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Attorney for Child versus Guardian Ad Litem: Wyoming Creates a Hybrid, but Is It a Formula for Malpractice

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ATTORNEY FOR CHILD VERSUS GUARDIAN AD LITEM: WYOMING CREATES A HYBRID, BUT IS IT A FORMULA FOR MALPRACTICE?

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I. INTRODUCTION

In recognition of the need for clarification and the lack of uniformity throughout our state, we urge our courts, legislatures, professionals, and concerned citizens to undertake a consolidated effort to address the appointment of counsel and guardian ad litem for Wyoming's children.[1]

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1. Clark v. Alexander, 953 P.2d 145, 151 n.2 (Wyo. 1998). The entire footnote reads:

> Our decision here does not address many areas of chronic confusion in the appointment of guardian ad litem, e.g., when an appointment is necessary, the necessary qualifications to serve as guardian ad litem, and the timeliness of the court's com-

This plea for public involvement is buried in a footnote of *Clark v. Alexander*, an important recent child custody modification case.[2] It reflects the Wyoming Supreme Court's concern about the lack of guidance in representing children in Wyoming,[3] but the problem it identifies is widespread. Other states have expressed similar concerns. In Michigan, for example, the introduction to their guidelines for advocates for children states that:

> [d]espite a widespread conviction that children should be independently represented in certain legal actions, consensus about the duties of that advocate is only beginning to develop. Since 1974, the federal government has required, as a condition to receiving federal child welfare funds, that each state provide for the appointment of a guardian ad litem (GAL) in civil child protection proceedings.[4]

> munication of the specific duties expected by the court. In recognition of the need for clarification and the lack of uniformity throughout our state, we urge our courts, legislatures, professionals, and concerned citizens to undertake a consolidated effort to address the appointment of counsel and guardian ad litem for Wyoming's children.

Id. (citing *In re* Jeffrey R.L., 435 S.E.2d 162, 178-80 App. A (W. Va. Ct. App.1993); Minnesota Rules of Guardian Ad Litem Procedure (adopted August 27, 1997); COLO. REV. STAT. § 14-10-116 (West 1997); Michigan Guidelines for Advocates for Children (submitted by the State Bar of Michigan's Children's Task Force); Missouri Supreme Court Standards for Guardians Ad Litem (Sept. 19, 1997); Virginia Standards to Govern the Appointment of Guardians Ad Litem Va.Code 16-1–266.1 (effective Jan. 1, 1995); *ABA Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29-3 FAM. L.Q. 375 (1995) (approved by the Council of the Family Law Section August 5, 1995); *Representing Children; Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1 (1995); Renee Goldberg & Nancy S. Porter, *Guardian Ad Litem Programs: Where They Have Gone and Where They Are Going*, 69 FLA. B.J. 83 (1995) (discussing recent amendments to Florida statutes regarding guardian ad litem practice)).

2. 953 P.2d 145 (Wyo. 1998).

3. *See also In re* MFB, 860 P.2d 1140, 1152 (Wyo. 1993). In *MFB*, the court also expressed concern about the representation of Wyoming's children in legal proceedings by addressing the role of a guardian ad litem in an abuse and neglect proceeding despite the fact that the parties did not raise the issue on appeal. *Id.* (citing *In re* AB, 839 P.2d 386, 390 (Wyo. 1992) (addressing issue not argued on appeal but injected through correspondence contained in the record)). The court noted that the GAL did not question any of the witnesses, offered no briefing on behalf of MFB, did not participate in the appeal and despite the prolonged time frame of the proceedings, never made a motion to move the proceeding forward. *Id.* Although the court did not hold the GAL unfairly prejudiced MFB's interests, the court did heed this warning:

> In appointing a guardian ad litem, the juvenile court has determined that either the child has no parent, guardian or custodian appearing on its behalf or that the interests of the parent, guardian or custodian are adverse to the best interests of the child. Therefore, the guardian ad litem must act with reasonable diligence in the role of an advocate for the child, and participate as necessary in all phases of the process, including subsequent appeals, to insure the rights of the client are protected.

Id. (citations omitted).

4. The federal law the quote refers to is the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 5 (1974) (codified at 42 U.S.C. §§ 5101-5107 (1994)). Specifically, the Act lists the criteria for receiving state development and operation grants, and in part requires that states adopt "provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate (or both), shall be appointed to represent the child in such proceedings." 42 U.S.C. § 5106a(b)(A)(ix) (1994).

However, federal law does not define the duties of that GAL.[5]

Clark v. Alexander [6] exemplifies some of the difficulties that can arise when the duties and roles of a GAL are undefined. In this case, K.C. Clark's (Mother) appeal is partially based[7] on the district court's decision to allow the guardian ad litem (GAL) to testify as a fact witness.[8] Although Mother first raises the issue on appeal,[9] the Wyoming Supreme Court nevertheless addresses the role of the attorney/guardian ad litem (attorney/GAL) during a child custody proceeding because it is a topic that statutory law ignores[10] and that the court itself characterizes as "problematic."[11]

In the *Clark* opinion, the Wyoming Supreme Court not only urges the public to address the role of attorney/GAL, it identifies some specific duties and establishes certain standards of conduct with which an attorney/GAL representation must conform.[12] In doing so, it also potentially increases the basis for GAL malpractice claims.[13] This article summarizes the guidance

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5. Guidelines for Advocates for Children, *in* Michigan Courts Introduction 1-2 *in* Final Report of the State Bar of Michigan Children's Task Force, 62 (visited Nov. 24, 1998) <http://www.rollonet.org/~childlaw/galstd/migalstd.htm> (on file with *Land and Water Law Review*). *See also* Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27-3 FAM. L.Q. 327 (1993).

6. 953 P.2d 145 (Wyo. 1998).

7. Although the parties, in total, presented fourteen issues, the Wyoming Supreme Court narrowed them down to the following three issues:

> 1. Whether the district court abused its discretion by admitting intentionally recorded tapes in violation of state and federal law.
> 2. Whether the district court abused its discretion in allowing the guardian ad litem to testify while participating as advocate for the parties' minor children.
> 3. Whether the district court abused its discretion in ordering appellant to pay fees and costs of the guardian ad litem and of the attorney for appellee.

Id. at 148.

8. According to the court, the role of the attorney/guardian ad litem [hereinafter attorney/GAL] during the proceeding is central to the case's disposition, since Mother claims that "because the guardian ad litem actively participated as the children's attorney, it was improper to allow her to testify at the modification hearing." *Id.* at 151.

9. *Id. See also* Rowan v. Rowan, 786 P.2d 886, 889 (Wyo. 1990) (the court will not address an issue which is raised for the first time on appeal absent special circumstances).

10. *See* Appendix B (all Wyoming Statutes that pertain to attorneys for children and guardians ad litem).

11. *Clark*, 953 P.2d at 151 (citing Leary v. Leary, 627 A.2d 30, 37 (Md. Ct. Spec. App. 1993); Ann Haralambie, *The Role of the Child's Attorney Throughout the Litigation Process*, 71 N.D. L. REV. 939, 941 (1995); Nancy J. Moore, *Conflicts of Interest in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1842 (1996); Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1786 (1996)). *See also In re* J.P.B., 419 N.W.2d 387, 391 (Iowa 1988) ("We are mindful that in the ordinary lawyer-client relationship, the lawyer's role is not to *determine* the client's interest but to *advocate* the client's interest. Such a duty may present an ethical dilemma in a juvenile proceeding where the objective is *always* the best interest of the child, not the child's personal objective. We are aware that the unsettled law in this area offers no clear direction . . . ." (emphasis in original)).

12. *See generally infra* notes 29-50 and accompanying text.

