

**BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE**

FORMAL ETHICS OPINION 2013-F-157

Is it a conflict of interest for a lawyer who was appointed guardian ad litem to subsequently represent another interest in a matter regarding the child for whom the lawyer was appointed guardian ad litem?

QUESTION

A formal ethics opinion has been requested as follows:

Is there a conflict for an attorney who was appointed as a Guardian ad Litem in a Dependency and Neglect matter to assist the adoptive parents in finalizing an adoption after the child comes into complete guardian ship of the State of Tennessee whether through involuntary termination or surrender of the parents?

OPINION

A lawyer who formerly represented the child or the child's interest(s) as guardian ad litem (hereinafter GAL) pursuant to Tennessee Supreme Court Rules (hereinafter SCR) 40 and or 40A could represent adoptive parents in the subsequent adoption proceeding only if the adoption is consistent with the interests of the former client/child and does not violate Tennessee Rules of Professional Conduct (hereinafter RPC) 1.9(c). To insure that the subsequent representation of another interest is not inconsistent with the interest(s) of the child, it would be advisable to secure consent or permission from the judge who had appointed the lawyer as GAL to represent the other interest, including the subsequent representation of the adoptive parents in an adoption proceeding regarding the child. See the DISCUSSION and CONCLUSION for broader application of this opinion.

DISCUSSION

While matters of substantive law must be considered with regard to this issue, the Board of Professional Responsibility can render opinions regarding only issues of ethics. Various statutes and rules of substantive and procedural law govern the appointment and obligations of GAL for minors. SCR 40 and 40A provide obligations of lawyers appointed by courts as GAL for minors.

SCR 40 applies to such appointments only in juvenile court neglect and abuse and dependence proceedings.¹ SCR 40 provides that the GAL is a lawyer appointed to represent the best interest of the child.^{2,3} The child, not the court, is the client of the GAL.³ The rule provides that the GAL may not be a witness in any proceeding in which they serve as GAL except in extraordinary circumstances provided in the rule; is not a special master and should not make a report or recommendation to the court; and must present their results and conclusions to the court in the same manner as any other lawyer.⁴

¹ Supreme Court Rule 40(a) provides:

(a) Application.

These Guidelines set forth the obligations of lawyers appointed to represent children as guardians ad litem only in juvenile court neglect, abuse and dependency proceedings pursuant to T.C.A. § 37-1-149, Rules 37 of the Tennessee Rules of Juvenile Procedure, and Supreme Court Rule 13. By adoption of these guidelines it is intended that they not be applied to proceedings in other courts that involve child custody or related issues.

² Supreme Court Rule 40(b)(1)(2) provides in part:

(b) Definitions.

As used in this Rule, unless the context otherwise requires:

(1) "Guardian ad litem" is a lawyer appointed by the court to advocate for the best interests of a child and to ensure that the child's concerns and preferences are effectively advocated.

(2) "Child's best interests" refers to a determination of the most appropriate course of action based on objective consideration of the child's specific needs and preferences...

³ Supreme Court Rule 40(c)(1) provides:

(c) General Guidelines.

(1) The child is the client of the guardian ad litem. The guardian ad litem is appointed by the court to represent the child by advocating for the child's best interests and ensuring that the child's concerns and preferences are effectively advocated. The child, not the court, is the client of the guardian ad litem.

⁴ Supreme Court Rule 40(f) provides:

(f) Guardian ad litem to function as lawyer, not as a witness or special master.

(1) A guardian ad litem may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, §§ EC 5-9, 5-10 and DR 5-101.

(2) A guardian ad litem is not a special master, and should not submit a "report and recommendations" to the court.

(3) The guardian ad litem must present the results of his or her investigation and the conclusion regarding the child's best interest in the same manner as any other lawyer presents his or her case on behalf of a client: by calling, examining and cross examining witnesses, submitting and

SCR 40A applies to appointments of GAL in custody proceedings.^{5,6} “Custody proceeding”⁷ is defined to include proceedings which could be pending in courts other than juvenile court. Like SCR 40, SCR 40A provides that the GAL is an attorney appointed to represent the best interest of the child, but does not specifically provide that the child is the client of the GAL.^{6,8} Even so, Commentary to SCR 40A § 9 provides, in part, that the “current rule 40A differs from the prior rule in that the guardian ad litem now functions as a lawyer, not as a witness or special master. The guardian ad litem does not prepare a report for the parties or the court, nor does the guardian ad litem make a recommendation to the parties or the court concerning custody...” The rule further provides that the GAL does not perform any other judicial or quasi judicial responsibilities⁸ and must satisfy their duties and responsibilities in an impartial, unbiased, objective and fair manner.^{6,9}

responding to other evidence in conformance with the rules of evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.

