behalf of the child.

A guardian ad litem is a special legal representative, appointed on behalf of a minor or other legal incompetent having an interest in the outcome of litigation. Guardians ad litem participate on behalf of children because children are legally incapable of initiating, defending, or functioning as a party in litigation without adult assistance. The function of the guardian ad litem is to identify the child's interests in the litigation, and to participate in the litigation in support of those interests.³ Guardians ad litem are legally obligated to do everything within their power to insure a judgment that is in the child's best interests.⁴

The duties of guardians ad litem are both temporary and limited in scope. They have no powers or duties prior to their appointment or after the case has terminated. Guardians ad litem do not exercise power or control

of the minor outside the context of the litigation.⁵ They have no right to interfere with the child's person or property, nor the power to bind the child or his estate. Guardians ad litem are neither legal guardians nor trustees.⁶

Guardians ad litem serve in a fiduciary relationship to the child. They may be required to conduct an investigation to determine where the child's interest actually lies in a particular matter. Perhaps the most important attribute of guardians ad litem is independence: they cannot be under the control or direction of another party to the litigation. Guardians ad litem have the power and duty to communicate directly to the court rather than to or through a particular party.⁷

Although the court may appoint a guardian ad litem as a third party to promote and protect the child's interests, the court remains ultimately responsible for the protection of the child. The appointed third party thus becomes an officer of the court.⁸

Legal Authority for the Guardian Ad Litem in Abuse and Neglect Cases

In 1974, the U.S. Congress enacted the Child Abuse Prevention and Treatment Act (Public Law No. 93-247), which created the National Center on Child Abuse and Neglect and earmarked federal funds for states to establish special programs for child victims of abuse or neglect. In order to qualify for these funds, states must meet a number of requirements contained in the legislation. One such requirement is that the state must

provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings. 42 U.S.C.A. §5103(b)(2)(G)

The rationale for appointing a guardian ad litem in civil abuse and neglect proceedings lies in the recognition that there is no party to the proceedings who can advocate for the child's best interests. *Petitioner* is the department of social services, which may be seeking to have the child declared a dependent of the court and must establish the proof of the alleged abuse or neglect. *Respondent* is the parent/caretaker, whose reported abuse or neglect of the subject child has been substantiated by the social service agency, yet typically desires to retain custody of the child. The *judge*, although the ultimate protector of the child in the juvenile court, cannot know the full details of the home situation and, furthermore, must remain impartial during the adjudicatory proceedings.⁹ Who speaks for the child?

Today, 47 states and the District of Columbia statutorily mandate the appointment of a representative for maltreated children before the juvenile

courts.¹⁰ In the three remaining states (Delaware, Indiana, and Oregon), such appointment is at the court's discretion. In 39 jurisdictions, maltreated children are entitled to *legal* representation: statutes provide either (1) for an attorney to be appointed for the child; (2) for both a guardian ad litem *and* an attorney to be appointed; or (3) for the appointed guardian ad litem to be an attorney. Conversely, two states (California and Nevada) stipulate that the guardian ad litem shall *not* be an attorney for the child, although Nevada does permit the appointment of attorneys as guardians ad litem. (Whether the child's representative acts as attorney for the child or as a guardian ad litem has important implications in practice, which are discussed in subsequent sections of this report.)

Recognizing the large investment of time and personal energy demanded of the guardian ad litem in abuse and neglect cases, a growing number of jurisdictions have adopted an alternative approach that was pioneered in Seattle in 1977, in conjunction with the National Council of Juvenile and Family Court Judges. Court Appointed Special Advocates (CASAs) are community volunteers who are specially recruited and trained to investigate, evaluate, and recommend to the court what is truly in the child's best interests.¹¹ The states of Indiana, Iowa, and Rhode Island statutorily provide for appointment of court-appointed special advocates as one means of providing representation for child victims.¹²

Depending on state law or local custom, the volunteers may themselves be the appointed guardians ad litem, or they may be assigned to work with the appointed guardians ad litem (who are typically attorneys). In other words, CASA is not always synonymous with guardian ad litem.

Regardless of whether the guardian ad litem is an attorney or a lay volunteer, the role in civil abuse and neglect cases has been described as having four components:

1. an investigator, whose task it is to ferret out all of the relevant facts;
2. an advocate, whose task it is to insure that all the relevant facts are before the court at all hearings;
3. a counsel, whose task it is to insure that the court has before it at the dispositional hearing all the available options; and
4. a guardian . . . , whose task it is to insure that the child's interests are fully protected.¹³

The guardian ad litem's activities contribute to every stage of a typical civil abuse and neglect proceeding. In support of the initial investigation, the guardian ad litem conducts an independent inquiry. This may include

gathering police, protective services, medical and school records; interviewing relatives, friends, neighbors, teachers, and others with personal knowledge of the child and family; and requesting psychological examinations of the child.

When the case moves to adjudication, the guardian ad litem may advise the court as to the child's ability to testify, and in most states the guardian ad litem can introduce, examine, and cross-examine witnesses at the adjudication hearing.¹⁴ Additional functions may include monitoring the legalities of the proceedings, ensuring that the child's rights are being protected, and ensuring that the child's interests are adequately presented and considered.¹⁵

Perhaps the most important contribution occurs at the dispositional hearing, where the guardian ad litem makes a recommendation for the child's placement, based on his or her own investigation and understanding of the child and family. The guardian ad litem may consult with experts to ascertain and evaluate all available alternatives.¹⁶ In doing so, the guardian ad litem considers the child's interests as an individual and as a member of a family. The guardian ad litem seeks to insure the child's continuing protection beyond the term of the court's supervision.¹⁷

It should be noted, too, that guardians ad litem have been appointed to represent the interests of children involved in other types of civil proceedings, e.g., delinquency proceedings, CHINS (Children in Need of Services) cases, custody disputes, and termination of parental rights. Only recently, however, have legislatures and the courts begun to consider the need to appoint guardians ad litem for child victims of physical or sexual abuse who must serve as witnesses in criminal cases.

Legal Authority for the Guardian Ad Litem in Criminal Cases

On first reading, it would appear that Public Law 93-247 (quoted above) requires the appointment of guardians ad litem for child victims of abuse and neglect in criminal cases, as well as civil proceedings. After all, criminal prosecution is certainly a judicial proceeding. Furthermore, the regulations implementing the Act include criminal actions among the range of services to be provided by the state in response to substantiated reports of abuse or neglect:

These services may include emergency caretaker or homemaker services; emergency shelter care or medical services; review by a multidisciplinary team; and, if appropriate, criminal or civil court action. . . . 48 Fed. Reg. 3702, Jan. 26, 1983, 45 CFT §1340.14(f) (1985).

Also, the legislative history of Public Law 93-247 suggests that the appointment of guardians ad litem in criminal cases was not explicitly contemplated, but was also not consciously excluded.

The Child Abuse Prevention and Treatment Act does, however, limit the extent to which the guardian ad litem mandate applies to criminal cases. The term "abused or neglected child," as used in paragraph (G) of 42 U.S.C.A. §5103(b)(2) cited above, is defined elsewhere in the Act to include only children who are abused or neglected "by a person . . . who is responsible for the child's welfare." [42 U.S.C.A. §5103(1)] The Act clearly does not apply to children who are abused by strangers.

Although the statutory language may well be construed to require appointment of guardians ad litem in criminal prosecutions, the Department of Health and Human Services (which houses the National Center on Child Abuse and Neglect) has not interpreted it that way: many states have been certified as eligible for funds under the Act with assurances only that guardians ad litem are provided in civil protection proceedings. Likewise, in *Burkett v. State*, 439 So.2d 737 (Ala. Cr. App. 1983), the Alabama Criminal Appeals court rejected an argument that the statute in question, which contains language identical to that of the federal Act, applies to criminal proceedings.

In fact, many state guardian ad litem statutes, like the federal Act, are ambiguous as to their application to criminal cases. Several have adopted the federal language; a few appear to give the courts discretion in appointing a guardian ad litem in criminal cases. By and large, however, state guardian ad litem statutes pertain only to civil abuse and neglect proceedings. Some explicitly apply only to sections or portions of the code that do not include criminal proceedings; others are limited to proceedings conducted by courts that lack jurisdiction over criminal proceedings. Still others include additional language that clearly links the intent to civil proceedings.

At this writing, at least six states have statutes explicitly requiring the appointment of guardians ad litem or other independent legal representatives for child victims in criminal proceedings: California, Florida, Iowa, Oklahoma, Pennsylvania and Wisconsin. (The pertinent language from the Florida, Iowa, and Oklahoma statutes is reproduced in Appendix A.) In addition, court rules in New Hampshire and Vermont authorize the appointment of guardians ad litem for child victims in sex-related cases. (N.H. Superior Ct., Rule 93-A [1986] is also contained in the Appendix.)

Iowa's law is perhaps the most restrictive. Although the law entitles any prosecuting witness who is a child to representation by a guardian ad litem at all stages of the proceedings, it also defines the role as follows:

The guardian ad litem shall receive notice of and may attend all depositions, hearings and trial proceedings to support the child and advocate for the protection of the child, but shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses. However, the guardian ad litem shall file reports to the court as required by the court. IOWA CODE §910A. 15 (West 1987).

Precisely how the guardian ad litem is to “advocate for the protection of the child” is nowhere defined. At this date, individuals serving as guardians ad litem in Iowa are testing the limits of their role, but there are no written guidelines.

In contrast, the Oklahoma statute appears to allow guardians ad litem to take a far more active role in representing a child’s best interests. Although the law applies only to cases prosecuted under a specific criminal statute (Okla. Stat. Ann. tit. 21 §843 [1985 Supp.]), providing for punishment of “any parent or other person who shall willfully or maliciously injure, torture, maim, or use unreasonable force upon a child under the age of eighteen (18), or who shall cause, procure, or permit any of said acts to be done . . . ,” it does specify, first, that an attorney-at-law shall be appointed to represent the child in such cases, and further, that such attorney shall

make such further investigation that he deems necessary to ascertain the facts, to interview witnesses, examine and cross-examine witnesses at the preliminary hearing and trial, make recommendations to the court and participate further in the proceedings to the degree appropriate for adequately representing the child. Okla. Stat. Ann. tit. 21 §846(B) (1985 Supp.)

Because the law is limited to such a narrow range of cases, it is rarely employed. When an attorney ad litem is appointed, the role is clearly unique in criminal jurisprudence.

The Florida statute is perhaps the most expansive, both in terms of its applicability and the potential range of activities it permits the guardian ad litem to undertake. Specifically, Florida law provides that

A guardian ad litem or other advocate shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding, whether civil or criminal. Fla. Stat. Ann. §415.508 (1985 Supp.)

Elsewhere in the statute, “child abuse or neglect” is defined to include practically all types of serious child maltreatment (Fla. Stat. Ann. §415.503 [1985 Supp.]), and the statute clearly embraces the full range of civil and criminal actions. Furthermore, in defining the term “guardian ad litem,”

Florida's statute, like Oklahoma's, potentially opens the door to an unprecedented role in the context of criminal prosecution:

"Guardian ad litem" means a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, . . . who shall be a party to any judicial proceeding as a representative of the child . . . Fla. Stat. Ann. §415.503 (1985 Supp.)

How can there be a third party to an adversarial proceeding? The question has not been addressed directly, but the courts and guardian ad litem programs in Florida have construed the phrase to provide that guardians ad litem 1) have access to agency records relating to the child, 2) receive notice of all events concerning the child, and 3) may appear at all hearings or proceedings to assure representation of the child. (See Exhibit 1.1, Sample Guardian Ad Litem Appointment Order in Criminal Cases.) Legislation is pending to clarify the guardian ad litem's role. In Oklahoma, however, attorneys ad litem have been permitted to question witnesses, object to testimony, and make opening and closing arguments. Conceivably, these statutes could revolutionize the way child abuse cases are handled in criminal court.

There is some case law to support the notion that a victim might become a party in interest to a criminal case under certain circumstances. In *State v. Walsh*, 495 A.2d 1256 (N.H. 1985), the New Hampshire Supreme Court interpreted the state rape shield statute to afford the victim a limited testimonial privilege, thereby making the victim a party in interest to the case. In upholding the trial court's appointment of a guardian ad litem to assist the child witness in affirming this privilege, however, the court did not rely on the New Hampshire statute granting courts the discretion to appoint guardians ad litem for children who are interested parties.

The Superior Court of New Jersey has also held that alleged child victims have an interest in a criminal proceeding sufficient to justify appointment of a guardian ad litem. In *State v. Freeman*, 496 A.2d 114 (1985), the trial court had appointed a guardian ad litem for the children of a murder defendant, in response to a state motion for an order to interview them. In justifying this appointment, the Superior Court held:

The most advantageous method of balancing the various interests of all concerned is for the courts to appoint a guardian ad litem for the children. The court's use of such an appointment has normally been limited to noncriminal matters; however, where the facts so warrant, there is no good reason why this protective device should not be extended for use in criminal cases. *State v. Freeman*, 496 A.2d at 114.

