Ethics Opinion EF-23-02: Guardian ad Litem Conflicts and Informed Consent

On July 20, 2023, the State Bar of Wisconsin's Professional Ethics Committee issued Opinion EF-23-02, discussing guardian ad litem conflicts and informed consent, confidentiality, and other obligations under the Rules of Professional Conduct.

Synopsis

In Wisconsin, guardians ad litem (GALs) must be lawyers and as such, are bound by the Rules of Professional Conduct for Attorneys. While GALs represent the best interests of their wards rather than the wards themselves, certain rules that are specific to clients, including the rules governing conflicts of interest do apply and useful guidance can be found in Wisconsin caselaw. Conflict rules sometimes permit resolution of conflicts through obtaining the written and signed informed consent of affected current or former clients. This approach is not possible when the client is the best interests of the ward. In this opinion, the committee suggests a procedure whereby a GAL may obtain court approval for continued representation for conflicts otherwise subject to informed consent. The application of certain other rules to GALs is also discussed.

Introduction and Client Identity

Guardians ad litem (GALs) play important roles in a variety of situations involving vulnerable adults and children.[1] In Wisconsin, GALs must be lawyers[2] and as such are governed by Wisconsin's Rules of Professional Conduct for Attorneys (the "rules"). Supreme Court Rule (SCR) 20:4.5 sets forth the responsibilities of GALs under Wisconsin's rules and states:

"A lawyer appointed to act as a guardian ad litem or as an attorney for the best interests of an individual represents, and shall act in, the individual's best interests, even if doing so is contrary to the individual's wishes. A lawyer so appointed shall comply with the Rules of Professional Conduct that are consistent with the lawyer's role in representing the best interests of the individual rather than the individual personally."

WISCONSIN COMMENT: The Model Rules do not contain a counterpart provision. This rule reflects established case law that a guardian ad litem in Wisconsin is a lawyer who represents the best interests of an individual, not the individual personally. *See Paige K.B. v. Molepske*, 219 Wis. 2d 418, 580 N.W.2d 289 (1998); *In re Steveon R.A.*, 196 Wis. 2d 171, 537 N.W.2d 142 (Ct. App. 1995). Supreme Court Rules, Chapters 35-36, govern eligibility for appointment as guardian ad litem in certain situations.

This rule expressly recognizes that a lawyer who represents the best interests of the individual does not have a client in the traditional sense but must comply with the Rules of Professional Conduct to the extent the rules apply.

Our supreme court rules track the statutory definition of the responsibilities of a GAL. For example, Wis. Stat. § 54.40(3) provides:

"The guardian ad litem shall be an advocate for the best interests of the proposed ward or ward as to guardianship, protective placement, and protective services. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but is not bound by, the wishes of the proposed ward or ward or the positions of others as to the best interests of the proposed ward or ward."[3]

Thus, Wisconsin law makes clear that GALs are advocates who are bound by the disciplinary rules. However, because they represent the best interests of the ward rather than the ward individually, the question may arise whether GALs have clients as that term in used in the disciplinary rules.

The State Bar's Standing Committee on Professional Ethics (the "committee") believes that GALs do have a client – the "best interests" of the ward and do act in a representative capacity. The alternative view – that GALs have no clients because "best interests" is just an abstract notion – is, in the view of the committee, incorrect for several reasons.

First, both SCR 20:4.5 and the statutory definition of the role of a Wisconsin GAL make clear that they "represent" the best interests of the ward. Importantly, under the disciplinary rules, lawyers cannot "represent" non-clients.

Second, many of a lawyer's most basic duties, such as competence (SCR 20:1.1) and diligence (SCR 20:1.3) are duties owed to clients. If GALs do not have clients, it could be said these basic duties do not apply, a view the committee believes is not reasonable given the text of SCR 20:4.5.

