

# **An Attorney Ad Litem Is Not a Law Firm: Only The Fees of the Person Appointed Ad Litem Should Be Paid by the County**

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Attorneys appointed to represent abused children and their parents in CPS<sup>1</sup> cases as attorneys ad litem are routinely billing Harris County for work done by associate attorneys and non-lawyers who work for the person appointed ad litem. This is wrong and violates the law.

In a regular divorce or child custody case, a law firm can represent the client and an attorney in charge is designated. However, any authorized attorney can work on the case or appear in court for the client. So, for example, Mr. Smith can hire The Enos Law Firm to represent him in his child custody case and perhaps Greg Enos or Christina Tillinger might appear in court for the client or maybe even an outside attorney would be asked to make an appearance for Mr. Smith, as long as the client consented. The fees for the various attorneys who worked on Mr. Smith's case would appear on his bill.

However, when a judge appoints a specific lawyer to be the attorney ad litem or guardian ad litem, the San Antonio Court of Appeals has held that it is not usually appropriate for the ad litem to bill for the services of other attorneys:

*When a guardian ad litem is appointed, the trial court intends that appointed attorney to personally protect the minor's interests and to act as an officer of the court.*

*Accordingly, it is generally not anticipated or reasonable for a guardian ad litem to delegate his ad litem responsibilities to other attorneys. We recognize, however, that extenuating circumstances may occasionally arise which justify another attorney's involvement. In those situations, prior approval from the trial court of the second attorney's involvement is preferable when time and circumstances permit; when prior approval is not possible or practical, a subsequent finding by the court that the additional attorney's services were reasonable and necessary will suffice.*

*Here, Lopez billed 3.20 hours each for himself and three other attorneys to attend a meeting about the case, for a total of 12.80 hours. Lopez also billed a total of 21.50 hours for three attorneys (including Lopez) to attend the settlement approval hearing, and billed 24.00 total hours for two other attorneys to attend the fee hearing with him.*

*Notzon had a total of seven people billing time on this case, including himself, three other attorneys and three paralegals. We hold that a guardian ad litem may not be compensated for time expended by other attorneys, unless the trial court has made a specific finding that the other attorney's services were reasonable and necessary under a particular extenuating circumstance.*

*Goodyear Dunlop Tires N. Am., Ltd. v. Gamez, 151 S.W.3d 574, 588 (Tex. App. - San Antonio 2004, no pet.)(citations omitted)(emphasis added). Gamez involved guardians ad litem appointed to represent minors in a personal injury suit, not appointments under the Texas Family Code.*

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<sup>1</sup> Child Protective Services is part of the Texas Department of Family and Protective Services. However, judges and lawyers still refer to the department as "CPS."

However, the *Gamez* holding should apply to any situation in which a judge appoints a specific attorney to serve the court.

Consistent with the reasoning in the *Gamez* case, a wise, ethical and experienced family judge explained to me how attorney ad litem in CPS cases are different than private attorneys:

*As a judge, I pick a specific lawyer to appoint as ad litem and I expect that lawyer to meet the child and foster parents and teachers and doctors and biological parents and appear in court for that child. If I appoint Sally Green to be the attorney ad litem, I want Sally to do the work because I selected her based on her skills and experience and performance in past cases. I did not appoint Sally's associate attorney or some lawyer she knows or her paralegal to be the ad litem, I chose her! Only in rare, unusual situations would I permit someone other than the attorney I appointed to visit the child at home and I had better be told up front exactly why it happened. Scheduling conflicts may require that a substitute attorney be occasionally sent to court for the ad litem, but the fill-in attorney must be familiar with the case and there had better be a real good reason why the ad litem is not in court.*

Good, ethical judges all think this way and they have all been universally amazed when I tell them what is happening in some courts that also hear CPS cases. In a few courts, judges are appointing attorneys to be ad litem but those attorneys are submitting pay vouchers for work done by other attorneys and even non-lawyers as if the ad litem himself had done the work.

Only the work done by the specific person appointed as attorney or guardian ad litem should be submitted for payment and paid by the county in CPS cases. An attorney ad litem appointed to represent a child or a parent in a CPS case is different than a lawyer or law firm hired by a private client because of the specific laws involved.

The Texas Family Code Section 107.001(2) defines an “attorney ad litem” as follows:

*107.001(2) "Attorney ad litem" means **an** attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.*

The definition of a guardian ad litem is found in Section 107.001(5):

*5) "Guardian ad litem" means **a person appointed to represent the best interests of a child.**<sup>2</sup> The term includes:*

*(A) **a** volunteer advocate appointed under Subchapter C;*

*(B) **a** professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;*

*(C) **an** adult having the competence, training, and expertise determined by the*

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<sup>2</sup> In many CPS cases, attorneys are often appointed in the dual role of attorney ad litem and guardian ad litem. Section 107.001(2) makes it clear that the “guardian ad litem” is “**a person appointed...**” A substitute lawyer or a non-lawyer who has not been selected by the judge would not be “a person appointed to represent the best interests of the child.”

*court to be sufficient to represent the best interests of the child; or*

*(D) **an** attorney ad litem appointed to serve in the dual role.*

The use of “an” or “a” in this context in plain English clearly refers to a singular person. When “a” or “an” is used as an indefinite article, it has this meaning: “Used before nouns and noun phrases that denote a single but unspecified person or thing: *a region, a person.*”<sup>3</sup> The *Wikipedia* article on the “English Indefinite Article” states:

*The indefinite article of English takes the two forms a and an. Semantically they can be regarded as meaning "one."*

If a teacher says, “A student will be selected to represent the class,” then the teacher clearly means that one student will be chosen.

