

At Issue: Ethical Issues for Guardians *ad Litem* Representing Children in Dependency Cases

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As the legal community continues to evaluate the effectiveness of various models of representation for children in abuse and neglect (dependency) cases, the debate has intensified over whether guardians *ad litem* (GALs) can uphold their ethical obligations under the rules of professional conduct.¹ Many states are transitioning from a GAL (substitute judgment) model to a model where children in dependency cases are appointed an attorney who will advocate for them under a traditional attorney/client model. Some states have adopted a hybrid approach where factors such as the age and desires of the child determine which model of advocacy is used. When attorneys are advocating under the GAL/substitute judgment model, *At Issue* is whether and, if so, how, they will uphold their ethical obligations under the rules of professional conduct.²

GAL Versus Traditional Role of Lawyer

The traditional role of a lawyer is that of advisor, advocate, negotiator, and intermediary. The lawyer is bound by the profession's rules of ethics to "abide by a client's decisions concerning the objectives of representation. . . ."³ Thus, the role of traditional counsel in representing a child, in contrast to the role of GAL, prohibits the lawyer from independently determining and advocating the child's "best interests" if contrary to the child's preferences. A GAL, on the other hand, is appointed to advocate what she determines is in the "best interests" of the child. The GAL often faces ethical dilemmas that the Model Rules do not resolve because the rules do not consider the GAL's unique role in the litigation. The dual role of the GAL as lawyer for the child and, in general, lawyer for the child's best interests makes applying some of the ethics rules to traditional ethics problems difficult, if not impossible. Some of these rules and the dilemmas they create for the GAL are discussed below.

Case Scenario:

Assume you are appointed as the GAL to represent three children: Jason (age 15), David (age 7), and Angela (10 months). The allegations are that their mother is abusing drugs and has left David and Angela home alone on several occasions. Sometimes Jason is home, but more often than not he is out with friends. Jason has not really gotten into a lot of trouble, but he has begun skipping school frequently, and his grades have recently dropped. During your interviews with the children, Jason and David consistently tell you they would like to go home and live with their mother. Further, Jason tells you that he has seen his mother use drugs, but he asks you not to tell anyone because he knows if this information comes out, he might be sent to a foster home.

This case raises several ethical issues that routinely confront GALs appointed in dependency cases. Because the role of the GAL differs from that in a traditional lawyer/client relationship, GALs are often uncertain how to handle ethical situations under the applicable ethical rules. In raising the inherent conflict between the role of GALs and certain ethical obligations, this article suggests how GALs can analyze common ethical problems—loyalty, confidentiality, and conflicts of interest—to represent what they determine to be the child's best interests, while fulfilling their ethical responsibilities.⁴

Role of the GAL in Dependency Cases

In 1996, the American Bar Association passed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (ABA Standards).⁵ The ABA Standards advocate a traditional lawyer/client approach to representing children in which the lawyer represents the child's "expressed wishes." However, the drafters of the ABA Standards recognized that in some states, a GAL is appointed to advocate the "best interests" of the child as opposed to the child's "expressed wishes." The ABA Standards define a GAL as an "officer of the court appointed to protect the child's best interests without being bound by the child's expressed preferences."⁶ In those states, the GAL is usually statutorily charged with representing the child's best interests. To fulfill that duty, the GAL is entitled to receive relevant reports and to be advised of significant developments in the case. The GAL must investigate matters she deems necessary and should talk with or observe the child client. In exercising those responsibilities, the child's GAL draws a conclusion about what is in the best interest of the child and advocates that position to the court.

Representing the child while simultaneously representing her assessment of the child's best interests can create a conflict for the GAL in terms of compliance with the ethics rules. Some jurisdictions have separated these roles by statute or declared the role of a GAL a "hybrid," excusing strict adherence to *some* Rules of Professional Conduct.⁷ Some states provide for the appointment of a lawyer for the child in cases where the child's wishes diverge from what the GAL thinks is best. However, even in states where the law provides a separate lawyer for the child, this often does not occur, either because of the prohibitive cost of appointing both a lawyer and a GAL for one child or the GAL simply does not ask the court to appoint a lawyer for the child.

Model Rule 1.2: Scope of Representation

As mentioned, the GAL is not bound by a child client's expressed wishes, but by his assessment of the child's best interests. That fundamental duty of the GAL conflicts with the traditional role of the lawyer as advocate for the client. It is also inconsistent with a lawyer's fundamental responsibility under MR 1.2 to abide by a client's decisions about the objectives of the case. GALs are required by statute to present to the court what they think is in the child's best interests, as well as the reasoning and facts that support this conclusion, regardless of the client's expressed wishes.

