

**Practicing Practically as an  
Amicus Attorney**  
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Revisions to Chapter 107 of the Texas Family Code created new monikers and responsibilities for Texas Family Lawyers practicing in cases involving the representation of children – if appointed in a private case, do you know your responsibilities? Read on, and you will!

Let's figure out legal fees first. In private custody cases, the Court is charged with determining the fees and expenses of an Amicus Attorney based on "reference to the reasonable and customary fees for similar services in the county of jurisdiction."<sup>1</sup> The Court must, in a suit other than a suit filed by a governmental entity, ascertain the fees and expenses of an amicus attorney by referring to the reasonable and customary rate for comparable services within the Court's jurisdiction, and can protect you by ordering "a reasonable cost deposit to be made at the time the Court makes the appointment. If the Court determines that one or more of the parties is able to pay the fees of the amicus attorney, the Court may order one or more parties to pay such fees, or "prior to final hearing, to pay the sums into the registry of the Court or into an account authorized for the use and benefit of the payee."<sup>2</sup>

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

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

**CAVEAT:** An Amicus Attorney DOES NOT provide legal services to the child.<sup>3</sup>

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

A. *Within a reasonable time following appointment, interview:*

1. the child (if the child is aged 4 or older);
2. each person with significant knowledge of the child, including foster parents;
3. the parties.

B. *Investigate the facts TO THE EXTENT THE ATTORNEY DEEMS APPROPRIATE;*

C. *Obtain and review the child's relevant records (subject to other laws, as noted below);*

D. *Participate in the litigation to the same extent as any party's advocate;*

E. *Expedite the proceedings;*

F. *Encourage settlement through ADR and*

G. *Be trained in child advocacy.*<sup>4</sup>

*Entitled to:* Receive a copy of each pleading filed with the Court and notice of every hearing, to participate in agency staffings, and to attend all legal proceedings.<sup>5</sup>

*Additional Duties of Amicus Attorney:* review the facts and circumstances of the case, and advocate the best interest of the child.

*Mandatory Duties of Amicus Attorney:*

1. ascertain the child's desires;
2. with the child's consent, assure that the child's desires are revealed to the Court;
3. consider the impact on the child in making the child's desires known;

<sup>1</sup> Id., §107.023.

<sup>2</sup> Id., §107.015 (b).

<sup>3</sup> Id., §107.001(1).

<sup>4</sup> Id., §107.003(1)-(2).

<sup>5</sup> Id., §107.003(3).

4. review, sign, or decline to sign an agreed order regarding the child;
5. explain the basis of any opposition to the agreed order;
6. explain the amicus attorney's role to the child;
7. explain that certain information disclosed by the child may be shared with the Court, PROVIDED that the amicus attorney first determines that the disclosure of otherwise confidential communications from the child to the Court are necessary in order to serve the best interests of the child.<sup>6</sup>

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

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

The Amicus must assure that his/her actions in regard to the child take regard of what is DEVELOPMENTALLY APPROPRIATE: i.e. demonstrating that we have considered a child's age, educational level, cultural background, and communication skills.<sup>8</sup>

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

TFC Chapter 261 defines abuse, mandates reporting of same, and creates certain immunities regarding the reporting of abuse or neglect of children.<sup>9</sup> "A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report."<sup>10</sup> The report should include the Amicus Attorney's belief that the child has been or may be abused or neglected, and should be made to the appropriate agency, including:

1. any local or state law enforcement agency;

2. the department if the alleged or suspected abuse involves a person responsible for the care, custody, or welfare of the child;
3. the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect has occurred; or
4. the agency designated by the court to be responsible for the protection of the children.<sup>11</sup>

Such a report should include the name and address of the child, the name and address of the person responsible for the care of the child and any other pertinent information. In the event of a false report, penalties flow. What type of penalties attach to a false report of abuse or neglect?

- (a) A person commits an offense if the person knowingly or intentionally makes a report as provided in this chapter that the person knows is false or lacks factual foundation.
- (b) A finding by a court in a suit affecting the parent-child relationship that a report made under this chapter before or during the suit was false or lacking factual foundation may be grounds for the court to modify an order providing for possession of or access to the child who was the subject of the report by restricting further access to the child by the person who made the report.<sup>12</sup>

Failure to report may lead to penalties – a conviction for failure to report abuse or neglect is a Class B misdemeanor.<sup>13</sup> Employers are prohibited from retaliating against employees who in good faith report abuse or neglect.<sup>14</sup> Caps are placed on the damages recoverable against an employer if that employer is a governmental unit.<sup>15</sup>

A "professional" for the purposes of Chapter 261, and the duty to report child abuse or neglect, includes individuals holding a license granted by the state, such as attorneys, as well as:

- . . . teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services,

<sup>6</sup> *Id.*, §107.005.

<sup>7</sup> *Id.*, §107.007(a).

<sup>8</sup> *Id.*, §107.001(3).

<sup>9</sup> *Id.*, §261.

<sup>10</sup> *Id.*, at §261.101.

<sup>11</sup> *Id.*, §261.102-103.

<sup>12</sup> *Id.*, §261.107.

<sup>13</sup> *Id.*, §261.109.

<sup>14</sup> *Id.*, §261.110.

<sup>15</sup> *Id.*

juvenile probation officers, and juvenile detention or correctional officers.<sup>16</sup>

YOUR ABILITY TO ACCESS INFORMATION AS AN AMICUS ATTORNEY MAY BE TRUMPED BY OTHER PROVISIONS OF LAW, including:

1. *Physician Patient Communication Under Medical Practice Act. (Tex.Occ.Code Ann §§151.001-165.160 (Vernon, 2000).*
2. *Court or administrative proceedings. (Tex.Occ.Code Ann.§§159.003).*
3. *Non-court or administrative proceedings. (Tex.Occ.Code Ann.§§159.004).*
4. *Hospital records regarding disclosure of Health Care Information. (§241.152 et seq.)*
5. *Mental Health Records. (Tex.Health & Safety Code §611.01(1).*
6. *Drug and Alcohol Abuse Patient Records from Federally Funded Programs – Certain records restricted. (42 USC §290 dd-2 §543; 42 CFR §§2.12(a) and 2.3(a).*
7. *AIDS/HIV Test Results and Fact of Testing Prohibited Under Communicable Disease Prevention and Control Act. (Tex.Health & Safety Code §§81.101(5); 81.103(a).*
8. *Waiver of Medical Peer Review Privilege. (Tex.Occ. Code §160.007(e).*
9. *Medical Liability Insurance Improvement Act. (Tex. Rev. Civ. Stat. Ann. Art. 45909c; §4.01(d) (Vernon Supp. 2001).*

The Amicus Attorney is not liable for civil damages for a recommendation rendered in a court appointed capacity UNLESS the recommendation was:

- a. made with conscious indifference or reckless disregard to the safety of another;
- b. in bad faith, or made maliciously; or
- c. grossly negligent or willfully wrongful.<sup>17</sup>

**CAVEAT EMPTOR:** the court **may not** award costs, fees or expenses “against the state, a state agency, or a political subdivision” as immunity is provided by the statute as to private custody matters.<sup>18</sup>

If you have interest in serving as an Amicus Attorney, contact Kathleen Norton of the 301<sup>st</sup> Judicial District Court. If you want to undertake

billable hours for your soul, contact DVAP, to take on pro bono work.

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<sup>16</sup> *Id.*, §261.101(b).

<sup>17</sup> Tex.Fam. Code §107.009.

<sup>18</sup> *Id.*, §107.023 ( c).