

Utah Ethics Opinions

2007.

07-02. UTAH STATE BAR

ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 07-02

June 10, 2007

1. **Issue:** If an attorney guardian ad litem is appointed by a court for a person, may another attorney communicate with the person about the subject of the representation without the prior consent of the attorney guardian ad litem?

2. **Opinion:** When a person is represented by an attorney guardian ad litem, an attorney representing another party in the proceeding may not communicate with the person about the dispute, or arrange for the person to meet with a second attorney for such purpose, without the prior consent of the attorney guardian ad litem or authorization of the appropriate court, unless the represented person is independently seeking a second opinion or alternative representation from the attorney.

3. **Facts:** A minor is involved in a contested abuse/neglect proceeding. The minor is represented by an attorney guardian ad litem ("GAL")¹ appointed for the minor through the Utah Office of the Guardian ad Litem. With knowledge of the parent's attorney, one of the minor's parents asks a third attorney, who is a friend of the family, to interview the child, interview the child's therapist and file a notice of appearance for the child in the proceeding, along with an affidavit from the children's therapist, all without the knowledge or consent of the GAL.

4. We also consider the variation of a mature minor child in an abuse/neglect or custody case who has become dissatisfied with the representation being provided by the GAL and independently seeks to obtain separate representation or a second opinion from another attorney.

5. **Statutory Background:** In order to address this issue it is necessary to consider Rule 4.2 of Utah Rules of Professional Conduct as it operates with respect to GALs. But, first, the analysis also requires careful consideration of the role of a GAL that has been appointed to represent a minor in a judicial proceeding.

6. The Utah Legislature has established statutory authority for a court to appoint a GAL in certain situations. For example, under the Juvenile Court Act in cases of child abuse, neglect and dependency, a court may appoint a GAL

"to represent the best interests of a minor involved in any case before the court"² and, in doing so, shall consider the best interests of a minor, consistent with Utah Code Ann. § 32A-4a-201 (rights of parents, children's rights, interests and responsibility of state) in determining whether to appoint a GAL. In cases where a GAL is appointed, the court also is required to make a finding that establishes the necessity of the appointment.³ In such cases, "[a]n attorney guardian ad litem shall represent the best interests of each child who may become the subject of a petition alleging abuse, neglect, or dependency."⁴ The statute provides that the Office of the GAL director, through a GAL, shall, among other things:

Represent the best interests of the minor in all proceedings,

Conduct or supervise an independent investigation in order to obtain first-hand, a clear understanding of the situation and needs of the minor,

Personally meet with and interview the minor, if the minor is old enough to communicate,

Determine the minor's goals and concerns,

Personally assess or supervise an assessment of the appropriateness and safety of the minor's environment,

File written motions, responses, or objections at all stages of a proceeding when necessary to protect the best interests of the minor,

Participate in all appeals, unless excused by order of the court,

Keep the minor advised of the status of the case and of all court and administrative proceedings,

Review proposed orders for, and

As requested by the court, prepare proposed orders with clear and specific directions regarding services, treatment, evaluation, assessment, and protection of the minor and perform other duties.⁵

7. The statute also prescribes that the GAL shall continue to represent the best interests of the minor "until released from that duty by the court." Furthermore, if a minor's wishes differ from the attorney's determination of the minor's best interests, the GAL must communicate the minor's wishes to the court in addition to presenting the attorney's determination of the minor's best interests.⁶

8. A GAL may be appointed by a court in any proceeding in which child abuse or neglect is alleged, and then the

GAL acts "in accordance with 78-3a-911 and 78-3a-912."⁷ Such a GAL is appointed "to represent the best interests of the child in all related proceedings conducted in any state court involving the alleged abuse, child sexual abuse, or neglect."⁸ These appointments are made in accordance with the requirements of § 78-3a-912.

9. The court also may appoint a private attorney as a GAL to represent the best interests of a minor in any district court action in which the custody of or visitation with a minor is at issue.⁹ Any such attorney must be certified by the director of the Office of the GAL, but shall not be employed by or under contract with the Office of the GAL. The duties of such a GAL are similar to the duties of a GAL appointed under § 78-3a-912.¹⁰ Such a GAL "shall represent the best interests of a minor" and, if the minor's wishes differ from the attorney's determination of the minor's best interests, "the GAL shall communicate to the court the minor's wishes and the attorney's determination of the minor's best interests."¹¹ Furthermore, a difference between the minor's wishes and the attorney's determination of the best interests "is not sufficient to create a conflict of interest."¹²

10. Rule 17(b) of the Utah Rules of Civil Procedure, which applies in custody cases pending in District Court, provides:

A minor or an insane or incompetent person who is a party must appear either by a general guardian or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the minor, insane or incompetent person in the action or proceeding, notwithstanding that the person may have a general guardian and may have appeared by the guardian.¹³

In many civil actions, a parent is the guardian or next friend for a minor if the minor is a party in litigation such as an action to recover for injuries to the minor. In other cases, however, where the person is the subject of the dispute, such as a custody, abuse or neglect action, the parent is a potentially adverse party to the child.