This is further complicated because a GAL must consider the child's position when assessing the child's best interests. In the case above, Jason (age 15) and David (age 7) have told their GAL that they want to return home. The GAL may determine that it is in Jason's best interest to return home because a change in school may be too disruptive, especially given Jason's recent school problems. Also, since Jason is 15 years old, the mother's drug use may not place him at as much risk as it does the younger two children. The GAL may feel that David's best interests are served by remaining out of the home. Advocating "best interests" thus may be at odds with MR 1.2, which says the client determines the objectives of the case. Because the GAL's duty of loyalty as the lawyer for the child under MR 1.2 is contrary to the GAL's statutory duty to the court, some

states confronted with a similar conflict have amended their versions of the rule to exclude GALs from complying with MR 1.2.⁸ In the absence of an express exception to MR 1.2 for the GAL, when the child's view and the GAL's view conflict, the GAL should inform the court of the child's view and the GAL's assessment of best interest. The GAL may also ask the court to appoint a lawyer to represent the child.⁹

Model Rule 1.6: Confidentiality

Applying the confidentiality rules to GALs under the Model Rules can be confusing. The difficult issue is *whether and to what degree to keep confidential certain communications between the GAL and the child*. Confidentiality normally required in the lawyer/client relationship and by MR 1.6 might prevent a GAL from carrying out the statutory responsibilities of her appointment. This is because MR 1.6 prevents the lawyer from disclosing confidential information that may be an important component of the GAL's position. Consequently, a GAL generally must disregard the restrictions of MR 1.6 in order to disclose relevant and necessary information provided by the child to the court and others. There is no satisfactory way to resolve this ethical dilemma.¹⁰ It is always best to seek the child's consent before divulging information about the representation to the court. In some states, a GAL is prohibited from disclosing client communications to the court absent client consent.

As legal counsel representing the child's best interests, the GAL must explain to the child, if possible, that the GAL is charged with advocating the child's best interests and that information otherwise deemed confidential may be provided to the court. What should the GAL do if the child informs the GAL of relevant facts that the child does not want to be divulged? This occurs in the case scenario where Jason reveals that he's seen his mother use drugs, but he asks his GAL not to tell anyone. Jurisdictions have devised a variety of approaches to guide the GAL to ethically discharge her duty to the client and the court. In some states where a GAL is appointed to represent the child's best interests, lawyer/client confidentiality still applies because state statute or case law prohibits disclosure.¹¹ Other states make clear that confidentiality does *not* apply.¹²

Even within a state, there may be a wide range of views regarding how the confidentiality issue is addressed. A recent ABA survey in Michigan identified several ways GALs handle the disclosure of information that the child does not want divulged.¹³ Some GALs felt the confidentiality rules strictly applied to their representation of children, and they would not reveal certain information even if they felt revealing it would be in the child's best interest. Others felt it was their duty to present the client's best interest to the court and overrode a strict application of the ethics rules on confidentiality.¹⁴

In the case example previously cited, the GAL must decide whether to reveal Jason's disclosure that he has seen his mother use drugs. When confronted with such a situation, a GAL may attempt to avoid the ethical dilemma by saying that disclosing Jason's mother's drug use is unnecessary because that fact would become known through other means. However, what if this is not the case? Drug screens can be inconclusive, and the agency may have no other eyewitnesses or mechanisms to prove the mother's drug use. Suppose, as well, that Jason confides in the GAL because one thing he knows about lawyers is that "they keep their clients' secrets."

Considering these same facts, the Michigan study reported that some GALs would not reveal information because they felt disclosure

was ethically prohibited. Other GALs believed their role required them to present to the court all relevant information, including statements made by the child, and believed that such disclosure was not prohibited.

Perhaps the only solution to a GAL's dilemma is to prevent the possibility that the issue will arise. Consequently, if a GAL plans to reveal client communications, including those the child does *not* want to be revealed, the GAL should advise the child, before soliciting information, that the information will not be confidential. The child then can make informed decisions about what to disclose.

This advisement is especially important when representing older children who often have a sophisticated understanding of what characterizes a lawyer/client relationship. Many young people see lawyers in movies, television, and other media. They, or people they know, often have personal experience with the legal system. They may assume their lawyer will keep information confidential. To make sure the GAL does not violate the trust of these young people, it is critical to let child clients know that the GAL's role is to tell the judge what the GAL thinks is best for the child and why. The GAL also should inform the child that he might have to reveal matters they will discuss to the judge, the social worker, or to other parties.

Some states *require* the GAL to inform the child, before any interview, of the GAL's role and responsibility. This includes telling the child that the GAL may provide information to the court or other parties, including communications that otherwise would be protected by the ethical rules governing the lawyer/client relationship. Although this advisement may lead children withholding information from the GAL, the alternative is that a child's trust may be betrayed. Being clear with children about the GAL's role, and to what degree information will or will not remain confidential, helps maintain children's sense of trust and confidence that the system will protect them.

