

## **Guidelines on the Role of Counsel**

### **1. Presumption of instructional advocacy**

Counsel appointed by LRCY shall assume an instructional advocacy role when representing children and youth who are able to express a wish, opinion, or position *unless* there are conditions present that would preclude counsel from doing so.

### **2. Conditions that may rebut the presumption of instructional advocacy**

For the purpose of Guideline #1, counsel should assess each child or youth individually to determine whether there are conditions present that would preclude him/her from assuming the role of an instructional advocate. Conditions that may justify the departure from this role include:

- preverbal
- easily apparent low cognitive functioning
- mental impairment due to illness or intoxication

A child being under a particular age (for example 12 years) does not necessarily justify a departure from the role of instructional advocate unless, for example, the child is an infant and can be assumed to be preverbal.

### **3. Core elements of instructional advocacy**

When acting as an instructional advocate counsel is expected to:

- a) consult with the child or youth to ascertain his interests based on his wishes, opinions, and positions;
- b) obtain the child or youth's consent before proceeding to advocate those interests on her behalf; and
- c) report back to the child or youth on the outcomes of his advocacy initiatives.

### **4. Interest based instructional advocacy is preferred**

When assuming an instructional advocacy role, interest based instructional advocacy is the preferred model of representation. Interest based instructional advocacy means:

- a) Counsel should be more than a mouthpiece for the child or youth and should avoid regurgitating the child or youth's position whenever possible.

- b) Counsel has an obligation to determine the interests of his client based on the child or youth's stated wishes, opinion, or position.
- c) Ascertaining and representing a child or youth's *interests* is distinct from determining and representing a child or youth's *best interests*. A child or youth's interests may include the maintenance of stable relationships, preservation of the family unit, preservation of cultural identity, etc. A best interests approach is out of place in the context of an instructional advocacy role.

## 5. Children and youth *unwilling* to express a preference, opinion, or position

When a child or youth is *able* to express a wish, opinion, or position, but is *unwilling* to do so, instructional advocacy is still the preferred model of representation. In the absence of a stated wish, opinion, or position counsel will identify the child or youth's interests, discuss those interests with the child or youth, seek consent to proceed, and advocate accordingly. When consent cannot be obtained, counsel will instead represent the child or youth's interest.

## 6. Non-instruction based roles

When instructional advocacy is not possible, for instance, when a child or youth is unable to express a wish, opinion, or position, or when conditions are present that justify a departure from this role, counsel will exercise discretion in determining which non-instruction based role to assume. Non-instruction based roles may include:

- a) Best interests representative

Counsel may substitute his judgment for the child or youth's and formulate and present a position which serves the child or youth's best interests. All submissions by the lawyer must be objectively based on consideration of the evidence, not the lawyer's subjective opinion of what is best for the child or youth.

- b) *Amicus curiae* representative

Counsel in this role assists the court by ensuring that all the relevant evidence is placed before the court and by providing information to the court about legal issues that may arise. In this capacity, the focus of counsel's efforts is on ensuring that all feasible options for the care of the child or youth are investigated and that any relevant evidence which the parties have not introduced is brought before the court. Counsel who adopt this role should explain the court process to the child or youth to the extent possible, and should ensure that the wishes of the child, if expressed, are introduced in evidence. Counsel is not expected to make submissions about what outcome resolution would be in the best interests of the

child or youth. Counsel may also have a neutral mediative role, attempting to facilitate a settlement.

**7. Essential elements of non-instruction based roles**

When a non-instruction based role is assumed, counsel will take measures to satisfy the following aspects of representation:

- a) ensure that the child or youth's interests are paramount in the representation;
- b) ensure independent legal representation for the child or youth by avoiding aligning with another party's position or appearing to advance another party's position;
- c) test the evidence, ensure it supports the application being sought, and ensure the appropriateness of the application being sought;
- d) ensure all relevant evidence is before the court and assist the court in understanding the evidence; and
- e) ensure that any position taken on behalf of the child or youth adequately advances the child or youth's substantive and procedural rights (for instance any *Charter* rights engaged, aboriginal rights, procedural rights, or rights under section 2 of the *Enhancement Act*).

**8. Appointment of a Child and Youth Instructing Agent**

As an alternative to assuming a non-instruction based role, counsel for the child or youth may request that LRCY appoint a Child and Youth Instructing Agent to give instructions on behalf of the child or youth. Counsel will work with the instructing agent to determine the interests of the child or youth, obtain instructions from the instructing agent, and report back to the instructing agent on the outcome of any proceedings. Counsel should consider the instructing agent the client and practice interest based instructional advocacy.

**9. Inform the Court of role**

Counsel shall advise the court of the role he/she has assumed, whether it be that of an instructional advocate or a non-instruction based role. Counsel should also inform the court when a Child and Youth Instructing Agent has been appointed.