Professional Responsibility in Representing Juvenile Clients: The Conflict Between The Attorney and the Guardian Ad Litem

THE ROLES OF ATTORNEY AND GUARDIAN

A. Duties As An Attorney

In the typical attorney-client relationship, the attorney advises the client of the law, and the client makes decisions based on the information and advice provided by the attorney. When representing a child, this is complicated by the fact that the juvenile client cannot be assumed to be capable of making such decisions. Accordingly, the lawyer's usual role is clouded by the question of whether the minor should be permitted to make the necessary decisions and whether the minor's confidences should be protected, as they would be in an adult setting.

Bar Rule 1.14 of the Georgia Rules of Professional Conduct indicates that an attorney should strive to maintain the same relationship with a minor client as with an adult client. The Comment to the Rule suggests that a juvenile client may have the ability to understand and reach conclusions about issues which affect his own well-being even if he technically lacks legal competence. Accordingly, the attorney should generally implement the juvenile client's decisions, but should understand the additional responsibility that arises when dealing with clients who are incapable of making considered judgments on their own behalf as to particular issues.

B. Duties Of A Guardian Ad Litem

A guardian ad litem may be appointed at any stage of a proceeding in the juvenile court where a juvenile party either has no parent, guardian or custodian appearing on her

behalf, or where the interests of the child's parent, guardian or custodian conflict with the child's interests. O.C.G.A. § 15-11-9. The function of a guardian ad litem is to *protect the best interest of the child* in connection with the litigation. In re J.S.C., 182 Ga. App. 721 (1987).

The guardian ad litem is an officer of the Court and therefore has ethical obligations to the child, the Court and the public. The guardian is not constrained by all of the ethical responsibilities that govern the attorney such as single-minded advocacy of the child's wishes or preservation of confidences and secrets.

C. Conflicts Inherent In Dual Representation

As described above, the role of the guardian ad litem is to represent the best interests of the child. The role of the attorney is to advocate the child's wishes. These two interests may conflict. It may be in the best interest of the child to be slapped on the wrist in a juvenile proceeding where a technical defense is available. It may be in the best interest of the child to be held in detention (e.g., habitual runaway). It may be in the best interest of the child to be taken from the home, but the child may wish to stay.

The above conflicts may arise both in attempting to avoid adjudication and in advocating a certain disposition after adjudication. At both stages, the guardian's obligation is to act based on the child's best interest, and not to advocate the child's wishes. At the disposition stage, for example, the guardian could convey the child's wishes to the Court and make a recommendation that differs from the child's desires. The attorney is generally required to follow the child's directions regarding the child's objectives. The attorney must resist the temptation to substitute his or her judgment for that of the client.

Where the Court has separately appointed an attorney and a guardian, the attorney may simply advocate the client's desires while the guardian may advocate the best interests of the child. Where one person serves both roles, the situation is much more difficult.

D. Withdrawal

If a situation arises where an attorney in a dual role cannot reconcile the best interests of the child with the child's wishes, the attorney must withdraw from the role of guardian ad litem. If the lawyer were to withdraw as attorney but continue on as guardian, the lawyer would not be free to use or reveal client confidences obtained while acting as attorney. If the lawyer stays on as the advocate, a new guardian ad litem can be appointed to advocate the child's best interests.

OTHER ETHICAL CONCERNS

A. Attorney-Client Privilege

Bar Rule 1.6 prohibits a lawyer from revealing the confidences of a client, except under certain circumstances. There is no similar constraint placed upon a guardian ad litem. The guardian may find it wise to keep information confidential in order to obtain the child's trust. The child may have a reasonable expectation that the guardian is serving as an attorney, and will maintain the child's confidences. The role of the guardian should therefore be explained in detail and distinguished from the role of the attorney. The guardian should make clear that he or she will convey the child's wishes to the Court but may choose to make a recommendation that is inconsistent with those wishes. In a dual role, the inability to reveal confidences may hamper the individual's ability to act effectively as a guardian.

B. Communication With Represented Persons

Bar Rule 4.2 provides that a lawyer representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer. This applies in the juvenile context as well.

Because the rule refers to a "lawyer who is representing a client," a lawyer serving only as guardian may not technically be constrained by this rule. Even so, the better course of action is to comply with this Rule. The lawyer serving in a dual role must, of course, comply with Rule 4.2.