Model Rule 1.7: Conflicts of Interest

MR 1.7(a) prohibits advocacy on behalf of one client that will be "directly adverse" to another client. An example of such a conflict of interest occurs when an agency brings a petition to obtain custody of an infant whose underage teenage mother is in foster care and under the legal custody of the agency. This may be a conflict for a GAL if what she believes is in the young mother's best interests may be inconsistent with what she believes is best for the baby. Most conflicts typically arise for GALs when representing sibling groups.¹⁵

In our case example, the GAL's representation of Jason, the 15-year-old, may conflict with the representation of David, the 7-year-old, or of Angela, the 10-month-old child. Suppose, for example, that Jason is bonded with his mother, and although he is experiencing some behavioral problems at school, educational stability is recommended. Removing him from his mother's home would mean a change of schools. Suppose, further, that because of his age, his mother's occasional drug use does not affect his safety and well-being to the same degree that it does the younger children. Given these and other considerations, the GAL might conclude that Jason's best interests would best be met by remaining at home, but that removal of Jason from the home would be in Angela's, and possibly David's, best interests.

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In this situation a lawyer performing the traditional role of counsel would have to withdraw from representing Angela and David and, perhaps, Jason as well. Under the traditional model, the lawyer's conflict analysis would require evaluating whether pursuing Jason's objectives would be adverse to pursuing Angela's and David's best interests, either directly or indirectly. Moreover, a lawyer in the traditional role would need to assess whether representing the younger children would compromise the duties of loyalty and confidentiality the lawyer owes to Jason.

These conflicts, however, are viewed differently by the GAL, whose duty is to protect the interests of the children, even if they are contrary to the children's wishes. From the GAL's perspective, there may be no conflict of interest because seemingly contradictory arguments for placing the children ultimately serve their best interests. Therefore, the GAL would not need to withdraw from representing one or all of the children. Nevertheless, representing the best interests of multiple clients by a GAL is not without potential conflicts. Suppose it is in Jason's best interests to continue to be placed with his younger siblings. Jason's therapist says that his sibling bonds are his strongest familial ties; therefore, he should remain with them. However, what if the younger children's treatment providers think otherwise? They say Jason is a negative influence on the younger children, especially David. The GAL faces a quandary. Advocating for the best interests of one sibling may compromise the best interests of another sibling. In this case, the GAL should ask the court to appoint a different GAL for the younger children.

Model Rule 3.7: Lawyer as Witness

Many lawyers and judges are confused regarding whether a GAL should be a witness in the proceeding to which he is appointed. MR 3.7 addresses whether a lawyer may testify on behalf of (or against) his client.¹⁶ The rule generally requires withdrawal if the testimony is on substantive issues. The rationale is that (1) combining the roles of advocate and witness can prejudice the opposing party, and (2) testifying for or against one's client potentially creates a conflict of interest between the lawyer and client.¹⁷ When applying this prohibition to GALs, however, it must be applied with consideration of the purpose of the legal representation. Because the purpose of GAL representation is to advocate for the GAL's assessment of best interests of the child, rather than the traditional expressed wishes of the child, it may not be unethical for the GAL to provide substantive evidence on behalf of the best interests of the child.

To avoid this dilemma, the GAL should understand the difference between *advocating* and *testifying* for a child client. The comment to MR 3.7 provides some guidance. "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others."¹⁸ It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. A Colorado court clarified the role of a GAL as a witness:

Insofar as the guardian *ad litem* chooses to present his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence, the guardian functions as a witness in the proceedings and, thus, should be subject to examination and cross-examination as to the bases of his or her opinion and recommendation. If, on the other hand, the guardian *ad litem*'s recommendations are based upon the evidence received by the court from other sources,

then they are analogous to arguments made by counsel as to how the evidence should be viewed by the trier of fact. Opinions and recommendations so based and presented are not those of a witness, but are merely arguments of counsel and examination and cross-examination concerning these should not be permitted.¹⁹

The critical issue is whether the GAL is providing evidence (in which case it should be subject to cross-examination, and testimony may be appropriate) or whether the GAL is analyzing evidence. Some states have resolved this complex issue by way of an advisory ethics opinion.²⁰ Some states have statutes that address this issue. Some states allow the GAL to testify under the theory that the GAL acts as an investigative arm of the court, and the content of the GAL's investigation, as well as the basis for any recommendations, should be subject to cross-examination by attorneys representing the agency and parents.

