

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2010-3
(May 2010)

The inquirer asks about her ethical responsibilities when serving as a court-appointed child advocate, guardian *ad litem* (“GAL”), or counsel for a minor, in the context of dependency and to some extent in the context of custody actions. While we address the inquirer’s specific concerns, we do so in the context of the statutes and court rules which define the responsibilities and functions of these roles (see attached chart).

A. CHILD ADVOCATE – HOME VISITS

The inquirer first asks whether, in the dependency court setting, there are ethical issues when a court orders a child advocate to go visit the child’s home and report back to the court about the safety and appropriateness of the home. The requirements and duties of “court-appointed special advocates” (“CASA”) are set forth in 42 Pa.C.S. §6342 and adopted by Pennsylvania Rule of Juvenile Civil Procedure (“the Pa.R.J.C.P.”) 1158. The appointee need not be an attorney.

The responsibilities of the CASA under 42 Pa.C.S. §6342 include:

- (2) interview the child and other appropriate persons as necessary to develop its recommendations;
- (5) submit written reports to the court to assist the court in determining the disposition best suited to the health, safety and welfare of the child; and
- (6) submit copies of all written reports and recommendations to all parties and any attorney of a party.

As the statute provides for the activities the inquirer describes, there does not appear to be any ethical prohibition against her performance of these duties. It is the inquirer’s personal decision as to whether she believes that she is competent to perform these functions.

As the inquirer is not representing the child as the child’s lawyer, the only applicable Rule of Professional Conduct (“RPC”) is RPC 8.4, which states that it is professional misconduct for a lawyer (c) to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and (d) to engage in conduct that is prejudicial to the administration of justice. Accordingly, the inquirer must be clear with anyone with whom she deals in this capacity that she is not acting as coun-

sel for any party and is not dispensing legal advice. She must accurately report any information to the court.

42 Pa.C.S. §6311 establishes the circumstances for appointment of a GAL in juvenile dependency matters, as well as the powers and duties of that role and states that a GAL must be an attorney at law. The duty of the GAL is “to represent the legal interests and the best interests of the child at every stage in the proceeding.” The duties are a hybrid of the usual responsibilities in any attorney-client relationship and a function which is similar to that of a social worker.¹ The statute provides that “A difference between the child’s wishes [which the GAL is required “to determine to the fullest extent possible”] and the recommendations which the GAL would make based upon the GAL’s own belief as to “the appropriateness and safety of the child’s placement and services necessary to address the child’s needs and safety” shall not be considered a conflict of interest for the guardian ad litem.”

However, Pa.R.J.C.P. 1151 provides for assignment of a GAL and appointment of counsel in a dependency proceeding but limits the latter to circumstances where there appear to be allegations of delinquency, disobedience, or

¹ (b) POWERS AND DUTIES.-- The **guardian ad litem** shall be charged with representation of the legal interests and the best interests of the child at every stage of the proceedings and shall do all of the following:

(1) Meet with the child as soon as possible following appointment pursuant to section 6337 (relating to right to counsel) and on a regular basis thereafter in a manner appropriate to the child's age and maturity.

(2) On a timely basis, be given access to relevant court and county agency records, reports of examination of the parents or other custodian of the child pursuant to this chapter and medical, psychological and school records.

(3) Participate in all proceedings, including hearings before masters, and administrative hearings and reviews to the degree necessary to adequately represent the child.

(4) Conduct such further investigation necessary to ascertain the facts.

(5) Interview potential witnesses, including the child's parents, caretakers and foster parents, examine and cross-examine witnesses, and present witnesses and evidence necessary to protect the best interests of the child.

(6) At the earliest possible date, be advised by the county agency having legal custody of the child of:

(i) any plan to relocate the child or modify custody or visitation arrangements, including the reasons therefor, prior to the relocation or change in custody or visitation; and

(ii) any proceeding, investigation or hearing under 23 Pa.C.S. Ch. 63 (relating to child-protective services) or this chapter directly affecting the child.

(7) Make specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety.

(8) Explain the proceedings to the child to the extent appropriate given the child's age mental condition and emotional condition.

(9) Advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court. A difference between the child's wishes under this paragraph and the recommendations under paragraph (7) shall not be considered a conflict of interest for the guardian ad litem.

ungovernability, and contemplates potential conflicts of interest. Pa.R.J.C.P. 1800 provides that “[T]o the extent 42 Pa.C.S. §6311(b)(9) is inconsistent with this rule, it is suspended,” and the Comment to the Rule, in so noting, cites, *inter alia*, RPC 1.7 and 1.8 (which address conflicts of interest).

