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**Revised Wisconsin Ethics Opinion EF-23-02<sup>1</sup>**  
**Guardian ad Litem Conflicts and Informed Consent, Confidentiality  
and other Obligations under the Rules of Professional Conduct**

*January 21, 2025*

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**Synopsis:** *Guardians ad litem (GALs) represent the best interests of the ward and not the ward as an individual. In Wisconsin GALs must be lawyers and consequently are bound by the disciplinary rules. Their unique role presents issues in the application of certain disciplinary rules, including those that address conflicts of interest. This opinion discusses how the conflict rules apply in cases involving GALs, including suggesting a procedure whereby a GAL may obtain court approval for continued representation in a conflict situation that would normally require the written and signed informed consent of the affected clients. It also discusses the application of other disciplinary rules as they apply to GALs. In addition to the disciplinary rules, guidance regarding the responsibilities of a GAL is found in the Wisconsin statutes and case law.*

### **Introduction and Client Identity**

Guardians ad litem (“GALs”) play important roles in a variety of situations involving vulnerable adults and children.<sup>2</sup> In Wisconsin, GALs must be lawyers<sup>3</sup> 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**

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<sup>1</sup> This opinion was revised to add footnote 9. None of the substantive conclusions or recommendations from the original opinion were changed.

<sup>2</sup> 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).

<sup>3</sup> See Wis. Stat. §§48.235(2), 54.40(2), 767.407(3), 757.48 and 938.235(2).

The Model Rules do not contain a counterpart provision. This rule reflects established case law that 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 Steven 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.<sup>4</sup>

Wisconsin law makes clear that GALs are advocates 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 is 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 in advocating for the ward’s “best interests”. 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 various statutory definitions 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.

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<sup>4</sup> 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.

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.<sup>5</sup> 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.<sup>6</sup>

## **I. Conflicts of Interest and GALs**

The primary disciplinary conflicts rules<sup>7</sup> 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, direction 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. While not comprehensive, guidance on how to treat GAL-related conflicts can be found in statutes and case law, in addition to the rules.

For example, 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.<sup>8 9</sup>

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<sup>5</sup> Similarly, prosecutors and other government lawyers represent the state or other governmental entities that are not individual persons.

<sup>6</sup> This is consistent with the position taken by the committee in Formal Ethics Opinion E-09-04 (2009).

<sup>7</sup> SCR 20:1.7, 20:1.8, 20:1.9, 20:1.10, 20:1.11, 20:1.18 and SCR 20:6.5.

<sup>8</sup> See n. 2 above.

<sup>9</sup> In Wisconsin, the settlement of a cause of action to which a minor or individual adjudicated incompetent may be made by a GAL. Wis. Stat. §807.10. Wis. Stat. §803.01(3)(a) mandates that in civil matters, “if the interests of the minor or individual alleged to be or adjudicated incompetent are represented by an attorney of record, the court shall, except upon good cause stated in the record, appoint that attorney as the guardian ad litem.” A lawyer who represents a minor or incompetent person does not violate disciplinary rules when appointed by a court as guardian ad litem pursuant to statute to approve a settlement for a minor or incompetent person. Attorneys are also advised to consult local court rules on this matter, as some specifically prohibit the practice or require the disclosure of any potential conflict of interest. See, for example, Marathon County rule 4.30 and Waukesha County 5.2, respectively.

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 they were not mentioned in the court's analysis, which relied on the disciplinary rules. 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."<sup>10</sup>

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.<sup>11</sup> The court had little trouble in determining that the mother could raise the issue, effectively giving a ward's parents "standing" to complain of a GAL 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

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<sup>10</sup> 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. Section 767.045(4), STATS. 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 .

<sup>11</sup> 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.