* * * *

Exhibit 1.1

Sample Guardian Ad Litem Appointment Order in Criminal Case

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY, FLORIDA CRIMINAL
DIVISION

STATE OF FLORIDA

vs

_____, Defendant

ORDER APPOINTING GUARDIAN AD LITEM

Pursuant to section 415.508, Florida Statutes, the Court hereby appoints a Guardian Ad Litem under the direction of the State of Florida Guardian Ad Litem Program, to represent the witness _____, a Child, in the above-styled cause.

It is further ordered that:

1. _____, Circuit Director of the Guardian Ad Litem Program, is hereby authorized to designate a certified Guardian Ad Litem. Upon such designation the individual shall immediately file an acceptance of appointment in this cause.

2. That upon presentation of this Order to any agency, hospital, school, person, or office, including the Clerk of this Court, Department of Health and Rehabilitative Services, human service and/or child-caring agencies, medical and mental health professionals, including doctors, nurses, psychologists or psychiatrists, and law enforcement agencies, the guardian ad litem is hereby authorized to inspect and copy any records relating to the above-named Child without consent of said Child or parents of said Child.

3. The Guardian Ad Litem shall maintain any information received as confidential, and will not disclose the same except in reports to the Court and other parties to this cause.

4. The Guardian Ad Litem shall appear at all hearings or proceedings in this cause and assure representation of the Child at said hearings.

5. The Guardian Ad Litem Program shall be notified of any hearings, investigations, depositions, or other proceedings concerning the Child.

DONE AND ORDERED AT _____ County, Florida,
this _____ day of _____, 198__.

Circuit Judge

Whether federal statute requires appointment of a guardian ad litem for child victims in criminal proceedings is debatable, although the administrative agency appears to limit its applicability to civil abuse and neglect proceedings. To date, only six states have passed laws explicitly providing independent legal representation in criminal cases, and two states have court rules with a similar intent.

Even where statutory authority exists, however, the boundaries of the guardian ad litem's role in criminal court are generally unknown. Experience in the criminal setting is limited, and there is virtually no relevant case law. Additional activity in this area may be expected, however, since at least two federal task forces—the U.S. Attorney General's Advisory Board on Missing Children¹⁸ and the Attorney General's Task Force on Family Violence¹⁹ have recommended appointment of guardians ad litem or volunteer advocates in criminal cases.

Endnotes

1. Ellen K. Solender, "The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?" *Texas Tech Law Review*, Vol. 7 (1976): 620.
2. Brian G. Fraser, "Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem," *California Western Law Review*, Vol. 13 (1976-77): 28.
3. Mark Hardin, "Guardians Ad Litem for Child Victims in Criminal Proceedings," *Journal of Family Law*, Vol. 25 (1987).
4. Fraser, "Independent Representation," supra, note 2 at 29.
5. Hardin, "Guardians Ad Litem for Child Victims," supra, note 3.
6. Fraser, "Independent Representation," supra, note 2 at 27-30.
7. Hardin, "Guardians Ad Litem for Child Victims," supra, note 3.
8. Fraser, "Independent Representation," supra, note 2 at 28-29.

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9. U.S. Department of Health and Human Services (HHS), National Center on Child Abuse and Neglect, *Representation for the Abused and Neglected Child: The Guardian Ad Litem and Legal Counsel* (Washington, D.C.: Government Printing Office, 1980), pp. 2-3.
 10. For a state-by-state analysis of statutory provisions for representation of maltreated children in civil abuse and neglect proceedings, see U.S. Department of Health and Human Services, *State Child Abuse and Neglect Statutes: A Comparative Analysis, 1985* (Washington, D.C.: Clearinghouse on Child Abuse and Neglect), pp. 55-56.
 11. Carmen Ray-Bettineski, "Court-Appointed Special Advocate: The Guardian Ad Litem for Abused and Neglected Child," *Juvenile and Family Court Journal* (August 1978): 65-70. For more information, contact the National CASA Association, 909 N.E. 43rd, Suite 202, Seattle, Washington 98105.
 12. *State Child Abuse and Neglect Statutes*, supra, note 10 at 109-111; see also, House File 515, 1987 Regular Iowa Sessions Laws, p. 23.
 13. Fraser, "Independent Representation," supra, note 2 at 33-34.
 14. HHS, *Representation for the Abused and Neglected Child*, supra, note 9 at 3-4.
 15. Arnold Schuchter, *Prescriptive Package: Child Abuse Intervention* (Washington, D.C.: Law Enforcement Assistance Administration, 1976), pp. 46-47.
 16. James R. Redeker, "The Right of An Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases," *Villanova Law Review*, Vol. 23 (1977-78): 544-45.
 17. Schuchter, *Child Abuse Intervention*, supra, note 15 at 46-47.
 18. U.S. Attorney General's Advisory Board on Missing Children, *America's Missing and Exploited Children: Their Safety and Their Future*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, March 1986, p. 23.
 19. U.S. Attorney General's Task Force on Family Violence, *Final Report*, September 1984, pp. 37-38.

Chapter 2

Potential Functions of a Guardian Ad Litem in Criminal Court

The need to appoint a guardian ad litem for child witnesses in the criminal justice system can be justified from the perspectives of both the courts and the children themselves.

From the court's point of view, any assistance in preparing a child witness for the ordeal of testifying should be welcome, since without the child's testimony, many cases simply could not be prosecuted. When considering the advisability of having a child testify in court, both the strength of the case and the strength of the witness should be weighed. The assessment of a child witness should attempt to answer the following questions:

Can the child be prepared and coached to function adequately as a witness?

Is the evidence the child will provide reliable, or will it be distorted by self-interest or immature cognitive processes?

How stressful will the court situation be for this individual child?

Does the child understand the process and know what to expect?

How does the child perceive the outcome?

Is the child capable of dealing with examination and cross-examination in the adversary process?

Does the value of the evidence the child provides justify the possible stress the child will face in court?

Will the child's permanent public court record as a witness damage the child now or in the future?¹

Answering these questions requires the input of someone who is close to the child, knowledgeable of the child's intellectual and emotional strengths and weaknesses, and at the same time knowledgeable of the court system and the child's role as a witness. Guardians ad litem can be an invaluable resource.

Furthermore, particularly in cases involving an intrafamilial perpetrator, judges are placed in the uncomfortable position of sentencing someone who has undoubtedly committed a criminal offense against a child, yet at the same time remains the central object of the child's natural love. Many child victims are emotionally torn between their desire to punish the offender and their need for parental affection. Guardians ad litem can help the court fashion a sentence that is both punitive for the offender and psychologically rewarding for the child.

From the child's point of view, a guardian ad litem can serve as a translator, to explain the "foreign" language and sometimes incomprehensible procedures that lawyers and judges take for granted. Once the imposing communication barrier is surmounted, the guardian ad litem can proceed to guide the child through the complexity, confusion and stress inherent in the criminal justice system itself. Arguably, the system is likewise difficult for adult witnesses, but child victims are often caught in additional entanglements due to the very nature of their cases, which may involve several agencies and more than one court system.

This chapter explores five potential roles for a guardian ad litem in criminal proceedings: 1) as counselor and interpreter for the child; 2) as a protector against system-induced trauma; 3) as a "linchpin" coordinating the actions of multiple agencies and court systems; 4) as a voice for the child; and 5) as an advocate for the child's legal rights. Actual examples of guardian ad litem activities are interspersed throughout the chapter.

The Guardian Ad Litem as Counselor and Interpreter

One important responsibility for a guardian ad litem is to be fully aware of the child's intellectual, emotional, and physical developmental stages. Many children and families have numerous contacts with social services and health- and mental health-related agencies before any charges are filed, and the guardian ad litem should have access to these records. By working with the child and family to identify needs and to arrange linkages with appropriate services, the guardian ad litem can build a rapport that flourishes throughout and beyond the adjudication process. Moreover, the resulting knowledge of the child's intellectual, emotional, and physical capabilities can be shared with investigators and prosecutors to help them devise the most effective ways to work with the child in eliciting a strong statement or testimony for court.

For example, children's limited vocabulary makes it hard for them not only to understand the questions that are posed of them and the explanations that professionals offer, but also to express their own observations and feelings. Successful interviews with children require a panoply of special skills and insights into verbal and nonverbal indicators of confusion or uncertainty.

A 4-year-old girl had been sexually abused by her father. She was very shy and found it hard to discuss the abuse with people other than the appointed guardian ad litem. The guardian ad litem felt that if the victim could not explain what had happened at her deposition, the perpetrator's attorney would be encouraged to contest the charges in court instead of pleading guilty. The guardian ad litem was able to get the victim to answer all the questions presented to her in the deposition. The perpetrator pled guilty.

One of the most crucial interviews with the child is the interview with law enforcement or social services investigators at which a formal statement is taken. An unknown number of child abuse allegations are dropped at this stage because the child is unable or unwilling to speak to investigators. Therapists have noted that child sexual abuse victims, in particular, go through a series of coping phases, during which they gradually divulge the facts about what happened to them.² It is, therefore, unreasonable to expect a child to sit down with a police officer or social worker and give a full account of every incident. Especially where children have been frightened or threatened into secrecy, extracting a complete story requires great skill and infinite patience.

Conducting or overseeing these preliminary interviews with child witnesses may not, however, be an appropriate function for guardians ad litem. To protect themselves against charges of "coaching" or being called as witnesses, guardians ad litem generally avoid discussing the facts of the case with the children. It is not unusual, however, for guardians ad litem to testify in criminal cases, and so they should be prepared for cross-examination about their communications with the child. They may also need to take steps to avoid being sequestered from the courtroom during the child's testimony.

Another critical interview with a child witness is the competency examination, since the child's failure to demonstrate competency may cause the case to be dismissed. But some of the reasons for such failure may pertain more to characteristics of the examination than to deficiencies of the child. After all, prosecutors presumably prepare children for this procedure and satisfy themselves of their witnesses' competency before subjecting them to

the scrutiny of the court. How, then, could a child fail? The language or forms of questioning may exceed the child's intellectual level. The courtroom environment and questioner's demeanor may be intimidating. The child may perceive some of the questions as accusatory or irrelevant. In other words, the questioning may be conducted in a manner that is incompatible with the child's capabilities.

Two children, both learning disabled, had been sexually abused by a friend of their mother. The prosecutor had found it difficult to interview the children, believed they would be found incompetent, and decided to discharge the case.

The appointed guardian ad litem reviewed all pertinent records, interviewed the mother, children, and school personnel, and determined that although the children were learning disabled, they were clear about the abusive incidents and able to distinguish between the truth and a lie. On the day of the preliminary hearing, the guardian ad litem prepared the children using anatomical dolls. Both children were found competent and testified well enough to convince the judge to hold the case for trial.

Some observers have suggested that a special interviewer be designated to handle all questioning of child witnesses. Libai, for example, describes an Israeli approach whereby special "youth interrogators" are recruited from the mental health professions and instructed in legal procedure.³ These individuals conduct or control all interviews with the child; in fact, interrogators can veto the admission at trial of any statement taken by police from the child without permission. Parker⁴ similarly recommends appointment of a Child Hearing Officer (CHO) who would likewise conduct or control interviews with child witnesses. Unlike Libai's interrogator, Parker's CHO is an attorney trained in child psychology, social work, nursing, or clinical interviewing. Recordings of the CHO's interview with the child should, in Parker's view, suffice for a ruling on the child's competency.

Although American jurisprudence would seem to preclude direct transfer of either procedure, Libai recommends that persons analogous to youth interrogators be responsible for advising the court as to the child's ability to testify. It would also be appropriate for guardians ad litem to assist the investigation by conveying the child's intellectual limits or idiosyncratic expressions to others who interview the child. Conversely, when guardians ad litem are involved with the case throughout the adjudication process, they can explain to the child and family why certain actions may (or may not) be taken, how decisions are made, and what to expect at each proceeding.

Even beyond sentencing, a guardian ad litem who has gained the trust and confidence of a child may continue to monitor the child's welfare through a continuing, informal relationship. Although it is probably not appropriate for the guardian ad litem to initiate such a relationship, it does seem advisable to leave the door open for consultations as needed, especially if there are new incidents or threats.

The Guardian Ad Litem as Protector Against System-Related Trauma

The guardian ad litem can play a critical role in shielding the child from additional anxiety or trauma caused by the civil and criminal justice systems themselves.

For example, guardians ad litem may work to prevent unnecessary interviews. They can inform investigators of the child's prior participation in investigative interviews, e.g., with protective services workers, and facilitate information-sharing wherever possible. Guardians ad litem in New Hampshire and Philadelphia have also advised children (and families) that they do not have to grant all requests for interviews; this is particularly helpful where investigators for defense attorneys attempt to reach the child even before the prosecution has mounted its case.