11. The Utah Rules of Juvenile Procedure, which apply in abuse, neglect, dependency, delinquency and protective order proceedings in Juvenile Court, do not separately address the appointment of a GAL in such cases. These rules, however, do address the minor's right to an attorney in a delinquency case (Rules 8 and 26) and the possibility of a minor being "represented by a private attorney" or having a GAL appointed pursuant to § 78-31-913 or § 78-31-911 (Rule 60) in a judicial bypass procedure to authorize the minor to consent to an abortion (Rule 60). Similarly Rule 37 addresses proceedings for child protective orders,

referencing §§ 78-3h-101 et seq., and provides that the court may appoint a GAL for the child.

12. In summary, under Utah law the primary way in which minors are represented is through appointment of a GAL who represents the minor's best interests, rather than by retention of an attorney who represents the minor's wishes. In certain circumstances, however, such as in a proceeding involving delinquency or the right to an abortion, Utah law also recognizes that a minor has a right to an attorney of his or her own choice.

13. **Analysis:** Representing minor, insane and incompetent people as a GAL "is unique in American jurisprudence and not yet sufficiently defined by law or tradition."¹⁴

Although there is a growing consensus that children in dependency cases should have lawyers, there continues to be confusion and debate over the role and duties of the lawyer. At the outset, we recognize that children are not simply small adults, and that extending the traditional role of a lawyer in the adult context to the representation of children will not necessarily serve the child client well. A lawyer representing a child has a client who may or may not be competent, and who may be competent for some decisions but not for others. Modifications to the lawyering role must, therefore, be made. The primary modification concerns the client's direction to the lawyer where a child is incapable or incompetent to make such decisions. With these modifications in place, the lawyer then participates in formulating the client's position and reporting that position to the court in a manner inconsistent with traditional adult representation. Such modifications, some argue, create a hybrid lawyer role that can diminish independent zealous advocacy. Crafting rules that blend the benefits of client autonomy and child protection have proved to be difficult.¹⁵

14. A survey by the National Council of Juvenile and Family Court Judges determined that 40 states appoint counsel for children in child-abuse and neglect cases. In 30 states, "an 'attorney-guardian-ad-litem' is typically appointed who serves a dual function of representing both the best interests and the wishes of the child. In the ten other states that appoint counsel for the child, a guardian ad litem is appointed in addition to the attorney, so that the attorneys perform the single role of representing the child (i.e., the child's wishes)."¹⁶

15. In Utah, the role of the GAL is clear: The attorney is appointed by the court to "represent the best interests of the minor in all proceedings."¹⁷ The GAL performs attorney functions, including advocacy, preparation of pleadings, filing of objections, and generally representing the person's best interests in the underlying proceeding. Even where the represented person's wishes may differ from the

recommendations of the GAL, the GAL must communicate such person's wishes to the court in addition to presenting the attorney's independent determination.¹⁸

16. In the context of Rule 4.2(a), and in light of the foregoing, we conclude that the GAL is an attorney representing a person. Rule 4.2(a) of the Utah Rules of Professional Conduct provides:

In representing the 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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d) or (e) of this rule.¹⁹

Subparagraph (b) of the Rule provides that:

A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3 (dealing with unrepresented person), unless the person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.²⁰

This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates, and it applies even though the represented person initiates or consents to the communication.²¹ Furthermore, an attorney may not make a communication prohibited by Rule 4.2 through the acts of another.²² An attorney desiring to engage in a communication with a represented person that otherwise is not permitted under the rule, must apply in good faith to a court of competent jurisdiction, either *ex parte* or upon notice, for an order authorizing the communication.²³ Finally, a person is "known" to be represented when the lawyer has actual knowledge of the representation.²⁴

17. Subparagraphs (c) (rules relating to government lawyers engaged in civil or criminal law enforcement) and (d) (organizations as represented persons) of Rule 4.2 are not relevant to our inquiry. Subparagraph (e) specifically limits the ability of an attorney to communicate with a represented person, even if the communication is permitted by the rule, by prohibiting the lawyer from inquiring about privileged communications, legal strategy or legal arguments, or from seeking to induce such person to forego

representation or disregard the advice of the person's counsel.²⁵ Subparagraph (e)(2) also prohibits the lawyer from engaging in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel, unless such negotiations are permitted by law, rule or court order.