The Family Code’s definition of attorney ad litem does not say, “attorney ad litem means an attorney or that attorney’s law firm or designated representative.”

The Family Code also uses “an attorney ad litem” and “a guardian ad litem” when it describes their duties. Sections 107.002, 107.003, 107.004, 107.0131, 107.0132, 107.014.

The Family Code describes situations when an attorney ad litem or guardian ad litem must or may be appointed and, again, the statutes use the singular “a” or “an.” Sections 107.011, 107.012, 107.0125, 107.013, 107.021.

In cases involving CPS, Section 107.004(d) states:

*(d) Except as provided by Subsection (e), **an** attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 shall:*

- (1) meet before each court hearing with:
  - (A) the child, if the child is at least four years of age; or*
  - (B) the individual with whom the child ordinarily resides, including the child's parent, conservator, guardian, caretaker, or custodian, if the child is younger than four years of age; and**
- (2) if the child or individual is not present at the court hearing, file a written statement with the court indicating that **the attorney ad litem** complied with Subdivision (1).*

Sec. 107.004(d-1) says that an attorney ad litem must meet with the child before each court hearing and the meeting must take place:

- (1) a sufficient time before the hearing to allow **the attorney ad litem** to prepare for the hearing in accordance with the child's expressed objectives of representation; and*
- (2) in a private setting that allows for confidential communications between **the attorney ad litem** and the child or individual with whom the child ordinarily resides, as applicable.*

The use of “the” in Sec. 107.004(d) and (d-1) make it clear that the individual who was appointed by the judge to be “the attorney ad litem” must be the person who meets with the child. The statute does not say “the attorney ad litem or his/her associate or social worker” must meet with the child.

There is a specific statute on attorney fees for attorneys appointed as attorney ad litem for a

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<sup>3</sup> *The American Heritage Dictionary of the English Language* (2014).

child or a parent. Section 107.015 says in part:

*(a) An attorney appointed under this chapter to serve as an attorney ad litem for a child, an attorney in the dual role, or an attorney ad litem for a parent is entitled to reasonable fees and expenses in the amount set by the court to be paid by the parents of the child unless the parents are indigent.*

*(b) If the court determines that one or more of the parties are able to defray the fees and expenses of an attorney ad litem or guardian ad litem for the child as determined by the reasonable and customary fees for similar services in the county of jurisdiction, the fees and expenses may be ordered paid by one or more of those parties, or the court may order one or more of those parties, prior to final hearing, to pay the sums into the registry of the court or into an account authorized by the court for the use and benefit of the payee on order of the court. The sums may be taxed as costs to be assessed against one or more of the parties.*

....

*(d) A person appointed as a guardian ad litem or attorney ad litem shall complete and **submit to the court a voucher or claim for payment that lists the fees charged and hours worked by the guardian ad litem or attorney ad litem.** Information submitted under this section is subject to disclosure under Chapter 552, Government Code.*

Section 107.015(d) says the voucher submitted for payment by the ad litem shall list, "...the fees charged and hours worked by **the guardian ad litem or attorney ad litem.**" The statute does not say the voucher can

include hours charged or worked by, "the attorney ad litem or her associate or designated representative."

There are two other important reasons why the specific person appointed as attorney ad litem must be the person who meets with the child and who represents the child or parent in court. Sec. 107.009 grants immunity to suit to, "A guardian ad litem, **an** attorney ad litem, ...appointed under this chapter." Another attorney not named in the order appointing the attorney ad litem is arguably not entitled to immunity to a civil suit.

Sec. 107.007(a) states:

***An attorney ad litem, an attorney serving in the dual role, or an amicus attorney may not:***

- (1) be compelled to produce attorney work product developed during the appointment as an attorney;*
- (2) be required to disclose the source of any information;*
- (3) submit a report into evidence; or*
- (4) testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct.*

A person who is not appointed the attorney ad litem is arguably not entitled to protection from being forced to testify or to disclose confidential information provided by the child or parent. If Tom Garza is appointed to be the attorney ad litem for a child and Tom sends a lawyer friend, Monica Wilson, to visit the child at home, only Tom is the attorney ad litem appointed by the judge. Monica is not the appointed ad litem and in theory Monica could be forced to testify and could be sued civilly.

The Texas Disciplinary Rules of Professional Conduct, which govern attorney's ethics and behavior, include this rule:

### 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

An appointed attorney ad litem who submits a CPS pay voucher to a judge for approval that includes hours performed by other attorneys, would arguably be violating this ethical rule if she fails to disclose to the judge that the hours submitted include work done by others.

An attorney ad litem who submits a pay voucher to the county for payment which includes work done by someone other than the person appointed ad litem, could also be committing a crime (especially if the voucher makes it appear that all of the work was done by the attorney ad litem).

Texas Penal Code Sec. 37.10 states in part:

*37.10. TAMPERING WITH GOVERNMENTAL RECORD. (a) A person commits an offense if he: (1) knowingly makes a false entry in, or false alteration of, a governmental record; (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;....*

Sec. 37.01(2) defines a "government record" to mean:

*(A) anything belonging to, received by, or kept by government for information, including a court record;*

The tampering with a government record statute has been applied to a deputy constable who submitted false time sheets for pay to the county in *State v. Collier*, 285 S.W.3d 133, 136-37 (Tex. App.-Houston [1st Dist] 2009, no pet.).

Tampering with a government record is a Class A misdemeanor,"unless the actor's intent is to defraud or harm another, in which event the offense is a state jail felony." Sec. 37.10(c). A lawyer who knowingly submits a false CPS pay voucher to the county is defrauding the county and therefore each false pay voucher constitutes a state jail felony.