Finally, there is precedent for the notion that lawyers may represent clients that are not persons. For example, under SCR 20:1.13, lawyers routinely represent entities, such as corporations and unincorporated associations, and the ABA comments to that rule confirm that the lawyer-client relationship is not limited to representation of actual persons.[4] Therefore, for purposes of analysis under the disciplinary rules, the committee takes the position that GALs do have a client, which is the best interests of the ward.[5]

Conflicts of Interest and GALs

The primary disciplinary conflicts rules[6] proceed from the premise that most conflicts arise from a conflict between a duty owed to a client and a duty owed to another current or former client, a third person or the lawyer's own interests. This being so, guidance on how to address conflict issues presume the existence of a client for purposes of consultation, discussion and decision-making. Given the construct of "best interests" of the ward as the GAL's client, the normal protocol for resolving conflict issues is often unhelpful. Guidance on how to treat conflicts related to GALs can be found in statutes and case law, in addition to the rules.

Each statute stating the qualifications for GALs contains the following or similar language:

"No one who is an interested person in a proceeding, appears as counsel in a proceeding on behalf of any party, or is a relative or representative of an interested person may be appointed guardian ad litem in that proceeding or in any other proceeding that involves the same proposed ward or ward."[7]

These statutory provisions track SCR 20:1.7(a)(1) and (2). The court's decision in *La Crosse County Dep't of Soc. Servs. v. Rose K.*, 196 Wis. 2d 171, 178, 537 N.W.2d 142, 145 (Ct. App. 1995), is consistent with the statutory limits even though the court did not mention the statute in its analysis, instead relying on the disciplinary rules, and thus this case is helpful in understanding how the conflicts rules apply to GALs. At issue in the case was whether the same lawyer could act as a GAL in a chapter 48 action while simultaneously representing La Crosse County in a child support enforcement action.

The appellate court concluded the lawyer had a conflict because enforcement of child support, which was assigned to La Crosse County due to the mother's receipt of government benefits, would benefit the county-client but prejudice the children's "best interests" by making the father's funds unavailable to them. Conversely, a decision to not enforce the child support order would harm the county-client even though it would benefit the children's "best interests." The court found a conflict and remanded the case with instructions to disqualify the attorney from acting as a GAL for the children.

There are several important points to take away from the *Rose K.* decision. First, the court analyzed the conflict as if the children were the clients of the GAL even while acknowledging the client was the children's "best interests."[8]

Second, the court found that it was appropriate for the mother to object to the GAL's conflict. While the court did not use the word "standing," the question of who has standing to complain of a conflict can become an issue in disqualification litigation.[9] The court had little trouble in determining that the mother could raise the issue, thus giving the parents of the ward "standing" to complain of the GAL's conflict. As this case involved a disqualification motion, the question of whether informed consent could cure the conflict was neither raised nor decided.

In re Tamara L.P., 177 Wis. 2d 770, 503 N.W.2d 333 (Ct. App. 1993), addressed a former client conflict involving a GAL. The court held that a lawyer who had acted as counsel for a client in a mental commitment proceeding could not thereafter serve as GAL for the same client in a guardianship proceeding. The court applied the "substantial relationship test" to conclude that the interests of the former client (the individual client) and the current client (the best interests of the ward) were materially adverse and that the two matters were substantially related. It ordered that the GAL be disqualified.

In both cases, the court applied the standard conflicts analysis that is codified in the rules, and thus, application of the conflict rules to GALs would be similar to any other lawyer acting as an advocate in a matter.[10]

Based on the current statutes and case law, the committee believes that GAL conflicts should be analyzed the same way as conflicts for any lawyer. What follows is a brief description of how selected rules would apply to GALs.[11] For purposes of brevity, the text of each referenced rule is not included in this opinion.

A. SCR 20:1.7 – Conflicts of Interest: Current Clients

A conflict arises under this rule when the interests of two or more clients of the lawyer are directly adverse or there is a significant risk that the lawyer's ability to represent a client may be materially limited by the lawyer's responsibilities to another client, a former client, a third person or the lawyer's own interests. *Rose K.* provides a useful example of this rule applied to current clients of a GAL. The court's decision in *Riemer v. Riemer*, 85 Wis. 2d 375, 270 N.W. 2d 93 (Ct. App. 1978) likewise looked to concurrent conflicts standards in requiring the appointment of separate GALs in a divorce case in which the children's interests were adverse. GALs considering the possibility of resolving a conflict arising under SCR 20:1.7 using the procedure described below must remember that resolution of such a conflict would require the written and signed informed consent of the other affected client, when applicable, of the GAL or their firm.