Guardians ad litem may also be perpetual monitors of case development. This role may be especially important, as research has shown that child victims tend to suffer when their cases are prolonged.⁵ Guardians ad litem can argue (or persuade prosecutors to argue) against continuances that may diminish the child's memory, expose the child to family hostility, or hinder the success of the child's therapy. Alternatively, guardians ad litem may be aware of pressures being brought on the child to recant or alter the allegations, and so may seek (or urge prosecutors to seek) continuances in order to reassure the child and strengthen the case.

Another important function of the guardian ad litem is to recommend innovations in the process that focus on the needs of the child. Guardians ad litem frequently advise prosecutors of the need to consider alternative means of obtaining the child's testimony, e.g., via videotaped depositions or closed circuit television. Most decisions to request alternative approaches are reached jointly through consultations between the guardian ad litem and prosecutor, and the prosecutor will file the motion. Where there is disagreement, however, guardians ad litem may file motions independently, basing their argument on their personal knowledge of the child's cognitive and emotional limitations.

A child entered the courtroom to find it packed with 40 friends and relatives of the defendant. The guardian ad litem persuaded the judge to clear the courtroom of all but the immediate family, and to allow the child to enter through the judge's chambers.

A five-year-old boy was sexually abused by his father. The father fled the state and was not apprehended and returned until three years later. By this time, the victim had forgotten some of the abuse he had suffered. Moreover, during the trial, the victim had problems testifying while his father was watching him. The guardian ad litem assisted the prosecutor in using the anatomical dolls so the victim could better describe what had happened. At the guardian ad litem's suggestion, the dolls' box was strategically placed to block the victim's view of his father while he testified.

There is some case law precedent for the guardian ad litem's role in identifying alternative ways for child witnesses to testify. In *State v. Gilbert*, 326 N.W.2d 744 (Wisc. 1982), the trial court had quashed a subpoena of a child witness in order to prevent trauma to the child. The Wisconsin Supreme Court found this action in error, holding that it was the responsibility of the district attorney, defense attorney, guardian ad litem, and the judge to devise a way for a child to testify in a criminal prosecution with minimal trauma. (The Court did not explicitly discuss the propriety of appointing a guardian ad litem, the authority for such an appointment, or the boundaries of the guardian's role.)

The need for a guardian ad litem to protect child witnesses from system-induced trauma is, naturally, most visible in extreme situations. Prosecutors have been known to charge children with false reporting when they recant their allegations, and judges have held children in contempt for refusing to testify.

In one New Jersey case, a teenaged girl threatened suicide if she were made to testify against her abusive father. The prosecutor resolved to move forward with the case; the Law Guardian, acting on recommendations of the girl's therapists, who noted a history of emotional instability and prior attempts at suicide, successfully filed a motion to quash the subpoena. In this situation, the guardian ad litem's actions may have cost the prosecutor his case, but the alternative may have cost this girl her life.

An eight-year-old girl had been brutally beaten by her father over a period of several years. Although she had been carefully

prepared for her role as a witness in criminal court, she fled the courtroom on the day of trial when she saw her father. At the guardian ad litem's suggestion, the girl was permitted to sit behind the spectator partition, flanked by the guardian ad litem and her caseworker. Empowered by the physical and psychological barriers between herself and her father, the girl was able to testify effectively.

Although cases like these may be few and far between, the price of ignoring a child's best interests clearly warrants appointment of a guardian ad litem.

At a minimum, guardians ad litem often accompany child victims and their families to interviews, hearings, and proceedings, with the notable exception of grand jury. They may request a separate waiting area for the child and family to avoid awkward or hostile interactions with the defendant and his friends or family. During formal proceedings, guardians ad litem usually remain in the audience, although they have been allowed to sit with the child at the witness stand (and see Section 2.5 for examples of more direct advocacy).

The Guardian Ad Litem as "Linchpin" Connecting Several Agencies

The Attorney General's Task Force on Family Violence recommended that:

For all court hearings and proceedings, judges should consider assigning a specially trained, volunteer advocate to represent the interests of the child. . . . The volunteer also can facilitate communication among all elements of the system working on the case, whether it be the court, protective services, foster care, school system or health facilities, to ensure that the child receives the proper care and services.⁶

Children who are abused by members of their immediate family or other individuals acting in a caretaking capacity often are subjects of civil abuse and neglect proceedings, which may occur immediately prior to, or concurrent with, criminal proceedings arising from the same allegations. In addition, there may be questions of custody, visitation rights, or termination of parental rights, each of which entails a separate set of civil proceedings. Many jurisdictions are working to develop multidisciplinary teams or task forces in an attempt to streamline their interventions in child abuse cases. But a large number of communities have not yet undertaken such an effort. Where

there is no interagency team in place, the guardian ad litem plays a pivotal role in making sure cases do not “fall through the cracks” as a result of communication gaps among the agencies involved.

A dependency prosecutor told the juvenile court that he had insufficient evidence to pursue his case. Meanwhile, however, the felony division was going forward with criminal charges. The guardian ad litem linked the two prosecutors, and both cases proceeded successfully.

By virtue of his or her knowledge of the family and actions already taken by the juvenile or family court, the guardian ad litem can continue to monitor or supervise the family throughout the duration of criminal proceedings. This function is particularly critical where protective services agencies suffer from heavy caseloads or high staff turnover, or where they have policies or other conditions restricting their intervention in various ways.

For example, the protective services agency may have obtained an order temporarily placing a child with a relative, and upon determining the placement was safe, would limit the worker’s involvement to monthly contacts with the child or supervising relative. This relaxed level of supervision may not be adequate to learn of threats made by the perpetrator or other family members when criminal proceedings get underway. The Support Center for Child Advocates in Philadelphia frequently files its own petitions for protection orders when the child advocates become aware of children in threatening situations.

An eight-year-old girl was sexually abused by her mother’s boyfriend. Although the child tested positive for gonorrhea, her mother had pressured her to recant, and the child refused to admit the abuse when interviewed by the prosecutor. Consequently, criminal charges were withdrawn.

The appointed guardian ad litem investigated the case and learned that the child was no longer in school and that the mother continued her relationship with the perpetrator. Furthermore, the child protection agency had not offered services to this family and was not monitoring the home. The guardian ad litem urged the child protection agency to file a dependency petition and persuaded the child to reveal the abuse — and her mother’s instructions to recant — on the morning of the dependency hearing.

Gaps in communication may also occur among the several court systems that become involved in resolving the various issues that may arise within a single family. Criminal court judges acknowledge that they rarely know of the actions of their counterparts "on the civil side." In some jurisdictions, criminal prosecutors assiduously avoid learning about parallel civil proceedings for fear of contaminating their cases with inadmissible evidence.⁷ Protective services workers are seldom informed when criminal prosecutions are initiated; some even observe a policy of restricting their activities to civil actions.

Not surprisingly, the absence of communication between the civil and criminal courts sometimes results in conflicting or inefficient actions. The juvenile court may place the child in foster care even as the criminal court has issued a no-contact order requiring the defendant to vacate the home.

The guardian ad litem for a nine-year-old sexual abuse victim had obtained a no-contact order against the stepfather/defendant from the criminal court. At the same time, however, the child protection agency filed a dependency petition to remove the child from the home. At the guardian ad litem's request, this petition was withdrawn, thereby avoiding unnecessary placement and additional court appearances for the child.

Or, an estranged father may successfully petition the family court for visitation rights, effectively nullifying a no-contact order previously issued by the criminal court. Worse, civil abuse and neglect proceedings may be suspended until the criminal case is resolved, in effect relieving the social services agency from its supervisory responsibilities. As a result, the child and family may lack needed services, and the child may be vulnerable to renewed abuse or pressure to recant.⁸

These examples may be extreme. Still, a child who is caught up in this morass of legal processes is understandably confused. Moreover, the proliferation of court activity vastly compounds the number of interviews and court appearances that are required of the child, and delays may also be incremental. The stress engendered by these complications is further magnified when one considers the relative inability of children to cope with it.

The Guardian Ad Litem as a Voice for the Child

There are a number of instances throughout the course of a criminal prosecution in which victims may wish to express their own concerns or preferences.

At least 39 states now require Victim Impact Statements to be submitted to the judge for consideration at sentencing; 30 states provide for victim allocation or other "statement of opinion" at the sentencing hearing. Twenty-one states provide for victim impact statements at parole hearings; 15 states allow parole allocation. Eleven states allow victims some limited participation in plea negotiations.⁹ Adult victims may be expected to assume responsibility for making their opinions known; children, of course, cannot be expected to articulate their positions. Speaking for the best interests of child victims as their cases progress is an important function of a guardian ad litem.

If guardians ad litem are appointed very early in the process, e.g., during case investigation, they may appear at bail hearings to inform the court of the child's circumstances and argue for appropriate conditions of pretrial release. This may be particularly critical in cases where the perpetrator shares the child's household, but there is no operative restraining order from the juvenile or family court. Release conditions may be tailored, for example, to allow the perpetrator to continue working to support the child and family, provided there is no unsupervised contact with the child.

Where pretrial diversion is available, the guardian ad litem's assessment of the child's best interests may be one factor in the prosecutor's decision to offer this option to the perpetrator. In fact, a pretrial diversion program in Sanford, Florida, refuses to accept parents who physically abuse their children without the express approval of the guardian ad litem. Of course, successful pretrial diversion depends heavily on careful supervision of the perpetrator and his relationship to the child and family, and the guardian ad litem is in the ideal position to perform this role.

Guardians ad litem may convey to prosecutors the child's wishes with regard to case outcome, along with their own perception of the preferred outcome.

Despite the 15-year-old victim's desire to prosecute, prosecutors felt the case was too weak to pursue. The victim's sister, herself a victim of the same perpetrator, had recanted; the family was hostile; and the complaining victim was perceived as a poor witness because she had been a runaway. The guardian ad litem arranged a meeting between the victim, two prosecutors, and the Guardian Ad Litem Program Director. As a result, the case was set for trial, and the victim's erratic behavior stabilized in a foster home.

As with most of the advice given to prosecutors by guardians ad litem, this input is typically offered informally. In some jurisdictions, however,

guardians ad litem have gone so far as to participate in plea negotiations between the defense and prosecution.

A victim and her guardian ad litem attended plea negotiations in a case involving an abusive stepfather. At the victim's request, the defendant was required, at the sentencing hearing, to read the information on all eight counts for which he was convicted — in the first person. From the victim's perspective, this action helped the defendant to break down his denial and accept responsibility for the abuse. It also constituted a public acknowledgement of his offenses.

A child had been tied up and raped by her stepfather. Prosecutors were reluctant to take this case to trial, despite the victim's wishes, because they feared traumatizing the child. The guardian ad litem challenged the plea negotiations and convinced the prosecutor to go forward. The defendant was convicted at trial and sentenced to 12 years in prison.

This practice is highly controversial, although defense attorneys are much more critical than prosecutors. The guardian ad litem's vigorous representation of the child's best interests may confound the attorneys' good faith efforts to arrive at an acceptable plea bargain, thereby forcing the case to trial. It is questionable whether such an outcome ultimately serves the child's best interests.

Guardians ad litem may assist child victims in writing impact statements for submission to the court at sentencing, or they may submit their own written or oral statement on behalf of the child. Some judges will ask the guardian ad litem to bring children to their chambers so they can consult with the victims about their desires for sentencing. This input is particularly helpful for child victims of intrafamilial abuse, whose unique situation should be considered. Many of these children harbor ambivalent feelings towards the offenders, and for some a prison sentence would trigger severe guilt reactions. Through the guardian ad litem, the children's interests can be expressed, and perhaps viable sentencing alternatives can be suggested, much as the guardian ad litem recommends appropriate placements in juvenile court.

The prosecutor had recommended a sentence of weekends in jail with work release for a defendant whose family was totally dependent on his income. Shortly before the plea hearing, however, the guardian ad litem learned that the defendant had

been threatening the child and that the mother was no longer supportive. The guardian ad litem recommended nine years in prison; the judge ultimately increased the jail sentence to one full year.

Guardians ad litem have even accompanied child victims to the sentencing hearing, at the child's request. However, discretion is advised in considering whether the child's presence at sentencing will indeed be beneficial. For example, in one instance, the judge imposed a sentence that exceeded even the prosecutor's recommendation, and the child was visibly stricken by the unexpected severity of the sentence. In this case, the guardian ad litem was criticized for bringing the child to the hearing. Although the child had expressed a desire to be there, critics argued that the child's presence exacerbated the trauma for everyone involved—especially the child.

Finally, guardians ad litem may represent child victims' best interests at parole or probation revocation hearings. Releasing a convicted molester after a period of incarceration, or conversely, imprisoning an offender who has violated the terms of probation, may have serious implications for the child's welfare. It may be in the child's best interests to impose certain conditions on parole, such as no contact with the child and family or enrollment in a counseling program.

A 13-year-old girl was sexually abused by her stepfather. The stepfather was tried and received a five-year sentence. Two years later, the guardian ad litem learned that the stepfather was being considered for parole. The guardian ad litem relayed this information to the victim and helped her write a victim impact statement, which was submitted to the parole board.