Section C of Rule 1151 states:

If a child has legal counsel and a guardian ad litem, counsel shall represent the legal interests of the child and the guardian ad litem shall represent the best interests of the child.

The Comment notes that the GAL may move the court for appointment as legal counsel and assignment of a separate GAL “[w]hen, for example, the information that the GAL possesses gives rise to the conflict and can be used to the detriment of the child.”

The duties of a GAL, set forth in Pa.R.J.C.P. 1154, include making independent investigation and evaluation of the situation, explaining the proceedings to the child, ascertaining the child’s wishes, and presenting them to the court. Those duties are in many respects coextensive with legal representation, and the attorney will be perceived as acting in that role by persons who may be aware of that status. Accordingly, pursuant to RPC 4.2, when the GAL is acting in that role, she must be certain to avoid communicating with others, such as parents, who may be represented by counsel, about the subject of the representation unless the court order specifically so provides.²

If the persons with whom the GAL are dealing on behalf of the child are not represented by counsel, RPC 4.3 sets forth both mandatory and advisory guidance which directs the attorney to avoid misleading the non-client as to the lawyer’s role and appearing to provide advice to that person:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer’s representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.

² The North Carolina Bar Association opined otherwise, stating that a lawyer appointed to serve as GAL and not as advocate is not subject to the prohibition of Rule 4.2(a) and may communicate directly with represented persons without their lawyers’ consent. Under NC law, the GAL does not have to be an attorney.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

B. GAL – TESTIMONY IN CUSTODY CASES

The inquirer also asks whether in custody cases, when a guardian ad litem is appointed, there are ethical issues for that GAL to testify in court about his/her observations, what he/she learned, and/or what he/she thinks may be best for the child. There is no statutory or regulatory authority for appointment of a GAL in custody cases³, other than involuntary termination cases, which do not appear to be the subject of this inquiry.⁴ and the inquirer has not provided any written transcripts or orders which are the basis for this part of the inquiry, so this response will address only the specific issue which the inquirer has asked in the context of the available applicable rule.

However, there is provision in Pennsylvania Rule of Civil Procedure 1915.11, under "ACTIONS FOR CUSTODY, PARTIAL CUSTODY, AND VISITATION OF MINOR CHILDREN," captioned "Appointment of Attorney for Child. Interrogation of Child. Attendance of Child at Hearing or Conference":

(a) The court may on its own motion or the motion of a party appoint an attorney to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law.

(b) The court may interrogate a child, whether or not the subject of the action, in open court or in chambers. The interrogation shall be conducted in the presence of the attorneys and, if permitted by the court, the parties. The attorneys shall have the right to interrogate the child under the supervision of the court. The interrogation shall be part of the record.

³ Pa.R.Civ.P. 1915.11 does provide for appointment of counsel in such cases: (a) The court may on its own motion or the motion of a party appoint an attorney to represent the child in the action.

...

⁴ 23 Pa.C.S. §2313 provides:

(a) CHILD.-- The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian ad litem to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

Philadelphia Local Rule 1915.11 elaborates on this rule by identify the appointee as a "Child Advocate" and adding qualifications of the appointee:

- (a) The Court may on its own motion or the motion of a party appoint an attorney to represent the child in the action. The Court may assess the cost upon the parties or any of them or as otherwise provided by law.

*(1) The qualifications of the Child Advocate shall be as follows:

- (i) Any attorney appointed must have four years experience in Family Law matters, and
- (ii) Must attended a training session for Child Advocates if such session is made available; and
- (iii) Must attend Continuing Education in the field of Child Advocacy on a regular basis.

Therefore, if the inquirer is appointed under this Rule, she is are expected to perform legal services, including interrogating the child, as well as services which might be characterized as "child welfare" or "social services."

In each instance in which the court appoints the inquirer to perform services with respect to a child, the inquirer must determine whether the functions include representation as a lawyer, or in a manner similar to that required by of a GAL appointed under Pa.R.J.C.P. 1151, or as a Child Advocate. To the extent that the inquirer is ordered by the court to represent the child as counsel, all Rules of Professional Conduct apply.