B. SCR 20:1.8 – Conflicts of Interest: Prohibited Transactions

For the most part, this rule governs personal interest conflicts that often will be highly unlikely to arise in GAL representation, such as SCR 20:1.8(a) which governs business transactions with clients. GALs, however, should be mindful of the Wisconsin case law that views the ward as a client for purposes of analyzing conflicts. For example, if the ward of a GAL was in challenging financial circumstances, a GAL who provided financial assistance to the ward would likely be viewed as being governed by SCR 20:1.8(e),

which generally prohibits financial assistance to clients in connection with contemplated or pending litigation. A GAL who practices in a firm should also be mindful that SCR 20:1.8(k) imputes most conflicts under this rule to all lawyers within the firm and that most of the conflicts under this rule are not subject to informed consent.

C. SCR 20:1.9 – Conflicts of Interest: Former Clients

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.[12] 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.[13] 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.[14]

D. SCR 20:1.10 – Imputed Disqualification: General Rule

Under this rule, in a private law firm, conflicts of lawyers under SCR 20:1.7 and SCR 20:1.9 are imputed to every other lawyer in the firm and, with the relatively rare exception of the circumstances described in SCR 20:1.10(a)(2), such conflicts cannot be resolved through screening measures. Thus, to continue with the example discussed above, if a lawyer in a private law firm has been appointed as GAL in a family law matter, and a different lawyer in the same law firm had previously represented one of the parents, the conflict must be analyzed as if the GAL had previously represented the parent. Therefore, before accepting an appointment to act as GAL in a matter, the lawyer must carefully check conflicts against all present and former clients of the firm.

E. SCR 20:1.18 – Duties to Prospective Clients

Under this rule, a lawyer has a conflict in a matter when a lawyer has consulted with a prospective client and obtained information that could be significantly harmful to the prospective client and now seeks to represent a different client

whose interests are materially adverse to the prospective client. For example, a lawyer who has had a consult with a parent in a family matter and obtained significantly harmful information would have a conflict in serving as a GAL for the children in the same or a substantially related matter. For a discussion of conflicts arising under SCR 20:1.18, including what constitutes significantly harmful information, see Wisconsin Formal Ethics Opinion EF-10-03.

Informed Consent to GAL Conflicts

The *Rose K.* and *Tamara L. P.* cases provide authority for the proposition that the conflict rules apply to GALs and that conflict analysis is substantially the same for GALs as for lawyers involved in a traditional advocacy role. One possible resolution of certain conflicts is obtaining the written and signed informed consent of the affected current or former clients to allow the conflicted lawyer to continue. How this might apply to GALs was not considered in *Rose K.* and *Tamara L. P.* as the relief sought and remedy ordered was disqualification.

In a traditional setting, both current and former clients may provide informed consent in certain situations to continued representation by a conflicted lawyer.[15] The disciplinary rules require consultation between the lawyer and client to explain the risks involved as a necessary predicate to obtaining informed consent, culminating in written and signed informed consent by the affected client or former client. In the case of an entity client such as a corporation, a person who has legal authority to act on behalf of the entity, such as the appropriate corporate officer, can give the necessary written and signed informed consent. As the "best interests" of a ward of a GAL is not a person, nor a person acting on behalf of an entity capable of providing informed consent in the traditional manner, the question arises of whether GAL conflicts may be subject to informed consent.

One option would be to assume that informed consent under SCR 20:1.7(b) is not an option to resolve any GAL conflict. The black letter of SCR 20:1.7(b)(4) requires informed consent in writing signed by the client, which is not possible to obtain from the best interests of a ward. This option would avoid rule interpretation problems but would be costly and impractical in areas with fewer lawyers. There is also no clear reason to believe it would improve the process or outcome of the matter to require withdrawal of a GAL from a matter when faced with any conflict.