C. Ex Parte Communications With The Court

Bar Rule 3.5 provides that a lawyer shall not, without regard to whether the lawyer represents a client, engage in *ex parte* communication with a judge, except as permitted by law. This Rule is unaffected by the nature of the relationship between the lawyer and client. Accordingly, both attorney and guardian would be required to follow Rule 3.5.

SOURCES OF RULES

A. State Bar Rules

The Georgia Rules of Professional Conduct govern lawyer conduct in Georgia. The Georgia Rules of Professional Conduct are located in the Rules of the State Bar of Georgia. The Supreme Court of Georgia promulgates the Bar Rules, but the Supreme Court Reporter no longer includes the Bar Rules. The official reporter for the Bar Rules is the State Bar of Georgia's website, gabar. org. Bar Rules are also published in the State Bar Handbook and Directory, which is distributed annually to members of the Bar.

Part IV of the Bar Rules covers lawyer discipline. The Georgia Rules of Professional Conduct are patterned after the ABA Model Rules of Professional Conduct, and went into effect on January 1, 2001.

B. State Bar Formal Advisory Opinions

The Formal Advisory Opinion Board drafts Advisory Opinions which interpret the Georgia Rules of Professional Conduct and grounds for disciplinary action as applied to a given set of facts. The Formal Advisory Opinion Board publishes proposed, draft opinions in the Georgia Bar Journal, a publication of the State Bar of Georgia, for comment from members of the State Bar. After consideration of any comments, the State Bar files proposed opinions with the Georgia Supreme Court for approval. The final versions of Formal Advisory Opinions also are published in the Georgia Bar Journal. A compilation of the opinions is available on the Bar's website and in the Handbook.

Recently the Formal Advisory Opinion Board addressed possible conflicts of interest for the attorney who also acts as guardian ad litem. The question presented is: "May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child's objection?" The summary answer provides: "When it becomes clear that there is an irreconcilable conflict between the child's wishes and the attorney's considered opinion of the child's best interests, the attorney must withdraw from his or her role as the child's guardian ad litem." The opinion is attached to this paper.

C. Case Law

Most Georgia public disciplinary cases are reported in the Supreme Court Reporter. Additionally, certain civil and criminal decisions, such as appeals alleging

ineffective assistance of counsel, and disqualification cases may contain judicial interpretations of ethical rules. See, e.g., Crawford W. Long Memorial Hospital of Emory University v. Yerby, 258 Ga. 720 (1988) (containing discussion of State Bar of Georgia Disciplinary Standard 69); see also Thompson v. State, 254 Ga. 393 (1985) (holding that an actual conflict of interest must be shown to disqualify a partner or associate of a part-time Solicitor of a State Court from representation of a defendant in a criminal case before a Superior Court).

Note that Bar Rules may be shepardized -- cases that cite the Bar Rules are listed in the Shepard's volume with court rules, under Georgia Court Rules/Supreme Court/Rules and Regulations of the State Bar.

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RULE 1.6 CONFIDENTIALITY OF INFORMATION

a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

b.

1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

    i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;

    ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;

    iii. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

    iv. to secure legal advice about the lawyer's compliance with these Rules.

2. In a situation described in paragraph (b)(1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

3. Before using or disclosing information pursuant to paragraph (b)(1), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

c. The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

d. The lawyer shall reveal information under paragraph (b) as the applicable law requires.

e. The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[4A] Information gained in the professional relationship includes information gained from a person (prospective client) who discusses the possibility of forming a client-lawyer relationship with respect to a matter. Even when no client-lawyer relationship ensues, the restrictions and exceptions of these Rules as to use or revelation of the information apply, e.g. Rules 1.9 and 1.10.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. Rule 1.6 applies not merely to matters communicated in confidence by the client but also to all information gained in the professional relationship, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. The requirement of maintaining confidentiality of information gained in the professional relationship applies to government lawyers who may disagree with the client's policy goals.

Authorized Disclosure

[6] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[7A] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized paragraph (b)(1)(iv) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Disclosure Adverse to Client

[8] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[9] Several situations must be distinguished. First, the lawyer may not knowingly assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence.

[10] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "knowingly assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[11] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent death or serious bodily injury which the lawyer reasonably believes will occur. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[12] The lawyer's exercise of discretion requires consideration of such factors as

the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

[13] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[14] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[15] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[16] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(1)(iii) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] If the lawyer is charged with wrongdoing in which the client's conduct is

implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(1)(iii) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[18] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[19] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:

    1. consultation with the lawyer, pursuant to Rule 1.0(c);

    2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and

    3. having been given the opportunity to consult with independent counsel.

c. Client informed consent is not permissible if the representation:

    1. is prohibited by law or these Rules;

    2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or

    3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's

other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (a) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[3] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3 and Scope.