13. *Cf.* Oosterhous *ex rel.* Short v. Short, 730 F. Supp. 1037, 1038-39 (D. Colo. 1990) (the court dismisses a negligence claim for legal malpractice under principles of absolute quasi-judicial immunity

the court provides in *Clark v. Alexander,* analyzes its possible impact, and proposes a rule that addresses the duties of an attorney/GAL in Wyoming.[14]

II. CLARK V. ALEXANDER

A. The Facts

The parties in this case, Mother and Clifford Graham Alexander (Father), married in 1981, had three children and divorced in 1993.[15] In October 1994, Mother petitioned for a modification of child custody[16] and requested the appointment of a GAL.[17] Prior to the hearing, Father alleged that Mother was inappropriately involving the children in the custody dispute,[18] and in September 1995, Father gave the GAL a tape he had inadvertently recorded of a telephone conversation between Mother, the stepfather and the two youngest children.[19] The GAL informed Mother's attorney of the tape's existence and recommended that Mother refrain from involving the children in the custody dispute.[20] The GAL did not, however, inform Mother's attorney that she had consented to continued taping. Father proceeded to tape Mother's telephone conversations with the children and submitted to the

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but recognizes that the immunity attaches only to conduct within a limited scope of duties and does not shadow every court appointment) (citing Ferri v. Ackerman, 444 U.S. 193 (1979) (appointed counsel has no license to commit malpractice)). *See also infra* notes 74-85 and accompanying text.

14. *See* Appendix A.

15. *Clark*, 953 P.2d at 148.

16. *Id.* To bring a modification action to alter the custody provisions of a divorce decree in Wyoming, the plaintiff must show that a material and substantial change of circumstances has occurred after entry of the initial decree, and that modification is in the children's best interests. *Id.* at 150 (citing Semler v. Semler, 924 P.2d 422, 424 (Wyo. 1996)). Mother alleged that Father's move with the two youngest children into a trailer, with the oldest moving in with the grandfather in a house that was on the same property, constituted the substantial change in circumstance required to maintain a custody modification action. *Id.* at 148, 150 (citing *Semler*, 924 P.2d at 424).

17. *Id.* at 148-49. The order appointing the GAL was not entered until January 1996, although it was made retroactive to November 23, 1994, to reflect that with both parties' consent, the GAL actively participated from that date by visiting with the children, conducting in-home interviews with both parents, the stepfather and the grandfather, as well as interviewing other family members, teachers, neighbors, and clergy. *Id.* at 149.

18. The court explains that when Father informed the GAL of his concerns, the GAL responded that she would like to hear recordings of these conversations. Father told the GAL that his attorney had advised against taping and the GAL conceded that Father should follow his attorney's advise. No further discussion of taping occurred until Father's attorney called and informed the GAL that Father had inadvertently recorded a conversation on September 23, 1995. *Id.*

19. *Id.* The court describes that:

> On the tape recording, Mother and the stepfather spoke to the nine-year-old about their frustration with the custody proceeding and indicated that Father was to blame for the delay. During the conversation the child was urged to telephone the guardian ad litem to report that Father often left children unsupervised, that the delay was upsetting, and to convey her preference for residing with her mother.

Id.

20. *Id.*

GAL two subsequent tapes recorded in October 1995.[21]

At the modification hearing, Father called the GAL as his first witness, and through her testimony, the district court admitted into evidence two of the taped telephone conversations[22] along with two written reports[23] prepared by the GAL.[24] At the close of the proceeding, the district court orally awarded sole custody to Father,[25] and in the decision letter that followed, required Mother to pay all fees for the GAL, as well as Father's attorney's fees and expenses.[26]

On appeal, Justice Taylor, writing for the Wyoming Supreme Court, found that the district court had erred in allowing the guardian ad litem to testify, but held the error harmless.[27] The court affirmed the custody decision, reversing and remanding the case only for redetermination of fees and expenses.[28]

B. The Role of an Attorney/Guardian Ad Litem

In *Clark v. Alexander*, the court expressly establishes a hybrid role of

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21. *Id.* The court explains that the GAL consented to Father's continued taping due to concerns that Mother would continue to involve the children in the custody dispute during telephone visits. *Id.*

22. Although the court acknowledges that Mother devotes a majority of her appeal to the alleged inadmissibility of the taped conversation, the court declines to address the issue both because it is one of first impression, without the benefit of a record, and because the court finds "the tape recordings were not properly before the district court on other grounds." *Id.* at 150-51.

23. *Id.* at 149. The report from the GAL issued on November 21, 1995, recommended that primary residential custody remain with Father, largely based on the substance of the taped conversations between Mother and the children. Mother filed several motions in response, including a "Motion in Limine" seeking to preclude the tape recordings from the modification hearing. The GAL, therefore, submitted a supplemental report to address the circumstances leading her to consent to the taping. *Id.*

24. *Id.*

25. More specifically, the court explains that:

> [a]t the close of the proceeding, the district court judge orally ruled that the best interests of the children would be served by recognizing that the initial provision of joint custody was a misnomer and, in fact, awarded sole custody to Father as residential custodian of the children. The district court, therefore, granted Father sole custody. The district court also ordered Mother, Father, and children to receive counseling, and the parents to cease pressuring the children regarding custody issues. The district court further ordered that the parties not disclose to the children the testimony at trial nor the fact that their conversations with Mother has been taped, and would continue to be taped for six months.

Id. at 150.

26. *Id.*

27. *Id.* at 154-55. An ethical violation, not brought about by the prevailing party, will only be reversed if it resulted in manifest injustice under the totality of the circumstances. *Id.* at 154 (citing Moore v. Moore, 809 P.2d 261, 264 (Wyo. 1991)). The court was unwilling to find that Father "brought about" the district court's error in admitting the GAL's testimony, thus, it reviewed the error under the manifest injustice standard. To find that an error resulted in manifest injustice, the error must not only be unmistakable or indisputable, but also not foreseeable and affecting the substantial rights of a party. *Id.* (citing McCarthy v. State, 945 P.2d 775, 777 (Wyo. 1997)).

28. *Id.* at 146, 155.

attorney/GAL for counsel representing children in custody cases.[29] After citing two other jurisdictions with similar holdings,[30] the court proclaims:

> We believe that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process. Thus, we too acknowledge the 'hybrid' nature of the role of attorney/guardian ad litem which necessitates a modified application of the Rules of Pro-

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29. *Id.* at 153. The linchpin of the court's holding is its reliance on Wyoming Statute section 14-3-211 and a Wyoming case, *Moore v. Moore*, 809 P.2d 261 (Wyo. 1991). The statute, which authorizes a district court to appoint counsel for a child in an abuse and neglect proceedings, distinguishes between an attorney for the child and a GAL, but combines the two roles if the court does not also appoint a GAL. *See Clark*, 953 P.2d at 152, 152 n.4. Wyoming Statute section 14-3-211 provides that:

> (a) The court shall appoint counsel to represent any child in a court proceeding in which the child is alleged to be abused or neglected. Any attorney representing a child under this section shall also serve as the child's guardian ad litem unless a guardian ad litem has been appointed by the court. The attorney or guardian ad litem shall be charged with representation of the child's best interest.
> (b) The court may appoint counsel for any party when necessary in the interest of justice.

WYO. STAT. ANN. § 14-3-211 (1997). In *Moore v. Moore*, the court extends the statute by applying the language of section 14-3-211 regarding "representation" of a child to custody cases. 809 P.2d at 264. The court therefore holds in *Moore* that an attorney appointed as GAL may not engage in *ex parte* communications with a trial court, and that an attorney/GAL must advocate for the child, as s/he has the same ethical responsibilities in the proceeding as any other attorney. *Id.* at 264. *See also Clark*, 953 P.2d at 153 (citing *In re* MFB, 860 P.2d 1140, 1152 (Wyo. 1993) (the attorney/guardian ad litem "must act with reasonable diligence in the role of an advocate for the child, and participate as necessary in all phases of the process . . . .")).

