Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95-08

Approved April 26, 1996

Issue No. 1. May the same Utah guardian ad litem represent the interests of siblings?

Opinion. There is no per se prohibition, and such representation is permissible where: (1) the interests of the siblings are not directly adverse, (2) the representation of one sibling will not materially limit the lawyer's responsibilities to another sibling or adversely affect the lawyer's representation of another sibling, and (3) it is not reasonably foreseeable that the lawyer will obtain confidential information relating to the representation of one sibling that might be used to the disadvantage of another sibling represented by the lawyer.

Issue No. 2. If the same attorney guardian may not represent siblings of a represented child, may other attorney guardians within the same office represent the siblings?

Opinion. No.

Issue No. 3. May attorney guardians in other offices represent siblings of a represented child?

Opinion. No, except where (1) they have no opportunity to discuss the cases with each other, to access each other's files, or to share confidential information in other respects, and (2) they are not subject to common direction, planning, or supervision with respect to the conduct of the case.

Introduction. The Ethics Advisory Opinion Committee has been asked to address certain legal ethics issues concerning representation by lawyers working for the Utah Office of the Guardian ad Litem. These questions must be answered in light of the statutory organization of the office and the special functions assigned to guardian ad litem attorneys by the Utah Legislature. (fn1)

In 1994, the Utah Legislature created the Office of Guardian ad Litem to oversee and manage guardian ad litem attorneys and volunteers in Utah's eight judicial districts. (fn2) The office operates under the direct supervision of the Judicial Council (fn3) and is currently housed in the Administrative Office of the Courts.

The Director of the Office of the Guardian ad Litem is charged with (a) establishing policies and procedures for the management of the statewide guardian ad litem program; (b) ensuring that guardian ad litem legal services are provided in accordance with state and federal law and policy; (c) contracting with licensed attorneys to represent children in their respective judicial districts; (d) evaluating guardian ad litem attorneys; (e) developing, maintaining and monitoring training programs for guardian ad litem attorneys and volunteers in accordance with national standards; (fn4) and (f) submitting an annual report to the Judicial Council and the Legislative Interim Human Services Committee regarding the progress and effectiveness of the Guardian Ad Litem program. (fn5)

Since the creation of the Guardian ad Litem Office, the Director has been appointed and separate guardian ad litem offices have been established in each judicial district. Attorneys in the First, Fifth, Sixth, Seventh and Eighth Districts work under the direct supervision of the Director. Attorneys in the Second, Third and Fourth Districts report to the respective office's lead attorney, who is designated by the Director. The district offices maintain separate filing and computer systems and do not share case information. However, the Director may access all files and computer systems and regularly checks on attorneys' work to assure that they are meeting the established standards and requirements. Attorneys in the separate offices meet together for quarterly training programs. Interaction among attorneys in the different offices occurs on this limited basis. In addition, the Director has full discretion in hiring and dismissing guardian attorneys in all offices throughout the state.

Pursuant to statute, guardian ad litem attorneys in the Second, Third and Fourth Districts devote their entire practices to providing guardianship services. Guardian ad litem attorneys in the other districts may contract to provide their services on a part-time basis. (fn6) All guardian ad litem offices and staff are funded and maintained by the State under the budget for the juvenile court. (fn7) Guardian ad litem attorneys are considered to be at-will employees of the Utah State Courts and receive state employee benefits. (fn8)

Under the statutory scheme, guardian ad litem attorneys are appointed to represent "the best interest of each child" named in juvenile court petitions alleging abuse, neglect or dependency filed in the juvenile court. (fn9) In fulfilling this representation, attorney guardians must conduct independent investigations of the child's situation; meet

with the child to determine the child's goals and concerns regarding the proceedings; and formulate a plan regarding assessment, placement, and provision of services for the child. The guardian must represent the child at every stage of the proceeding, at all times promoting the best interests of the child. In addition to presenting the court with a determination of the child's best interest, the guardian must also communicate the child's wishes to the court. Thus, the guardian plays a special role for an attorney. Under normal circumstances, an attorney would be prohibited from asserting a position different from the wishes of the client. (fn10) However, the guardianship statute specifically provides that "A difference between the child's wishes and the attorney's determination of best interest shall not be considered a conflict of interest for the attorney." (fn11)