⁵ Supreme Court Rule 40A, §2 provides:

Section 2. Applicability

This Rule applies to all guardian ad litem appointments in custody proceedings pending on or filed after the effective date of this Rule. On or after the effective date of this Rule, licensed attorneys appointed as guardians ad litem under the prior Rule 40A may be re-appointed under the terms of this Rule.

⁶ Supreme Court Rule 40A, §3(a)(d) provides:

Section 3. Guardian Ad Litem Appointments

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a guardian ad litem when the court finds that the child’s best interests are not adequately protected by the parties and that separate representation of the child’s best interests is necessary. Such an appointment may be made at any stage of the proceeding.

d) If the court concludes that appointing a guardian ad litem is necessary, the court should endeavor to appoint a person with the knowledge, skill, experience, training, education and/or any other qualifications the court finds necessary that enables the guardian ad litem to conduct a thorough and impartial investigation and effectively represent the best interests of the child.

⁷ Supreme Court Rule 40A §1(a) provides:

“Custody proceeding” means a court proceeding, other than an abuse or neglect proceeding, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, post divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.

⁸ Supreme Court Rule 40A, §6(a)(b) provides:

Section 6. Role Of Guardian Ad Litem

The rules permit the same attorney to be appointed GAL in the juvenile court proceeding pursuant to SCR 40 and subsequently in a custody proceeding pursuant to SCR 40A. Commentary to SCR 40A, § 1 provides:

Under revised Rule 40A it is now possible for the same attorney who is appointed as a Rule 40 guardian ad litem to follow a case and be appointed to represent the child as a Rule 40A guardian ad litem in subsequent proceedings (e.g., a termination of parental rights case in Juvenile Court followed by a contested adoption between competing grandparents in Chancery Court).

Concerns have been expressed by parties or witnesses, or their counsel, that the lawyer who had been appointed GAL had a conflict of interest in a subsequent proceeding because the party and/or witness had provided information to the GAL only because they thought they were obligated to do so because the GAL was appointed by the court. It is asserted that a conflict of interest exists because the lawyer who had been GAL could potentially reveal or use such information to the disadvantage of the party or witness in a subsequent proceeding.

While the term “guardian ad litem” is not referenced in the Tennessee Rules of Professional Conduct (RPC), it is clear from SCRs 40 and 40A that the GAL is not permitted to represent interest(s) contrary to the interest of the child and that conflicts of interest must be avoided. Commentary to SCR 40A, §4 provides:

The omission of the original Section 4(d) (conflicts of interests) from revised Rule 40A does not mean that a guardian ad litem may ignore a conflict of interest. On the contrary, a guardian ad litem who runs afoul of the conflict-of-interest provisions of the Rules of Professional Conduct is subject to appropriate disciplinary action.

Conflicts of interest governed by the Rules of Professional Conduct (RPC) arise primarily out of representation of current or former clients. Conflicts of interest with current clients are governed by RPC 1.7.¹⁰ Conflicts of interest with former clients are governed by RPC 1.9.¹¹

(a) The role of the guardian ad litem is to represent the child’s best interests by gathering facts and presenting facts for the court’s consideration subject to the Tennessee Rules of Evidence. (See Section 8 of this Rule.)

(b) The guardian ad litem shall not function as a special master for the court or perform any other judicial or quasi-judicial responsibilities.

⁹ Supreme Court Rule 40A, §8(a) provides:

Section 8. Duties/Rights Of Guardian Ad Litem

(a) The guardian ad litem shall satisfy the duties and responsibilities of the appointment in an unbiased, objective, and fair manner.

¹⁰ Tennessee Rule of Professional Conduct 1.7 provides in part:

Rule 1.7: Conflict Of Interest: Current Clients

RPC 1.7¹⁰ prohibits a lawyer, in the absence of informed consent,¹² from representing competing, inconsistent or contrary interest. “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibility to another client, a former client or a third person or from the lawyer’s own interest...” RPC 1.7, Cmt. [1]. “Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent...” RPC 1.7, Cmt. [6]. “Even where there is no direct adversity between clients, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client...The critical questions are: what is the likelihood that a difference in interests will eventuate and, if it does, will it materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?” RPC 1.7, Cmt. [8]. “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client...” RPC 1.7, Cmt. [10].

