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May 7, 2018

Via Email to: clerk@wicourts.gov

Honorable Justices of
Supreme Court, State of Wisconsin
16 East State Capitol
PO Box 1688
Madison, WI 53701-1688

RECEIVED
MAY 07 2018
CLERK OF SUPREME COURT
OF WISCONSIN

Re: Rule Petition 17-06, In re petition to amend SCR 81.02

Dear Justices,

Please accept this letter as a comment to Petition 17-06.

I respectfully request that the Supreme Court grant Atty. John Birdsall and Atty. Henry Schultz' petition to amend SCR 81.02. In this comment letter, I also offer some additional, and some slightly different, suggested language to SCR 81.02.

I. AUTHORITY UNDER THE WISCONSIN CONSTITUTION.

Article VII, §3 of the Wisconsin Constitution provides in pertinent part, "Supreme court: jurisdiction. Section 3. [As amended April 1977]

(1) The supreme court shall have superintending and administrative authority over all courts."

II. WHY SHOULD SCR 81.02 BE AMENDED?

I personally support changes to SCR 81.02 for the following reasons:

A. The Current Amount Paid to Attorneys is Unreasonably & Extremely Low.

Some Wisconsin Circuit Courts and the Wisconsin Public Defender are paying an extremely low amount to private attorneys.

For example, Milwaukee County Circuit Court Probate Division is only paying a flat fee of \$80 per case for some Guardian ad Litem (hereafter, also "GAL") cases.

Milwaukee County Circuit Court's flat fee is \$80 total for an entire case representation by a court-appointed Guardian ad Litem in an uncontested annual review protective placement case.

(Please see Exhibit 1 (August 29, 2017-letter from Milwaukee County Chief Judge regarding SCRs 81.01 and 81.02, and the \$70/hr. rate. However, I understand the Milwaukee County Probate Division was not, and is not, paying the \$70/hr. rate) and Exhibit 2 (Probate Division – County Pay Rate sheet with \$80 flat fee rate; sheets were available in 2016 and/or 2017 – this copy has my written note and markings on it). When I recently stopped by the Milwaukee County Register of Probate's Office in 2017, these Probate Division

To: Wisconsin Supreme Court
Re: Petition No. 17-06
May 7, 2018
Page 2 of 7

– County Pay Rate sheets were no longer on the office counter-top. Instead, taped to the wall in the Milwaukee County Courthouse Register of Probate's office was a document dated 8-24-2010 from Judge Mel Flanagan, Chief Judge of the Probate Division (obviously, of the Probate Division in 2010), indicating the flat rate of \$80 for all initial Watts Review hearings and a \$60/hr. rate. In the past, I also understood that for initial uncontested adult guardianship cases, there was a normal maximum of six (6) hours x \$60/hr. for a total of \$360 on a non-private case. I recently withdrew my name from the appointment list for GAL in the Milwaukee County Circuit Court Probate Division.)

In the above \$80 flat fee GAL example, let's briefly look at the typical work involved with an uncontested annual review protective placement case. Circuit court forms for Guardianships provide some background on the work involved with GAL cases. In particular, the attached form found on wicourts.gov (Exhibit 3 is GN-4110) provides some details of the work involved with an annual review protective placement case.

In form GN-4110, the attorney certifies to the court that the attorney has complied with the requirements of a GAL under §55.18 (2)(a) to (e), Wis. Stats., (except as noted in the "Additional Comments" section at the end of the report). Obviously, it takes time to review court records, review county reports, draft a letter to the guardian, talk with the guardian, review medical/facility records, talk with staff at the facilities, provide a notice of rights document to the individual ward, personally meet with the individual ward, complete the GN-4110 report (and any additional attached document(s)), appear in court, and other work that GN-4110 generally describes/includes. Travel time to and from personally meeting with the individual adult ward at a facility would also be required (and I found that this is almost never at the same facility as another ward). (The rate sheet (Exhibit 2) indicated \$25/hr. for travel time out of the county. I understood that travel time within Milwaukee County was not billable. I also understood that travel time was only allowed at the rate of \$25/hr. after the county line was crossed.) Likewise, even if an attorney had more than one case scheduled for one court date, there would also be travel to and from the courthouse for the cases. (I believe that rarely, an attorney might be able to appear via telephone with the court's permission). Of course, sometimes legal research could also be time-consuming.

Including travel time, work on an uncontested annual review protective placement GAL case could easily take 5 hours or more.