18. Rule 4.2 "contributes to the proper function of the legal system by protecting a person who has *chosen to be represented by a lawyer* in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation."²⁶

19. There is an additional and stronger reason in child-abuse and neglect cases for protecting the child from the attorneys representing others in the case. In such cases, the child's welfare is the primary issue in the case, and it is particularly important that the child not be subjected to overreaching by opposing counsel (or their clients) in order to prevent manipulation of the child or alteration of the child's testimony.

20. Therefore, 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.²⁷

21. Nevertheless, a problem can arise where the child has not "chosen" the GAL as the child's representative and is dissatisfied with the representation being provided by the GAL. Because of the child's status as a minor, one might argue that the child does not generally have capacity to choose counsel. In some situations, however, a mature minor does have capacity to seek independent representation and to direct an attorney to represent the minor's "wishes," rather than the GAL's assessment of the minor's "best interests." And in other cases, the mature minor may have legitimate concerns about the quality and nature of the representation being provided by the court-appointed GAL.

22. When such a situation arises, it is preferable for the GAL, or an attorney for another party, to bring this concern to the court's attention and seek retention of an additional, independent attorney for the child. Just as criminal

defendants may occasionally have legitimate complaints about their court-appointed counsel, so too a mature minor may have like complaints and should have like rights. It also would be proper for the child to seek such independent representation, so long as the effort is the child's independent, voluntary act and not the result of manipulation by another party or an attorney for another party. Any such manipulation or interference, whether direct or indirect, would be a violation of Rule 8.4.

23. While this limitation may present some evidentiary challenges for the party's attorney in making an appropriate showing to the court, those challenges are not insurmountable nor do they obviate compliance with Rule 4.2(a). Accordingly, 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.²⁸

24. Conclusion: When 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. Nothing contained in this opinion is intended to affect or modify any such rights. This opinion only addresses the ethical and professional responsibilities of Utah attorneys when the minor is represented by a GAL.

Footnotes:

1. This Opinion assumes that the guardian ad litem is an attorney. Situations in which the guardian ad litem is not an attorney require a different analysis, which we do not address here.

2. Utah Code Ann. § 78-3a-912(1) (2006 Supp.).

3. *Id.* § 78-3a-912(1)(b).

4. *Id.* § 78-3a-912(2).

5. *Id.* § 78-3a-912(3).

6. *Id.* § 78-3a-912(8)(b).

7. Utah Code Ann. § 78-7-9(1) (2004).

8. *Id.* § 78-7-9(2).

9. *Id.* § 78-7-45(1)(a).

10. *See id.* § 78-7-45(3).

11. *Id.* § 78-7-45(4).

12. *Id.*

13. Utah R. Civ. Proc. 17(b) (2007).

14. Donald Duquette & Marvin Ventrell, *Representing Children & Youth*, in CHILD WELFARE LAW AND PRACTICE 493 (Martin Ventrell & Donald Duquette eds. 2005).

15. *Id.*

16. *Id.* at 495.

17. *E.g.*, Utah Code Ann. § 78-3a-912(3)(a) (2006 Supp.).

18. *See, e.g., id.* § 78-3a-912(8)(b).

19. Utah R. Prof. Conduct 4.2(a) (2007) (emphasis added).

20. *Id.* 4.2(b).

21. *Id.*, cmts [3] & [4].

22. *See* Utah R. Prof. Conduct 8.4(a). It is professional misconduct for a lawyer to "knowingly assist or induce another to [violate or attempt to violate the Rules of Professional Conduct], or to do so through the acts of another."

23. Utah R. Prof. Conduct 4.3, cmt. [16].

24. Knowledge is a question of fact to be resolved by reference to the totality of the circumstances. Rule 4.2, cmt. [21].

25. *See id.* 4.2(e)(1).

26. *Id.* cmt. [2] (emphasis added).

27. While we have not found any ethics opinion directly on point, an opinion of the District of Columbia Bar Association concluded that a GAL for a child was prohibited from communicating about the subject of a representation with either of the child's parents without notification of and consent from the parents' attorneys. Limited communication directly with a represented parent was found to be permissible if the sole purpose of the communication was to obtain information about how to contact the child or to schedule a meeting with the child.

Such limited communications were considered to be "administrative in nature" and were not found to be "about the subject of the representation." D.C. Bar Op. 295, www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion295.cfm (2002). Similarly, the North Carolina State Bar found that, where a GAL was represented by an attorney, counsel for another party could not communicate directly with the GAL about the subject of the representation unless the attorney first obtained the prior consent of the GAL's attorney, even though, in that case, the GAL was an attorney. N. Car. Formal Ethics Op. (2003), www.ncbar.com/ethics/ethics.asp.

28. *See also* Utah Ethics Advisory Op. 110, 1993Westlaw 741794 (Utah St. Bar).