

In this hypothetical, a husband and wife are involved in a contentious custody and visitation dispute over the couple's 7-year-old daughter. A guardian ad litem ("GAL") is appointed to the case. In meeting with the GAL, the mother asserts that the father has subjected the daughter to abuse and the daughter does not want continued visitation with the father. Further, the mother is asking for any visitation, if ordered, to be supervised because of the father's continued abuse. The GAL then meets with the daughter who asks the GAL not to repeat what she tells her because she is afraid her parents might get angry with her and also says she is afraid of her father and does not want to visit him. When the GAL meets with the father, the father denies all such allegations as being contrived by the mother in an effort to deny him custody and visitation. The mother insists that the GAL proceed with an investigation into the allegations of child abuse in spite of daughter's reluctance and father's denial.

This hypothetical involves the special role of a GAL and the question of whether a GAL may reveal information received from the child, against the child's wishes.

The fundamental ethics rule involved in this analysis is Rule 1.6¹, which deals with the lawyer's duty of confidentiality of information. While Rule 1.6 safeguards information that the lawyer gains in a professional relationship, Rule 1.6(b)(1) specifically allows a lawyer to reveal information to the extent reasonably necessary to comply with law.²

The Committee's analysis also considers the role of a GAL as outlined in Rule 8:6 of the Rules of the Supreme Court of Virginia:

RULE 8:6. The Roles of Counsel and of Guardians Ad Litem When Representing Children.

The role of counsel for a child is the representation of the child's legitimate interests.

When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

This Committee has also previously addressed the unique role of a GAL. In LEO 1729 this Committee opined as follows:

¹ RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

² RULE 1.6 Confidentiality of Information

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
(1) such information to comply with law or a court order;

In determining the ethical duties of an attorney serving as GAL, this committee has recognized that the relationship of the GAL and child is different from the relationship of attorney and client.³ In reconciling the differences between the traditional ethical duties an attorney owes to a client, and the legal obligations that a GAL must discharge, the committee believes that where fulfilling a specific duty of the guardian ad litem conflicts with the traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow traditional course of action required under the Code of Professional Responsibility.

*The Standards to Govern the Performance of Guardian Ad Litem for Children*⁴ (“*The Standards*”) outline the specific duties and qualifications of a GAL appointed by the court. *The Standards* were formally adopted by the Judicial Council of Virginia and reviewed by the Supreme Court in September of 2003, after this Committee issued its then latest ethics opinions addressing a GAL’s duties. *The Standards* inform Virginia courts as to the expectations regarding the conduct of GALs and provide additional guidance for a GAL’s conduct.

As outlined in *The Standards*, and as agreed to in past opinions from this Committee, lawyers serving as GALs are subject to the Rules of Professional Conduct as they would be in any other case, except when the special duties of a GAL conflict with such rules.⁵ Therefore, although the lawyer serving as a GAL for the child must generally protect the child’s confidences and secrets as required by Rule 1.6, Rule 1.6 (b)(1) permits the disclosure of information protected by Rule 1.6, if disclosure is necessary for the GAL to comply with the law. The Committee believes that the GAL’s compliance with *The Standards* and Rule 8:6 may justify the disclosure of confidential information pursuant to Rule 1.6 (b)(1).⁶ For example, the GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian.

The Standards outline, in terms of the GAL’s relationship with the child, that the duty of confidentiality is not absolute.⁷ In fact, *The Standards* require the GAL to advise the child of the limitations on confidentiality and the fact that there may be circumstances when confidentiality will not apply to their communications and times when it will.⁸

Based upon the obligations set forth in *The Standards*, this Committee opines that the duties of a GAL may extend further than those anticipated by the typical lawyer/client relationship, as the GAL not only serves as the child’s advocate but is obliged to identify and recommend the outcome that best serves the child’s interests.⁹ Therefore, the GAL needs to investigate

³ See LEO 1725.

⁴ See *Standards to Govern the Performance of Guardian Ad Litem for Children* (“*The Standards*”), at http://www.courts.state.va.us/gal/gal_standards_children_080403.html (effective September 1, 2003).

⁵ *The Standards*, *supra* at “Introductory Comment.” (“Attorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules.”); See also Va. Legal Ethics Op. 1810 (2004) *citing* Va. Legal Ethics Op. 1729 (1999).

In addition, *The Standards* describe the GAL as representing the child as a lawyer and advocate. Therefore, even though the relationship is not strictly that of lawyer and client, a lawyer serving as a GAL is generally subject to the Rules of Professional Conduct except where compliance therewith will conflict with his or her specific duties as a GAL.

⁶ *Id.*, at *Standard C*.

⁷ *The Standards*, *supra* note 1. *Standard C* states in pertinent part: “[t]he GAL must inform the child that there may be circumstances when confidentiality will apply to communication between the child and GAL, and circumstances when it may not.”

⁸ *Id.*

⁹ *Id.*, at Introductory Comment (“The role and responsibility of the GAL is to represent, as an attorney, the child’s best interests before the court. The GAL is a full and active participant in the proceedings who independently investigates, assesses and advocates for the child’s best interests. Decision-making power resides with the court.”).

information obtained from and about the child in order to ascertain certain facts. The GAL must interview parties and other persons who have relevant knowledge of the child and facts that give rise to the allegations. This duty is outlined in *Standard B*, which states that “GALs should independently evaluate all allegations of child abuse or neglect, or of risk to the child’s safety or welfare, including but not limited to physical or mental abuse, sexual abuse, lack of supervision, educational neglect, and exposure of the child to domestic violence or substance abuse, regardless of whether such abuse or neglect or risk is identified in the parties’ pleadings.”

Only after this investigation can the GAL independently make an evaluation. Through this independent investigation, the GAL assesses the risk of probable harm to the child. That assessment then leads to the determination of whether the GAL has a duty, as an advocate for the child’s best interests, to disclose to the court or appropriate authority information necessary to safeguard the best interests of the child. That disclosure would be permitted in light of the Committee’s analysis earlier in this opinion of Rule 1.6(b)(1), where a lawyer can reveal protected information to the extent reasonably necessary to comply with law.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
December 18, 2008