Therefore, if an attorney spends 5 hours total on a case for \$80, the attorney makes only \$16/hr. (Let's look at some more scenarios. If an attorney spends 8 hours on a semi-complicated case, the attorney only brings in \$10/hr. Likewise, if an attorney spends 10 hours on a complicated case, the attorney only brings in \$8/hr. This is close to minimum wage.)

Let's look at only spending 5 hours on a case and the calculation of \$16/hr.

When there are just 5 hours on a GAL case relating to the annual review of protective placement of an incompetent person, this \$80 total flat fee for the case (i.e., \$16/hr.) could be even less than the State Public Defender \$40/hr. rate for criminal defense of indigent people.

Likewise, when I last took GAL appointments in 2017, I understood that Milwaukee County Circuit Court did not allow reimbursement of mileage, postage, outside copying, etc.

To: Wisconsin Supreme Court
Re: Petition No. 17-06
May 7, 2018
Page 3 of 7

Starting with our \$16/hr. calculation example, the cost of the attorney's mileage, copying, postage, parking, printing/ink-jet/toner, paper, envelopes, etc., would further reduce the amount to less than \$16/hr.

On the other hand, I understand that some circuit courts in Wisconsin pay \$100/hr. or other amounts per hour for adult GAL cases.

There should be uniformity for all GAL appointment cases in the Wisconsin Court system.

What about other types of cases?

I understand that when the State Public Defender private attorney appointment rate went down from \$50/hr. to \$40/hr. (for in-court hours) approx. twenty-three (23) years ago (and the hourly rate never went back up), many attorneys took less case appointments (if they took any at all). I personally took far fewer cases, and there were periods when I did not take these case appointments. (Many hours and expenses were also not counted/reimbursed in these cases.)

\$16/hr. or \$40/hr. is not even enough to cover an extremely modest attorney's law office overhead.

Private attorneys are not employees of the Wisconsin Court System. Therefore, the Wisconsin Court system does not pay for the following:

- Vehicle purchase, maintenance and repairs (used to go to courts, prisons, nursing homes and other facilities)
- Telephone
- Office space
- Utilities
- Self-employment taxes (self-employed attorneys pay more taxes than employees)
- Workers Compensation
- Unemployment Compensation
- Life insurance
- Health insurance
- Long-term disability insurance
- Short-term disability insurance
- Retirement
- Personal paid time off/vacation days
- Holiday pay
- State Bar of Wisconsin dues and other assessments (very high)
- State Bar of Wisconsin sections' dues
- Local bar association dues
- Continuing education costs
- Computer systems
- Computer maintenance and technology assistance
- Computer programs
- Computer backup systems
- Research materials/access, books and manuals
- Website creation and maintenance

To: Wisconsin Supreme Court
Re: Petition No. 17-06
May 7, 2018
Page 4 of 7

- Printers/Copiers/Scanners/Fax machines (or combination machines)
- Toners/ink-jets
- File storage
- File shredding/destruction
- Shredder machines
- Office furniture
- Office cleaning
- Supplies (paper, pens, rubber bands, paper clips, etc.)
- Other things reasonably needed or useful to a law office

The cost of even a very basic private law office is expensive.

Also, becoming an attorney takes years of costly education. Undoubtedly, the enormous loan debts acquired from the years of college and law school plague some attorneys for many years after they become attorneys.

B. Unfair Market Forces: State of Wisconsin vs. Private Attorneys.

Overall, the State of Wisconsin is a huge part of the market demand for attorneys' services. The State of Wisconsin government probably has the biggest single demand of attorneys' services in the State of Wisconsin.

The State of Wisconsin has an unfair market advantage over the many attorneys in the legal market because it is a market price-setter of a large portion of the market.

As the State of Wisconsin uses public funds to pay a large number of private attorneys, and because the State of Wisconsin is a powerful market force, the State of Wisconsin should not cause market distortions toward the absolute lowest possible pay to attorneys.

Instead, the State of Wisconsin should pay a reasonable, and family-supporting, rate of pay.

If attorneys could unionize, attorneys would have a chance at a fair wage. I understand that although teachers, police, firefighters, state employees, etc., have unions, private attorneys may not unionize and try to reach an agreement on a fair payment scale for themselves. I also understand that private attorneys may not work together to boycott the government.

What is left as an avenue of solution? Only the Wisconsin Supreme Court.