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

¹¹ Tennessee Rule of Professional Conduct 1.9 provides in part :

Rule 1.9: Duties To Former Clients

(a) 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 in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

¹² Tennessee Rule of Professional Conduct 1.0(e) provides:

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

It is clear that SCRs 40 and/or 40A in conjunction with RPC 1.7 would prohibit a lawyer from serving as GAL while at the same time representing another interest(s) which is inconsistent with, contrary to, compromises or interferes with the GAL's exercise of their independent judgment on behalf of the child or the child's interest. While RPC 1.7(b) permits waiver of conflicts of interest, neither SCR 40^{2,3} nor 40A^{6,8} provide for waiver of the requirement of the GAL to represent only the child or interest of the child. The Rules of Professional Conduct would permit an attorney to serve as GAL for a child while at the same time representing another party to proceeding only if the representation of the other party was consistent with the interest of the child and if the lawyer does not violate RPC 1.6¹³ and/or RPC 1.8(b)¹⁴ by revealing information relating to the representation or using such information to the disadvantage of the child or the child's interest, except as provided in the rules. While both RPC 1.6¹³ and 1.8(b)¹⁴ provide an exception for informed consent, by whom and under what circumstances such consent can be given on behalf of the child is a matter of substantive law beyond the scope of the Rules of Professional Conduct.

Regardless of the Rules of Professional Conduct, TCA 37-1-149¹⁵ prohibits a party or a party's representative from being appointed GAL in any action governed by the statute. Tennessee Rules of Juvenile Procedure (TRJP) 39(d) provides that appointment of a GAL in a termination of parental rights action in juvenile court is governed by TCA 37-1-149¹⁵. An attorney, therefore, cannot represent a party in an action to terminate parental rights in juvenile court or as otherwise governed by TCA 37-1-149 while at the same time serving as GAL for the child, even though both TCA 36-1-113(b) and TRJP 39(a) permit a GAL to file a petition for termination. TRJP 37(c)¹⁶ prohibits a party or a party's representative from being appointed GAL in a proceedings governed by the rule.

¹³ Tennessee Rule of Professional Conduct 1.6 provides in part:

- (a) A lawyer shall not reveal information relating to the representation of a client unless:
 - (1) the client gives informed consent;
 - (2) the disclosure is impliedly authorized in order to carry out the representation; or
 - (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

¹⁴ Tennessee Rule of Professional Conduct 1.8(b) provides:

- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules.

¹⁵ Tennessee Code Annotated § 37-1-149(a)(1) provides:

- (a)(1) The court at any stage of a proceeding under this part, on application of a party or on its own motion, shall appoint a guardian ad litem for a child who is a party to the proceeding if such child has no parent, guardian or custodian appearing on such child's behalf or such parent's, guardian's or custodian's interests conflict with the child's or in any other case in which the interests of the child require a guardian. The court, in any proceeding under this part resulting from a report of harm or an investigation report under §§ 37-1-401 -- 37-1-411, shall appoint a guardian ad litem for the child who was the subject of the report. A party to the proceeding or the party's employee or representative shall not be appointed.

In the absence of informed consent¹², RPC 1.9(a)¹¹ prohibits a lawyer from representing an interest against a former client in the same or substantially related matter.¹⁷ “After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.” RPC 1.9, Cmt. [1]. “Representing one side in a lawsuit and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences...” RPC 1.9, Cmt. [1a]. “The lawyer's duty of loyalty survives the termination of the former representation to the extent that it precludes the lawyer from acting to deprive the former client of the benefit of the lawyer's prior work on the former client's behalf.” RPC 1.9, Cmt. [3a].

RPC 1.9(a)¹¹ would permit a lawyer who formerly represented the child and/or the child's interest as GAL pursuant to SCRs 40 and/or 40A to represent another subsequent interest(s) in the same substantially related matter only if consistent with the interest of the former client/child. A lawyer who formerly represented the child or the child's interest(s) as GAL pursuant to SCRs 40 and or 40A could represent adoptive parents in the subsequent adoption proceeding only if the adoption is consistent with the interests of the former client/child.

SCR 40 (d)(1)(vi)¹⁸ requires a GAL to interview parents or legal guardians of the child only with permission of their counsel, or, in the absence of permission, through formal discovery. But

¹⁶ Tennessee Rule of Juvenile Procedure 37 provides:

(a) In delinquent and unruly proceedings, the court at any stage of a proceeding, on application of a party or on its own initiative, shall appoint a guardian ad litem for a child if such child has no parent, guardian or custodian appearing on such child's behalf; or such parent's, guardian's or custodian's interests conflict with the child's; or in any other case in which the interests of the child require a guardian.

(b) In any proceeding resulting from a report of harm or an investigation report under T.C.A. §§ 37-1-401 – 37-1-411 and T.C.A. § 37-1-101, et. seq., the court shall appoint a guardian ad litem for the child who is or may be the subject of such report. The guardian ad litem shall comply with the requirements of Tennessee Supreme Court Rule 40.

(c) A party to the proceeding or the party's employee or representative shall not be appointed as the child's guardian ad litem.