[4] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraphs (b) and (c) express that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require informed consent of the respective clients.

Consultation and Informed Consent

[5] A client may give informed consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's informed consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to give informed consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to give informed consent. If informed consent is withdrawn, the lawyer should consult Rule 1.9 and Rule 1.16.

[5A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at

the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1 and 1.5. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (c)(2) prohibits representation of opposing parties in the same or a similar proceeding including simultaneous representation of parties whose interests may conflict, such as co-plaintiffs or co-defendants. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal, the requirements of paragraph (b) are met, and consent is not prohibited by paragraph (c).

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients give informed consent as required by paragraph (b). By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government entity is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit

charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases while they are pending in different trial courts, but it may be improper to do so should one or more of the cases reach the appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and gives informed consent and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients give informed consent and the arrangement ensures the lawyer's professional independence.

Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for material and adverse effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles

may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

a. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

b. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

c. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severly incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished mental capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the

lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative.

In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other

protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

[11] This Rule is not violated if a lawyer acts in good faith to comply with the Rule.

FORMAL ADVISORY OPINION NO. 10-2
Approved And Issued On January 9, 2012 Pursuant To Bar Rule 4-403
By Order Of The Supreme Court Of Georgia
Supreme Court Docket No. S11U0730

QUESTION PRESENTED:

May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child's objection?

SUMMARY ANSWER:

When it becomes clear that there is an irreconcilable conflict between the child's wishes and the attorney's considered opinion of the child's best interests, the attorney must withdraw from his or her role as the child's guardian ad litem.

OPINION:

Relevant Rules

This question squarely implicates several of Georgia's Rules of Professional Conduct, particularly, Rule 1.14. Rule 1.14, dealing with an attorney's ethical duties towards a child or other client with a disability, provides that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Comment 1 to Rule 1.14 goes on to note that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[1]

This question also involves Rule 1.2, Scope of Representation, and Rule 1.7, governing conflicts of interest.[2] Comment 4 to Rule 1.7 indicates that "[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."[3]

Finally, this situation implicates Rule 3.7, the lawyer as a witness, to the extent that the guardian ad litem must testify and may need to advise the court of the conflict between the child's expressed wishes and what he deems the best interests of the child. Similarly, Rule 1.6, Confidentiality of Information, may also be violated if the attorney presents the disagreement to the Court.

Statutory Background

Georgia law requires the appointment of an attorney for a child as the child's counsel in a termination of parental rights proceeding.[4] The statute also provides that the court may additionally appoint a guardian ad litem for the child,

and that the child's counsel is eligible to serve as the guardian ad litem.[5] In addition to the child's statutory right to counsel, a child in a termination of parental rights proceedings also has a federal constitutional right to counsel.[6]

In Georgia, a guardian ad litem's role is "to protect the interests of the child and to investigate and present evidence to the court on the child's behalf."[7] The best interests of the child standard is paramount in considering changes or termination of parental custody. *See, e.g.,* Scott v. Scott, 276 Ga. 372, 377 (2003) ("[t]he paramount concern in any change of custody must be the best interests and welfare of the minor child"). The Georgia Court of Appeals held in In re A.P. based on the facts of that case that the attorney-guardian ad litem dual representation provided for under O.C.G.A. § 15-11-98(a) does not result in an inherent conflict of interest, given that "the fundamental duty of both a guardian ad litem and an attorney is to act in the best interests of the [child]."[8]

This advisory opinion is necessarily limited to the ethical obligations of an attorney once a conflict of interest in the representation has ***already arisen***. Therefore, we need not address whether or not the dual representation provided for under O.C.G.A. § 15-11-98(a) results in an inherent conflict of interest.[9]

Discussion

The child's attorney's first responsibility is to his or her client.[10] Rule 1.2 makes clear that an attorney in a normal attorney-client relationship is bound to defer to a client's wishes regarding the ultimate objectives of the representation.[11] Rule 1.14 requires the attorney to maintain, "as far as reasonably possible . . . a normal client-lawyer relationship with the [child]."[12] An attorney who "reasonably believes that the client cannot adequately act in the client's own interest" may seek the appointment of a guardian or take other protective action.[13] Importantly, the Rule does not simply direct the attorney to act in the client's best interests, as determined solely by the attorney. At the point that the attorney concludes that the child's wishes and best interests are in conflict, the attorney should petition the court for removal as the child's guardian ad litem, disclosing only that there is a conflict which requires such removal.