Several additional ethical aspects of the guardian's role are also addressed explicitly by the statute. The guardian is charged to keep the child informed of the status of the case, to the extent it would not be detrimental to the child for the guardian to do so. (fn12) Communications from the child to the guardian, as well as records of the guardian, are confidential but are subject to legislative subpoena, and such subpoenas are exceptions to the attorney's duty of confidentiality. (fn13)

Issue No. 1. May the same attorney guardian ad litem represent the interests of siblings-for example, in neglect or abuse proceedings? (fn14)

Opinion. Under a conflicts analysis of Rule 1.7 of the Utah Rules of Professional Conduct, there is no per se prohibition, and such a representation is permissible where: (1) the interests of the siblings are not directly adverse, (2) the representation of one sibling will not materially limit the lawyer's responsibilities to another sibling or adversely affect the lawyer's representation of another sibling, and (3) it is not reasonably foreseeable that the lawyer will obtain confidential information relating to the representation of one sibling that might be used to the disadvantage of another sibling represented by the lawyer. (fn15)

Analysis. Utah Rule of Professional Conduct 1.7(a) states that a lawyer shall not represent multiple clients when their interests are directly adverse unless the lawyer reasonably believes the representation of one client will not adversely affect the lawyer's relationship with another client and each client consents after consultation. There are circumstances in neglect or abuse proceedings in which representation of one sibling would be directly adverse to representation of another. An example would be a situation in which one sibling is being investigated for abuse of another sibling. Another example would be a situation in which it is in the best interest of one sibling to be placed alone, but it is in the best interest of another sibling that siblings be placed together. In such clear instances of directly adverse interests among siblings, a lawyer could not reasonably believe that joint representation would be proper, and the lawyer would be directly prohibited from the joint representation by Rule 1.7(a).

In some circumstances involving adverse interests among siblings, a lawyer might conclude that the representation of one sibling would not adversely affect the lawyer's relationship with a sibling. However reasonable such a conclusion might be in certain cases, Rule 1.7(a) would still forbid simultaneous and directly adverse representation involving a minor sibling, because minors are incapable of giving effective consent. (fn16)

Utah Rule of Professional Conduct 1.7(b) also forbids representation when the representation of one client might be materially limited by the representation of another client, even though the two clients' interests are not directly adverse, unless the client consents after consultation and the attorney reasonably believes that the representation will not be adversely affected. In cases where the representation of the best interests of one minor sibling might be materially limited by the best interests of another minor sibling, Rule 1.7(b) would forbid simultaneous representation. As with the analysis of Rule 1.7(a), regardless of the lawyer's assessment of the circumstances, a minor sibling is incapable of giving effective consent to the simultaneous representation.

If the circumstances of a particular case are such that (a) representation of one sibling will not materially limit the lawyer's representation of another sibling, (b) the lawyer reasonably believes the representation of one sibling will not adversely affect the other, and (c) the interests of the siblings are not directly adverse, the lawyer might conclude that Rule 1.7(b) permits simultaneous representation of the siblings.

However, representation of minor siblings by attorney guardians ad litem presents special problems where the lawyer obtains confidential information that cannot be used or revealed. The attorney guardian ad litem is required by statute to interview the child personally, if the child is old enough to communicate, and determine the child's goals and concerns regarding placement. (fn17) In such an interview, the attorney guardian ad litem will obtain confidential information that is subject to the attorney-client privilege. Even if the child is not old enough to communicate, the attorney guardian ad litem has access to confidential client information. (fn18)

Utah Rule of Professional Conduct 1.8(b) prohibits an attorney from using information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation. Rule 1.6(a) prohibits an attorney from revealing information relating to

the representation of a client (except in narrowly defined circumstances, including where the lawyer must reveal information to comply with "other law" (fn19)), unless the client consents after disclosure. Once again, a minor cannot give effective consent.

In many situations an attorney guardian ad litem could not obtain the information necessary to make the appropriate determinations under Rule 1.7(a) and 1.7(b) without thereby being disqualified in the event that the interests of one sibling required use of confidential information obtained from the other. For example, one sibling might reveal details about abuse or neglect that could be used against the interests of another sibling. An attorney guardian ad litem who interviewed each of the siblings would then have confidences obtained from one sibling that might need to be revealed in the interests of representing another sibling, thus disqualifying the attorney guardian ad litem from representing either sibling. Because the siblings are minors incapable of giving effective consent, the attorney's disqualification could not be cured by consent.