C. Attorneys that Provide Real Legal & Constitutional Advocacy Are Needed.

I have seen people wrongfully prosecuted, incorrect court filings, incorrect court documents, lost/illegible documents, critical part of video evidence missing, etc.

Unfortunately, some appointed private attorneys do not appear to put the required time or effort into cases when they are not paid a reasonable hourly rate and/or when they do not receive reimbursement for their expenses.

I want to respectfully bring to the Wisconsin Supreme Court's attention that I have a large

To: Wisconsin Supreme Court
Re: Petition No. 17-06
May 7, 2018
Page 5 of 7

concern for the rights of citizens in the court systems.

Injustice is occurring.

D. If Wisconsin Does Not Reasonably Pay Attorneys, Everyone Could Lose.

Someone might argue that there are economic and budget reasons for not paying attorneys a reasonable market hourly rate. If we look further, we see irony in that argument. If the State of Wisconsin is the lowest payer of attorney services, it brings the entire market of attorneys down. This derivatively and negatively affects families, other private markets, local economies, tax payments, etc. Therefore, the State of Wisconsin will eventually be negatively affected by the unreasonably low rates paid to attorneys.

I understand that hundreds of millions of dollars of government money is being/was spent toward a new arena in Wisconsin to be used by a private sports team owned by a small number of super wealthy persons. I understand that an argument for this government spending was that it would help Wisconsin's economy and tax base.

What about the affect of the extremely low payments to attorneys for more than 23 years? How does that affect the economy and tax base?

Let's also look at the economic value of our Constitutional liberties and rights.

Why do people want to live in the U.S.A.? I believe many want to live in the U.S.A. so they can enjoy our liberties, our rights and the opportunity to gain wealth.

We live in a civilized society with constitutions. Of course, the U.S. Constitution and the Wisconsin Constitution provide for liberty. This liberty adds great value to our society. I believe that our Constitutional rights and liberties provide the main value to our fiat (non-gold or other commodity backed) currency and nation's wealth.

Parts of our government itself are always seeking to take away some liberties and rights from individuals, and from our society as a whole, in efforts to make society safer, to help people in need of protection, in attempts to make our society better economically, etc. Unfortunately, history and common sense show us that these efforts can often be mistaken, overreaching, misdirected and improper.

When attorneys protect the Constitutional liberties and rights of one person, they protect the Constitutional liberties and rights of all U.S. citizens.

We can easily see that without learned attorneys giving a voice to Constitutional rights, eventually no one will be free.

Without a reasonable and family-supporting compensation for their work, more attorneys will be forced to not take cases. Worse, some attorneys will likely become paper pushers that really do not represent their clients' Constitutional interests.

When our Constitutional liberties and rights erode in Wisconsin and in other states, so will our Wisconsin and U.S. economies.

To: Wisconsin Supreme Court
Re: Petition No. 17-06
May 7, 2018
Page 6 of 7

E. What Changes are Needed to SCR 81.02?

Below are my suggestions for amending SCR 81.02. (Inserted below is a quote of the proposed SCR 81.02 1, (1m) & 2 from page 2 of Petition 17-06. I strongly agree that some changes should be made to SCR 81.02. As I indicated above, I also added more suggested language and provided a little different language compared to Petition 17-06.)

SCR 81.02 Compensation and Reimbursement.

(1) ~~Except as provided under sub. (1m), a~~Attorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at the rate of ~~\$70 per hour or a higher rate set by the appointing authority. The supreme court shall review the specified rate of compensation every two years~~ \$100/ hour or a higher rate set by the appointing authority. The minimum hourly rate shall be indexed and raised annually consistent with cost of living increases.

~~(1m) Any provider of legal services may contract for the provision of legal services at less than the rate of compensation under sub. (1).~~

(2) The rate specified in sub. (1) applies only to services performed after ~~July 1, 1994~~ January 1, 2018.

(3) Flat fees shall not be used for the appointment of any court-appointed attorneys.

(4) Pre-determined maximum number of hours on a type of case shall not be used for determining the payment to court-appointed attorneys.

(5) Travel time to and from courts, jails, prisons, mental institutions, nursing homes and all other locations (inside and outside of the circuit court's county) by all court-appointed (non-private pay) attorneys shall be reasonably included in the hourly rate of (1).

(6) When the entire court file is not electronically available to court-appointed attorneys, all court-appointed (non-private pay) attorneys shall be provided by the court with free copies of the court file as the court-appointed attorneys reasonably request.

