

DILEMMA:

GALs and Conflicts Now Clarified with Ethics Opinion EF-23-02

New Wisconsin Formal Ethics Opinion EF-23-02 confirms that lawyers acting as guardians ad litem (GALs) are bound by the disciplinary conflicts rules just as other lawyers are. This opinion, discussed below, offers general guidance when analyzing conflicts that might arise from a lawyer's work as a GAL.

Question

I am a solo practitioner and I do a lot of guardian ad litem (GAL) work in family cases. I have recently been offered a part-time job prosecuting child support enforcement actions for the county in which I live.

I would like to take the job, but I am concerned about how it might affect my GAL work. I don't really have a regular "client" when I act as a GAL, so I am not sure how to analyze whether a conflict would exist if I act as GAL in a case in which the child support may be owed to the county.

How do I analyze conflicts when working both as a GAL and child support attorney?

Discussion and Answer

I addressed this question in June in *Guardian ad Litem Work: Analyzing Potential Conflicts*,¹ in which the answer relied on Wisconsin case law.

The reason to revisit the question now is that a new resource is available to assist GALs in answering questions such as the one posed here. Wisconsin Formal Ethics Opinion EF-23-02, *Guardian ad Litem Conflicts and Informed Consent, Confidentiality and Other Obligations Under the Rules of Professional Conduct*, was released July 20, 2023, and is explained in detail in the Ethics Column elsewhere in this issue of *Wisconsin Lawyer*.²

It is the hope of the State Bar of Wisconsin's Standing Committee on Professional Ethics that EF-23-02 will be a useful resource for GALs and other lawyers who practice in GAL matters.

The opinion address four primary topics.

Client Identity and Conflicts Analysis Framework

The first part of the opinion notes that in Wisconsin, GALs must be lawyers and as such, are bound by the rules of

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professional conduct, including the disciplinary rules for conflicts.³

The opinion, relying on Wisconsin case law, takes the position that for conflicts analysis purposes, GALs represent the best interests of the ward and therefore GALs do have a client. Consequently, conflicts analysis under the applicable disciplinary rules for GALs is similar to conflicts analysis for any lawyer representing a client in a matter before a tribunal.

Tour of the Conflict Rules

With the framework for conflicts analysis in place, the opinion briefly reviews certain conflict rules that are likely to be relevant for GALs in practice, specifically SCR 20:1.7, 20:1.8, 20:1.9, 20:1.10, and 20:1.18.

While the opinion does not go into great depth with respect to each, it does provide general guidance for proper analysis under the applicable rule and gives examples of common situations.

For example, in discussing former-client conflicts under SCR 20:1.9, the opinion states:

“The *Tamara L.P.* case applied the normal former client conflicts analysis to a GAL. Pursuant to SCR 20:1.9(a), a lawyer has a former client conflict when the interests of the current and former clients are materially adverse and the representations are substantially related, meaning that it is reasonable to assume that a lawyer in the prior representation would have had access to information that is relevant to the current matter. This may arise for GALs when the GAL serving in a family dissolution matter had previously represented one of the parents. Whether a GAL would have a conflict in such a situation would depend on application of the substantial relationship test. For example, if the GAL had previously represented a parent in a prior divorce involving children, the matters would clearly be substantially related and the GAL would have a former client conflict. Similarly, if the GAL had previously represented one of

the parents in connection with criminal charges that were relevant to the determination of custody, the GAL would have a former client conflict. Under SCR 20:1.9(a), all former client conflicts are subject to informed consent. A potential GAL must remember that informed consent would need to be obtained from both the former and current clients, the latter of which is discussed below.” (Footnotes omitted.)

Confronting the Informed Consent Question

Given that GALs are bound by the disciplinary conflicts rules just as other lawyers are, a question arises. Many conflicts under the rules can be resolved with the written and signed informed consent (sometimes referred to as “waiver”) of the affected current or former clients. But how does a lawyer obtain the written and signed informed consent from the “best interests” of a ward?

One possible answer is that no conflict for GALs is subject to informed consent, because it cannot be obtained from the best interests of the ward. Another possible solution is to seek written and signed informed consent from the ward.

