

LEO 1870

DOES THE ETHICAL RESTRICTION AGAINST COMMUNICATING WITH REPRESENTED PERSONS APPLY IN MATTERS WHERE A GUARDIAN *AD LITEM* HAS BEEN APPOINTED FOR A MINOR CHILD? ARE GOVERNMENT ATTORNEYS PROHIBITED FROM COMMUNICATING OR DIRECTING INVESTIGATORS TO COMMUNICATE WITH REPRESENTED PERSONS IN SUCH MATTERS?

This opinion answers the following questions:

- 1) May an attorney representing a parent or guardian in a matter communicate with a minor child for whom the court has appointed a guardian *ad litem* (“GAL”) without the GAL’s consent or legal authority?
- 2) May a GAL representing a minor child in a matter communicate with a parent or other person represented by an attorney in the matter without that person’s attorney’s consent or legal authority?
- 3) May a government attorney communicate with a represented person, including a child for whom a GAL has been appointed, or request or direct social workers and others performing investigative functions regarding the matter to do so without the GAL’s or other attorney’s consent or legal authority?

### **1. Communications by a Parent’s/Guardian’s Lawyer with Child Represented by GAL**

Virginia Rule of Professional Conduct 4.2 provides:

#### **RULE 4.2 Communication With Persons Represented By Counsel**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Thus, a parent’s or guardian’s attorney would be restricted from communicating with the child if the guardian *ad litem* were deemed the child’s lawyer. In Virginia, as elsewhere<sup>1</sup>, guardians *ad litem* represent the child *as an attorney*.

The GAL acts **as an attorney** and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify. The GAL should rely primarily on opening statements, presentation of evidence and closing arguments to present the salient information the GAL feels the court needs to make its decisions. \*\*\*

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<sup>1</sup> In some jurisdictions, guardians *ad litem* are called “law guardians.”

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.<sup>2</sup>

(Emphasis added).

Courts and ethics authorities in other jurisdictions have held that Rule 4.2 prohibits a parent's lawyer from communicating with the client's child once a GAL has been appointed, unless the guardian consents or a court authorizes such contact.

In *Disciplinary Proceedings Against Kinast*, 530 N.W.2d 387, 192 Wis.2d 36 (1995), an attorney representing a wife in a custody dispute had his client bring the two minor children to his office, where he had a five-minute conversation with them in the presence of their mother, during which he purportedly asked them about school and commented that they would probably like to live with both of their parents. The attorney, Kinast, accomplished this without the consent or knowledge of the children's court-appointed guardian *ad litem*, despite Kinast's knowledge that an attorney had been appointed to serve as such for the children.

In determining that Rule 4.2<sup>3</sup> had been violated by Kinast, the Supreme Court of Wisconsin cleared up the bar's "confusion" surrounding this subject, opining that

[T]he rule prohibiting a party's lawyer from communicating with another party without the consent of that party's attorney is intended to protect litigants from being intimidated, confused or otherwise imposed upon by counsel for an adverse party. **Children involved in divorce litigation are no less entitled to the protection that rule affords than are adult parties to the litigation.** Any confusion that may exist among lawyers in Rock County or elsewhere in the state regarding the application of SCR 20:4.2 to children represented by a guardian ad litem is hereby resolved.<sup>4</sup>

(Emphasis added).

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<sup>2</sup> "Standards to Govern the Performance of Guardians *Ad Litem* for Children" (2003) Judicial Counsel of Virginia. See, also, Rule 8:6 of the Rules of the Supreme Court of Virginia, wherein it is stated: "When appointed for a child, the guardian ad litem shall vigorously **represent the child**, fully protecting the child's interest and welfare." [Emphasis added.]

<sup>3</sup> Wisconsin's version of the Rule, SCR 20:4.2, then applied to contact with a "party" versus a "person," but the Court overrode a referee's finding of no ethical violation, finding that children were indeed parties in custody litigation.

<sup>4</sup> 530 N.W.2d at 390, 391.