To: Wisconsin Supreme Court
Re: Petition No. 17-06
May 7, 2018
Page 7 of 7

- (7) All court-appointed (non-private pay) attorneys shall be reimbursed for U.S. postage, parking, and other reasonable expenses for appointed cases.
- (8) All court-appointed (non-private pay) attorneys shall be reimbursed for mileage (inside and outside of the respective county of the court-appointed case) at the U.S. I.R.S. business mileage rate in effect on the date the attorney was appointed.
- (9) The payment of an hourly rate less than the rate set forth in SCR 81.02(1)-(5) for legal services rendered pursuant to any of the following appointments is unreasonable:
 - (a) Appointment by the State Public Defender under Wisconsin Statutes sec. 977.08; or
 - (b) Appointment by any Wisconsin Circuit Court for Guardian ad Litem or any other type of case.
- (10) The payment of expenses less than the amounts set forth in SCR 81.02(6)-(8) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes sec. 977.08, or appointment by any Wisconsin Circuit Court for Guardian ad Litem or other type of case, is unreasonable.

III. CONCLUSION.

I urge you to grant petition 17-06 with the additional suggestions that I offered in this letter.

Thank you for considering my opinion.

Respectfully Submitted,

/s/ Theodore D. Kafkas

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Cc: Atty. Henry Schultz and Atty. John Birdsall via email

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Deputy Chief Judge
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HOLLY SZABLEWSKI
District Court Administrator
Telephone: (414) 278-5115

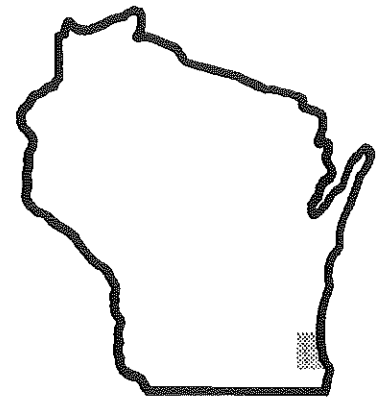
STATE OF WISCONSIN

FIRST JUDICIAL DISTRICT

MILWAUKEE COUNTY COURTHOUSE
901 NORTH NINTH STREET, ROOM 609
MILWAUKEE, WISCONSIN 53233-1425

TELEPHONE (414) 278-5112
FAX (414) 223-1264
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August 29, 2017



RECEIVED

MAY 07 2018

CLERK OF SUPREME COURT
OF WISCONSIN

VIA E-MAIL AND U.S. POST

kafkaslaw@gmail.com

Attorney Theodore D. Kafkas
Law Office of Theodore D. Kafkas
P. O. Box 320072
Milwaukee, WI 53132

Exhibit 1

Kafkas letter re Petition 17-06

Re: Your Records Request

Dear Mr. Kafkas:

This letter is in response to your e-mail request for records which was forwarded to me for handling. You asked for "copies of all past Milwaukee County Circuit Court Orders and Directives relating to the fee schedule for Adult Guardian ad Litem Fees and Expenses." You write that you have received some preliminary verbal and email responses about your request on July 5, 2017 from James Wilson, Administrator in Probate indicating that the Clerks Office does not set rates on Watts' cases. On July 28, 2017 and on August 14, 2017 you received responses from Carolyn Smith, Senior Clerical Assistant, to the Chief Judge indicating that she had not been able to find any documents relating to your request. We have also reviewed all of our records relating to your specific request as underlined above and have not identified any Milwaukee County Circuit Court Orders and Directives relating to the fee schedule for Adult Guardian ad Litem (GAL) Fees and Expenses, except Chief Judge Directive 09-22 regarding the timeliness of submitting the GAL bill and Chief Judge Directive 14-14 amending the 09-22 Chief Judge Directive, in part only (both of these are attached). In response to your request, we are referring you to Wisconsin Supreme Court Rules 81.01 and 81.02 which set the rate of compensation for court appointed lawyers at \$70 per hour or at a higher rate if set by the appointing authority.

If you consider anything in this communication to be a denial of your request, please be advised you have the right to review of any denial by mandamus under Wis. Stat. § 19.37(1), or upon application to the attorney general or Milwaukee County corporation counsel. Wis. Stat. §§ 19.35(4)(b), 59.42(2)(b)4.