In the case of probation revocation, it may be in the child's best interests to impose a work-release condition so the offender can continue to support the child and family or to finance therapy for the child. If noticed when these hearings are scheduled, the guardian ad litem can submit reports updating the child's condition and circumstances for consideration when setting the terms of parole or imposing penalties for probation violations.

The Guardian Ad Litem as Advocate for the Child's Legal Rights

Among the more popular defense strategies in child abuse cases is attacking the child's credibility and competency to testify. To do this, defense attorneys often seek access to the child's medical and school records to find

evidence of propensity for lying, poor intellectual capacity, learning disabilities, disciplinary problems, and referrals for psychotherapy or other types of counseling. Prosecutors, too, may seek these records to satisfy their own misgivings or to forestall the anticipated defense strategies. To preserve these records from outside scrutiny, guardians ad litem may file pretrial motions for protective orders, citing the child's right to privacy; alternatively, they may review the records themselves or with the court to resolve competing interests.

Local media wanted to film a sex abuse trial involving a 15-year-old female victim. The guardian ad litem joined the state in a motion of resistance to protect the victim's privacy interests. Another guardian ad litem resisted defense efforts to introduce evidence of previous assault complaints that were brought by the same victim against other alleged perpetrators.

The role of a guardian ad litem at trial is somewhat more problematic. Libai¹⁰ recommends that someone like the Israeli "youth interrogator" be available at trial to help the judge cope with unexpected developments in the child's behavior. Likewise, Parker¹¹ suggests an active trial role for the "Child Hearing Officer," to include raising objections to unfair or unduly harsh questioning or offering to rephrase questions as needed. Several prestigious organizations and task forces¹² have recommended provision of a support person in the courtroom for child victims when they testify, and indeed, a number of states have adopted legislation in this regard. Typically, these statutes and recommendations envision the support person's role to be passive; he or she is merely a "friendly face" in the courtroom audience.

Iowa's statute providing for appointment of a guardian ad litem in criminal cases expressly prohibits the guardian ad litem from introducing evidence at trial and examining and cross-examining witnesses. Recall, however, that the Oklahoma statute clearly permits the appointed attorney ad litem to undertake these same practices. Interestingly, Florida's legislation suggests that guardians ad litem are *parties* to the criminal litigation, as they are in civil abuse and neglect proceedings. (See the Appendix for the precise language in these laws.)

Theoretically, then, a guardian ad litem in Oklahoma or Florida, for example, might undertake such actions as:

- explaining the criminal justice system to the child;
- investigating the merits of the criminal case;
- subpoenaing and questioning witnesses;

- introducing documentary evidence;
- objecting to evidence, either to protect the child or to otherwise influence the outcome of the case;
- pursuing discovery of evidence from the state and the defendant;
- submitting motions for protective orders during the discovery phase to avoid harm to the child;
- making opening statements and arguments to the judge or jury at trial;
- challenging the prosecutor's decision to dismiss the case or to reach a plea bargain;
- presenting information and arguments at sentencing;
- seeking special treatment services for the child; and
- presenting information and arguments at parole hearings.¹³

"In other words," according to Hardin, "a guardian ad litem for a child in a criminal case might exercise powers comparable to those of either the state's or the defendant's attorney."¹⁴

In practice, it is extremely rare to see a guardian ad litem or child advocate assume an active role at trial, although a few instances have been documented. Twenty years ago, in a handful of East Coast communities, advocates from the local Society for the Prevention of Cruelty to Children would appear in court as *amicus curiae*, to oppose unwarranted defense motions for continuances, to argue for having the case heard in camera or for excluding the general public from the courtroom, or to urge the prosecutor to accept a guilty plea.¹⁵ More recently, guardians ad litem have intervened to assert a child witness's right to invoke the testimonial privilege afforded by the state's rape shield law,¹⁶ or the Fifth Amendment privilege against self-incrimination.¹⁷ In at least one case in Oklahoma, the court-appointed attorney for the child was permitted to question witnesses, object to testimony, and make closing arguments.¹⁸ Finally, under Florida statute, a guardian ad litem might serve as an "interpreter" for a child witness. [Fla. Stat. 90.606 (1985).]

A private attorney is representing the interests of children who will testify at the McMartin preschool trial in Los Angeles. Among his various pretrial activities on behalf of the children were opposing subpoenas for the children's school and psychotherapy records and resisting attempts to force the children to undergo additional physical examinations. He describes his role as follows:

My role will vary from child to child. Some parents may not want their child to testify at all, and some may want closed circuit testimony. Others may want to protect the psychotherapist-patient privilege. And still others may want me to be in court when the child testifies to make certain that their child obtains all of the legal protections that CLOUT (Children's Legislative Organization United by Trauma) and other groups have sponsored successfully in the Legislature.¹⁹

In the vast majority of cases, however, guardians ad litem limit their role at trial to sitting in the audience during the child's testimony.

* * * *

The potential role for a guardian ad litem in criminal prosecutions is quite diverse. An examination of these various functions raises several important questions. First, is the full range of advocacy functions permissible in a criminal case? Second, is it realistic to expect a single individual to perform all these functions equally well? And third, does every child victim actually require all the services described in this chapter?

There are, as yet, no definitive answers to any of these questions. Experience with guardians ad litem in criminal cases is limited, and case law is negligible. In subsequent chapters of this report, we consider what can be learned from the research and experience that are currently available.

Endnotes

1. Barton E. Bernstein, et al., "The Child Witness: A Model for Evaluation and Trial Preparation," *Child Welfare*, Vol. LXI (February 1982): 95-104.
2. Kee MacFarlane, "Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases*, ed. Josephine Bulkley (Washington, D.C.: National Legal Resource Center for Child Advocacy and Protection, 1985), pp. 119-144.
3. David Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," *Wayne Law Review*, Vol. 15 (1969): 995-1001.
4. Jacqueline Y. Parker, "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" *New England Law Review*, Vol. 17 (1982): 664-673.
5. Robert S. Pynoos and Spencer Eth, "The Child As Witness to Homicide," *Journal of Social Issues*, Vol. 40 (1984): 103. See also Desmond K. Runyan, et al., "Impact of Legal Intervention on Sexually Abused Children," paper presented to the Third National Family Violence Research Conference, Durham, New Hampshire, July 1987.
6. U.S. Department of Justice, Attorney General's Task Force on Family Violence, *Final Report*, September 1984, p. 38.
7. U.S. Department of Justice, National Institute of Justice, *When the Victim Is a Child: Issues for Judges and Prosecutors*, by Debra Whitcomb, Elizabeth R. Shapiro, and Lindsey D. Stellwagen (Washington, D.C.: Government Printing Office, 1985), p. 104.
8. Naomi Post, "Criminal and Civil Court Coordination," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases*, ed. Josephine Bulkley (Washington, D.C.: National Legal Resource Center for Child Advocacy and Protection, 1985), pp. 81-92.
9. National Organization for Victim Assistance, *Victims Rights and Services: A Legislative Directory* (Washington, D.C.: NOVA, 1985), pp. 10-14.
10. Libai, "The Protection of the Child Victim," supra, note 3.
11. Parker, "The Rights of Child Witnesses," supra, note 4.

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12. See, for example, "Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged," approved by the American Bar Association, July 1985; *Recommendations for the U.S. Attorney General's Advisory Board on Missing Children*, March 1986, p. 23; and U.S. Department of Justice, National Institute of Justice, *Statement of Recommended Judicial Practices*, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime (Rockville, M.D.: National Criminal Justice Reference Service, 1983), p. 12.
 13. Mark Hardin, "Guardians Ad Litem for Child Victims in Criminal Proceedings," *Journal of Family Law*, Vol. 25 (1987).
 14. Ibid.
 15. Vincent De Francis, *Protecting the Child Victim of Sex Crime*, 1965, p. 11.
 16. See, for example, *State v. Walsh*, 495 A.2d 1256 (N.H. 1985).
 17. Hardin, "Guardians Ad Litem," supra, note 13, citing *State v. Lawson*, 367 So.2d 295 (La. 1979); *State v. Bell*, 298 A.2d 753 (1972); *State v. Pinch*, 197 N.E.2d 235 (Ohio App. 1962); *People v. Cooper*, 73 Cal. Rptr. 608 (Cal. App. 1968).
 18. Personal conversation with Denny Johnson, Esq., Tulsa County (Oklahoma) Public Defender's Office, December 19, 1986.
 19. Kathleen Dixon, "Attorney Selected by CLOUT to Represent McMartin Child Witnesses," *News of CLOUT*, July 1987, quoting Gregory Mooney. CLOUT—Children's Legislative Organization United by Trauma — is a special project of the South Bay Center for Counseling in the Los Angeles area.

Chapter 3

Legal Issues Surrounding the Use of a Guardian Ad Litem in Criminal Court

As the activities of the guardian ad litem begin to encroach upon traditional procedures of adversarial justice, the more likely it is that legal challenges will arise. Although there is little on this issue in the legal literature to date, in this section we discuss four possible points of attack:

1. Does the guardian ad litem have legal standing?
2. To what extent does the guardian ad litem function as a "private prosecutor"?
3. Does the presence of a guardian ad litem violate the defendant's right to a fair trial?
4. Does the guardian ad litem enjoy privileged communications with the child?

Does the Guardian Ad Litem Have Legal Standing?

Many defense attorneys and judges question the role of the guardian ad litem in criminal cases on grounds that the guardian ad litem lacks legal standing. Even in Florida, where the law appears to make the guardian ad litem a party to the case, they claim that American jurisprudence does not allow for a third "party" to an adversarial proceeding, and therefore the guardian ad litem lacks standing to intervene directly.

In his analysis of this question, Hardin¹ reviews the United States Supreme Court case of *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), in which the Court stated that:

This Court in its prior holdings has consistently held that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. [Citations omitted.] Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. 410 U.S. at 619.

This language appears to preclude private citizens (who are not themselves criminal suspects or defendants) from participating in criminal prosecutions in any way that deviates from the policy of the public prosecutor. Since a guardian ad litem may well take a position that conflicts with that of the prosecutor on various issues that are pertinent to the case, it seems that standing would be denied.

But Hardin distinguishes *Linda R.S.* from the situation in which a guardian ad litem is appointed for a child victim in two ways:

- First, Hardin contends that the Court may have meant only that state law generally does not permit citizens to have interests in the prosecution of others. If so, this principle could be modified by statute, so that a statute authorizing the appointment of a guardian ad litem would not be subject to challenge under *Linda R.S.*

- Second, Hardin points out that the *Linda R.S.* case involved a suit to compel the public prosecutor to initiate a prosecution, and cites an earlier case (*Younger v. Harris*, 401 U.S. 37 [1971]) in which the Court held that private citizens could not bring suit to enjoin prosecution where there had been no threats of prosecution, arrest, or indictment. According to Hardin, *Linda R.S.* and *Younger v. Harris* involve the doctrine of *standing to sue*, which governs whether or not an individual may initiate a lawsuit. It does not apply to ongoing cases where a guardian ad litem is appointed:

The standing requirement must be met for there to be a "Case or Controversy," as required under Article III of the Constitution. But where a criminal prosecution is ongoing, the existence of a "Case or Controversy" is not in question.²

To date, there are no published cases directly on point to help elucidate this question. As guardians ad litem become more assertive in their representation, however, we can expect to see legal challenges, and eventually the issue should be resolved.

To What Extent Does the Guardian Ad Litem Function as a "Private Prosecutor"?

Perhaps the most potent challenge to the guardian ad litem lies in the perception of the role as that of a second prosecutor.

Every state assigns to a public prosecutor the responsibility of prosecuting all crimes falling within the prosecutor's substantive and geographic jurisdiction. At the same time, most states also permit victims to employ private attorneys to assist in the prosecution of their cases, *provided* that the private attorney is approved by the prosecutor (and usually the judge) and works under the direction of the public prosecutor.

There are two ways in which the actions of a guardian ad litem can be thwarted under these statutes. First, by definition the guardian ad litem is an independent entity and cannot be controlled by either the state or the defense. The very fact that a guardian ad litem has been appointed may, in itself, violate a statute's requirement that private attorneys act under the prosecutor's direction.

Secondly, by vigorously representing the child's best interests, the guardian ad litem may actually interfere with the prosecution of the case. It is true, for example, that guardians ad litem have attempted to free child victims from the burden of testifying; if successful, such actions might compel dismissal of the case. Similarly, a guardian ad litem's zealous protection of a child's privacy might block access to critical information that the prosecution needs to bolster its case. In one case, for example, a guardian ad litem successfully objected to the prosecutor's attempt to "wire" the child in order to get a confession from the father. In such instances, the prosecutor could conceivably ask the court to remove the guardian ad litem, on grounds of interference with the prosecutor's statutory mandate to retain control over the prosecution.