Conclusion

The unique role of GALs in helping the court reach the best decisions for children raises ethical considerations that are not easily reconciled under the Model Rules. The GAL's ethical obligations to the child, court, and opposing parties often conflict because the GAL serves as an advocate for the child, one who assesses what she believes to be in the child's best interests. Several important ethical issues affecting the role of the GAL should be addressed through legislation, case law, court rules, or ethics opinions. These include the following:

- The relationship of the GAL to the client
- Whether and, if so, how the child's preferences affect the position that the GAL advocates
- The extent that confidentiality and privilege attach in that relationship, and what disclosures are required if there is no confidentiality or privilege
- When a conflict of interest analysis applies
- Whether a GAL can be called as a witness

Clarifying these ethical issues would help GALs more concretely define their role as counsel. It also provides children with a clearer understanding of what to expect from GALs, including what, if any, information will remain confidential. Finally, resolving these issues will provide uniformity in the practice of law and much-needed guidance to GALs.



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Notes

- ¹ Most states require GALs to be attorneys. Some states permit laypeople to serve as GALs. This article is about ethical obligations of attorneys, so it applies only to lawyer-GALs.
- ² This article analyzes the ethical issues under the ABA Model Rules of Professional Conduct (Model Rules). Forty-one states have modeled their state rules of professional conduct on the Model Rules. Most of the remaining states have based their rules on earlier versions of the ABA Model Code.
- ³ Model Rule 1.2.
- ⁴ Some states have resolved these ethical problems by clarifying that the GAL does not represent the child but represents the child's "best interests."
- ⁵ *ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases, A-2*, "Lawyer Appointed as Guardian Ad Litem." See <http://www.abanet.org/child/rep-define.html>.
- ⁶ *Ibid*; see also *ABA/NACC Revised Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, NACC Revised Version (NACC Children's Law Manual Series, adopted Oct. 13, 1996): <http://www.naccchildlaw.org/documents/abastandardsnaccrevised.doc> or <http://www.naccchildlaw.org/training/standards.html>.
- ⁷ *In re J.P.B.*, 419 N.W.2d 387, 391-92 (Iowa 1988); *in re Rolfe*, 699 P.2d 79, 86-87 (Mont. 1985), *aff'd* 766 P.2d 223 (Mont. 1988).
- ⁸ E.g., in Wyoming, a recent proposed amendment to MR 1.2 reads, "Contrary to the ethical rules, the lawyer/guardian is not bound by the client's expressed preferences, but by the client's best interests. . . ." In Iowa, the Supreme Court has modified the Rules of Professional Conduct so that GALs "give priority to the paramount goal of discerning the child's best interest while enabling the lawyer to advocate an opposing viewpoint without fear of ethical violation."
- ⁹ A dichotomy exists between the lawyer as guardian and the lawyer as advocate, and the lines become very easily blurred. Courts and legislatures have not provided much assistance and have often required attorneys to assume dual and potentially inconsistent roles." Haralambie, Ann. "The Role of the Child's Lawyer in Protecting the Child Throughout the Litigation Process," *North Dakota Law Review* 71 (1995), 939, 941.
- ¹⁰ See Stuckey, Roy T. "Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality," *Fordham Law Review* 64 (1996), 1785, 1786. ("Role definition and confidentiality issues can arise whenever attorneys are appointed to serve as guardians *ad litem*; however, they become even more complex when an attorney is appointed to serve as both the attorney and the guardian *ad litem* for a child").

- ¹¹ E.g., New Hampshire enacted a statute creating lawyer-client confidentiality between GAL and child. See *N.H. Rev. Stat.* § 458.127-a-110 (1992).
- ¹² To determine whether confidentiality applies, it first must be decided what or who is being represented. Representing the "best interests" of the child is distinct from representing the child. A loose analogy is made to the corporate arena where, under MR 1.13, the corporate lawyer represents the organization, not the individuals within the organization. Although some communications by corporate officers are protected, in performing his or her fiduciary duty to protect the best interests of the corporation, the corporate lawyer may have to reveal certain communications.
- ¹³ The Michigan report is available from the ABA Center on Children and the Law, available by calling (202) 662-1746.
- ¹⁴ See generally *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, NACC Program Committee, 2001, at <http://www.naccchildlaw.org/training/standards.html>.
- ¹⁵ See Moore, Nancy J. "Conflicts of Interest in the Representation of Children," *Fordham Law Review* 64, (1996), 1819, 1842. ("[A] more common example of a possible conflict arising from duties . . . is the lawyer in a child custody . . . case who serves *both* as the child's lawyer *and* as guardian *ad litem*.")
- ¹⁶ Model Rule 3.7.
- ¹⁷ MR 3.7, cmt. 1.
- ¹⁸ MR 3.7, cmt. 2.
- ¹⁹ *In re J.E.B.*, 854 P.2d 1372 (Colo. Ct. App. 1993).
- ²⁰ See, e.g., North Carolina Ethics Advisory Op. 2251 (Feb. 2000).

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