30. *Clark*, 953 P.2d at 153 (citing *In re* J.P.B., 419 N.W.2d 387, 391-92 (Iowa 1988); *In re* Marriage of Rolfe, 699 P.2d 79, 86-87 (Mont. 1985), *aff'd* 766 P.2d 223 (Mont. 1988)).
The Montana Supreme Court states that:

> We recognize that in Montana the attorney for a child is not a guardian ad litem. Nevertheless his role in a custody dispute is to advocate the child's best interest, not the child's wishes. This is a difficulty role, particularly when the child's expressed wishes conflict with the attorney's determination of his best interests. But, given the immaturity of the client and the pressures that often exist in a divorce situation, it is this Court's opinion that the best interests of the child, the paramount concern of all custody disputes, is best served by modifying the traditional lawyer-client relationship.

In re Marriage of Rolfe, 699 P.2d at 86.

In *J.P.B*, the Iowa Supreme Court quotes *Marriage of Rolfe*, and modifies the rules of professional conduct which the court concludes,

> gives priority to the paramount goal of discerning the child's best interest while enabling the lawyer to advocate an opposing viewpoint without fear of ethical violation. Moreover, such an approach obviates the expensive and burdensome practice of appointing both a guardian ad litem and attorney for each child in a family to ensure that the child's expressed wishes as well as the child's best interest are advocated.

In re J.P.B., 419 N.W.2d at 391-92. *See also* Veazey v. Veazey, 560 P.2d 382, 390 (Alaska 1977).

fessional Conduct.[31]

To flesh out the need for this court-created modification of the professional conduct rules, the court compares and contrasts the traditional roles of an attorney for the child and a guardian ad litem.[32] Then the court identifies four ways in which this case exemplifies conflicts that combining the two roles creates.[33]

The Supreme Court next carefully delineates two changes to the Wyoming Rules of Professional Conduct as they apply to an attorney serving in this hybrid capacity. First, the court modifies Rule 1.2, which requires an attorney to "abide by a client's decision's concerning the objectives of representation"[34] by providing:

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31. *Clark*, 953 P.2d at 153.

32. *Id.* at 152. The court in part characterizes the traditional role of a GAL as the "investigator, monitor, and champion for the child." *Id.* (citing Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. LAW. 57, 73-74 (Summer 1995)). The court also explains that "[i]n many jurisdictions, the guardian ad litem is required to oversee the process of proceedings involving the child and, after reaching an independent conclusion, to recommend to the court the outcome which the guardian ad litem believes to be in the child's best interests." *Id.* (citing Haralambie & Glaser, *supra*, at 70-72 nn.55-57 (listing guardian ad litem duties in various jurisdictions)).

In contrast, the court states that traditionally, "an attorney is that of adviser, advocate, negotiator and intermediary." *Clark*, 953 P.2d at 152 (citing WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW, PREAMBLE (1998)). Thus, an attorney for a child "must, as far as reasonably possible, maintain a normal client-lawyer relationship with the child and . . . 'abide by the client's decisions concerning the objectives of representation . . . .'" *Id.* at 152 (citing WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rules 1.14, 1.2, respectively).

33. To paraphrase the court, the four ethical conflicts present in *Clark v. Alexander* are:

> 1) when a child informs an attorney/GAL of relevant facts that the child does not want divulged, because Rule 1.6 requires an attorney to maintain confidentiality unless the client consents to disclosure but a GAL must alert the court to all relevant information;
>
> 2) when an attorney/GAL is called to testify because Rule 3.7 prohibits an attorney from participating as an advocate where s/he may have to testify but, in some cases a GAL's testimony introduces facts relevant to the child's best interests that may not otherwise be presented to the court;
>
> 3) when the attorney/GAL represents more than one child with conflicting preferences regarding custody since a GAL, who is not bound by the children's expressed preference, should continue representing the children but, an attorney, according to Rules 1.2.and 1.7, must withdraw when two client's interests diverge; and
>
> 4) similarly, when an attorney/GAL does not believe that a child's expressed interest is their best interest.

Id. at 153.

34. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.2(a) (1998). Rule 1.2 addresses the scope of representation and provides in full:

> (a) A lawyer shall abide by a client's decision's concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by the client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment,

> [c]ontrary to the ethical rules, the attorney/guardian is not bound by the client's expressed preferences, but by the client's best interests. If the attorney/guardian ad litem determines that the child's expressed preference is not in the best interests of the child, both the child's wishes and the basis for the attorney/guardian ad litem's disagreement must be presented to the court.[35]

Under *Clark v. Alexander*, an attorney/GAL must independently evaluate and advocate for a child's best interest, even if it is contrary to the child's wishes.[36] When the child's and the attorney/GAL's views conflict, therefore, the attorney/GAL is not bound by the client's expressed preferences. Instead, *Clark* merely requires the attorney/GAL to inform the court of both views and the basis of the disagreement.[37]

The second way the court modifies the professional conduct rules is by altering the duty of confidentiality embodied in Rules 1.2, 1.4, and 1.14[38] as

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> does not constitute an endorsement of the client's political, economic, social or moral views or activities.
> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope meaning or application of the law.
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.2 (1998).

35. *Clark*, 953 P.2d at 153-54 (citing *In re* Marriage of Rolfe, 699 P.2d at 86-87).

36. *Id.*

37. *Id.*

38. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rules 1.2, 1.4, 1.14 (1998). For Rule 1.2, see *supra* note 34. Rule 1.4 is titled "Communication," and states in full:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain in a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.4 (1998).

Rule 1.14 is entitled "Client Under a Disability," and provides in full that:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.14 (1998).

they apply to an attorney/GAL.[39] The court explains that:

> the confidentiality normally required in an attorney-client relationship must be modified to the extent that relevant information provided by the child may be brought to the district court's attention. While it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child's consent.[40]

The court continues, though, by imposing a duty,

> [a]s legal counsel to the child, . . . to explain to the child, if possible, that the attorney/guardian ad litem is charged with protecting the child's best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship.[41]

Thus, the court lessens the child's right to confidential communications, but requires an attorney/GAL to alert the child to his or her role in the proceedings, including the reason for diminished confidentiality.[42]

In addition to modifying the Professional Rules of Conduct, the Wyoming Supreme Court renders two other important holdings. First, the court holds that an attorney/GAL may not be a fact witness at a custody hearing.[43] In doing so, the court expressly declines to modify Rule 3.7,[44] which precludes a lawyer from participating as an advocate at a proceeding in which

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39. *Clark*, 953 P.2d at 154.

40. *Id.*

41. *Id.* (citing WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rules 1.2, 1.4, 1.14 (1998)). *See also id.* at 154 n.5 ("We recognize that in some instances a child may be too young to understand the purpose of the proceedings or the role of the attorney/guardian ad litem. However, in most cases, the information may be conveyed in an age-appropriate manner.").

42. *Clark*, 953 P.2d at 154. *See also infra* note 93.

43. *Clark*, 953 P.2d at 154 (citing COLO. REV. STAT. § 14-10-116(2)(a) (1997); S.S. v. D.M., 597 A.2d 870, 877 (D.C. 1991); Hollister v. Hollister, 496 N.W.2d 642, 644-45 (Wis. 1992)).