Where guardians ad litem refrain from direct intervention in the conduct of the case — e.g., by working with the prosecutor to reach decisions that are mutually acceptable rather than approaching the court directly with requests that may diverge from the prosecutor's plans — this challenge to the guardian ad litem's role may be averted. However, restricting their activities in this way could seriously undermine the guardian ad litem's effectiveness as a vociferous child advocate.

To temper this tension between the child victim's need for independent representation and the principle of absolute prosecutorial control, guardians ad litem and prosecutors should be encouraged to communicate freely and to remain open to each other's positions. Moreover, children can sense distrust

and hostility among their elders, so that overt disagreements should be avoided simply to spare the child from again being caught between opposing factions.

Does a Guardian Ad Litem Threaten the Defendant's Right to a Fair Trial?

It may be argued that, as the child's representative, a guardian ad litem may have special credence with the jury and therefore bias the proceedings against the defendant. Whether a guardian ad litem does, indeed, threaten a defendant's right to a fair trial appears to depend on what the guardian ad litem actually does.

In one case, *State v. Walsh*, defense counsel argued that the mere presence of a guardian ad litem impermissibly bolstered the child witness's credibility. In fact, during the trial, the appointed guardian ad litem sat at the prosecution table and spoke seven words in the presence of the jury: "Thank you. May we approach the bench?" This occurred in response to the child's request for a recess in order to consult with the guardian ad litem. Upon appeal, the New Hampshire Supreme Court found no error,

given the young age of the victim, her stake in obtaining the full protection available to her under the rape shield statute, and the limited involvement of the guardian ad litem in this case. 495 A.2d 1256 (N.H. 1985)

The implication, of course, is that other, more intrusive actions of a guardian ad litem during trial might not be viewed so favorably.

In addition, one might argue that having a guardian ad litem *plus* a prosecutor stacks the case unfairly against the defendant. As noted above, however, the interventions of a truly independent guardian ad litem are often equally beneficial (or detrimental) to both prosecution and defense. Unless the guardian ad litem behaves at trial in such a way as to become, effectively, a "second" prosecutor, it is unlikely that the defendant's fair trial guarantees are threatened.

Finally, Hardin suggests that a guardian ad litem might prejudice a defendant's rights by selectively funneling information to the prosecutor and then unfairly blocking discovery of information that should be available to the defendant.³ To avoid this situation, guardians ad litem should be bound by the same discovery rules that apply to the prosecutor, especially with regard to exculpatory information. (See the following section.)

Does the Guardian Ad Litem Enjoy Privileged Communications with the Child?

Defense attorneys sometimes feel perplexed by guardians ad litem and victim advocates because they do not know the nature of the communication between these individuals and the child witnesses they represent. Defense attorneys suspect that guardians ad litem and advocates are, whether intentionally or inadvertently, "coaching" the child to respond to questions in a way that benefits the prosecution. To satisfy their doubts (and sometimes to obtain a court order sequestering the guardian ad litem from the courtroom during the child's testimony), they may call guardians ad litem as witnesses to testify as to the nature of their conversations with child victims.

Volunteer guardians ad litem and victim witness advocates presumably do not enjoy privileged communications with child victims, although a few states have created a special privilege for rape victim counselors. Lay advocates and guardians ad litem generally believe, however, that their communications with child witnesses should be privileged, to encourage greater candor and trust: the better their understanding of the child, the more effectively they can advocate for the child's best interests.

Where the guardian ad litem is an attorney, the question of privilege becomes more complicated. The difficulty lies in the nature of the attorney/guardian ad litem's role vis a vis the child. Does this individual represent the child (the traditional role of counsel), or does he or she represent the child's best interests (the role of guardian ad litem)? Arguably, where the attorney is acting solely in a guardian ad litem capacity, then there is no attorney-client relationship, and therefore, no privilege. Conversely, where the attorney/guardian ad litem acts at the direction of the child, then there is an attorney-client relationship, and communications would be protected accordingly. In practice, many guardians ad litem attempt to wear both hats: they convey to the courts the child's wishes as well as their own recommendations.

For purposes of discussion, however, even if communication between a guardian ad litem and a child victim were privileged, there are situations in which the privilege may be waived.⁴ For example, the guardian ad litem may share information with the prosecutor, or the prosecutor may have sat in on one or more meetings between the guardian ad litem and the child. In either instance, the defense may be able to compel the guardian ad litem to testify to any or all of the contents of conversations with the child because those contents had been made known to a third party (the prosecutor).

Parker⁵ attempts to construct a special privilege for her proposed Child Hearing Officer by asserting that

. . . disclosure of some of the confidential communications between the child and the CHO does not result in waiver of the privilege for all communications on the same subject. The CHO may choose to disclose to the prosecutor any information necessary to conduct the investigation or prosecution of the case.

It seems unlikely, however, that the courts would permit such a radical departure from standard discovery practices. In fact, where the guardian ad litem acts so closely in concert with the prosecution, as Parker proposes, the defense could argue that the guardian ad litem is practicing as a "private prosecutor" and therefore must disclose exculpatory information (and any other evidence as required under local discovery rules). Presumably, the guardian ad litem would then be subject to the same discovery rules as the public prosecutor.⁶

Finally, even if a privilege exists, confidential communication may still be discoverable where the defendant's constitutional rights to confrontation and compulsory process outweigh the statutory privilege.⁷ Of particular interest here is *In Matter of Pittsburgh Action Against Rape*, 428 A.2d 126 (Pa. 1981), in which counsel for the accused sought to inspect a rape crisis center file in order to impeach the credibility of the complainant. The court rejected the rape center's assertion of the claim of absolute privilege on the grounds that it would be unfair to erect a privilege that would deny the accused an opportunity at least to ascertain what the complainant previously said. (428 A.2d at 132) Seemingly, a similar argument would apply in many child sexual abuse cases, in which it is not uncommon for victims to recant their stories at some point during the adjudication process.

Whether the attorney-client privilege does, indeed, apply to an attorney acting as guardian ad litem is a subject for additional legal research. Until the question is resolved, guardians ad litem — whether lay volunteers or attorneys — should be prepared to testify about their communications with child victims. Some volunteer programs address this issue by instructing their guardians ad litem to avoid discussing the facts of the case with the children as much as possible, although many children feel comfortable discussing the case only with a trusted figure — their guardian ad litem. Also, where the guardian ad litem's role includes conducting an independent investigation of the charges, he or she will be privy to a wealth of information. At a minimum, all guardian ad litem programs should develop their own policies regarding communications with child victims and incorporate preparation for this line of questioning in their training programs.

* * * *

The above analysis of legal issues suggests that the role of the guardian ad litem in criminal cases should be limited in certain ways. For example,

active intervention by the guardian ad litem, especially at trial, may generate legal complications. Where the position of the guardian ad litem diverges from that of the prosecutor, charges of private prosecution may be fueled. Prosecutors and guardians ad litem should make every effort to reach mutually agreeable solutions, not only to avert legal challenges to the guardian ad litem's role, but also to avoid further traumatizing the child victims, who may feel just as trapped between their guardian ad litem and the prosecutor as they are within their families.

It nevertheless remains critical for guardians ad litem to adhere closely to their mandate of independence. In extreme situations where the guardian ad litem and prosecutor cannot agree, the guardian ad litem should be able to approach the court directly for resolution. Wherever possible, this should occur prior to the trial. During the trial, guardians ad litem should limit their involvement to providing support for the child and raising objections to the manner of questioning or threats to the child's legal rights.

Endnotes

1. I am indebted to Mark Hardin, Esq., Assistant Director of the National Legal Resource Center for Child Advocacy and Protection, American Bar Association, for many of the ideas and arguments presented in this chapter. See Mark Hardin, "Guardians Ad Litem for Child Victims in Criminal Proceedings," *Journal of Family Law*, Vol. 25 (1987).
2. Ibid.
3. Ibid.
4. David A. Garfunkel and Mark L. Sisti, "The Role of Guardians Ad Litem and Victim Witness Advocates in Criminal Cases," Presentation for the National Legal Aid and Defender Association 64th Annual Conference, Atlanta, Georgia, October 24, 1986, p. 3.
5. Jacqueline Y. Parker, "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" *New England Law Review*, Vol. 17 (1982): 667.
6. Garfunkel and Sisti, "The Role of Guardians Ad Litem," supra, note 4, at p. 9.
7. Ibid., at p. 4.

Chapter 4

Assessing the Need for a Guardian Ad Litem Program

Provision of a guardian ad litem for child victims in criminal proceedings is a concept still in its infancy. Despite more than ten years of experience with independent representation for children in the context of juvenile or family court, only recently has the criminal justice system begun to consider a parallel need for these same children.

Of 18 prosecuting attorneys who were interviewed by telephone in the preliminary research for this report¹, eleven perceived no pressing need for a firm policy on guardian ad litem programs in criminal court. Most implied that victim/witness assistants or individuals from child protection agencies and child advocacy groups were already responsible for providing the necessary assistance to children.

The other seven prosecutors, however, sincerely desired to promote the use of guardians ad litem in criminal proceedings. These individuals felt that, despite the work of prosecutors and other personnel to help child victims through the criminal process, children generally did not receive the degree of attention or assistance they needed. They observed that existing staff simply could not allocate sufficient time towards introducing children to the court process or making them feel at ease about testifying.

In this chapter we attempt to guide the reader through several critical steps that should help to inform a decision to initiate a guardian ad litem program for criminal cases.

Research Legislative and Judicial Authority

As was indicated in Chapter 1, federal and state laws pertaining to guardians ad litem are generally ambiguous about their role in criminal cases. There are also very few published appellate decisions that are directly on point. Before embarking on a program to appoint guardians ad litem in criminal proceedings, local planners would be wise to analyze their state statutes and case law in this area. It may be necessary to introduce new legislation or to draft an appropriate court rule to ensure that guardians ad litem will have the authority they need.

Survey the Scope, Depth, and Quality of Existing Services for Child Victims

Aside from the interpretation of federal and state statutes calling for independent representation for child abuse victims, it is probably inappropriate to suggest that every community should provide a guardian ad litem for every child victim who serves as a witness in a criminal prosecution. Rather, planners should evaluate the strengths and weaknesses of existing support and ancillary services available to child victims of physical and sexual abuse in their own communities. By analyzing the functions of existing agencies in advance, planners may be able to avoid duplicating services and creating "turf" conflicts when designing a guardian ad litem program.

Many communities already have in place an array of services that are available to child victims, including (but not limited to):

- specialized child abuse prosecution units;
- specialized child abuse law enforcement units;
- protective services;
- victim assistance programs;
- rape crisis programs;
- legal aid;
- medical facilities; and
- counseling and mental health providers.

Readers may have observed, quite correctly, that many of the activities described in this report fall within the domain of existing agencies, particularly the protective services agency or rape crisis program. This assertion is true, to varying extents, in some communities. Indeed, in some jurisdictions, guardians ad litem have been specifically warned not to intrude on the social workers' and victim assistants' roles. The fact is, however, that these agencies often have legal or practical limitations on their activities.

Protective services agencies, for example, are typically limited in several ways. One limitation pertains to their legal mandate, which is usually to reunite families. This goal often conflicts with the goal of prosecution — to convict offenders — and may well conflict with the individual needs of the child victim. Indeed, it was this perceived conflict between the mission of protective services agencies and the best interests of the child that prompted the U.S. Congress to include its provision of guardian ad litem appointments in Public Law 93-247.

A second constraint on protective services agencies is their position within a large bureaucracy. Particularly in heavily populated communities, protective services agencies are strapped by escalating caseloads and shrinking budgets, burned out caseworkers and close public scrutiny. Some agencies have made policy decisions to restrict their activities in various ways in order to focus limited resources on the most urgent problems. Child advocacy in criminal prosecutions, though generally recognized as a valid role for a child protection worker, usually falls well beyond the scope of emergency abuse investigations and protective services.

Victim assistance programs are likewise limited, albeit for different reasons and in different ways. In theory, the activities of these organizations may, indeed, be quite broad. They may include, for example:

- making referrals to services and treatment resources in the community;
- familiarizing victims with the criminal justice process;
- ensuring victim participation in every stage of the court proceeding;
- helping victims to deal with harassment or intimidation and to prevent further victimization;
- facilitating convenient court dates;
- arranging transportation to court proceedings;
- ensuring that victims have a secure place to wait before testifying; and
- interceding with witnesses' employers or creditors.²

It is important to recall, however, that many victim assistance programs operate under the auspices of prosecutors' offices. Where prosecutors respect the opinions of the victim assistant about a child's capabilities or need for alternative approaches, this arrangement may be satisfactory. If, however, prosecutors elect to pursue a course that the victim assistant perceives as detrimental to the child, there is no recourse. Victim assistants cannot go

directly to the court to challenge the prosecutors' actions. Victim assistants also would have little knowledge of any civil proceedings that may occur prior to, or concurrent with, the criminal case.

Quite apart from the prescribed roles of existing agencies with regard to child victims is the quality of their services. Are some agencies seriously constrained by unreasonable caseloads, manpower shortages, or rapid staff turnover? Do agency staff have insufficient training, experience, and resources to perform their jobs effectively?