Sincerely,

Hon. Maxine Aldridge White, Chief Judge

CC: John Barrett, Clerk of Circuit Court/Director of Court Services/ and Register in Probate
Amy Wochos, Legal Counsel and Senior Administrator, Clerk of Circuit Court
Presiding Judge David L. Borowski, Probate Division
Presiding Judge William S. Pocan, Civil Division
Holly Szablewski, District Court Administrator

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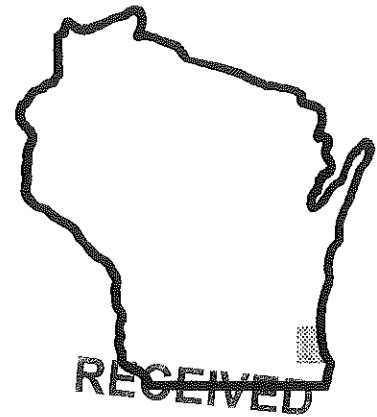
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STATE OF WISCONSIN

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MAY 07 2018

CLERK OF SUPREME COURT
OF WISCONSIN

CHIEF JUDGE
DIRECTIVE
09-22

DATE: November 16, 2009

TO: All Judges, All Court Commissioners, District Court Administrator, Deputy District Court Administrator, County Executive, Clerk of Circuit Court, Corporation Counsel, Sheriff, District Attorney, City Attorney, Public Defender, Court Coordinators, Managing Court Reporter, IMSD, Legal Resource Center, CCAP, Facilities Management, Justice 2000, WCS and Press

FROM: Chief Judge Jeffrey A. Kremers

RE: APPOINTED COUNSEL REIMBURSEMENTS

IT IS HEREBY DIRECTED that, effective immediately:

All requests for reimbursement by counsel appointed by a circuit court judge or for which Milwaukee County has been ordered to pay are subject to the following requirements:

1. The request must first be submitted to the Chief Judge's office for review.
2. The request must be accompanied by a copy of the order of appointment, an itemized statement and a supporting affidavit.
3. The request must be submitted on or before March 31, 2010 or within 90 days of the last billable event, whichever is later. A billable event is defined as the performance of some task for which counsel seeks to be paid.
4. Untimely requests will be denied unless the Chief Judge is satisfied that the attorney seeking payment has demonstrated good cause for the delay.

Dated at Milwaukee, Wisconsin, this 16th day of November 2009.

Hon. Jeffrey A. Kremers
Chief Judge

JAK:bjs

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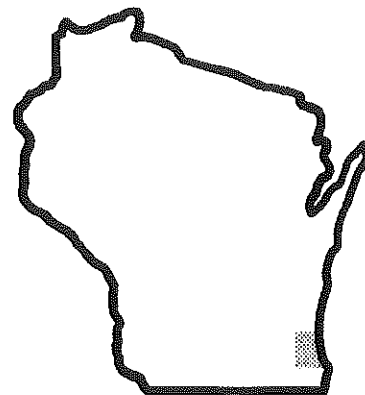
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STATE OF WISCONSIN

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CHIEF JUDGE
AMENDED DIRECTIVE
14-14

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**CLERK OF SUPREME COURT
OF WISCONSIN**

DATE: July 7, 2014

TO: All Judges, All Court Commissioners, District Court Administrator, Deputy District Court Administrator, County Executive, Clerk of Circuit Court, Corporation Counsel, Sheriff, District Attorney, City Attorney, Public Defender, DAS Fiscal Affairs, Court Coordinators, Managing Court Reporter, Legal Resource Center, Facilities Management, Press

FROM: Chief Judge Jeffrey Kremers

**RE: AMENDED DIRECTIVE 9-22 RE: APPOINTED COUNSEL
REIMBURSEMENTS**

IT IS HEREBY DIRECTED that, effective September 1, 2014:

Paragraph 3 of Directive 9-22 regarding reimbursements of appointed counsel is amended by adding this additional language: For purposes of this Directive, the last billable event in an original jurisdiction CHIPS case is the date of discharge from representation or the entry of the dispositional order, whichever is earlier. Thereafter, requests for payment in these CHIPS cases shall be submitted semiannually.

All other terms and conditions of Directive 9-22 remain in full force and effect.

Dated at Milwaukee, Wisconsin, this 7th day of July, 2014.