44. *Clark*, 953 P.2d at 154. Rule 3.7 provides that:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 3.7 (1998).

s/he is will likely be called to testify to a matter of import to the case.[45] The court states that "the attorney/guardian ad litem has the opportunity *and the obligation* to conduct all necessary pretrial preparation and present all relevant information through the evidence offered at trial."[46] An attorney/GAL need not put his/her credibility at issue by testifying, the court concludes, because, "[r]ecommendations can be made to the court through closing argument based on evidence received."[47]

Finally, the court decides to no longer allow an attorney/GAL to file written reports with the court or to offer them into evidence without the express consent of the parties.[48] The court does qualify this by asserting:

> [t]his is not to say that the attorney/guardian ad litem may not submit a written report to the parties. A detailed report which timely informs the parties of the relevant facts and the basis of the guardian ad litem's recommendation may facilitate agreement prior to trial. If the parties so stipulate, the report may be presented to the court.[49]

The court, therefore, expressly overrules prior case law that admitted a GAL's written reports without the parties agreement, and suggests that the proper use of such reports is to facilitate settlement between the parties.[50]

III. ANALYSIS

Wyoming needs a rule of professional conduct that addresses the duties of an attorney/GAL and provides a basis to evaluate the adequacy of an attorney/GAL's representation.[51] The following analysis demonstrates that

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45. *Clark*, 953 P.2d at 153, 154.

46. *Id.* at 154 (emphasis added). The court asserts that it recognizes this obligation in *Moore*: "Our holding in *Moore* clearly mandates that the attorney/guardian ad litem is to be an advocate for the best interests of the child and actively participate in the proceeding." *Id.*

47. *Id.* In *S.S. v. D.M.* the court explains that

> the basic reason for prohibiting an attorney from being both an attorney and a witness . . . [is] to avoid conflicts that arise when an attorney puts his or her own credibility at issue in litigation. Such conflicts may prejudice the client when the attorney's testimony is impeached on cross-examination or may prejudice the opposing party when the attorney's testimony is given undue weight by the fact-finder as a result of his dual role.

S.S. v. D.M., 597 A.2d at 877.

48. *Clark*, 953 P.2d at 154. The court continues by stating, "[t]o the extent that prior Wyoming cases may conflict with this holding, they are here overruled." *Id. See also id.* at 154 n.6 (citing as overruled Wilcox-Elliott v. Wilcox, 924 P.2d 419 (Wyo. 1996)); *In re* Parental Rights of ARW, 716 P.2d 353 (Wyo. 1986); *In re* Parental Rights of PP, 648 P.2d 512 (Wyo. 1982)).

49. *Id.* at 154.

50. *Id.*

51. Other courts have relied on state statutes or rules which address the role of a GAL in determining whether a GAL is acting within the scope of his or her duties. *See, e.g.*, Oosterhous *ex rel.* Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990).

Clark increases the likelihood that courts will hold Wyoming attorney/GALs to the same negligence malpractice standard[52] that ordinarily applies to the practice of law. Why should Wyoming practitioners care whether attorney/GALs will be subject to malpractice? Recent commentators explain:

> [b]ecause statutes of limitations for children's claims are generally tolled during their minority, a child's malpractice claim has a long time frame, and immunity that existed at the time of the representation may not continue to apply when the suit is filed many years later. If the courts and bar associations do not adequately ensure competent representation by children's attorneys, it is likely that immunity, at least against malpractice suits by a client, will be found not to exist or will be abrogated.[53]

Given the longevity of possible malpractice claims by children and the decreasing chance that GALs will be immune from such claims (by either a child or a parent on the child's behalf), the potential risks should concern Wyoming attorneys. A new rule of professional conduct can respond to the need for better and more uniform representation of children,[54] and may also limit a possible proliferation of malpractice suits against Wyoming's attorney/GALs.

A. Malpractice Issues: Enhancing Attorney Involvement

Malpractice, like other negligence claims, requires a plaintiff to prove that the defendant breached a duty owed to the plaintiff and that the breach was the legal cause[55] of the injury the plaintiff suffered.[56] To succeed with a legal malpractice claim, the parties must ordinarily share an attorney-client relationship.[57] The court explains that "it is essential to establish an attorney-

52. *See, e.g.*, Meyer v. Mulligan, 889 P.2d 509, 516 (Wyo. 1995). In *Meyer*, the court identifies the elements that must be shown in a malpractice case, which are "'(1) the accepted standard of [legal] care or practice, (2) that the [lawyer's] conduct departed from the standard, and (3) that [the lawyer's] conduct was the legal cause of the injuries suffered.'" *Id.* (quoting Moore v. Moore, 855 P.2d 1245, 1248 (Wyo. 1993)).

53. Shari F. Shink & Ann Haralambie, *Ethical and Malpractice Issues*, *in* ADVOCATING EXCELLENCE; OFFERING HOPE FOR THE INNOCENTS 1, 11 (J. Wadine Gehrke et al. eds., 1997) (on file with *Land and Water Law Review*). The immunity the authors refer to is quasi-judicial immunity which generally protects quasi-judicial officers acting within the scope of their authority. *See, e.g., Short*, 730 F. Supp. at 1038. *See also infra* notes 74-85 and accompanying text.

54. *See, e.g., In re* Jeffrey R.L., 435 S.E.2d 162, 174 (W.Va. 1993) ("Quite often children do not get adequate representation because the guardians *ad litem* have not been given proper direction as to their role in representing the child . . . .").

55. Legal causation requires that a plaintiff establish that the breach of the duty is both the cause in fact and the proximate cause of the injury. *Meyer*, 889 P.2d at 516.

56. *Id.*

57. *Id.* at 513 (citing Brooks v. Zebre, 792 P.2d 196, 201 (Wyo. 1990); Bowen v. Smith, 838 P.2d 186, 198 (Wyo. 1992) (Brown, J., concurring)).

client relationship,"[58] because the relationship "creates a professional duty on the part of the attorney."[59] Significant to an analysis of GAL liability, therefore, is the initial issue of whether an attorney-client relationship exists between the hybrid attorney/GAL and a child in a custody case.

The court never explicitly holds in *Clark*, nor do the statutes require,[60] that guardians ad litem appointed in custody cases be attorneys. The court's decision to acknowledge the role of an attorney/GAL hybrid and to define the attorney/GAL's duties through modified application the Wyoming Rules of Professional Conduct,[61] however, effectively precludes a non-attorney from serving in a hybrid capacity and reflects the court's preference for attorney involvement in child custody cases.[62] The district court still has the authority to limit a GAL's involvement in a case,[63] but unless the district

58. *Id.*

59. *Id.* (citing Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 632 (1991); Goerlich v. Courtney Industries, Inc., 581 A.2d 825, 827 (Md. Ct. Spec. App. 1990); Warmbrodt v. Blanchard, 692 P.2d 1282, 1285 (Nev. 1984)).

60. Several Wyoming statutes grant district courts the authority to appoint guardians ad litem, and none require that the GAL be an attorney. See Appendix B for a complete list of Wyoming statutes that authorize appointment.

61. Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998).

62. Although other states utilize non-attorneys to advocate on behalf of children, see, for example, COLO. REV. STAT. § 14-10-116(2)(b) (1997); WASH. REV. CODE. ANN. § 26.12.175 (West 1997) (authorizing court appointed special advocates), several statements in *Clark* demonstrate the court's preference that courts appoint attorneys as GALs. Paramount is the court's assertions that "the skills of a legal advocate are invaluable to the child caught within a contentious custody dispute. With counsel, the child has an unbiased adult who can explain the process, inform the court of the child's viewpoint, and ensure an expeditious resolution." *Clark*, 953 P.2d at 153 (citing J.A.R. v. Superior Court, 877 P.2d 1323, 1331 (Ariz. 1994)). Further support is the court's reliance on the Arizona Supreme Court case which concludes, "a mental health professional . . . simply cannot assure that . . . all relevant information is properly investigated and introduced in an admissible fashion at trial, or that irrelevant or biased information is either kept out or cross-examined." *J.A.R.*, 877 P.2d at 1331.