In *Auclair v. Auclair*, 127 Md.App. 1, 730 A.2d. 1260 (1999), the Court of Special Appeals of Maryland cited *Kinast* with approval but left open the opportunity for mature minor children represented by a guardian *ad litem* to seek out advice from a private attorney.<sup>5</sup> The *Auclair* case involved minor children who sought to intervene as parties in their parents' divorce case. The appellate court would have allowed the minor children "access to legal counsel with respect to matters not within the purview of the guardian's realm of responsibility." 730 A.2d. 1275.

State bar ethics committees have reached the same conclusion as courts that Rule 4.2 prohibits a parent's attorney from communicating with a minor child regarding the custody dispute, absent the consent of the child's guardian *ad litem* or a court order authorizing such contact.

The State Bar Association of North Dakota Ethics Committee was confronted with the question of whether it was ethically permissible for a client to bring a child to the attorney's office so that the child's affidavit might be obtained in connection with a proceeding for modification of custody. In Opinion No. 09-06, the Committee opined:

Rule 4.2 of the Rules of Professional Conduct addresses communication with persons who are represented by counsel. The Rule provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." When a guardian *ad litem* has been appointed to represent a child's best interests, it is the opinion of the Ethics Committee that Rule 4.2 would prohibit communication with the child without the consent of the guardian *ad litem* or court order. A guardian *ad litem* appointed under N.D.C.C. § 14-09-06.4 must be a licensed attorney and functions independently in the same manner as an attorney for a party to the action. N.D.R.Ct. 8.7

New York State Bar Association Committee on Professional Ethics Opinion #656 (38-93) answered in the negative the question, "May the attorney for a parent in a child custody proceeding question a child for whom the court has appointed a law guardian without the law guardian's consent?" Quoting from an earlier opinion, the ethics committee opined:

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<sup>5</sup> "Consequently, although we hold that Rule 4.2 of the Maryland Rules of Professional Conduct applies to communications with minors for whom guardians have been appointed, under the unique facts of this case, we are not persuaded that private counsel should be prohibited from consulting with the children because of the ages, intelligence, and maturity of appellants and the real or perceived inability of the guardian *ad litem* to be the investigative arm of the court and reporter of the children's preferences to the court, while simultaneously acting as advocate for appellants." 730 A.2d. 1276.

Where a person is represented by counsel, there is an absolute proscription which serves to bar any and all communications relating to the matter for which that person has retained counsel .... If a person is represented by counsel, absent such counsel's consent, the ethics of our profession require that no lawyer other than his own communicate with him on the subject of the representation and all forms of communications are proscribed.

The New York opinion also addresses the question of whether parental consent to have the parent's attorney speak to a child plays a role in whether the attorney may speak to the represented child: "In light of the purposes of the rule, **the presence or absence of consent by the child's parent for the parent's attorney to speak with the child is not pertinent**; the rule requires that the consent of the child's law guardian be obtained before counsel for either parent may communicate with the child." (Emphasis added). In other words, the parent's consent does not override the need for consent of the GAL representing the child.

The Utah State Bar Ethics Advisory Opinion Committee, in Opinion No. 07-02 (2007), stated that "except in the narrow circumstance described below involving a 'mature' minor, we conclude that another attorney may not communicate with the represented minor about the subject of the representation without either obtaining (a) prior consent of the GAL or (b) permission from the court. In the context of custody, dependency, abuse or neglect cases, the 'best interest' of the represented person, as well as the wishes of the represented person, would both be within the 'subject of the representation' by the GAL."

As was recognized by the *Auclair* court, *supra.*, the Utah opinion acknowledges that there will be times when "mature" minors may wish to obtain a second opinion or their own independent representation from an otherwise uninvolved attorney. Thus,

[w]hen a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent. Minors also have statutory and constitutional rights that are independent of the rights of their parents and guardians.