In large jurisdictions, for example, it is not uncommon to see specialized child abuse units within the protective services agency, major law enforcement agencies, and the prosecutor's office. Such units typically offer an enhanced degree of training and resources for investigating and pursuing reports of child abuse. In smaller communities, however, reported cases may be so few that front-line personnel lack sufficient experience to recognize problems that may affect child victims. Regardless of the size of the jurisdiction, where such conditions prevail, child victims might be shortchanged.

Planners should review the written policies and regulations of the major agencies offering assistance to child victims and interview key agency personnel to clarify their actual practices. These reviews should reveal any gaps in services caused by either restrictive policies or organizational limitations. A guardian ad litem program could then be fashioned to fill those gaps and to advocate for needed improvements.

Track Cases Through the Child Protection and Criminal Justice Systems

Since the plight of child sexual abuse victims became known, legislatures, the courts, and practitioners have experimented with a wide variety of innovations, all intended to ease child victims' trauma and strengthen their testimony as witnesses. All too often, however, these supports are offered in isolation — there is no "big picture" of the child's experience throughout the investigation and adjudication process. Consequently, in many communities, child victims continue to be prodded and probed by a succession of professionals (who certainly mean no harm) in their efforts to assess the children's competency and credibility. Each of the many agencies and court systems that become involved in intrafamilial cases, in particular, maintains its own perspective on these cases and how they should be handled. The bottom line is that the child victim is often caught between divergent factions — and this is above and beyond any struggles that may be going on within the family.

When tracking selected cases through the child protection and criminal justice systems, planners should attempt to document the number of interviews and court appearances required of the child. Some may be redundant or unnecessary, and a guardian ad litem who oversees the entire process could help to streamline it, for example, by coordinating joint interviews or arguing against unwarranted continuances.

Planners should also look for protocols to guide cross-reporting among agencies or provisions for joint case review. In an attempt to bridge the information gaps among agencies, communities of all sizes have been striving to develop multidisciplinary teams that meet regularly to "staff" cases and determine the most appropriate interventions for each child coming to their attention. Examples include the Children's Advocacy Center in Huntsville, Alabama, and the Sexual Abuse Intervention Network in Springfield, Massachusetts.³ Presumably, with a well-integrated and coordinated approach and plenty of emotional support, most children would be capable of enduring the anxiety and stress of a criminal prosecution. But such a well-coordinated approach is by far the exception, and not the rule. In many jurisdictions, then, an independent guardian ad litem may be the most logical ombudsman of the conflicts, misunderstandings, and information gaps that characterize any "system" comprising separate, yet interdependent parts.

One interesting approach to the problem of coordinating the actions of the criminal and juvenile justice systems is a program in Weber County (Ogden), Utah. Weber County maintains two volunteer programs: a guardian ad litem program for children in juvenile abuse and neglect proceedings, and a victim/witness program for criminal cases. Since 1983, a special group of volunteer guardians ad litem has been trained to serve as victim/witness volunteers in criminal court. These individuals are called Court Advocates for Abused Children. When a prosecutor decides to file charges in an intrafamily sexual abuse case, the victim/witness-guardian ad litem liaison (a court employee) is contacted, and a Court Advocate is assigned. This same volunteer is appointed guardian ad litem when a juvenile court petition is filed.⁴

In most jurisdictions, the guardian ad litem is in a unique position. There is no other actor in the system with the potential to observe actions in both civil and criminal courts and to advise the courts of pertinent actions taken by their counterparts. Moreover, where civil proceedings precede the criminal case, the guardian ad litem has already nurtured a relationship with the child. In fact, by the time the case reaches prosecution, the child may view a victim assistant as "one more stranger" and resist overtures to develop rapport.

Specify Appropriate Roles for the Guardian Ad Litem

Once the need for a guardian ad litem in criminal proceedings has been established, planners should turn to the difficult task of delineating appropriate roles. While guardians ad litem and CASAs are familiar and accepted “players” in civil abuse and neglect proceedings, this is not the case on the criminal side, even where statute provides for their appointment. One program director cautioned that, out of necessity, the program had adopted a form of “maverick justice,” stepping beyond functions normally relegated to guardians ad litem and CASAs. This absence of a well-defined role tends to intimidate volunteers, especially; only the most assertive attorneys would attempt to intervene in a criminal case without formal recognition by the court.

Before instituting a guardian ad litem program for criminal proceedings, then, the boundaries of the guardian ad litem’s role should be specified either legislatively (if the appointment of guardians ad litem in criminal cases is statutorily authorized) or by court order when making the appointment. Planners should be as specific as possible when documenting the parameters of the guardian ad litem’s role, especially when legal advocacy is considered. For example, can the guardian ad litem:

- accompany the child to depositions and all court appearances?
- argue on behalf of the child at plea negotiations or sentencing?
- file motions seeking protective orders or alternative methods of obtaining the child’s testimony? or
- introduce evidence, examine and cross-examine witnesses at trial?

These may be difficult questions, but they should be addressed before any appointments are made.

Table 4.1 offers some guidance in defining an appropriate role for guardians ad litem in criminal cases. For each of the five potential roles outlined in Chapter 2, the table suggests several factors indicating a need for someone to fill that role. Many of the factors are structural, i.e., they have to do with aspects of the local system and the way child abuse cases are managed. Other factors, however, are individual, unique to each child. Using these indicators, a program could be designed to provide representation only for children in certain categories — e.g., those involved in both dependency and criminal court proceedings — or only for children in unique situations — e.g., those whose cases are going to trial — or, indeed, for all child victims.

Table 4.1
How To Identify Appropriate Roles For A Guardian Ad Litem
In Criminal Proceedings

<u>Potential Role</u>	<u>Indicators of Need</u>
Counselor and Interpreter	<ul style="list-style-type: none"> • There is no victim assistance program • Existing victim assistance programs and/or child protection workers lack authority, time, or knowledge to support child victims throughout the entire civil and criminal adjudication processes • A victim's parents are nonsupportive, hostile, or unable to represent the child's best interests
Protector Against System-Related Trauma	<ul style="list-style-type: none"> • Any of the above is true • There is no existing multidisciplinary team with a case review function • The existing multidisciplinary team is ineffective • Prosecutors and/or the judiciary are uneducated about concerns relating to child victims • Defense counsel are particularly aggressive
Linchpin Connecting Multiple Agencies	<ul style="list-style-type: none"> • Any of the above is true • The case involves concurrent dependency, divorce, and/or custody proceedings
Voice for the Child	<ul style="list-style-type: none"> • Any of the above is true • The child is sufficiently articulate to appraise the situation and the available options
Legal Advocate	<ul style="list-style-type: none"> • Any of the above is true • The child's privacy rights are threatened • The child's testimonial privileges are threatened • Legal actions are initiated against the child

Explicitly outlining the scope of the guardian ad litem's activities has several advantages. It will help the guardians ad litem avoid turf conflicts with existing agencies that provide support services to child victims. It will also invest them with the authority they need to perform their role most effectively. Perhaps most importantly, by tailoring the guardian ad litem's role to fit within the apparent constraints of local law or custom, the courts should be able to forestall legal challenges to the guardian ad litem's interventions.

* * * *

Ideally, there would be no need for guardians ad litem to represent the best interests of child victims. Every community would have devised a consistent, empathetic system for resolving crimes against children (and especially those involving perpetrators within the family) in a way that satisfies both society's need to sanction offenders and the children's need to mature in a loving, nurturing environment. But such communities are rare indeed. The more common approach to these cases is fragmented. At best, there are occasional lapses in communication among agencies; at worst, there is outright hostility. When "systems" go awry, no one suffers more than the child victims.

In conducting the kind of needs assessment outlined in this chapter, local planners may identify some problems that are easily remedied and others that are less tractable. Wherever possible, problems should be ameliorated without designing new programs to further complicate matters. However, the appointment of guardians ad litem is not "new" to most jurisdictions in the context of civil abuse and neglect proceedings. Until the child-serving community can achieve a unified and effective approach to criminal cases involving child victims, it is only logical to extend this unique service for children into the criminal courts.

Endnotes

1. "Independent Representation for Child Victims in the Criminal Justice System: Report of a Telephone Survey," unpublished report, Abt Associates Inc., Cambridge, Massachusetts, April 1986.
2. U.S. Department of Justice, Attorney General's Task Force on Family Violence, *Final Report*, September 1984, p. 29.
3. For more information, contact Ms. Lisa Harris, Program Coordinator, National Children's Advocacy Center, 106 Lincoln Street, Huntsville, Alabama, 35801; Dr. Edward Bailey, Wesson Memorial Unit, Bay State Medical Center, 140 High Street, Springfield, Massachusetts 01105. See also, *Investigation and Prosecution of Child Abuse*, Patricia A. Toth and Michael P. Whalen, ed. (Alexandria, V.A.: National Center for the Prosecution of Child Abuse, 1987), Chapter 7 and Appendix B.
4. For more information, contact the Weber County Child Sexual Abuse Task Force, 385-24th Street, P.O. Box 349, Ogden, Utah, 84402.

Chapter 5

Considerations for Starting a Guardian Ad Litem Program

Once the need to appoint guardians ad litem in criminal cases has been established and appropriate roles have been defined, planners can begin to consider the structure and logistics of a guardian ad litem program. Some of these questions may already be answered where there is a guardian ad litem program operating for civil abuse and neglect cases. Decisionmakers may find it simplest merely to adopt the existing model, rather than create a new one, especially if one goal is to coordinate the proceedings and resulting actions of the criminal and civil systems. Nevertheless, readers should evaluate the pros and cons of each option, as presented below, and develop measures to strengthen the existing program.

In this chapter we discuss four general issues surrounding the development of a guardian ad litem program for criminal cases: (1) organizational placement, (2) staffing configurations, (3) procedures for appointment, and (4) potential funding sources.

Identify Organizational Placement

Perhaps the most striking organizational feature of a guardian ad litem program is its need for total independence. To be effective, child advocates must be able to "fight city hall." They must be able to sue the social services department, for example, if services to a child are inadequate, or to file motions directly with the court to protect a child from systemic sources of trauma.

Bross and Munson¹ have identified three additional elements to consider when selecting an organizational structure for a guardian ad litem program:

accountability, funding, and access to specialized resources. Our research identified several models for providing guardian ad litem services for child victims in criminal cases. Each has its strengths and weaknesses, as discussed below.

The Private Nonprofit Agency

The Youth Law Center in Des Moines is a nonprofit, tax-exempt private corporation providing legal services exclusively to young people under the age of 18. The Center is supported by the United Way of Greater Des Moines, Polk County, private foundations and private contributions. Services provided by the Youth Law Center include:

- legal representation, in juvenile court proceedings (abuse and neglect, delinquency, Children in Need of Assistance), probation revocation matters, school disciplinary hearings and, of course, criminal proceedings in which the child is a victim/witness;
- advice and information about the laws affecting young people;
- community education for school and community groups; and
- juvenile employment training, through a special project with the Des Moines Junior League.

The Support Center for Child Advocates in Philadelphia is also a private nonprofit corporation. Launched in 1971 under the sponsorship of the Young Lawyers Section of the Philadelphia Bar Association, the Support Center is dedicated to providing essential legal and social services to abused and neglected children. Traditionally, the Support Center has been most active in representing children in the following arenas:²

- abuse and dependency proceedings;
- foster care;
- custody;
- mental health cases;
- status offenders;
- termination of parental rights and adoption;
- special education advocacy.

The Support Center for Child Advocates is essentially a volunteer program. Its small staff (executive director/attorney, secretary, and four social workers) are supported by private contributions and foundations. In October 1984, the Support Center received a one-year grant from the National

Center on Child Abuse and Neglect to extend its traditional juvenile court advocacy services to child sexual abuse victims in criminal courts. That grant expired in December 1985, and since then the Center has accelerated its fundraising efforts to enable the program to continue representing child victims in criminal cases.

These two agencies exemplify both the bright and dark sides of their status as private nonprofit organizations. They enjoy considerable independence, although the Youth Law Center is partially funded by Polk County and may be somewhat limited in actions it might take against county agencies. Despite the constant search for funds, the Executive Director of the Support Center for Child Advocates declined an offer of support from the Department of Social Services because of the potential for conflict of interest, for example, when DSS and the Support Center disagree over the appropriate interventions for a child.

Accountability is fairly well assured by the fact that these organizations are competitive with other agencies that also provide guardian ad litem services to the local courts. Since both centers do their own hiring, they can assure that their staffs possess the requisite backgrounds and experience. The Philadelphia program also provides specialized training for the volunteer attorneys who work with the program.

Finally, both agencies have taken steps to assure that specialized resources will be available to them as needed. Both are members of community multidisciplinary teams that were created to monitor and improve management of child abuse cases. In addition, the Youth Law Center is governed by a Board of Directors representing the fields of law, social work, education, psychology, sociology, medicine and other related fields.