Jeffrey A. Kremers
Chief Judge

JAK: dla

Probate Division – County Pay Rates

GUARDIANS AD LITEM

Exhibit 2

Kafkas letter re Petition 17-06

WATTS

Summary Hearing

\$80 flat fee for Watts hearing (summary hearing or to file objection).

\$25 per hour travel for out of county (no mileage)

\$50 flat fee per case if more than 4 cases at same facility for same court date

\$25 if it is determined ward has died (higher rate can be granted at discretion of commissioner depending on work done).

Watts After objection filed

\$60 per hour

\$25 per hour travel for out of county (no mileage)

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Guardianships

\$60 per hour

\$25 per hour travel for out of county (no mileage)

CLERK OF SUPREME COURT
OF WISCONSIN

Probate

None – are private pay from estate

DOCTORS

Guardianships

\$80 per hour – PhD or MD

\$25 per hour for travel out of county OR mileage

Mental Commitments

MD - \$100 flat rate

PhD - \$70 flat rate

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE MATTER OF

Exhibit 3

Kafkas letter re Petition 17-06

Amended

**Report and
Recommendation of
Guardian ad Litem
(Annual Review)**

Name of Ward

Date of Birth

Case No. _____

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CLERK OF SUPREME COURT
OF WISCONSIN

I am the court appointed guardian ad litem for the above-named individual. I certify to the court that I have complied with the requirements of a guardian ad litem under §55.18 (2) (a) to (e), Wis. Stats., (except as noted in the "Additional Comments" section at the end of this report) and this report is being filed within 30 days of my appointment.

1. I have reviewed the county department's annual report of the review of the status of the individual, the Annual Report on the Condition of the Ward, and any other relevant reports on the individual's condition and placement.
2. I have personally met with the individual and contacted the individual's guardian.
3. I have orally explained to the individual and to the individual's guardian, and provided to the individual and the individual's guardian in writing, all of the following:
 - A. The procedure for review of protective placement.
 - B. The right of the individual to counsel, including when a lawyer can be appointed.
 - C. The right to an independent medical or psychological examination on the issue of competency (at county expense if the person is indigent).
 - D. The contents of the county department's annual report of the review of the status of the individual.
 - E. That a change in or termination of protective placement may be ordered by the court.
 - F. The right to a hearing and an explanation that the individual or the individual's guardian may request a full due process hearing.
4. I have reviewed the individual's condition, placement, and rights with the individual's guardian, and I have ascertained whether the individual wishes to exercise any of the individual's rights. Based on these reviews, I make the following report:
 - A. Individual's current living arrangement is a nursing home. an intermediate facility.
 a center for developmentally disabled. a CBRF. an adult family home.
 Other: _____ Name of Facility: _____
 Is the home or facility licensed for 16 beds or greater? No Yes
 - B. The individual appears to continue to meet all the standards for protective placement.
 Yes No, please explain: _____
 - C. The current protective placement is the least restrictive environment that is consistent with the individual's needs.
 Yes No, please explain: _____
 - D. The individual has a developmental disability and placement is in a nursing home or intermediate facility, and the placement is the most integrated setting appropriate to the individual's needs. Not Applicable
 Yes No, please explain: _____
 - E. An independent evaluation is requested by the individual, the individual's guardian ad litem or guardian.
 No Yes, please explain: _____
 - F. The individual or the individual's guardian requests modification or termination of the protective placement.
 No Yes, please explain: _____
 - G. The individual or the individual's guardian requests or the guardian ad litem recommends that legal counsel be appointed for the individual.
 No Yes, please explain: _____
 - H. The individual or the individual's guardian or the guardian ad litem requests a full due process hearing for the individual.
 No Yes, please explain: _____
 - I. Regarding the individual's attendance at the hearing:
 it is my opinion that the individual **can attend** the hearing in court.

- I **waive** the individual's attendance after considering the ability of the individual to understand and meaningfully participate, the effect of the individual's attendance on his/her physical or psychological health in relation to the importance of the proceedings and the individual's expressed desires. I certify the individual is unable to attend for these specific reasons: _____
- the individual is **unable to attend** the hearing in court because of residency in a nursing home or other facility, physical inaccessibility, or a lack of transportation; and the individual, advocate counsel, other interested person, or I request that the court hold the hearing in a place where the individual can attend. Specify location requested: _____

5. I recommend continued protective placement in the facility in which the individual resides at this time.

Yes No, please explain: _____

6. Additional comments: _____

Guardian ad Litem

Name Printed or Typed

Date