Confidential information will be obtained in nearly every, if not every, case of neglect or abuse. Furthermore, the interests of siblings in matters such as custody and care are not always identical and by statute must be evaluated and represented individually. (fn2) **0** Accordingly, the potential for disqualification of an attorney who is investigating the potential representation of more than one sibling is high.

There may be cases where, without obtaining confidential information, (1) the lawyer can reasonably determine that it is not foreseeable that representation of one sibling could materially limit the lawyer's representation of another sibling, (2) the lawyer can reasonably believe that the representation of one sibling will not adversely affect the other, and (3) the lawyer can determine that the interests of the siblings are not directly adverse. In such a case, Rule 1.7(b) would permit simultaneous representation of the siblings, and rules barring use of confidential information would not apply. One can imagine a case, for example, involving siblings too young to share confidences, where the lawyer guardian ad litem could represent both. However, even in such a case, the lawyer would have to determine that the representation could not later become inappropriate, such as where the representation may continue (or resume) after an age when the siblings could share confidences with the lawyer.

Issue No. 2. If the same attorney guardian may not represent siblings of a represented child, may other attorney guardians within the same office represent the siblings?

Opinion. No.

Analysis. Under Utah Rule of Professional Conduct 1.10, if one attorney is disqualified by Rule 1.7, attorneys in the same firm are also disqualified. The Comment to rule 1.10 indicates that lawyers employed in the same office of a legal service organization are to be regarded as a firm for the purposes of Rule 1.10. Because such lawyers have access to common files and have the opportunity to discuss cases with each other within the office, protection of confidential information cannot be assured. Attorney guardians within the same office, like legal service attorneys, have the opportunity to discuss cases with each other and to access common files. They are also subject to the common supervision of the lead attorney if the office. Thus, if an attorney guardian may not represent siblings, attorney guardians within the same office also are disqualified from the representation.

Issue No. 3. May attorney guardians in other offices represent siblings of a represented child?

Opinion. No, except where (1) they have no opportunity to discuss the cases with each other, to access each other's files, or to share confidential information in other respects, and (2) they are not subject to common direction, planning, or supervision with respect to the conduct of the case.

Analysis. The Comment to rule 1.10 indicates that whether lawyers in separate offices of legal services organizations are to be regarded as a firm should be determined on a case-by-case basis. Crucial to the inquiry are the specific facts of the situation and the purpose of the rule involved. In requiring vicarious disqualification, Rule 1.10 seeks to assure loyalty and the protection of confidential information.

Loyalty requires that the lawyer act as a fiduciary for the client. If the lawyers in different guardian offices are subject to common direction, planning, or supervision in their representation of siblings, there is the potential for dilution of loyalty. Common management risks compromise of the interests of one sibling in the interests of other siblings or of overall office policies. As it is presently structured, the Office of the Guardian ad Litem does pose risks to loyalty from common management. All district offices report to the Director, who has full discretion in hiring and firing guardian attorneys. Although the Director does not manage specific cases, the Director has access to the files of all the offices, and could give common direction in any given case.

Protection of confidentiality requires that lawyers not have access to confidential information about each others' clients. If attorney guardians in different offices do have such common access, they would be regarded as a "firm" for the purposes of Rule 1.10. As it is presently structured, the Office of the Guardian ad Litem does not guarantee protection against the transfer of confidential information.

The Director has access to the files, including confidential information about all cases. Information about individual cases might also be shared by attorneys at their quarterly training sessions.

Thus, if the separate locations of the Office of the Guardian ad Litem are subject to common case management, or have access to confidential information, they are to be regarded as a single firm for purposes of Rule 1.10. If attorney guardians in the separate offices manage their cases independently so that loyalty is not put at risk, if the hiring and termination decisions in the individual offices are not made at the sole discretion of the state Director, and if there is no opportunity to share confidential information, it would be proper for them to represent siblings when simultaneous representation would be improper for one guardian attorney.

Footnotes

1. This opinion is founded on the Utah Rules of Professional Conduct in effect on the date of issuance. It does not address the potentially conflicting results that a pending proposal to amend Rule 4-906 of the Code of Judicial Administration would create. *See* note 14, *infra.*

2. Utah Code Ann. § 78-3a-44.6 (Supp. 1995).

3. *Id.*§ 78-3a-44.6(1).