Ad Hoc Appointments of Private Attorneys

The courts in New Hampshire rely on ad hoc appointments of private attorneys to provide guardian ad litem services to child abuse victims. The clerk of the court maintains a list of attorneys who have expressed a desire to represent the interests of child victims. In practice, prosecutors and defense attorneys often recommend lawyers for this purpose, and the court makes its own choice. Appointed guardians ad litem are paid from the state's indigent defense fund, at the rate of \$30 per hour in court, \$20 per hour out of court.

Guardians ad litem in New Hampshire appear to value their independence, although those who are inexperienced are in danger of being "co-opted" by either side. Although guardians ad litem have filed motions with the court for protective orders, the use of videotape, and other devices to reduce trauma for child victims, they have not yet "flexed their muscles" against government agencies or bureaucracies to challenge or coerce action.

Accountability is assured solely by the small, tightly-knit bar in the state of New Hampshire and case-by-case oversight by the judge and the other attorneys involved. There are no training criteria for lawyers who volunteer to serve as guardians ad litem; typically, they are newly admitted to the bar and anxious for trial experience. As Bross and Munson have observed, "Whatever the theoretical controls of peer pressures, the isolation engendered by the ad hoc system makes accountability difficult."³

Funding has not been a problem since guardians ad litem who serve ad hoc are essentially working pro bono. New Hampshire pays only nominal fees to these attorneys. In a state this size, the total cost to the state is still relatively low, but in a larger state even nominal fees may not be feasible.

Finally, attorneys appointed under an ad hoc system may not have knowledge of, or formalized access to, specialized resources for child victims. In the larger counties of New Hampshire, guardians ad litem work through the prosecutors' victim assistants to obtain needed services for child victims. More commonly, however,

A person appointed intermittently has little incentive to develop expertise or organizations of consultants which lend themselves to skill and efficiency. There is less opportunity for the occasional child's advocate to learn about the need for or existence of professional networks of a specialized nature, multidisciplinary teams, or special professional associations.⁴

State- or County-Based Volunteer Guardian Ad Litem Programs

The courts in many communities rely on volunteer guardian ad litem and CASA programs for representation of child victims. Some are privately sponsored (e.g., by the Junior League or the National Council for Jewish Women), and thus would be more appropriately described as private nonprofit organizations. This section examines volunteer programs that are supported by state or county governments. The State of Florida's Volunteer Guardian Ad Litem Program and the Child Advocate's Office in Los Angeles are examples of this approach.

Florida's statewide volunteer program supports 59 paid employees (program directors, administrative assistants, and contractual attorneys) in 20 programs operating in all but one of the state's 20 judicial circuits. At this writing, volunteers are involved in about 200 criminal cases around the state. In Los Angeles, the Child Advocate's Office operates under the auspices of the Superior Court with county and private funding. The Office supervises approximately 150 volunteers and 100 attorneys who serve as guardians ad

litem for the juvenile court and occasionally participate in criminal proceedings as "friends of the court."

In these programs, volunteers from the community are recruited, trained, and monitored under standards developed by their state or county directors. Because they come from outside the criminal justice system, volunteer guardians ad litem bring a fresh perspective to their advocacy role. Many see themselves as "crusaders" for children's rights, an attitude that may be counterproductive to their ability to work with personnel within the system, but certainly calls attention to their willingness to "fight" for their clients when necessary.

To assure accountability, volunteers are carefully screened before they are admitted to the program. They must attend a structured training program and work with experienced volunteers before they receive their own assignments. Program directors also solicit feedback on the volunteers' performance from judges, attorneys, and social workers.

Funding for state- or county-sponsored programs comes from state legislatures or county administrators. Initially it may be hard to get, but once appropriated it should be relatively stable—at least until the program itself is threatened by shifts in political interests. It is instructive to note that funding limitations have forced the Child Advocate's Office in Los Angeles to curtail its representation of child victims in criminal cases.

Access to specialized resources may be authorized by the legislature or the courts, but neither authority can mandate cooperative relationships with community agencies. Most volunteers place special emphasis on nurturing their relationships with community service agencies so that volunteers have easy access to this "network."

Public Defender Programs

It is not unusual for a public defender program to be a source of guardians ad litem for the courts. The public defender's role in representing the interests of children is derived from its general mission to provide legal services for the indigent. Problems may arise, however, with regard to the guardian ad litem's independence. Attorneys who are trained in the public defender model and who work within that structure may carry a certain bias that influences their view of victim advocacy. To avoid this problem, the Public Defender's Office in Tulsa, Oklahoma has assigned one attorney to work exclusively as a child advocate, primarily in juvenile court, but occasionally in criminal court as provided by statute. (See Chapter 1 and the Appendix.)

There is also potential for conflict of interest, where the public defender is also representing the parent accused of abusing the child. When this

happens, the court must appoint a guardian ad litem from another source. In Des Moines, the Office of the Juvenile Citizen Advocate has separated from the Office of the Citizen Advocate (the public defender program), at least in part to avoid this conflict. In Philadelphia, the court turns to Women Organized Against Rape (a volunteer group) or the Support Center for Child Advocates when it cannot appoint a guardian ad litem from the Public Defender's Office.

Accountability in these programs depends heavily on internal monitoring systems. Public defender programs are, of course, guided by the ethical standards of the legal profession, but typically there is no special training for attorneys who serve as guardians ad litem. Funding for guardian ad litem services is usually absorbed within the overall budget of the public defender's office.

Access to specialized resources depends on historical relationships between the defender program and local human services agencies. Generally, child-serving professionals have come to believe that prosecution of offenders is necessary to assure treatment, so that communication with the public defender's office — which is more often associated with representation of the defendant than the child victim — may be strained.

Table 5.1 on the following page summarizes the strengths and weaknesses of these four alternative methods of providing guardian ad litem services.

Determine Appropriate Staffing Configuration

Whether the guardians ad litem should be attorneys or lay volunteers will likely be determined in part by the role that is envisioned for them and by the type of guardian ad litem program that may already be in place for civil abuse and neglect cases.

According to the National Center on Child Abuse and Neglect, at least 39 states provide for legal representation for child victims of abuse and neglect in their guardian ad litem statutes.⁵ Under these statutes, attorneys may be appointed in any of three capacities: 1) to serve as guardians ad litem themselves, 2) to serve in tandem with other persons who are appointed as guardians ad litem, or 3) to represent child victims in lieu of appointed guardians ad litem.

The impetus for appointing legal counsel for subjects of abuse and neglect proceedings derives largely from the U.S. Supreme Court's landmark decision in *In re Gault*, 387 U.S. 1 (1967), which provides a right to independent representation by counsel to juvenile subjects of delinquency proceedings. A parallel may be drawn to abuse and neglect cases, as Fraser asserts:

Table 5.1
Comparison Of Alternative Organizational Structures

PROGRAM FEATURES

ORGANIZATIONAL STRUCTURE	INDEPENDENCE	ACCOUNTABILITY	FUNDING	ACCESS TO RESOURCES
Private non-profit (Youth Law Center; Support Center for Child Advocates)	Not affiliated with any other agency.	Assure through selective employment, training; competitive with other sources of guardians ad litem.	Largely dependent on grants and private contributions.	Can be quite good where tied into local services network.
State or county CASA program (Florida, Los Angeles)	Not affiliated with any other agency.	Assure through written standards for screening, training, and supervision; judges and attorneys provide feedback.	Relatively low-cost since rely on volunteers, but subject to political shifts in emphasis.	Can be quite good where tied into local services network.
Ad hoc appointments (New Hampshire)	Generally good, but subject to cooptation by either side if attorneys are inexperienced.	Rests on self-monitoring within the legal profession.	Court-appointed attorneys serve pro bono or for a nominal fee.	Rests on individual initiative or reliance on victim assistance program.
Public defenders program	Affiliated with the public defender's office.	Rests on self-monitoring within the legal profession.	Varies with relative strength of the defender program.	Community services agencies may be wary of public defenders.

Perhaps it is now incumbent upon Americans to question the rationale that provides a child with independent representation in cases in which his liberty is endangered but does not provide such representation when his health and life are endangered.⁶

From a more practical point of view, it has been argued that the child's representative should have skills equal to those of the prosecutor and defense attorney, and that this individual should understand and know how to manipulate the legal system.⁷ Moreover, without counsel, an articulate child (e.g., a teenager) may never have the opportunity to express his or her own views to the court, since the guardian ad litem's mandate is to represent the child's *best interests*, which may not coincide with the child's desires.⁸

A twelve-year old child had been sexually abused by her father for at least two years. Nonetheless, she expressed a desire to continue living with him and, indeed, to have children with him. An attorney for the child, acting at the child's direction, might argue for a return to the home, omitting any mention of the child's delusions about a "quasi-marital" relationship. But a guardian ad litem representing the child's best interests would certainly advocate for a more appropriate outcome — at a minimum, a good guardian ad litem would work through the juvenile or family court to secure counseling for i. 's child.

It is also argued that attorneys typically lack experience understanding child clients, and that individuals who represent children should possess specialized expertise in human development.⁹ Furthermore, attorneys often cannot devote the time required to pursue a complete investigation of the allegations and to develop a relationship with the child. In fact, the CASA program in Albuquerque, New Mexico, was created precisely because the chief judge felt that attorney guardians ad litem were not "doing their jobs."

In practice, jurisdictions across the country have instituted three basic staffing patterns for representing child victims: lay volunteers only, attorneys only, and teams of attorneys and lay persons. Each has its advantages and disadvantages.

Volunteer guardian ad litem programs have become increasingly popular across the country: the National CASA Association currently lists 245 member programs. Legal services are often available to these programs on a contractual basis; sometimes the program director is an attorney. Where attorneys are not routinely available, the volunteer guardian ad litem may request the court to appoint an attorney, particularly in situations where the guardian ad litem's assessment of the child's best interests diverges from the

child's personal desires. Regardless of how the child comes to have legal representation, the attorney's role is typically limited to the specific legal requirements of the case: legal advice, appearances at court proceedings, filing motions, etc. There is occasionally some confusion, however, as to whether the attorney represents the child or the guardian ad litem.

Alternatively, children's interests may be represented solely by attorneys. Guardian ad litem appointments may be made from a panel of private attorneys who may serve *pro bono* or for a nominal fee (as they do in New Hampshire), or from the public defender program (as they do in Oklahoma). Sometimes the courts appoint legal counsel for the child; this attorney, in turn, may request appointment of a guardian ad litem. In some jurisdictions, an attorney may actually be the appointed guardian ad litem, but services to the child are provided almost exclusively by volunteers, so that in practice, representation of the children's interests operates no differently than in jurisdictions where the volunteer is the appointed guardian ad litem. This is the case in Ogden, Utah, where the appointed attorney reviews cases before "delegating" them to the volunteers and remains available as needed for legal services and advice.

Finally, some jurisdictions rely on teams of attorneys and lay citizens to provide optimal representation at minimal cost. Regardless of whether the attorney or the lay citizen is named in the court order appointing the guardian ad litem, the responsibilities are clearly divided. The main difference between these programs and those described in preceding paragraphs is the degree of interaction between lay person and attorney.

Both the Youth Law Center in Des Moines and the Support Center for Child Advocates in Philadelphia employ teams, although their composition differs. The Youth Law Center is staffed by three attorneys and two social workers. Any of the professional staff may be appointed guardian ad litem in a given case, depending on the court's perception of the child's needs, but there is always close interaction between attorneys and social workers to ensure that the child's interests are adequately protected. The Support Center for Child Advocates is headed by an attorney and staffed by four social workers. The Center recruits, trains, and supervises a cadre of volunteer attorneys drawn from law firms citywide. Although the Center's social workers perform most of the investigative work, they coordinate closely with the attorneys and rely on them to file petitions or motions, as necessary, and to ensure that the children's rights are protected.

Regardless of whether the appointed guardian ad litem is a lay citizen or an attorney, strict screening requirements should be instituted to preclude inappropriate individuals from gaining access to this extremely vulnerable population. At a minimum, background checks into criminal records and

the state's central child abuse registry should be required of all prospective guardians ad litem. Furthermore, every individual who works in this capacity — whether an attorney or a lay volunteer — should receive specialized training in the following areas:

- the dynamics of child abuse;
- the pressures operating on child abuse victims;
- the procedures developed for case management by the child protection and criminal justice systems; and
- pertinent aspects of the law and courtroom procedure.

Along with this training should be procedures for supervising guardians ad litem and updating their knowledge as changes occur. Untrained, unsupervised guardians ad litem run the risk of doing more harm than good, despite their worthy intentions.

A three-year-old boy had been sexually abused by his natural father and his paternal grandfather. Despite confirmation of the abuse by several medical and mental health experts who examined the child, prosecutors were unable to pursue criminal charges because the child could not identify which perpetrator committed which acts, nor could he establish whether the acts occurred in his father's home or in his grandfather's home.