Another authority cited that supports the court's position actually contends that it may be more economical to appoint an attorney/GAL in all child custody cases:

> According to the study, there is an increased diversion of cases where the child has an advocate and that advocate is well trained. Cases were more efficiently processed, resulting in fewer hearing over a shorter period of time. Therefore, any increase in the cost of legal services to children may result in a "bubble effect", a temporary increase during transition which gradually contracts. Beyond the contracting "transition bubble", the Duquette/Ramsey study projects that these institutional economies could yield a more efficient legal process than the current legal process.

Michigan Guidelines, *supra* note 5, at 65 (citing Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341 (1987)).

63. The court is careful to clarify that *Clark v. Alexander* is binding only when an attorney is appointed to represent the child while also acting as the GAL, and states: "[W]e do not intend to usurp the role of the district court in appointing individuals to act solely as an attorney or as guardian ad litem. It is imperative, however, that the appointee request clarification from the appointing court if questions regarding duties arise." *Clark*, 953 P.2d at 151-52. The possibility remains in Wyoming, that a court may still appoint a guardian ad litem who is not an attorney. This may be appropriate, for example, if counsel for the child has already been retained. *But see supra* notes 30-31 and accompanying text (reflecting the Supreme Court's belief that appointing both an attorney and a GAL "would in every case conscript

court directs otherwise, at least in child custody cases, the duties the Wyoming Supreme Court imposes in *Clark* obligate a guardian ad litem to serve in a hybrid capacity and participate as a legal advocate.[64] Furthermore, by precluding an attorney/GAL from being a fact witness and from submitting written reports to the district court absent the parties' consent in custody cases,[65] the Wyoming Supreme Court reduces the role of a GAL as an arm of the court.[66] Thus, *Clark* arguably magnifies the importance of participating as a legal advocate since it is principally in that role that a child's representative now must advocate for the child's best interests.

The court has stated in other malpractice cases that "[d]etermining the existence of an attorney-client relationship 'depends on the facts and circumstances of each case' and 'may be implied from the conduct of the parties . . .'"[67] In *Clark*, the court prescribes specific conduct for a hybrid representative. It requires an attorney/GAL to advocate for the child's best interests by conducting all necessary pretrial preparation,[68] offering evidence at trial,[69] examining witnesses,[70] making opening and closing statements[71] and overseeing the proceedings to ensure an expeditious resolution.[72] As these tasks are ordinarily only performed by attorneys, they also support a conclusion that an attorney-client relationship exists between a child and an attorney/GAL.[73]

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family resources better directed to the children's needs outside the litigation process.").

64. *Clark*, 953 P.2d at 154 (citing Moore v. Moore, 809 P.2d 261, 264 (Wyo. 1991). *See also In re* MFB, 860 P.2d 1140, 1152 (Wyo. 1993) ("[T]he guardian ad litem must act with reasonable diligence in the role of an advocate for the child, and participate as necessary in all phases of the process, including subsequent appeals, to ensure the rights of the client are protected.").

65. *Clark*, 953 P.2d at 154. *See also supra* text accompanying notes 43-49.

66. *See supra* note 32. *See also* Barr v. Day, 854 P.2d 642, 650 (Wash. Ct. App. 1993); Kohl v. Murphy, 767 F. Supp. 895, 901 (N.D. Ill. 1991) (stating that when testifying in court and making reports and recommendations to the court, a guardian ad litem acts as an actual functionary or arm of the court).

67. Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995) (quoting Chavez v. State, 604 P.2d 1341, 1346 (Wyo. 1979)).

68. *Clark*, 953 P.2d at 154.

69. *Id.*

70. *Id.* at 153.

71. *Id.* at 153, 154. *See also supra* text accompanying notes 46-47.

72. *Clark*, 953 P.2d at 153 (citing J.A.R. v. Superior Court, 877 P.2d 1323, 1331 (Ariz. 1994)). *Cf. In re* MFB, 860 P.2d 1140, 1152 (Wyo. 1993) (questioning the adequacy of the GAL's representation of a child in an abuse and neglect proceeding, in part for not making a motion to move the proceedings forward).

73. The court arguably implies that an attorney-client relationship exists by stating:

> [a]s legal counsel to the child, the attorney/guardian ad litem is obligated to explain to the child, if possible, that an attorney/guardian ad litem is charged with protecting the child's best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship.

Clark, 953 P.2d at 154.

B. Malpractice Issues: Quasi-Judicial Immuniy

Since Wyoming law does not address whether GALs are subject to malpractice suits,[74] evaluating the potential risk of such liability, broadly speaking, hinges on the common law principles of quasi-judicial immunity which generally attach "to the actions of quasi-judicial officers acting within the scope of their authority."[75] To determine the propriety of GAL liability, many other jurisdictions[76] utilize the functional approach the United States Supreme Court applies in analyzing quasi-judicial immunity issues in comparable cases.[77] The Third Circuit explains:

> Supreme Court precedent in analogous cases . . . counsels the adoption of a functional approach to determining whether a guardian ad litem is absolutely immune. Under this approach, a guardian ad litem would be absolutely immune in exercising functions such as testifying in court, prosecuting custody or neglect petitions, and making reports and recommendations to the court in which the guardian acts as an actual functionary or arm of the court. This does not exhaust the list of functions which would be immune, and each function would have to be analyzed on a case-by-case basis.[78]

The functional approach, therefore, is widely accepted as an appropriate way to evaluate an attorney/GAL's potential vulnerability to suit by focusing on the GAL's specific actions to determine if s/he is, in fact, functioning

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74. The court has never addressed whether the principles of legal malpractice apply to GALs. But for a Wyoming case perhaps remotely applicable to issues of accountability in representing of children, see *In re* LDO, 858 P.2d 553 (Wyo. 1993) (In a delinquency proceeding, juvenile received ineffective assistance of counsel due to counsel's failure to investigate.).

75. Oosterhous *ex rel.* Short v. Short, 730 F. Supp. 1037, 1038 (D. Colo. 1990).

76. *See id.*; Barr v. Day, 854 P.2d 642, 650 (Wash. Ct. App. 1993); Kohl v. Murphy, 767 F. Supp. 895, 901 (N.D. Ill. 1991); Collins *ex rel.* Collins v. Tabet, 806 P.2d 40, 44 (N.M. 1991); Gardner v. Parson, 874 F.2d 131, 145-46 (3d Cir. 1989); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989). *But see* McKay v. Owens, 937 P.2d 1222, 1232 (Idaho 1997).

77. *See, e.g.*, Forrester v. White, 484 U.S. 219, 224 (1988); Cleavinger v. Saxner, 474 U.S. 193, 200 (1985).

Much of the existing case law addressing quasi-judicial immunity for GALs are brought as federal civil rights cases under 42 U.S.C § 1983 (1994). *See, e.g.*, Kohl v. Murphy, 767 F. Supp. 895 (N.D. Ill. 1991); Cok v. Cosentino, 876 F.2d 1 (1st Cir. 1989). Several courts, though, have applied the principles of the civil rights cases to malpractice cases. *See, e.g.*, *Short*, 730 F. Supp. at 1039; *Collins*, 806 P.2d at 47. The New Mexico Supreme Court, in doing so, expressly states that:

> The law relating to the quasi-judicial immunity of functionaries like guardians ad litem has thus developed in recent decades in a context different from the malpractice setting of the present lawsuit, but we see no reason why the basic principles applicable in the civil rights context should not apply in adjudicating a guardian ad litem's liability for negligence.

Collins, 806 P.2d at 47.