The attorney should not reveal the basis of the request for the appointment of a guardian ad litem to preserve confidentiality and so as not to compromise the child's position.[14] An exception to the duty of confidentiality may arise "[w]here honoring the duty of confidentiality would result in the children's exposure to a high risk of probable harm."[15]

The attorney should not reveal further information received during the representation, nor should the attorney otherwise use the information received from the child in confidence to advocate a position not desired by the child.[16] This contrasts with the attorney's ability to disclose such information to the court in service of the child's wishes.[17]

The attorney is under an affirmative ethical obligation to seek to have a new guardian ad litem appointed following his withdrawal as guardian, as Comment 3 to Rule 1.14 explains that "the lawyer should see to [the appointment of a legal

representative] where it would serve the client's best interests." If the conflict between the attorney's view of the child's best interests and the child's view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16 or seek to have a separate guardian appointed.[18]

The attorney may not withdraw as the child's counsel and then seek appointment as the child's guardian ad litem, as the child would then be a former client to whom the former attorney/guardian ad litem would be adverse.[19]

This conclusion is in accord with many other states.[20] For instance, Ohio permits an attorney to be appointed both as a child's counsel and as the child's guardian ad litem.[21] Ohio ethics rules prohibit continued service in the dual roles when there is a conflict between the attorney's determination of best interests and the child's express wishes.[22] Court rules and applicable statutes require the court to appoint another person as guardian ad litem for the child.[23] An attorney who perceives a conflict between his role as counsel and as guardian ad litem is expressly instructed to notify the court of the conflict and seek withdrawal as guardian ad litem.[24] This solution (withdrawal from the guardian ad litem role once it conflicts with the role as counsel) is in accord with an attorney's duty to the client.[25]

Connecticut's Bar Association provided similar advice to its attorneys, and Connecticut's legislature subsequently codified that position into law.[26] Similarly, in Massachusetts, an attorney representing a child must represent the child's expressed preferences, assuming that the child is reasonably able to make "an adequately considered decision . . . even if the attorney believes the child's position to be unwise or not in the child's best interest."[27] Even if a child is unable to make an adequately considered decision, the attorney still has the duty to represent the child's expressed preferences unless doing so would "place the child at risk of substantial harm."[28] In New Jersey, a court-appointed attorney needs to be "a zealous advocate for the wishes of the client . . . unless the decisions are patently absurd or pose an undue risk of harm."[29] New Jersey's Supreme Court was skeptical that an attorney's duty of advocacy could be successfully reconciled with concern for the client's best interests.[30]

In contrast, other states have developed a "hybrid" model for attorneys in child custody cases serving simultaneously as counsel for the child and as their guardian ad litem.[31] This "hybrid" approach "necessitates a modified application of the Rules of Professional Conduct."[32] That is, the states following the hybrid model, acknowledge the "'hybrid' nature of the role of attorney/guardian ad litem which necessitates a modified application of the Rules of Professional Conduct," excusing strict adherence to those rules.[33] The attorney under this approach is bound by the client's best interests, not the client's expressed interests.[34] The attorney must present the child's wishes and the reasons the attorney disagrees to the court.[35]

Although acknowledging that this approach has practical benefits, we conclude that strict adherence to the Rules of Professional Conduct is the sounder approach.

Conclusion

At the point that the attorney concludes that the child's wishes and best interests are in conflict, the attorney should petition the court for removal as the child's guardian ad litem, disclosing only that there is a conflict which requires such removal. The attorney should not reveal the basis of the request for the appointment of a guardian ad litem to preserve confidentiality and so as not to compromise the child's position. The attorney should not reveal further information received during the representation, nor should the attorney otherwise use the information received from the child in confidence to advocate a position not desired by the child. The attorney is under an affirmative ethical obligation to seek to have a new guardian ad litem appointed following his withdrawal as guardian. If the conflict between the attorney's view of the child's best interests and the child's view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16 or seek to have a separate guardian appointed.

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1. Georgia Rules of Professional Conduct, Rule 1.14, Comment 1.

2. Georgia Rules of Professional Conduct, Rules 1.2, 1.7.

3. Georgia Rules of Professional Conduct, Rule 1.7, Comment 4.

4. O.C.G.A. § 15-11-98(a) ("In any proceeding for terminating parental rights or any rehearing or appeal thereon, the court *shall* appoint an attorney to represent the child as the child's counsel and *may* appoint a separate guardian ad litem or a guardian ad litem who may be the same person as the child's counsel") (emphasis added).