The parents were divorced, and the mother sought to prevent further visitations with the father and grandfather. Upon learning that criminal charges had been dismissed, however, the appointed guardian ad litem reversed his earlier position against visitation and recommended placement of the child with his father. Apparently he believed that, since the criminal case was dropped, the allegations must have been false.

To prevent the state from placing her son, the mother moved with the child to a neighboring state. She subsequently filed suit against the guardian ad litem.

No matter how sophisticated the training, however, it may be unrealistic to expect lay volunteers to understand the intricacies of the criminal system and to operate effectively within it. Several prosecutors and attorney guardians ad litem interviewed for this project expressed a fear that the criminal process would “swallow up” inexperienced volunteers. To avoid this problem, the director of the Sanford, Florida Guardian Ad Litem Program actively assists in all cases going to trial, and where there are signs that the case will be seriously contested, she calls on the program's contractual attorney.

In most jurisdictions, where there is no clear statutory authority for a guardian ad litem to address the court directly, it may be that only a seasoned attorney could function effectively. One attorney guardian ad litem, for example, asserted that she would continue doing whatever she felt was necessary in the interest of the child — until told otherwise by the court. Most lay volunteers would be less inclined to provoke an admonition from the court.

On the other hand, lay volunteers might be more effective than attorneys in certain circumstances. In the words of one judge,

The CASAs put more time (relatively) into the cases, since, from the beginning they never expected to be paid for their work — but rather it's something they really want to do — whereas the attorneys usually resent the small reimbursement they receive for the cases.¹⁰

Raising the attorney's fees might improve their motivation, but it probably would wreak havoc with court budgets and preclude routine appointments of attorneys as guardians ad litem in all child abuse cases.

These observations suggest that decisionmakers should explore ways to garner the respective strengths of both attorneys and lay volunteers. Each could benefit from the other. Where an attorney is the appointed guardian ad litem, a volunteer program should be tapped for assistance with the investigation and human relations aspects of the guardian ad litem's role. These volunteers could be drawn from a CASA program designed for this purpose, from an existing victim assistance program, or from local civic organizations. Conversely, where a lay volunteer is the appointed guardian ad litem, provision should be made for ready access to legal counsel. In the best of all possible worlds, lay volunteers would be "teamed" with attorneys to ensure that child victims receive as much support and representation as they need. To avoid confusion, the attorney's role should be explicitly defined as a guardian ad litem, rather than counsel, for the child. If the child's stated position diverges from the guardian ad litem's assessment of "best interests," then counsel for the child should be appointed from another source. Of course, there is nothing to preclude parents from retaining private counsel or legal services for their child if they believe it would be helpful.

Establish Procedures for Appointment of Guardians Ad Litem

In civil abuse and neglect proceedings, guardians ad litem are typically appointed by the judge at the time a dependency petition is filed. This action triggers the process of investigation which leads to a placement recommendation. The guardian ad litem conducts an investigation and

submits recommendations that are independent of those prepared by the state social services or public welfare agency, which may have temporary custody of the child.

Where a guardian ad litem has already been appointed in a separate dependency action, this individual should be notified of the impending criminal proceedings and permitted to assist the child as necessary. The criminal court may wish to confirm the guardian ad litem's appointment to authorize the role in the criminal prosecution.

In cases that have no concurrent civil actions, or where dependency proceedings are suspended until the criminal case is disposed, the courts may wish to consider the unique needs of each child and the circumstances of the case before appointing a guardian ad litem. Some children may seem to need emotional support far more than the intervention of legal counsel; for other children, the opposite may be true. Often, however, such detailed information will not be available at the time an appointment should be made. Under these circumstances, the courts should have an alternative procedure in place for appointing guardians ad litem in criminal cases.

It is difficult, however, to identify the "perfect" time to appoint a guardian ad litem in criminal proceedings. In practice, there are a few variations. In Philadelphia, child advocates are appointed at preliminary hearings when the cases are bound over for prosecution. In New Hampshire, court rule provides for appointment of a guardian ad litem at a pretrial conference to be held within 45 days of indictment. The primary purpose of this appointment is to involve the guardian ad litem in decisions regarding the use of videotape or other alternative means of obtaining the child's testimony. Historically, however, prosecutors in New Hampshire have requested appointment of guardians ad litem whenever a child's right to privacy is threatened by defense attorneys' attempts to discover school or health records.

The principal reason for this difference is the perceived role of the guardian ad litem. In Philadelphia, a primary function of the guardian ad litem is to coordinate the criminal and civil processes, and to see that the child receives necessary services and adequate protection from further abuse. Consequently, upon a positive finding at the preliminary hearing, steps are taken to ensure continuity in representation for the child. In New Hampshire, however, the guardian ad litem performs a more legalistic role, entirely independent of any civil proceedings that may be ongoing or contemplated.

Ideally, perhaps, a guardian ad litem would be appointed at the time of initial report (to law enforcement or protective services), so that the guardian ad litem could assist the child through the investigation process and

represent the child's interests at the various pretrial proceedings that typically occur in a criminal case. But such early appointment may not be feasible in view of the number of reports that are ultimately unfounded or subject to lengthy investigations. To assure consistency in representation of all child victims entering the criminal system, it seems appropriate to appoint a guardian ad litem upon formal "opening" of a case for prosecution, whether by information, indictment, or preliminary "bindover" hearing.

Explore Potential Funding Sources

Obviously, the cost of a guardian ad litem program for criminal cases is dependent on many factors. Given the wide range of functions a guardian ad litem could be expected to undertake, an approach which relies on lay volunteers with easy access to contractual attorneys (or volunteer attorneys, as in Philadelphia), offers the most comprehensive representation at minimal cost.

In addition to salaries for individuals to direct or coordinate such a program, cost elements might include:

- compensation for contractual attorneys, psychologists, or other consulting specialists;
- training programs and related materials;
- liability insurance, to protect volunteers against potential civil lawsuits relating to their work as guardians ad litem;
- office space, equipment and supplies; and
- reimbursement to volunteers for local travel and incidental expenses.

Many existing guardian ad litem programs were launched with grants from public agencies or private foundations with expectations of future local support. Ideally, guardian ad litem services in criminal cases would be permanently funded as a line item in the state, county, or court budget.

Other potential sources of financial support include Children's Trust Funds, which now exist in at least 35 states, and victim compensation or restitution funds. Some states have explored creative sources of funding for specific criminal justice purposes: imposing fines on related criminal offenses, or attaching surcharges on certain fees (e.g., for marriage licenses). In view of the very limited public funds, planners may wish to explore the private sector for additional support.

* * * *

In conclusion, the need for child victims to have support throughout the adjudication process is well established. And, in fact, in many

communities children are already benefiting from various services that are provided by other agencies or programs. Victim assistance programs frequently accompany children to court proceedings, explain the process, and prepare children to testify. Protective services often arrange counseling and medical services for child victims and monitor their homes for the duration of both criminal and civil proceedings. An active multidisciplinary team that includes prosecutors may assure that cases are handled expeditiously and efficiently, with no unnecessary interviews or delays. And some children may be adequately represented by supportive parents or private counsel. Under these optimal circumstances, most child victims probably do not need a guardian ad litem to represent their interests in criminal proceedings (although a guardian ad litem should still be appointed if a dependency petition has been introduced).

But many jurisdictions lack one or more of the essential ingredients that together comprise a sensitive, yet effective approach to prosecuting child abuse cases. And some child victims — especially those who were allegedly abused by a parental figure, or who become trapped in their parents' divorce or custody conflicts — need more than just a hand to hold. Even though they are not themselves the subjects of criminal litigation, these children have a vital stake in the decisions that are made as their cases are adjudicated, and so they need the authority and independence of a guardian ad litem.

Endnotes

1. Donald C. Bross and Myra M. Munson, "Alternative Models of Legal Representation for Children," *Oklahoma City University Law Review*, Vol. 5 (1980): 579-580.
2. National Legal Resource Center for Child Advocacy and Protection, *The Child Abuse Legal Representation Project: Suggestions for Effective Implementation* (Washington, D.C.: American Bar Association, May 1979).
3. D. Bross and M. Munson, "Alternative Models," *supra*, note 1 at p. 584.

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4. Ibid., at pp. 584-585.
 5. U.S. Department of Health and Human Services, *State Child Abuse and Neglect Statutes: A Comparative Analysis, 1985* (Washington, D.C.: Clearinghouse on Child Abuse and Neglect, 1984), pp. 55-56.
 6. Brian G. Fraser, "Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem," *California Western Law Review*, Vol. 13 (1976-77): 21.
 7. U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Representation for the Abused and Neglected Child: The Guardian Ad Litem and Legal Counsel* (Washington, D.C.: Government Printing Office, 1980), pp. 4-5.
 8. James R. Redeker, "The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases," *Villanova Law Review*, Vol. 23 (1977-78): 539-40.
 9. D. Bross and M. Munson, "Alternative Models," *supra*, note 1 at p. 619.
 10. "Independent Representation for Child Victims in the Criminal Justice System: Report of a Telephone Survey," unpublished report, Abt Associates Inc., Cambridge, Massachusetts, April 1986.

Appendix

Sample Statutes and Court Rules Providing Independent Representation for Child Victims In Criminal Proceedings

FLORIDA

415.503 Definitions of terms used in §415.502-415.514—As used in §415.502-425.514.

(6) “Guardian ad litem” means a responsible adult who is appointed by the court to represent the best interest of a child in a proceeding as provided by law, including, but not limited to, Chapter 39 and this Chapter, who shall be a party to any judicial proceeding as a representative of the child, and who shall serve until discharged by the court.

415.508 Appointment of guardian ad litem for abused or neglected child:

(1) A guardian ad litem or other advocate shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding, whether civil or criminal. Any person participating in a civil or criminal judicial proceeding resulting from such appointment shall be presumed prima facie to be acting in good faith, and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.

(2) In those cases in which the parents are financially able, the parent or parents of the child shall reimburse the court, in part or in whole, for the cost of provision of guardian ad litem services. Reimbursement to the individual providing guardian ad litem services shall not be contingent upon successful collection by the court from the parent or parents.

OKLAHOMA

Okla. Stat. Ann. tit. 21 846(B) (1985 Supp.).

In any case filed under Section 843 of this title, the judge of the district court shall appoint an attorney-at-law to represent a child who is the alleged subject of child abuse in such case. The attorney may be allowed a reasonable fee for such services to be paid from the court fund to be fixed by the district court. The attorney shall be given access to all reports relevant to the case and to any reports of examinations of the child's parents or other custodian pursuant to this section. The attorney shall be charged with the representation of the child's best interests. To that end, he shall make such further investigation that he deems necessary to ascertain the facts, to interview witnesses, examine and cross-examine witnesses at the preliminary hearing and trial, make recommendations to the court and participate further in the proceedings to the degree appropriate for adequately representing the child.

PENNSYLVANIA S.B. 176

5983. Rights and Services.

(a) Designation of persons to act on behalf of children. Courts of common pleas may designate one or more persons as a child advocate to provide the following services on behalf of children who are involved in criminal proceedings as victims or material witnesses:

- (1) To explain in language understood by the child, all legal proceedings in which the child will be involved.
- (2) As a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand and cooperate with any court proceedings.
- (3) To assist or secure assistance for the child and the child's family in coping with the emotional impact of the crime and subsequent criminal proceedings in which the child is involved.

(b) Qualifications. Persons designated under subsection (1) may be attorneys at law or other persons, who by virtue of service as rape crisis or domestic violence counselors or by virtue of membership in a community service organization or of other experience acceptable to the court, possess education, experience or training in child or sexual abuse and a basic understanding of the criminal justice system.

IOWA

910A.15 Guardian Ad Litem for Prosecuting Witnesses.

A prosecuting witness who is a child, as defined in Section 702.5, in a case involving a violation of chapter 709 or section 726.2, 726.3, 726.6, or 728.12, is entitled to have the witness' interests represented by a guardian ad litem at all stages of the proceedings arising from such violation. The guardian ad litem may but need not be a practicing attorney and shall be designated by the court after due consideration is given to the desires and needs of the child and the compatibility of the child and the child's interests with the prospective guardian ad litem. However, a person who is also a prosecuting witness in the same proceeding shall not be designated guardian ad litem. The guardian ad litem shall receive notice of and may attend all depositions, hearings and trial proceedings to support the child and advocate for the protection of the child, but shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses. However, the guardian ad litem shall file reports to the court as required by the court.

References in this section to a guardian ad litem shall be interpreted to include references to a court appointed special advocate as defined in section 232.2, subsection 9A.

NEW HAMPSHIRE

Court Rule 93-A. 12 NHLW 436, January 27, 1986.

93-A. Minor victims or witnesses—sex-related cases.

The Clerk shall schedule a pretrial conference, to be held within forty-five (45) days of the filing of an indictment, for the purpose of establishing a discovery schedule and trial date. At such conference, the court shall consider the advisability and need for the appointment of a guardian ad litem to represent the interests of the alleged victim.