78. Gardner v. Parson, 874 F.2d 131, 145-46 (3d Cir. 1989). *See also Kohl*, 767 F. Supp. at 901; *Barr*, 854 P.2d at 650 ("A guardian ad litem is absolutely immune when testifying or making reports and recommendations to the court as an actual functionary or arm of the court.").

as a quasi-judicial officer of the court.

When utilizing the functional approach, courts hold GALs immune from malpractice[79] when they function in their traditional role as an agent or arm of the court, and are responsible for conducting their own investigation and for reaching independent conclusions as to a child's best interests.[80] Within that role, quasi-judicial immunity extends to GALs because "a guardian ad litem 'must render impartial decisions in cases that excite strong feelings,' and if without immunity, 'face the risk of unfounded suits by those disappointed by their decisions . . . .'"[81]

The New Mexico Supreme Court explains, however, that the same rationale under the functional approach does not support application of quasi-judicial immunity when a GAL acts as a legal advocate:

> [w]here the guardian ad litem is acting as an advocate for his client's position . . . the basic reason for conferring quasi-judicial immunity on the guardian does not exist. In that situation, he or she functions in the same way as does any other attorney for a client—advancing the interests of the client, not discharging (or assisting in the discharge of) duties of the court. While the threat of civil liability may deter the guardian in various ways, the same can be said of the effects of the similar threat with which all attorneys appearing in lawsuits are faced.[82]

Thus, a GAL should not be immune, according to a functional analysis, when acting as an advocate for the child and performing tasks any other attorney performs in advocating for a client's interests.

Assuming the Wyoming Supreme Court will also take the functional approach, *Clark v. Alexander* shrinks the shield of immunity for children's representatives in court proceedings. By prohibiting an attorney/GAL from performing two traditionally quasi-judicial functions,[83] testifying in custody proceedings or submitting written reports to the court absent the parties'

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79. *See, e.g.*, McKay v. Owens, 937 P.2d 1222, 1232 (Idaho 1997); *Cok*, 876 F.2d at 3.

80. For a definition of the traditional role of GALs, see Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998) (quoting State *ex rel.* Bird v. Weinstock, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993); Peterson *ex rel.* Berndt v. Molepke, 565 N.W.2d 549, 553 (Wis. Ct. App. 1997); and citing *McKay*, 937 P.2d at 1230 (noting traditional role of guardian ad litem as arm of the court)).

81. *Short*, 730 F. Supp. at 1038 (quoting State v. Mason, 724 P.2d 1289, 1291 (Colo. 1986)). *See also Barr*, 854 P.2d at 650 (citing *Collins*, 806 P.2d at 45 ("Immunity protects participants in the judicial process from harassment, intimidation, and interference with their ability to engage in impartial decisionmaking.")).

82. *Collins*, 806 P.2d at 48.

83. *See supra* note 78 and accompanying text (identifying that testifying and submitting reports to the court are quasi-judicial functions).

consent,[84] and by emphasizing the attorney/GAL participation as legal counsel for the child, subject to the rules of professional conduct (as modified),[85] *Clark* indicates an underlying belief of the court that, like any other lawyer, an attorney/GAL should be responsible for breaches of duty that cause harm to their clients.

C. Evaluating the Wyoming Supreme Court's Approach

While the fear of malpractice may deter some attorneys from GAL practice, the Wyoming Supreme Court's approach has some important advantages. The court has in several cases[86] articulated dissatisfaction with current GAL practice and representation of children, as have some Wyoming practitioners.[87] In *Clark,* the court expresses an urgent need for change and, like it or not, malpractice liability may be an effective incentive for improving representation of children. Holding attorney/GALs financially accountable to their children-clients encourages better representation and is consistent with the pervasive principle in our legal system "'that persons are responsible for the harm they inflict upon one another, and that the victims may seek compensation from the perpetrators.'"[88] So while the court's approach may increase unwanted liability, it furthers principles of accountability and encourages better representation of children.

The court's approach may also assist attorneys who want to actively participate as GALs. Integrating the roles of attorney for the child and guardian ad litem creates a unique position from which to advocate for chil-

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84. *Clark*, 953 P.2d at 154.

85. *Id.* at 153.

86. *See In re* MFB, 860 P.2d 1140, 1152 (Wyo. 1993); *In re* LDO, 858 P.2d 553, 557-60 (Wyo. 1993); *In re* Paternity of IC, 941 P.2d 46, 52-53 (Wyo. 1997); *Clark*, 953 P.2d at 151 n.2.

87. Interviews with Vanessa Summerfield, President of Family Law Division, Dona Playton, President of Albany County Bar and domestic relations practitioner, and Casey Wood, former Legal Services counsel; all three are currently co-workers of the author as attorneys for the Civil Legal Assistance Project, Wyoming Coalition Against Domestic Violence and Sexual Assault (Mar. 1999).

88. Collins *ex rel.* Collins v. Tabet, 806 P.2d 40, 52 (N.M. 1991) (quoting Mason v. Melendez, 525 F. Supp. 270, 275 (W.D. Wis. 1981)). Two competing public policies underlie the debate regarding the propriety of GAL liability. On the one hand is the need to preserve impartial adjudication. The Washington Court of Appeals explains, "[i]mmunity protects participants in the judicial process from harassment, intimidation, and interference with their ability to engage in impartial decisionmaking." Barr v. Day, 854 P.2d 642, 650 (Wash. Ct. App. 1993) (citing *Collins*, 806 P.2d at 45). Similarly, the U.S. District Court of Colorado contends that "[w]ithout immunity guardians ad litem would act like litigation lightning rods. Lawsuits would, in the words of Learned Hand, 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" Oosterhous *ex rel.* Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990) (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

On the other hand is the principle of accountability. *Short*, 730 F.Supp. at 1039. The New Mexico Supreme Court acknowledges that "'[i]mmunity from damages, whether absolute or qualified, represents a sharp departure from the principle that persons are responsible for the harm they inflict upon one another, and that the victims may seek compensation from the perpetrators.'" *Collins*, 806 P.2d at 52 (quoting *Mason*, 525 F. Supp. at 275).

dren. Some commentators assert that "[a] hybrid role may be the best framework within which to advocate for children. Such an approach attends to both a child's wishes and his or her best interests and integrates them into a meaningful result in a timely manner."[89] *Clark* also helps vigilant attorney/GALs by clarifying their role. In evaluating a GAL's effectiveness, one article explains,

> [t]hat attorneys had little effect overall is understandable if the circumstances surrounding the guardian's role are considered. First, there was much confusion about the role of the guardian ad litem . . . . This confusion not only prevented the guardian ad litem from having a clear goal, but it was also a source of confusion to the judge who may have resented, criticized, or ignored a guardian ad litem who was taking on responsibilities that the judge felt were inappropriate . . . .[90]

So, *Clark* may assist attorneys who experience resistance from judges because it identifies specific duties for an attorney/GAL. In light of the opinion's impact on quasi-judicial immunity, an attorney/GAL may even argue that failure to perform the duties prescribed in *Clark* may constitute malpractice or ineffective assistance of counsel.[91]

Another advantage to the court's approach is that district courts will no longer have to defer to a GAL's determination of a child's best interests. The Wyoming Supreme Court, by restricting attorney/GAL's recommendations to those that "can be made to the court through closing argument based on evidence received,"[92] forces GALs to present to the district court the evidence or information upon which the GAL based his/her recommendation. The district court need not rely on a GAL's assessment of a child's best interests, since the court can review the evidence produced by an attorney/GAL's investigation itself and reach its own conclusion.[93]

This change facilitates better decisions in two ways. First, it encourages GALs to more actively participate on behalf of their clients throughout

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89. Shink & Haralambie, *supra* note 53, at 8.

90. Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 451 (1983).

91. *Cf. In re* LDO, 858 P.2d 553 (Wyo. 1993) (In a delinquency proceeding, juvenile received ineffective assistance of counsel due to counsel's failure to investigate).