RPC 3.7(a) states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; ... or "(3) disqualification of the lawyer would work substantial hardship on the client."

If the inquirer is a CASA, she is not representing the child as an attorney. If she is representing the child as an attorney, she may testify in that matter if the issues are uncontested. Even if the issues are contested, as the stated goal of the rule is to avoid misleading the tribunal and prejudicing the opposing party (see Comment [1]), and as the child is the subject of the litigation rather than a party to it, the inquirer's testimony would not violate the intent of the rule. **The inquirer must determine in each instance where she is acting as counsel whether her disqualification would work substantial hardship on the client.**

Other significant Rules apply to the representation of a child. When a lawyer is appointed as a guardian ad litem, the lawyer must accept that assignment only if the lawyer can provide competent representation as required by RPC 1.1. However, that rule relates only to legal knowledge and skill and does not speak to the expertise required to evaluate a child's circumstances. Any

concerns with respect to the other types of expertise which may be required to perform evaluative functions are beyond the scope of this Committee's authority.

The performance of the duties of the lawyer serving as GAL to communicate and explain matters to the child, the is governed by RPC 1.4:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information ...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

Additionally, Rule 1.14(a) speaks to the special concerns of representing a minor client but provides advisory rather than mandatory guidance:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

C. MALPRACTICE ISSUES

The inquirer's third question, as to whether either of these roles raise any concerns about the inquirer's attorney malpractice insurance, is not an ethical issue and is beyond the scope of the Committee's authority. It is suggested that the inquirer review her professional liability policy or consult with her carrier to assess this issue.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

		<u>Appointment</u>	<u>Qualifications</u>	<u>Powers & Duties</u>
<u>DEPENDENCY</u>				
Guardian Ad Litem "to represent the legal interests and best interests of the child"	42 Pa.C.S. 6311 susp where incons w/ PaRJCP 1151 per PaRJCP1800	where alleg of depend. under 6302	atty	meet w. child asap & regularly access to all court, med., school, agency, other records; partic. in all proc. incid masters' hrgs to degree necy to adeq. rep. child; conduct such further inv necy to asc. facts interview wits, exam and x-exam wits, present wits and evide necy to protect best int of child; make specific rec to court re approp and safety of placement and services necy to address child's needs and safety; explain to child; advise court of child's wishes, present evid. in support
Guardian ad Litem to rep legal interests and best interest of alleging dep. under Rule 1200:	Pa.R.J.C.P 1151 Pa.R.J.C.P 1152 Pa.R.J.P. 1154	court shall appt immly if child in prot.custody or when dependency pet filed if not in cust. not waivable		
and Counsel to rep legal interests and best interest of alleging dep. under Rule 1200:		waivable by child per R 1800, wh susps. 42 PA 6337		
	PaRJCP 1128			no proceeding without GAL and legal counsel if any
	If child has legal counsel & GAL, counsel shall rep best legal interests of child & GAL shall rep best interests of the child			
	Comment: see 42 PaCS 6302 6311, 6337 GAL may move ct for appt as legal counsel and appt of sep GAL when, eg, info that GAL possesses gives rise to conflict and can be used to detriment of child; to extent inconsistent, 6311(b)(9) suspended, see R. 1800, RPC 1.7, 1.8.			interview child & others
<u>CASA</u>				
	42 Pa.C.S. 6342	ct may appt or discharge at any time during inv. or proc.	21; training, screening	receive notices re proc. & movement of child
	PaRJP 1158			follow duties in 6342
<u>CUSTODY</u>				
"Attorney for Child"	PARCivP 1915.11	Attorney for Child		ct may interrogate child in presence of atty; also parties and attys may interr under superv.
"Attorney for Child" Child Advocate	Phila Cty LR 1915.11	on ct's motion or motion of a party from list maintained by each FC judge under Bd of Judges pro	"any atty appointed as Child Advocate must have four years exp. in Family Law matters", training, CLE of ct	
<u>ADOPTION</u>				
	23 PaCS 2313	ct shall appoint counsel for child in contested invol. term and may appt when in best int of child		
<u>CHILD VICTIMS & WITNESSES</u>				
child advocate	42 PaCS 5983	ct may designate	may be attys or others qualified by exp., poss. edu, exp or training in child or sexual abuse and und. crim. just. system	explain legal proceedings to child; "as a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand & cooperate in court proceedings; assist or secure assistance for child and family in coping w. emo. impact of crime and crim proc.