Another is to look to the ward for informed consent. This is undesirable and impractical both because the ward is not a client but also because the reason the ward has a GAL is most often because they lack the capacity to give truly informed consent.[16]

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 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.[17] The committee believes this should occur in open court with all interested parties present and allowed to be heard.[18] 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.

In cases involving GALs, the court and GAL have a common interest in acting in the "best interests" of the ward. Such a procedure would extend the court's supervision to a process that best serves the ward's interests as well as the pre-existing responsibility of making an appropriate substantive decision. Providing such oversight is not unprecedented, as courts already have jurisdiction to hear disqualification motions concerning GALs, as discussed above.[19] The committee believes this to be a reasonable accommodation of the various interests involved and the best of the available options. As stated above, there is no specific authority for this recommended procedure, but it is hoped that courts and disciplinary agencies will view the use of this procedure as a reasonable accommodation designed to protect the interests of all involved in the matter.

Beyond the caveat that the recommended procedure does not have a specific basis in established law, there are other questions that a GAL considering this procedure should consider.

First, simply because a conflict may technically be subject to informed consent under the rules does not mean that the lawyer *should* seek to resolve the conflict. There are circumstances where a lawyer may not seek the necessary informed consent because to do so would involve making disclosures that would be detrimental to the interests of the affected current or former clients.[20] A GAL must carefully consider whether making the necessary disclosures to permit a judge to consider the issue, or to obtain the informed consent of other affected current or former clients, would advance the best interests of the ward. Before seeking to resolve the conflict, the GAL should be able to articulate why resolving the conflict through the recommended procedure would advance the best interests of the ward and is an appropriate course of action. If the GAL cannot do so, the GAL should seek to withdraw rather than attempting to resolve the conflict.

Second, this opinion should not be read to suggest that the committee believes that judicial approval would eliminate the need to obtain written and signed informed consent from other affected current or former clients. So, for example, if a GAL conflict arises

under SCR 20:1.7(a) because the best interests of the ward and the interests of another client are directly adverse, the GAL must still obtain the written and signed informed consent of the other client in addition to judicial approval. If such consent cannot be obtained, the GAL should not seek judicial approval and should instead seek to withdraw.[21]

Applying Other Disciplinary Rules to GALs

As noted, the disciplinary rules were drafted to apply to the traditional lawyer-client paradigm. Consequently, application of the rules to non-traditional settings can be challenging. Our supreme court recognized this in the language of SCR 20:4.5 in stating, "[a] lawyer so appointed [as a GAL] shall comply with the Rules of Professional Conduct that are consistent with the lawyer's role in representing the best interests of the individual rather than the individual personally."[22] Although the focus of this opinion is conflicts of interest, it may be useful to consider how certain other disciplinary rules relate to the role of a GAL in Wisconsin. While discussion of all, or even many, of the disciplinary rules is beyond the scope of this opinion, the committee believes discussion of certain common situations may be helpful.

A. Confidentiality – SCR 20:1.6

In Wisconsin, all GALs have a duty to investigate the circumstances of the case and report their conclusions about the ward's "best interests" to the court.[23] By statute, the only information a ward may prevent from being disclosed is their opinion on custody in divorce cases.[24]

In contrast, SCR 20:1.6 provides protection for all "information relating to the representation of a client."[25] As discussed above, the ward is not the client of the GAL, and therefore no specific duty of confidentiality is owed to the ward. GALs do, however, represent the best interests of their wards, and therefore possess "information relating to the representation" of both current and former clients, which is protected by SCRs 20:1.6 and 20:1.9(c), and the committee believes these rules apply to GALs. While some may at first mistakenly believe that this means that GALs are prevented from making disclosures necessary to fulfill their responsibilities because the GAL has no client to consent to disclosures, this is not the case.

SCR 20:1.6(a) permits lawyers to make "impliedly authorized" disclosures which are necessary to competently represent their clients. So, for example, when a GAL communicates with a ward's teachers or caregivers, or any person who may have relevant information about a matter, such disclosures are "impliedly authorized" and do not violate the duty of confidentiality because the GAL must communicate with such persons to competently represent the best interests of the ward.[26] This means that the vast majority of disclosures that GALs routinely make fall under the "impliedly authorized" exception. Similarly, disclosures that GALs are required to make by statute or other law fall squarely within the SCR 20:1.6(c)(5) exception which permits disclosures which are required to "comply with other law or a court order."[27]

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[28] 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.[29] 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.