Utah State Bar Ethics Adv. Op 07-02, *supra* at para. 24. Consistent with a minor child's right to consult counsel found in *Auclair* and the Utah ethics opinion, this Committee opines that Rule 4.2 does not restrict another lawyer from communicating with a minor child who is seeking a

“second opinion” or “replacement counsel” without the guardian’s knowledge or consent. Those exceptions are contained in Comment [3]<sup>6</sup> to Rule 4.2. Obviously, no such lawyer should *also* be a parent’s lawyer, due to the inherent conflict of interest and the inability of such lawyer to be disinterested.

## **2. Communication by a GAL with a Parent or Guardian Represented by an Attorney**

Just as the attorney representing a parent or guardian may not communicate with a child represented by a GAL without the GAL’s consent or legal authority, neither may the GAL communicate regarding the matter with a represented parent or guardian of the child without that parent’s or guardian’s attorney’s consent or authorization conferred by a court order or other legal authority. As is clear in the foregoing analysis, such a restriction upon the GAL is necessary under Rule 4.2 because the duties and functions of the GAL are those of an attorney representing a client except when it would be inconsistent with the “Standards to Govern the Performance of Guardians *Ad Litem* for Children,” referred to above. Further, this Committee has previously opined that a lawyer serving as a GAL for a child is also subject to the applicable Rules of Professional Conduct governing lawyers unless those ethical obligations are inconsistent with the lawyer’s obligations or duties as a GAL. *See, e.g.* Virginia Legal Ethics Op. 1725 (1999) (lawyer serving as GAL for child subject to conflict of interest rules). Virginia Legal Ethics Op. 1729 (1999) (When the duties do not conflict, the lawyer serving as GAL should follow the course of action required by the Code of Professional Responsibility).

This Committee acknowledges that a GAL appointed to represent a child is authorized and charged to communicate with or interview all parties to the dispute including the child’s parents and any other persons having relevant information.<sup>7</sup> The court’s order appointing the lawyer as GAL states, in pertinent part:

The guardian *ad litem* appointed to represent the child shall have access to the following persons and documents without further order of the Court:

- A. The child.
- B. Parties to the proceeding.
- C. Court Appointed Special Advocate (CASA), local department of social services and court services unit worker in the case, and school personnel involved with the child.

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<sup>6</sup> Comment [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a “second opinion” or replacement counsel.

<sup>7</sup> Form DC 5-14, *Order for Appointment of Guardian ad Litem; GAL Standards, supra* at S-4.

Form DC 514, *Order for Appointment of Guardian Ad Litem*, District Court Manual, Forms Volume (December 2007). This does not mean, however, that a lawyer appointed as GAL pursuant to this order may disregard the lawyer's ethical obligations under the Rules of Professional Conduct in the discharge of his or her duties as GAL. To the contrary, the *Standards to Govern the Performance of Guardians ad Litem for Children* make clear that "[a]ttorneys 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."<sup>8</sup> This Committee's review of applicable law reveals no authority that a lawyer serving as GAL is "authorized by law" to have *ex parte* contacts or interviews with represented parents in the context of the GAL's investigation, solely by virtue of his or her appointment as GAL. Rule 4.2 recognizes that in particular and exceptional circumstances a court order may *specifically authorize* the GAL to communicate directly with a parent that is represented by counsel.<sup>9</sup> However, this Committee believes that a lawyer serving as GAL is not, solely by virtue of his or her appointment, "authorized by law" to have direct *ex parte* interviews or communications with parents or other persons the GAL knows to be represented by counsel in that matter.

### **3. Attorney-Directed Communications by Social Workers and Others Performing Investigative Functions with Represented Persons in Matters Where a GAL Has Been Appointed**

In Virginia Legal Ethics Opinion 1755, the Committee noted that Rule 8.4(a)<sup>10</sup> prohibits an attorney from violating Rule 4.2 through the acts of others. Consistent with this precept, ABA Formal Legal Ethics Op. 95-396 (1995), in its analysis of an attorney's use of investigators, states as follows:

Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do. [Footnote omitted.] Whether in a civil or a criminal matter, if the investigator

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<sup>8</sup> *Standards to Govern the Performance of Guardians ad Litem for Children* at S-2.