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 same rule-based conflicts analysis used by any lawyer analyzing conflicts.<sup>12</sup> Based on the statutes and case law, the committee believes that GAL conflicts should be analyzed in the same way. What follows is a brief description of how selected rules would apply to GALs.<sup>13</sup> 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 a situation in which one client is a governmental entity and the other the "best interests" of the ward. The court's decision in *Riemer v. Riemer*, 85 Wis. 2d 375, 270 N.W. 2d 93 (Ct. App. 1978) involved a divorce action in which an attorney was appointed as GAL for two children with different parentage. The court found a conflict given the adversity of interests between the minor children. Although the court did not cite the disciplinary rules in its decision, its analysis treated the two children as the clients of the GAL and tracked SCR 20:1.7(a)(1). The court reversed and remanded to allow for the appointment of two separate GALs to represent the best interests of each child. Both cases suggest GALs facing conflict issues may rely on the guidance provided by SCR 20:1.7 and consider the wards as clients for purposes of the analysis.

**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

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<sup>12</sup> 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 part due to the unique circumstances of *Tamara* where the former client was the ward and does not affect the substantive conflicts analysis.

<sup>13</sup> Because of the relative rarity of situations involving GAL conflicts under SCR 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.

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.<sup>14</sup>

On its face, SCR 20:1.9(a) applies when the former and current clients are not the same.<sup>15</sup> The court in *Tamara L.P.* concluded SCR 20:1.9(a) applied because the ward as an individual – the former client – was distinct from the “best interests” of the ward.

Two related scenarios can arise with GALs. The first are cases like *Tamara L.P.*, where the lawyer represents the ward as an advocate first and subsequently is appointed as GAL for the ward. In such situations, because the ward’s wishes may be at odds with the GAL’s view of their “best interests” and where the matters are substantially related, there is a conflict.<sup>16</sup>

The second situation can arise when a lawyer is first a GAL for the ward and subsequently serves as the ward’s advocate counsel in another matter. This situation requires the lawyer to determine whether the interests of the ward (the current client) and the best interests of the ward (the former client), are materially adverse and whether the matters are substantially related. In most such situations, the lawyer will have served as GAL for a minor and later represent the ward as an individual. If the represented individual is now an adult, and capable of defining their own interests, there will likely be no material adversity of interest. Further, future representation of former wards may often arise in unrelated matters. So, for example, a lawyer who had served as GAL for a child in a divorce, may later represent the former ward in a different matter. However, a lawyer who had served as GAL for an adult facing guardianship proceedings may not normally thereafter represent the same person in challenging the same

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<sup>14</sup> 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).

<sup>15</sup> SCR 20:1.9(a) states, “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent *another person* in the same or a substantially related matter ...” (italics supplied).

<sup>16</sup> It would be unusual for a lawyer’s prior representation of an individual as advocate counsel to not be substantially related to the lawyer later serving as GAL for the same individual.

guardianship. As in most conflict situations, such matters are fact specific and depend on the circumstances of the particular case.

Former client conflicts for GALs may also arise apart from cases in which the ward is involved in both representations. For example, a conflict may arise for a GAL in a family dissolution matter where the GAL 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.<sup>17</sup> Therefore, 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.<sup>18</sup>

#### **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 a 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

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<sup>17</sup> The interests of the ward of the GAL, the children, and the parents would be positionally materially adverse 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).

<sup>18</sup> See Section 132, Restatement (Third) of the Law Governing Lawyers.

conflicts arising under SCR 20:1.18, including what constitutes significantly harmful information, see Wisconsin Formal Ethics Opinion EF-10-03.

#### **F. 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 under the disciplinary rules 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.<sup>19</sup> 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 final 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.<sup>20</sup>

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<sup>19</sup> See SCR 20:1.0(f), 20:1.7(b), 20:1.9(a).

<sup>20</sup> 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.



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.<sup>21</sup> The committee believes this should occur in open court with all interested parties present and allowed to be heard.<sup>22</sup> Whether a formal motion is necessary or what other procedures might apply are questions best left to the judge or local court rules.

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.<sup>23</sup> 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

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<sup>21</sup> This would not violate the GALs 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.