5. Id.

6. Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1359-61 (N.D. Ga. 2005), *rev'd on other grounds*, 2010 WL 1558980 (U.S. Apr. 21, 2010).

7. See Padilla v. Melendez, 228 Ga. App. 460, 462 (1997).

8. In re A.P., 291 Ga. App. 690, 691 (2008).

9. See, e.g., Wis. Ethics Op. E-89-13 (finding no inherent conflict of interest with the dual representation of an attorney and guardian but concluding that if a conflict does arise based on specific facts, the attorney's ethical responsibility is to resign as the guardian).

10. Georgia Rules of Professional Conduct, Rule 1.2.

11. Georgia Rules of Professional Conduct, Rule 1.2, Comment 1.

12. Georgia Rules of Professional Conduct, Rule 1.14.

13. Id.

14. See In re Georgette, 785 N.E.2d 356, 367 (Mass. 2003).

15. In re Christina W., 639 S.E.2d 770, 778 (W. Va. 2006).

16. See Georgia Rules of Professional Conduct, Rule 1.6, specifically subsection (e).

17. See Georgia Rules of Professional Conduct, Rule 1.6(a) (permitting disclosure of confidential information "impliedly authorized to carry out the representation").

18. See Rules 1.14 (b), 1.16 (b) of the Georgia Rules of Professional Conduct.

19. See Rule 1.9 of the Georgia Rules of Professional Conduct.

20. See, e.g., Wis. Ethics Op. E-89-13, Conflicts of Interests; Guardians (1989) (providing that dual representation as counsel and guardian ad litem is permitted until conflict between the roles occurs, and then the attorney must petition the court for a new guardian ad litem); Ariz. Ethics Op. 86-13, Juvenile Proceedings; Guardians (1986) (providing that a "lawyer may serve as counsel and guardian ad litem for a minor child in a dependency proceeding so long as there is no conflict between the child's wishes and the best interests of the child").

21. Ohio Board of Comm'rs. on Griev. and Discipline, Op. 2006-5, 2006 WL 2000108, at*1 (2006).

22. Id. at *2.

23. Id.

24. Id., quoting In re Baby Girl Baxter, 17 Ohio St. 3d 229, 479 N.E.2d 257 (1985) (superseded by statute on other grounds).

25. Id. See also Baxter, 17 Ohio St. 3d at 232 ("[w]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause").

26. *See* Conn. Bar Ass'n Comm. on Prof. Ethics, CT Eth. Op. 94-29, 1994 WL 780846, at *3 (1994); In re Tayquon, 821 A.2d 796, 803-04 (Conn. App. 2003) (discussing revisions to Conn. Gen. Stat. § 46b-129a).

27. See Mass Comm. For Public Counsel Servs., Performance Standards, Standard 1.6(b), at 8-10, *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf; See also In re Georgette, 785 N.E.2d 356, 368 (Mass. 2003).

28. Mass Comm. For Public Counsel Servs., Performance Standards, Standard 1.6(d) at 11.

29. In re Mason, 701 A.2d 979, 982 (N.J. Super. Ct. Ch. Div. 1997) (internal citations omitted).

30. See In re M.R., 638 A.2d 1274, 1285 (N.J. 1994).

31. See Clark v. Alexander, 953 P.2d 145, 153-54 (Wyo. 1998); In re Marriage of Rolfe, 216 Mont. 39, 51-53, 699 P.2d 79, 86-87 (Mont. 1985); In re Christina W., 639 S.E.2d at 777 (requiring the guardian to give the child's opinions consideration "where the child has demonstrated an adequate level of competency [but] there is no requirement that the child's wishes govern."); see also Veazey v. Veazey, 560 P.2d 382, 390 (Alaska 1977) ("[I]t is equally plain that the guardian is not required to advocate whatever placement might seem preferable to a client of tender years.") (superseded by statute on other grounds); Alaska Bar Assn Ethics Committee Op. 85-4 (November 8, 1985)(concluding that duty of confidentiality is modified in order to effectuate the child's best interests); Utah State Bar Ethics Advisory Opinion Committee Op. No. 07-02 (June 7, 2007) (noting that Utah statute requires a guardian ad litem to notify the Court if the minor's wishes differ from the attorney's determination of best interests).

32. Clark, 953 P.2d at 153.

33. Id.

34. Id.

35. Id. at 153-54; Rolfe, 699 P.2d at 87.