After considering and finding both positions unsatisfactory, the opinion proposes an alternative:

“A final option would be for the GAL to present the matter to the trial court which has jurisdiction over the matter and allow the court to decide whether the conflicted GAL should be permitted to continue to act in the matter. Admittedly, there is no direct authority in the rules, nor in statute or case law for this proposition, but in a situation without a perfect solution, the committee believes this option would best serve the interests of the parties and the efficient administration of justice.

“In a situation wherein a GAL has a conflict and believes in good faith that the conflict is subject to informed consent under the relevant rule, the GAL could provide a description of

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• **Dilemma: Can I Respond to Online Criticism?** A former client made false claims about my representation in a critical review online. I’m worried about what it may do to my reputation. How can I respond? (July 19, 2023)

• **Dilemma: Practicing in Two States: Do I Need Two Trust Accounts?** When you practice in two separate jurisdictions that have different trust account rules, do you need to use separate trust accounts to comply with the different rules? (June 21, 2023) **WL**

the conflict to the court, explain their rationale for why the conflict is subject to informed consent, and provide whatever additional information the court requests. The committee believes this should occur in open court with all interested parties present and allowed to be heard. Whether or not the GAL should file a formal motion asking the court to consider the conflict is a procedural question the committee believes is best left to the judge or possibly a local court rule.” (Footnotes omitted.)

As noted in the excerpt, the opinion frankly acknowledges that there is no direct authority on this question in Wisconsin’s case law or rules.

The question, however, of how or whether to resolve GAL conflicts has been long-standing, and the committee believed that it was important to offer a solution.

Other Disciplinary Rules

In the last section, the opinion discusses how a few other disciplinary rules apply to GALs. Of these, perhaps the most important is SCR 20:1.6, the duty of confidentiality. Application of this rule can sometimes be confusing because of the client identity issue discussed above.

The opinions states, in part:
 “Given that the majority, if not all, of the disclosures GALs routinely make, fall within exceptions to the duty of confidentiality, what does it mean to say that the duty of confidentiality applies to GALs? GALs, like most lawyers, come into possession of much sensitive and important information, and like other lawyers, GALs are not free to use or disclose such information as they wish. While it is appropriate and indeed required that GALs make disclosures that advance the best interests of the ward, sometimes even over the objections of the ward, they may not make disclosures not required by their responsibilities that are adverse to the interests of the ward or that solely further the interests of the GAL or a third party. So, for example, a GAL may not disclose information about the ward to assist a colleague in cross examining the former ward should they be an adverse witness

in a matter. Similarly, a GAL who is in possession of financial information about an elderly ward may not use or disclose that information solely to benefit the GAL or a third person. To illustrate, while a GAL may disclose, over the objections of the ward, the fact that a ward may have a substance abuse disorder if the GAL reasonably believes the disclosure is in the best interests of the ward, the same GAL may not later disclose the same information to assist a future colleague in a law firm in cross examining the ward as a witness in a future matter.” (Footnotes omitted.)

The opinion goes on to discuss the caselaw and opinions relevant to SCRs 20:3.7 and 20:4.2.

Conclusion: A Useful Guide

Questions from GALs are common on the ethics hotline. A frequent source of difficulty is how to analyze responsibilities under the conflict and confidentiality

rules, given the fact that GALs represent the best interests of an individual rather than the individual themselves. EF-23-02 provides a useful guide for analysis.

And in answer to the question posed in this column, which is based on the facts of *La Crosse County Dep’t of Social Services v. Rose K.*,⁴ – discussed in detail in EF-23-02 – the lawyer would have a conflict acting as GAL in any matter involving child support. **WL**

ENDNOTES

¹Timothy J. Pierce, *Guardian ad Litem Work: Analyzing Potential Conflicts*, Inside-Track (June 19, 2019), www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=27087.

²See wisbar.org/formembers/ethics/Ethics%20Opinions/EF-23-02%20GAL%20Conflict.pdf; see also Timothy J. Pierce, *Ethics Opinion EF-23-02: Guardian ad Litem Conflicts and Informed Consent*, 96 Wis. Law. 49 (October 2023).

³See SCR 20:4.5.

⁴196 Wis. 2d 171, 178, 537 N.W.2d 142 (Ct. App. 1995). **WL**



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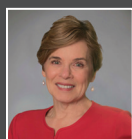
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