4. National standards are developed by the National Court Appointed Special Advocate Association, 272 Eastlake Ave.., E. Suite 220, Seattle, Washington 98102.

5. Utah Code Ann. § 78-3a-44.6(3) (Supp. 1995).

6. Utah Code Ann. § 78-3a-44.6(2)(c) (Supp. 1995).

7. *Id.*§ 78-3a-44.5(2).

8. Form contract for guardian ad litem services provided by the Office of Guardian ad Litem Director.

9. Utah Code Ann. § 78-3a-44.5(2) (Supp. 1995).

10. Utah Rule of Professional Conduct 1.2(a) provides as follows: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."

11. Utah Code Ann. § 78-3a-44.5(8)(a) (Supp. 1995).

12. *Id.*§ 78-3a-44.5(3)(u).

13. *Id.*§§ 78-31-44.5(b), (d).

14. Although the original request asked specifically about joint representation of siblings, the analysis in this opinion applies equally well to other children that might be involved, such as cousins and grandchildren living in the same household.

15. This conclusion, based on the Utah Rules of Professional Conduct, is in conflict with a pending proposal to amend Rule 4-906(5)(A) of the Utah Code of Judicial Administration: "Upon a finding that a conflict of interest exists, the court shall relieve the guardian ad litem from further duties in that case and appoint an alternate guardian, which may be a guardian ad litem employed by the Administrative Office of the Courts in that or another judicial district." (Proposed new language italicized.) The Committee takes no position on the resolution of the conflict, should it materialize.

16. In the Utah Judicial Code, which includes the statutes that create the Office of Guardian ad Litem Director and provides for the appointment of an attorney guardian ad litem in cases of abuse, neglect or dependency, a "child" means "a person less than 18 years of age." Utah Code Ann. § 78-3a-2(5) (Supp. 1995). Utah's statute on the legal capacity of children provides: "The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage." Utah Code Ann. § 15-2-1 (1992). It has been directly held in New York, for example, that minors cannot legally consent to an attorney's simultaneous representation of conflicting interests. *In re Estate of Merrick,* 107 Misc. 2d 988, 436 N.Y.S.2d 125 (1980).

17. Utah Code Ann. § 78-3a-44.5(3)(h) (Supp. 1995).

18. *Id.*§ 78-3a-44.5(3)(g) (medical and psychological records of the child), § 78-3a-44.5(9) (all Division of Family Services records regarding the child).

19. Utah Code § 78-3a-44.5(11)(d) (Supp. 1995) states an express exception to Rule 1.6 and the attorney-client privilege when the records of an attorney guardian ad litem are subject to legislative subpoena. This provision may be viewed as highlighting the obligation of the attorney guardian ad litem not to reveal confidential client information under other circumstances.

However, the attorney guardian ad litem is required by § 78-3a-44.5(8)(a) to communicate the child's wishes to the court in addition to presenting the attorney's own determination of the child's best interest, even when the child's wishes differ from the attorney's own determination. Section 78-3a-44.5(8)(a) states that a difference between the child's wishes and the attorney's determination of best interests shall not be considered a conflict of interest for the attorney, but, unlike the exception made by § 78-3a-44.5(11), there is no express exception to Rules of

Professional Conduct 1.6 or 1.8 or the attorney-client privilege if the attorney guardian ad litem complies with § 78-3a-44.5(8)(b) by disclosing the child's wishes revealed to the attorney in confidence. Rule 1.6(b)(4) permits a lawyer to reveal confidential client information to the extent the lawyer believes necessary to comply with "other law." Compliance with the requirements of the attorney guardian ad litem statute should fall within this exception. Furthermore, Utah law requires that "any person" (excepting only a clergyman or priest in specified circumstances) report defined circumstances involving past, present, or potential abuse. *See* Utah Code Ann. § 62A-4a-403 (Supp. 1995). Compliance with this law should also fall within the exception provided in Rule 1.6(b)(4).

20. *See, e.g.,* Utah Code Ann. § 78-3a-44.5(1) (attorney guardian ad litem is to represent the best interest of "a child"); § 78-3a-44.5(2) (attorney guardian ad litem shall represent the best interest of "each child"); §§ 78-3a-44.5(3)(a), -44.5(5) (attorney guardian ad litem shall represent the best interest of "the child").

Rule Cited:

1.61.71.10