¹⁷ Tennessee Rule of Professional Conduct 1.9, Cmt. [3] provides:

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or other work the lawyer performed for the former client or if there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter, unless that information has become generally known...

¹⁸ SCR 40(d)(1)(vi) provides:

(d) Responsibilities and duties of a lawyer guardian ad litem.

The responsibilities and duties of the guardian ad litem include, but are not limited to the following:

SCR 40A §8(b)(3)¹⁹ requires the GAL to interview anyone, including foster parents of the child, who have significant knowledge of the child’s history and condition and the parties to the proceeding. Some of the individuals interviewed by the GAL pursuant to SCR 40A could well be parties or witnesses in subsequent proceedings. Can the lawyer who was formerly the GAL use or reveal information which the GAL gathered from parents, legal guardians, foster parents, parties or others in the proceeding in which they were appointed GAL in subsequent custody, termination, adoptions or other proceedings? RPC 1.9(c)¹¹ precludes the lawyer who formerly represented the child or the child’s interest as GAL from revealing information relating to the former representation or using such information, regardless of its source, to the disadvantage of the child or the child’s interest, except as provided in the rule. See cmt. [3] to RPC 1.6. By whom and under what circumstances consent can be given by or on behalf of the child to reveal or use such information is a matter of substantive law beyond the scope of the Rules of Professional Conduct.

RPC 1.6¹³, 1.8(b)¹⁴ and RPC 1.9(c)¹¹ prohibit revealing or using information with respect to current clients and former clients, respectively. The Rules of Professional Conduct do not otherwise limit an attorney who was GAL for a child from revealing or using of information obtained from other parties or witnesses. Likewise conflicts of interest are not created by RPC 1.7¹⁰ or 1.9(a)¹¹, except as provided herein, with respect to individuals who were other parties or witnesses in the matter for which the lawyer had been appointed GAL for the child.

Both SCR 40⁴ and 40A⁸ provide that the GAL does not function as a special master for the court and SCR 40A⁸ provides that the GAL shall not perform any other judicial or quasi-judicial responsibilities. Even so, the GAL was appointed by the court, and as a courtesy to the court

(1) Conducting an independent investigation of the facts that includes:

(vi) Interviewing the parent(s) and legal guardian(s) of the child with permission of their lawyer(s) or conducting formal discovery to obtain information from parents and legal guardians if permission to interview is denied;

¹⁹ Supreme Court Rule 40A, §8(b)(3) provides:

Section 8. Duties/Rights Of Guardian Ad Litem

(b) A guardian ad litem shall:

(3) within a reasonable time after the appointment, interview:

(i) the child in a developmentally appropriate manner, if the child is four years of age or older;

(ii) each person who has significant knowledge of the child’s history and condition, including any foster parent of the child; and

(iii) the parties to the suit;

which appointed the GAL and to insure that the concurrent or subsequent representation of another interest is not inconsistent with the interest(s) of the child, it would be advisable to secure consent or permission from the judge who had appointed the lawyer as GAL to represent the other interest, including representation of the adoptive parents in a subsequent adoption proceeding regarding the child.

CONCLUSION

RPC 1.7 would permit a lawyer representing a child or the child's interest as GAL pursuant to SCR 40 or 40A to represent another interest(s) only if other interest(s) was consistent with and did not compromise or interfere with the GAL's exercise of their independent judgment on behalf of the child or the child's interest and did not require the lawyer to violate RPC 1.6 or 1.8(b) by revealing information relating the representation or using such information to the disadvantage of the child or the child's interest. However, other statutes and/or rules of substantive or procedural law appear to prohibit a lawyer from serving as GAL while representing other interest(s) in the same matter. RPC 1.9(a) would permit a lawyer who formerly represented the child and/or the child's interest as GAL pursuant to SCR 40 and/or 40A to represent another subsequent interest(s) in the same or substantially related matter only if the interest(s) is consistent with the interest of the former client/child and does not violate RPC 1.9(c) by revealing information relating the former representation or using such information to the disadvantage of the child or the child's interest. A lawyer who formerly represented the child or the child's interest(s) as GAL pursuant to SCR 40 and or 40A could represent adoptive parents in the subsequent adoption proceeding only if the adoption is consistent with the interests of the former client/child and they did not violate RPC 1.9(c). To insure that the concurrent or subsequent representation of another interest is not inconsistent with the interest(s) of the child, it would be advisable to secure consent or permission from the judge who had appointed the lawyer as GAL to represent the other interest, including representation of the adoptive parents in a subsequent adoption proceeding regarding the child.

This 6th day of December, 2013.

ETHICS COMMITTEE:

Scott Reams

Michael Callaway

Wade Davies

APPROVED AND ADOPTED BY THE BOARD