The committee believes therefore that confidentiality duties found in SCRs 20:1.6, 20:1.8(b), and 20:1.9(c) are applicable to GALs representing the "best interests" of the ward and not the ward themselves, as required by SCR 20:4.5. Whether the evidentiary attorney client privilege applies to any communications to or from GALs is beyond the scope of this opinion.[30]

B. Contact with Represented Party – SCR 20:4.2

SCR 20:4.2 does not permit a lawyer representing a party in a matter to communicate about the matter with a person represented in the same matter without the permission of the lawyer representing that person. Wisconsin caselaw extends this protection to wards of GALs even if they are not clients represented by adversary counsel.

In *In re Kinast*, 192 Wis. 2d 36, 530 N.W. 2d 387 (1992), the court viewed minor children as entitled to the protections extended by SCR 20:4.2 even though the text of the rule limits its reach to persons "represented by another lawyer in the matter." Therefore, other lawyers in the matter could not communicate directly with the ward about the matter without first obtaining the consent of the GAL. This is another example of Wisconsin courts interpreting certain disciplinary rules as if GALs represent their wards. Of course, GALs themselves must observe SCR 20:4.2 and may not contact persons represented in the same

matter without the consent of their counsel.[31]

C. The Lawyer as Witness – SCR 20:3.7

SCR 20:3.7 prohibits a lawyer from acting as an advocate and a "necessary" witness in the same case. Insofar as GALs act as investigators who report to the court and provide information accessible to other interested parties, one might view their role as an exception to SCR 20:3.7. However, in *Hollister v. Hollister*, 173 Wis. 2d 413, 496 N.W. 2d 642 (Ct. App. 1992), the court held that the GAL's responsibility to function as an advocate for the "best interests" of the child precluded them from being called as a witness by another party in the matter.

Conclusion

GALs must be lawyers in Wisconsin and are bound by the Rules of Professional Conduct pursuant to SCR 20:4.5. While difficulties can arise from the fact that GALs represent the best interests of the ward rather than the ward individually, guidance can be found in Wisconsin caselaw, statutes, and the rules themselves. **WL**

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ENDNOTES

[1]In Wisconsin, guardians ad litem may be involved in actions involving children, Wis. Stat. § 48.235(3)(a), incompetent adults, Wis. Stat. § 54.40(3), divorce actions involving the custody of minor children, Wis. Stat. § 767.407(4), and juveniles charged with criminal offenses. Wis. Stat. § 938.235(3)(a).

[2]*See* Wis. Stat. §§ 48.235(2), 54.40(2), 767.407(3), 757.48, and 938.235(2).

[3]See n. 1 above. The statutes reflect largely identical definitions of the role of a GAL in the various types of legal actions in which they are involved.

[4]Similarly, prosecutors and other government lawyers represent the state or other governmental entities that are not individual persons.

[5]This is consistent with the position taken by the committee in Formal Ethics Opinion E-09-04 (2009).

[6]SCRs 20:1.7, 20:1.8, 20:1.9, 20:1.10, 20:1.11, 20:1.18, and SCR 20:6.5.

[7]See n. 2 above.

[8]196 Wis. 2d at 178. Footnote 2 of the opinion states: "The guardian ad litem is an advocate for a minor child's best interests, functions independently, and considers, but is not bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. Wis. Stat. § 767.045(4). This means that the guardian ad litem does not represent a child per se but represents the concept of the child's best interests. *Wiederholt v. Fischer*, 169 Wis. 2d 524, 536, 485 N.W.2d 442, 446 (Ct. App. 1992). We conclude that for the purpose of this conflict of interest analysis, a guardian ad litem represents a child." 196 Wis. 2d at 177, 537 N.W. 2d at 144.

[9]See e.g. *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n Inc.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789.