<sup>9</sup> Comment [4] to Rule 4.2 states, in relevant part, "a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so."

<sup>10</sup> **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

Pursuant to law, social workers, police officers, and other government employees routinely investigate allegations of crimes against and mistreatment of minor children.<sup>11</sup> The matters are often investigated before a parent or guardian has counsel, and before a prosecutor on behalf of the Commonwealth or a local government attorney representing a social services department knows of the matter. Under those circumstances, it is clear that Rule 4.2 is not applicable because no lawyer is yet involved and as such cannot be directing the communications. Additionally, these public employees are both authorized by law and specifically trained to conduct these investigations.

Subject to the exceptions discussed in this opinion, once a prosecutor or local government attorney assumes responsibility to represent the Commonwealth or other governmental entity in a matter, he or she may not:

a) communicate regarding the civil matter with a represented person, including a child for whom a GAL has been appointed in that matter; and/or

b) use a social worker, police officer, or other investigator as an intermediary to circumvent Rule 4.2 in order to communicate with a represented person, including a child in regard to the civil matter in which a GAL has been appointed. However, investigative contacts regarding possible violations of criminal law made at the request of a prosecutor or lawyer representing a social services agency *are* "authorized by law," and therefore ethically permissible when judicial precedent has approved such contacts prior to the attachment of one's right to counsel. *See*, Comment [5] to Rule 4.2.<sup>12</sup> Under this "law enforcement" exception to Rule 4.2, a government lawyer may not only instruct or direct a non-lawyer investigator or agent to communicate, but may also give advice regarding the content of the communication with a represented person. Unless a GAL has been appointed to represent a child in a criminal proceeding, criminal prosecutors may communicate directly and indirectly with the child/victim, even if such communication involves subject matter related to a pending or contemplated civil proceeding involving the child.

Attorneys who represent government agencies in pending or contemplated civil proceedings may communicate directly or indirectly with a minor child prior to the time that a court has appointed a GAL to represent a child in the matter. Once the government attorney

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<sup>11</sup> *See, e.g.*, Va. Code §63.2-1518.

<sup>12</sup> Comment [5] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

becomes aware that a GAL has been appointed to represent the child in the particular civil proceeding, the government attorney who, in representing the agency, is representing another party in that proceeding must obtain the consent of the GAL before communicating with the child, either directly or indirectly through the agency of a social worker or investigator.<sup>13</sup> If the government attorney cannot obtain the appointed GAL's consent to have such contacts with the child, and no court order authorizes such contact, that attorney should move the court to authorize such contact with the child.

### CONCLUSION

When a lawyer has been appointed to serve as a GAL for a child in a civil proceeding, Rule 4.2 applies and prohibits counsel for another party in that proceeding from communicating *ex parte* with the child about the subject matter of that proceeding, unless the GAL consents to such communication or unless the law or court order authorizes that lawyer to communicate *ex parte* with the represented child. Similarly, the lawyer serving as GAL for the child is bound by Rule 4.2 and may not have *ex parte* communications with another represented party in that proceeding, unless counsel for that party consents, or unless the GAL is authorized by law or court order to have such communication.

Rule 4.2 also applies to lawyer-directed communications with a represented person by non-lawyers. However, a government lawyer does not violate Rule 4.2 merely by requesting a social worker or investigator to communicate with a represented person, including a child for whom a GAL has been appointed, if the law entitles or charges the investigator or social worker to have such communication. While the government lawyer may request that the social worker or investigator contact and interview a represented person, and advise generally what information the lawyer seeks, the lawyer may not "mastermind" or "script" the interview or dictate the content of the communication. Such conduct would be viewed as circumventing Rule 4.2 through the actions of another. Rule 8.4(a).

Committee Opinion

October 4, 2013

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<sup>13</sup> As stated previously, Rule 4.2 does not prohibit a non-lawyer social worker or investigator from independently contacting the represented child; however the Rule does come into play when the government lawyer directs or controls the content of the communication through an intermediary such as a social worker or investigator.