92. Clark v. Alexander, 953 P.2d 145, 154 (Wyo. 1998).

93. A desire for the district court to independently determine a child's best interest is perhaps what motivated the Supreme Court to modify an attorney/GAL's duty of confidentiality. *See supra* notes 38-42 and accompanying text. If a district court should no longer defer to the GAL's judgement, it becomes essential that the attorney/GAL be able to disclose to the judge statements made by the child to ensure the judge is privy to all information relevant to determining the child's best interests.

the proceedings. Second, it reveals when a GAL's conclusions are not adequately supported or are based on personal bias. The change may not only prevent courts from relying on unwarranted recommendations, but also will provide essential information bearing on issues of malpractice, removal and future appointments of GALs.

D. Choosing a Response to the Wyoming Supreme Court's Mandate

In *Clark,* the court takes important steps to address the problems in our legal system regarding the representation of children. The court readily acknowledges that it "does not address many areas of chronic confusion" and implores Wyoming's "courts, legislators, professionals, and concerned citizens" to "address the appointment of counsel and guardians ad litem for Wyoming's children."[94] Because the holding in *Clark* is binding only in child custody matters, it cannot create the systemic changes needed to adequately protect Wyoming's children. Therefore, the court urges public involvement "[i]n recognition of the need for clarification and the lack of uniformity throughout our state . . . ." One advantage, then, to proposing a new rule of professional conduct is that it can address the need for uniformity in GAL practice.

Under *Clark,* the responsibility of ensuring adequate representation of children rests on Wyoming's lawyers.[95] So it is likely that, regardless of who institutes a response, it will be the Wyoming attorneys appointed as GALs who will be bound by it. The Wyoming Bar, therefore, has an interest in addressing the problems identified in *Clark* in a way which will be the least burdensome to its members.

While legislation might be equally effective in addressing the court's concerns, proposing a rule allows the state bar, rather than the legislature, to define the duties and roles of an attorney/GAL, while advancing its interest in adopting the least burdensome solution. Furthermore, if the rule proves to be ineffective, lawyers will have the opportunity to propose changes without having to face the daunting political task of amending a statute. A rule of professional conduct, which responds to the court's concerns, is the approach most advantageous for Wyoming practitioners.

E. The Proposed Rule

With both the needs of children and the interests of the bar in mind, this author proposes the rule of professional conduct found in Appendix A.

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94. *Clark,* 953 P.2d at 151 n.2. *See also supra* note 1.
95. *See supra* notes 29-50 and accompanying text.

The rule is modeled after the Kansas Guidelines for Guardians Ad Litem,[96] although significantly modified to incorporate the Wyoming Supreme Court's guidance.

While much of the rule comes directly out of *Clark*, the opinion does not directly speak to the need for an educational requirement. Mandated GAL training is one of the key elements to the proposed rule because it is essential to improving the representation of children. The West Virginia Supreme Court, in imposing a GAL training prerequisite, explains that:

> because the practice of guardians *ad litem* is rather unique, and at times complex, guardians *ad litem* need specialized education and training to fulfill their responsibilities. . . . Therefore, we find that a minimum of three hours of continuing legal education per year, relating to the representation of children, for guardians *ad litem* to complete is necessary to ensure the effective representation of children.[97]

The Wyoming Supreme Court also hints at the unique nature of GAL practice when commenting on an attorney/GAL's duty to keep the child informed. In *Clark*, the court says, "[w]e recognize that in some instances a child may be too young to understand the purpose of the proceedings or the role of the attorney/guardian ad litem. However, in most cases, the information may be conveyed in an age-appropriate manner."[98] Since legal training does not teach the skills necessary to communicate to children in "an age-appropriate manner," this comment reflects the need for specialized training to assist attorney/GALs in fulfilling these responsibilities. Thus, a GAL educational requirement is paramount in proposing a rule that will improve the representation of Wyoming's children.

IV. CONCLUSION

Clark v. Alexander is an important child custody case which addresses some of the problems with guardian ad litem practice. In *Clark*, the Wyoming Supreme Court establishes a hybrid by combining the roles of a guardian ad litem and attorney for the child and by identifying some of the duties of an attorney/GAL.

When acting as a hybrid, an attorney/GAL is bound by the Wyoming Rules of Professional Conduct, except in two ways. First, the court holds

96. Kansas Supreme Court Rules, Guidelines for Guardians Ad Litem (1995).
97. *In re* Jeffrey R.L., 435 S.E.2d 162, 178 (W. Va. 1993).
98. *Clark*, 953 P.2d at 154 n.5.

that an attorney/GAL has a duty to advocate for a child's best interests and is not bound by his/her client's expressed preferences. Second, the court lessens the duty of confidentiality to ensure that an attorney/GAL can present all information relevant to a child's best interests to the district court. Finally, *Clark* precludes an attorney/GAL from being a fact witness or from submitting written reports to the district court absent the parties' consent.

In *Clark*, the Wyoming Supreme Court urges practitioners and others to address the problems with Wyoming's representation of children. The *Clark* opinion also increases the likelihood that attorney/GALs will be subject to malpractice claims. By proposing a new rule of professional conduct, the Wyoming State Bar can not only respond to the need for better representation, but also may limit a possible proliferation of malpractice suits against Wyoming's attorney/GALs.

Appendix A

PROPOSED RULE OF PROFESSIONAL CONDUCT: DUTIES OF AN ATTORNEY/GUARDIAN AD LITEM

Unless the presiding judge authorizes departure for good cause shown, an attorney/guardian ad litem shall:

1) Conduct an independent investigation. Review all relevant documents and records including those of social services agencies, police, courts, physicians (including mental health), and schools. When investigating:

(i) interviews either in person or by telephone with the child, parents, social workers, relatives, school personnel, caregivers and others having knowledge of the facts are recommended; and

(ii) continuing investigation and regular contact with the child are mandatory.

2) Determine the best interests of the child by considering, but not limited to, such factors as the child's preference, age, level of maturity; culture and ethnicity; degree of attachment to family members, including siblings; as well as continuity, consistency, and the child's sense of belonging and identity.

3) Actively participate in all hearings and meetings to represent and advocate for the best interests of the child.[99]

4) Explain the court's proceedings and the role of the guardian ad litem to the child in terms the child can understand. Explain to the child, if possible, that the attorney/guardian ad litem is charged with protecting the child's best interests and that the attorney/guardian ad litem may disclose information to the court that would otherwise be protected by the attorney-client relationship. Seek consent from the child prior to disclosing otherwise confidential information, although consent is not mandatory.[100]

5) Present all relevant information provided by the child to the court. Inform the court of the child's expressed preferences, and if the attorney/guardian ad litem determines that the child's wishes are not in the child's best interest, inform the court of the child's wishes and the basis for the attorney/guardian ad litem's disagreement.[101]

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99. Clark v. Alexander, 953 P.2d 145, 154 (Wyo. 1998).
100. *Id.* at 154 n.5.
101. *Id.* at 153-54.

6) Conduct all necessary pretrial preparation, present all relevant information to the court through evidence offered at trial and make recommendations to the court through closing argument based on the evidence received.[102]

7) Monitor implementation of service plans and court orders, and participate in subsequent appeals, as necessary to ensure the child's rights are protected.[103]

8) Participate in prerequisite education prior to appointment as attorney/guardian ad litem which consists of:

(i) initially completing six (6) hours of approved continuing legal education (CLE) in the following areas:

a. Overview of the juvenile and domestic relations law;

b. Roles, responsibilities and duties of attorney/guardian ad litem representation;

c. Laws governing child abuse and neglect, termination of parental rights;

d. Developmental needs of children;

e. Characteristics of domestic violence, abusive and neglectful families, and of children who are victims; physical and medical aspects of child abuse and neglect;

f. Communication with children; children as witnesses; and

(iii) annually completing three (3) hours thereafter on any topic related to the representation of children as a guardian ad litem.