<sup>22</sup> Given that the court in *Rose K.* held that parents have standing to object to potential GAL conflicts, the committee believes it is necessary to give parties the opportunity to be heard on the matter.

<sup>23</sup> 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.

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.<sup>24</sup> 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.<sup>25</sup>

## **II. Applying other Disciplinary Rules to GALs**

As noted, the disciplinary rules were drafted to apply to the traditional lawyer-client paradigm. As a consequence, 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.”<sup>26</sup> 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**

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<sup>24</sup> See e.g. ABA Formal Ethics opinion 08-450 (2008).

<sup>25</sup> In the event that the court would not permit withdrawal, the GAL’s responsibilities are governed by SCR 20:1.16(c).

<sup>26</sup> 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.”

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.<sup>27</sup> By statute, the only information a ward may prevent a GAL from disclosing is the ward's opinion on custody in divorce cases.<sup>28</sup>

In contrast, SCR 20:1.6 provides protection for all "information relating to the representation of a client."<sup>29</sup> As discussed above, the ward is not the client of the GAL, and therefore no specific duty of confidentiality is owed to the ward. The interface between the duty of confidentiality and the unique role of GALs has been the source of confusion. Some GALs have assumed the absence of a "real" client combined with a duty to conduct a thorough investigation of the "best interests" of the ward permits broad disclosure of what they discover. Others view SCR 20:1.6 as limiting what information can be shared with anyone, including the court. The committee believes neither of these views are correct.

GALs are advocates and, in the course of discharging their responsibilities, possess "information relating to the representation" of both current and former clients, information which is protected by SCR 20:1.6 and 20:1.9(c). However, the provisions of the disciplinary rules make clear that the duty of confidentiality and the responsibility to investigate and report to the court are not in conflict.

First, 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, and discloses information necessary to facilitate such communications, 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.<sup>30</sup> This means that the vast majority of disclosures that GALs routinely make fall under the "impliedly authorized" exception.

Second, disclosures that GALs are required to make by statute or other law, typically the order appointing them, 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."<sup>31</sup>

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<sup>27</sup> 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.

<sup>28</sup> Wis. Stat. §767.407(4).

<sup>29</sup> For a discussion of the scope of the duty of confidentiality see Wisconsin Formal Ethics Op. EF-17-02.

<sup>30</sup> 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."

<sup>31</sup> See also SCR 20:1.14(c) regarding "implied authority" to disclose information in the case of clients with diminished capacity.

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 to competently represent the best interests of the ward.<sup>32</sup> So for example, a GAL may not disclose information about the ward to assist another lawyer in cross examining the former ward should they be an adverse witness in a matter.<sup>33</sup> Similarly, a GAL who is in possession of financial information about an elderly ward may not disclose that information solely for the 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 another lawyer from a different firm who asks the GAL whether the ward has had issues with substance abuse. While GALs are relatively free to make disclosures that are necessary to represent the best interests of the ward, the GAL must be mindful of the duty of confidentiality when considering requests for information or other possible disclosures that are not necessary to advance the best interests of the ward.

The committee believes therefore that the duties found in SCR 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.

#### **B. Contact with represented party – SCR 20:4.2**

SCR 20:4.2 prohibits 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.

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<sup>32</sup> See SCR 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 whether disclosure would disadvantage the client or former client under these rules.

<sup>33</sup> 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. While lawyers within firms may routinely disclose information to each other, if one lawyer in a firm had formerly acted as GAL and another lawyer in the firm seeks to cross examine the former ward, the entire firm would be conflicted out of the matter if the matters are substantially related. SCR 20:1.10.

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.<sup>34</sup>

### **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. If a conflict of interest arises which requires informed consent from the GAL’s client, the “best interests of the ward”, the conflict should be brought to the Court’s attention, as the Court is in the best position to determine whether to permit the GAL to proceed in lieu of obtaining informed consent from the “best interests of the ward.”

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<sup>34</sup> For further discussion of SCR 20:4.2, see Wisconsin Informal Ethics Opinion EI-17-04.