[10]It is worth noting that in *Rose K.*, the court stated that the ward was the "client" of the GAL for conflicts purposes, but in *Tamara*, the court clearly analyzed the client of the GAL as the best interests of the ward. The committee believes that this is [in] part due to the unique circumstances of *Tamara* where the former client was the ward and does not affect the substantive conflicts analysis.

[11]Because of the relative rarity of situations involving GAL conflicts under SCRs 20:1.11, 20:1.12, 20:1.13 and SCR 20:6.5, those rules are not discussed in the opinion. Wisconsin Formal Ethics Opinion E-09-04 provides an extensive discussion of SCR 20:1.12 when applied to a former GAL in a matter.

[12]Note that whether the lawyer is actually in possession of such information is irrelevant to the analysis. The only question is whether it is reasonable to make the assumption. See *Burkes v. Hales*, 165 Wis. 2d 585, 478 N.W.2d 37 (Wis. App. 1991).

[13]The interests of the ward of the GAL, the children, and the parents would be materially adverse positionally because competent representation by a GAL would require the GAL to be free to take positions in the best interests of the ward that may be opposed by the parent. For further discussion of what constitutes material adversity, see ABA Formal Ethics Opinion 497 (2021).

[14]See Section 132, Restatement (Third) of the Law Governing Lawyers.

[15]See SCRs 20:1.0(f), 20:1.7(b), 20:1.9(a).

[16]The Wisconsin Court of Appeals has held that a person who has been adjudicated incompetent cannot give informed consent to conflicted representation. See *In re Guardianship of Lillian P.*, 2000 WI App 203, 238 Wis. 2d 449.

[17]This would not violate the GAL's duty of confidentiality, as discussed in this opinion, because SCR 20:1.6(c)(6) permits lawyers to disclose protected information to the extent reasonably necessary to detect and resolve conflicts of interest.

[18]Given that the court in *Rose K.* held that parents have standing to object to GALs' conflicts, the committee believes it is necessary to give parties the opportunity to be heard on the matter.

[19]While the committee has no authority to opine on the powers of circuit court judges in Wisconsin, it would seem reasonable to assume that a court that has authority to hear a disqualification motion would have the authority to consider whether conflicted representation by a GAL would be appropriate.

[20]See e.g. ABA Formal Ethics opinion 08-450 (2008).

[21]In the event that the court would not permit withdrawal, the GAL's responsibilities are governed by SCR 20:1.16(c).

[22]The comment to SCR 20:4.5 further notes, "a lawyer who represents the best interests of the individual does not have a client in the traditional sense but must comply with the Rules of Professional Conduct to the extent the rules apply."

[23]*See* Wis. Stat. §§ 48.235(3)(b)2., (5m), 54.40(4)(c), (d)3., (f), (j), 767.407(4), and 938.235(3)(b)2.

[24]Wis. Stat. § 767.407(4).

[25]For discussion of the scope of the duty of confidentiality, see Wisconsin Formal Ethics Op. EF-17-02.

[26]Section 61 of the Restatement (Third) of the Law Governing Lawyers states; "A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation."

[27]*See also* SCR 20:1.14(c) regarding "implicit authority" to disclose information in the case of clients with diminished capacity.

[28]See SCRs 20:1.8(b) and 20:1.9(c). As with conflicts, the committee believes that the ward should be considered the client for purposes of determining adversity under these rules.

[29]See Wisconsin Formal Ethics Op. EF-20-02 for a discussion of conflicts arising from facing a current or former client as an adverse witness.

[30]The primary question is whether communications between the ward and GAL are privileged. Although nothing in Wis. Stat. § 905.03 applies to this relationship, the ruling in the *Hollister* case, discussed, *supra*, that a GAL may not be called as a witness appears to be a *de facto* grant of privilege, as least as to in court testimony even if the communications are available to all parties as part of the GAL's report to the court. At least one jurisdiction has found that the attorney-client privilege does not protect communications between a GAL and their ward. See *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).

[31]For further discussion of SCR 20:4.2, see Wisconsin Informal Ethics Opinion EI-17-04. **WL**