9) File a statement with the CLE division of Wyoming State Bar after completing the prerequisite education for initial inclusion on the list of qualified attorney/guardians ad litem which will be provided to the courts and made available upon request from the Wyoming State Bar. Every year thereafter when appropriate, indicate when applying for CLE credit hours that the CLE hours are intended to satisfy the educational requirements for attorney/guardians ad litem.

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102. *Id* at 154.
103. *In re* MFB, 860 P.2d 1140, 1152 (Wyo. 1993).

Appendix B

WYOMING STATUTES REGARDING ATTORNEYS FOR CHILDREN AND/OR GUARDIANS AD LITEM

Wyoming Rules of Civil Procedure, Rule 17(c) gives guardians the authority to sue or defend on behalf of a minor or incompetent person, and requires the court to either appoint a guardian ad litem when a minor or incompetent person is not otherwise represented, or to "make such other order as it deems proper" for their protection.

Wyoming Statute § 3-1-108, which was amended in July of 1998, clarifies that the appointment of a guardian or conservator for a ward does not impair or affect any court's power to appoint a guardian ad litem to represent the best interest of a child or an incompetent person. Section (b) of this statute requires a guardian ad litem appointed under the guardian and ward statutes to report back to the court within 30 days as to the condition of the ward and recommendations. Perhaps to distinguish the many and confusing roles an attorney can play in these proceedings, section (c) explicitly precludes the guardian ad litem from having the powers of the guardian or conservator or as acting as legal counsel for the proposed ward.

Wyoming Statute § 3-1-205(a)(iv) provides a proposed ward of any involuntary petition for guardianship or conservator the right to have a guardian ad litem *and* counsel appointed upon order of the court.

Wyoming Statute § 3-2-202(a) requires appointment of a guardian ad litem, and approval of the court prior to allowing a guardian to do certain things like committing a ward to a mental hospital or consenting to certain types of treatment.

Wyoming Statute § 7-13-1205 allows a guardian ad litem to participate in a teen court program.

Title 14, Chapter 2—Parents

Wyoming Statute § 14-2-107 provides that in paternity actions, a minor child, when not represented by a state agency, shall be represented by a guardian or court appointed guardian ad litem, and precludes the child's mother or father from representing the child "as guardian or otherwise."

Wyoming Statute § 14-2-312 applies when a party files a petition for the termination of a parent-child legal relationship. It requires the court to appoint a guardian ad litem unless it finds both that the petitioner or another party will adequately represent the interests of the child and that the child's

interests are not adverse to that party's interests. Unlike other Wyoming statutes that authorize the court to appoint a guardian ad litem, this statute further requires that when the court makes such an appointment, it must also approve a fee for the guardian ad litem's services.

Wyoming Statute § 14-2-318(b)(i), in parental termination proceedings, allows the court to appoint counsel for an indigent party, and requires the authorized agency, when it is the petitioning party, to pay costs, including the fee for the guardian ad litem.

Title 14, Chapter 3—Child Protection

Wyoming Statute § 14-3-204(a)(vii) grants power to the local child protective service to petition the court to appoint a guardian ad litem to act in the best interest of the child, if the agency has requested court action, but the county attorney elects not to bring it. The guardian ad litem may petition the court to direct the county attorney to show cause why an action has not been commenced.

Wyoming Statute § 14-3-211 requires the court to appoint counsel to represent any child "in a court proceeding in which the child is alleged to be abused or neglected." It also directs the appointed counsel to serve as the child's guardian ad litem unless the court has already appointed one. Regardless of whether the attorney is appointed as the counsel for the child or as a guardian ad litem, though, the statute dictates that the appointed person represent the child's best interest. It also allows the court to appoint counsel for any other party when necessary in the interest of justice.

Wyoming Statute § 14-3-409 provides that when a child is placed in shelter care without a court order, the court shall hold an informal shelter care hearing within seventy-two hours and at the hearing's commencement, the judge must advise the child and her/his parents or guardians of five things including their right to counsel as provided by section 14-3-422.

Wyoming Statute § 14-3-416 requires the juvenile court to appoint a guardian ad litem for a child who is party to proceedings under the Children Protection Act, "if the child has no parent, guardian or custodian appearing on his behalf," or if the interests of such person are adverse to the child's best interest. It also forbids a party or a party's employee or representative from being the child's guardian ad litem."

Wyoming Statute § 14-3-422 states that at the first court appearance under

the Child Protection Act, the court shall inform the child's parents, guardian or custodian of their right to be represented by counsel, and after sworn testimony or affidavit verifying the person's financial condition, the court shall appoint counsel. The court can also appoint counsel for a child under this section since subsection (c) provides that "[t]he court may appoint counsel for any party when necessary in the interest of justice."

Wyoming Statute § 14-3-434 addresses fees, costs and expenses, and allocates financial responsibility for certain costs to the county, including fees for court appointed counsel or guardian ad litem, for a action under the Children Protection Act. Subsection (c), however, requires the court, in every case where the court appoints a guardian ad litem or an attorney, to determine and assess costs to the parties if any of the parties have the ability to pay reimbursement costs for representation.*

Title 14, Chapter 6—Juveniles

Wyoming Statute § 14-6-222 provides that at the first appearance under to Juvenile Justice Act, the court shall inform the child and his/her parents, guardian or custodian of their right to be represented by counsel. It authorizes the court to appoint counsel for any party when necessary for the interest of justice, but requires the court upon request to appoint counsel "who may be the guardian ad litem" to represent the child. Subsection (d) states that counsel representing an allegedly delinquent child under the act "shall consider among other things the best interest of the child."

Wyoming Statute § 14-6-409 pertains to taking children into custody under the Children in Need of Supervision Act but is otherwise substantially similar to section 14-3-409, except that this section is effectively repealed July 1,1999.

Wyoming Statute § 14-6-416 dictates that the court appoint a guardian ad litem when a child is a party to proceedings under the Children in Need of Supervision Act and the child has no parent or custodian appearing on his behalf. This statute also precludes parties to the proceeding (or their employees or representatives) from becoming the guardian ad litem, and states that the court shall appoint a guardian ad litem "if the interests of the parents, guardian or custodian are adverse to the best interest of the child." This section is effectively repealed July 1, 1999.**

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* Note, the language of WYO. STAT. ANN. § 14-3-434 and WYO. STAT. ANN. § 14-6-434 are identical.

** Note, the language in WYO. STAT. ANN. § 14-3-416 and WYO. STAT. ANN. § 14-6-416 are identical.

Wyoming Statute § 14-6-434 addresses fees, costs and expenses, allocating financial responsibility for certain costs, including court appointed counsel or guardian ad liten, to the county for a action under the Children In Need of Supervision Act (CHINS). Subsection (c), however, requires the court, in every case where the court appoints a guardian ad litem or an attorney for a child, to determine and to assess costs if any of the parties have the ability to reimburse for cost of representation. This section is effectively repealed July 1, 1999.*

Wyoming Statute § 25-5-119 involves the state training school which is a boarding school for mentally retarded persons, and subsection (b) provides that when an application for involuntary admission is filed, the court must appoint an attorney to represent the proposed resident. Several other sections in this chapter require notice and/or consent from a parent, guardian or guardian ad litem.

Wyoming Statute § 35-6-118(b)(iii) authorizes the court to appoint of a guardian ad litem and an attorney for the minor when the minor is seeking right of self-consent to an abortion.

* Note, the language of WYO. STAT. ANN. § 14-3-434 and WYO. STAT. ANN. § 14-6-434 are identical.