



Ohio Board of Professional Conduct

OPINION 2024-02

Issued February 2, 2024

Withdraws Adv. Op. 2006-5

Communication While Serving in a Dual Role as Guardian ad Litem and Attorney

SYLLABUS: A lawyer appointed to serve in a dual role as a child’s attorney and guardian ad litem may not communicate with a represented person without permission of counsel. If the communication is authorized by law or court order, or the communication is solely to obtain information about how to contact the child or to schedule an appointment with the child, then a lawyer appointed in a dual role may contact a represented person without permission of counsel.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 4.2

QUESTIONS PRESENTED:

May a lawyer appointed to serve in a dual role as a child's lawyer and guardian ad litem communicate with a represented person without permission of counsel?

ANALYSIS:

This opinion addresses ethical restraints on communicating with represented persons by a lawyer serving in a dual role as a child's attorney and guardian ad litem. It does not address the situation where a lawyer is appointed to serve only as a guardian ad litem.

Appointment as a Child's Attorney and Guardian ad Litem

A court may appoint a lawyer to serve in a dual role as a child's attorney and guardian ad litem. See e.g., Juv. R. 4(C), Civ.R. 75, Sup.R. 48.02(A)(1), and R.C. 2151.281(H). However, a lawyer may not serve in a dual role as a child's attorney and guardian ad litem when a conflict exists in carrying out the two roles. Sup.R. 48.02(D)(1)&(2). The duties owed to the child conflict when the recommendations and best interest determination of the guardian ad litem are contrary to the client's wishes. *Id.* See also *In re Baxter*, 17 Ohio St.3d 229 (1985). When there is a conflict between the two roles, the court shall appoint another person as guardian ad litem for the ward. Sup.R. 48.02(D)(1)-(2).

Responsibilities and Duties of a Guardian ad Litem

The responsibilities and duties of a guardian ad item are set forth in the Rules of Superintendence. A guardian ad litem must investigate and provide the court with recommendations as to the best interest of the child. *Id.* To provide the court with recommendations the guardian ad litem must become informed about the facts of the case and contact all relevant parties. Sup.R. 48.03(D)(1). This includes interviewing the child, if age and developmentally appropriate, outside of the presence of the parents, foster parents, guardians, or physical custodians. Sup.R. 48.03(D)(3). A guardian ad litem must also interview the parties, foster parents, guardians, physical custodians, and other significant individuals who may have relevant knowledge regarding the issues of the case. Sup.R. 48.03(D)(6). Upon request of the individual to be interviewed, the lawyer for the individual may be present. *Id.*

Communication with Represented Persons

Prof.Cond.R. 4.2 provides that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer unless the lawyer has consent of the other lawyer or is authorized to do so by law or court order. The purpose of the "anti-contact" rule is to protect a person who has chosen to be represented by a lawyer from possible overreaching by other lawyers who are participating in the matter, including interference with the client-lawyer relationship and the uncounseled disclosure of information. Prof.Cond.R. 4.2 cmt. [1]. Where a lawyer is appointed in a dual role, the lawyer functions

as a guardian ad litem and is also responsible for representing the child as a client. Thus, the client-lawyer relationship is established, and the protections under Prof.Cond.R. 4.2 are triggered.

In addressing the “authorized by law” exception, the Board observes that the rule itself does not define communications authorized by law, but the comments, while not intended to be limiting, provide examples of situations that are not applicable to this question. The Board is unaware of any law that would allow a lawyer appointed in a dual role to communicate with represented persons absent consent of their lawyer.

In considering whether a court order appointing a lawyer as a guardian ad litem and lawyer for a child gives that lawyer the ability to directly communicate with represented persons without consent of their counsel, the Board reviewed both the Rules of Superintendence and the Judicial Guide for Guardian ad Litem Programs issued by the Supreme Court of Ohio. Guardian ad Litem Programs, Judicial Guide, <https://www.supremecourt.ohio.gov/docs/JCS/courtSvcs/resources/GALToolkit.pdf> (last accessed January 10, 2024). The Judicial Guide provides courts with a sample order for appointing a guardian ad litem and lawyer for a child. The sample order does not include any language giving a lawyer the ability to directly communicate with represented parties. Further, as indicated above, Sup.R. 48.03(D)(6) provides that, “[u]pon request of an individual to be interviewed, the lawyer for the individual may be present.” Thus, a standard appointment of a lawyer to serve as a guardian ad litem and attorney for a child does not authorize the lawyer to communicate directly with represented persons without consent of the person’s lawyer. The Board recognizes, however, that in exceptional circumstances the rule may permit the court to issue an order allowing a lawyer in a dual role to communicate directly with a person represented by counsel. Prof.Cond.R. 4.2 cmt. [6].

The Board’s view on this question is supported by the conclusions of other jurisdictions that have concluded that a guardian ad litem appointed as a lawyer for a child may not communicate directly with a represented person about the subject of the representation without notification and consent from the person’s lawyer. Wash. D.C. Adv. Op. 295 (2000) and Va. Adv. Op. 1870 (2013). Wash. D.C. Adv. Op. 295 also concluded that it is permissible to contact the represented person if the sole purpose of the communication is to obtain information about how to contact the child or schedule a

meeting with the child, because that type of communication is administrative in nature and not about the subject of the representation. Further, the opinion observed that a lawyer appointed as a guardian ad litem shall not use another individual, such as a social worker, to question a represented person to obtain information about the child without the consent of the person's lawyer. *Id.* See Prof.Cond.R. 8.4(a).

The Board agrees that a lawyer appointed in a dual role may communicate with a represented person if the sole purpose of the communication is to contact the child or schedule a meeting with the child. The Board also agrees that a lawyer should not use another individual, such as a social worker, to question a person represented by counsel without the consent of the person's lawyer.