Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-454
Issued: November 19, 2021

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at http://www.kybar.org/237), before relying on this opinion.

Subject: Ethical Responsibilities of an Attorney as a Guardian *Ad Litem*

Question #1: As a Court-appointed Guardian *Ad Litem* ("GAL") , does the attorney owe ethical duties to the minor, prisoner and/or legally disabled person as opposed to the Court?

Answer: Yes.

Question #2: If the GAL reasonably believes that the client has diminished capacity, is at risk for substantial physical, financial or other harm unless action is taken, and cannot adequately act in his or her own interest, can the GAL take reasonably necessary protective action for the client, even to the point of advocating a position contrary to the client's wishes?

Answer: Qualified Yes.

Principal References: Supreme Court Rules 3.130 (1.1); SCR 3.130 (1.4); SCR 3.130 (1.6); SCR 3.130 (1.14); Black vs. Wiedeman, 254 S.W.2d 344 (Ky. 1952); Morgan vs. Getter et al., 441 S.W.3d 94 (Ky. 2014).

Kentucky law has long recognized the need to protect the legal rights of minors, prisoners and disabled persons through the appointment of an attorney as the guardian *ad litem*.[1] Civil Rule ("CR") 17.03 provides for the appointment of a GAL for infants and persons of unsound mind in civil proceedings. Similarly, CR 17.04 mandates that GALs are to be appointed for prisoners confined either within or without the Commonwealth in pending civil litigation. Kentucky's Family Court Rules of Procedure and Practice ("FCRPP") allow the Court to order the appointment of a GAL for children in family law cases if needed.[2] KRS 387.305 sets forth the duties of a GAL. As the Supreme Court has explained, "(The GAL) is appointed to represent defendants who are under legal disability and is given the duty to 'attend properly to the preparation of the case' in their behalf.... (The GAL's) obligation is to stand in the infant's place and determine what his rights are and what his interests and defense demand.

[1]For an extensive discussion of the history of the GAL in both Kentucky's Rules of Civil Procedure and statutory law, review Morgan vs. Getter, et al., 441 S.W.3d 94, 107 (Ky. 2014).

[2]FCRPP, Part III, Part 6 : "General Provisions".

Although not having the powers of a regular guardian, (the GAL) fully represents the infant and is endowed with similar powers for purposes of litigation in hand.... He is, therefore, both a fiduciary and lawyer of the infant, and in a special sense, the representative of the court to protect the minor."[3]

As the GAL, an attorney[4] is ethically required, as with any other client, to render competent legal representation to the minor, prisoner or disabled person, providing "... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[5] The attorney is required to inform the client of the circumstances of the case, consult with the client about how goals and objectives of the client are to be accomplished, and explain all matters "... to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[6] Further, the attorney is not to reveal confidential information imparted by the client to the attorney unless the client gives informed consent, the disclosure is implied authorized so that the attorney can carry out the representation of the client, or the disclosure is specifically permitted by SCR 3.130 (1.6)(b).[7]

Under Kentucky law, a GAL is held to Kentucky's Rules of Professional Conduct except where the lawyer's conduct is governed by statute rather than by Rule.[8] In 1966, the Kentucky General Assembly adopted KRS 387.305 to emphasize to GALs that the child's 'best interests' was paramount to the child's 'preferences' in a pending matter: "Whether appointed pursuant to this statute or pursuant to a provision of the Kentucky United Juvenile Code, the duties of a guardian *ad litem* shall be to advocate for the child's best interest in the proceeding through which the guardian *ad litem* was appointed." Critics have argued that the 'best interest' representation as a GAL under Kentucky law, especially in family law cases, does not 'comport' with an attorney's ethical responsibilities under the Kentucky's Rules of Professional Conduct[9].

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[3]Black vs. Wiedeman, 254 S.W.2d 344, 346 (Ky. 1952), referencing Kentucky's then- Civil Code of Practice Section 36, cited as authority in Morgan vs. Getter et al., 441 S.W3d 94, 108 (Ky. 2014)

[4]CR 4.04(3) mandates that the GAL be a "practicing attorney". See also KRS 387.305 which mandates that the GAL appointed to defend an infant who does not have a resident guardian, curator or conservator be a "regular, practicing attorney of the court".

[5]SCR 3.130-1.1;

[6]SCR 3.130 (1.4) (a) - (b).

[7]SCR 3.130 (1.6).

[8]See Gambrel et al. vs. Paul Croushore, et al., Case No. 2020-CA-0881 (Motion for discretionary review filed on 08/04/2021

[9]SCR 3.130 et seq.; Morgan, supra at 114, citing Barbara Ann Atwood, The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism, 42 Family Law Quarterly. 63 (2008); Se also, ABA/BNA Lawyers' Manual on Professional Conduct, "Lawyer-Client Relationship: Client with Diminished Capacity."

"(A) lawyer undertaking to serve in the hybrid role of attorney-for-the-child / advisor-to-the-court is immediately confronted with a likely conflict between his or her duty to report to the court and the duties to maintain the child-client's confidences, Supreme Court Rule (SCR) 3.130-1.6, and not to act as both advocate and witness."[10] Even absent the likely conflicting responsibility as an agent of the court, moreover, critics maintain that a 'best interest' lawyer who substitutes his or her best-interest judgment for that of the child runs afoul of the duties to "... advocate ... zealously ... the client's position."[11] and to "... abide by a client's decisions concerning the objectives of (the) representation."[12]

However, equally as important, are the ethical responsibilities outlined for the attorney in SCR 3.130 (1.14) which deals with those clients with a diminished decision-making capacity.[13] This Rule reminds GALs that a client may have a diminished mental capacity by virtue of minority, age, mental impairment or other reason which places the client at a risk of "... substantial physical, financial or other harm" unless some action is taken by the lawyer, and the client cannot act in his/her own interest. At that point, under this Rule, the attorney is entitled to take "reasonably necessary protective action" for the client.[14]

How does an attorney determine to what extent the client's capacity is 'diminished'? Comment 6 to the Rule explains that the lawyer has to balance several factors in making that determination: "... the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client."[15] The attorney is also permitted by the Rule to seek professional help from a diagnostician if needed.

Once a determination of diminished capacity decision-making ability is made, then the attorney can consider protective measures which Commentary 5 to the Rule explains includes: "... consulting with family members; using a reconsideration period to permit clarification or improvement of the circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; (and) consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client."[16] At all times, however, the attorney is required to maintain a normal client-lawyer

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[10]Morgan, supra at 116.

[11]SCR 3.130 Preamble

[12]SCR 3.130 (1.2), as cited in Morgan, supra at 116.

[13] For an extensive discussion of what is 'diminished capacity' for purposes of SCR 3.130(1.14), see KBA E-440.

[14]SCR 3.130 (1.14) (a).

[15]SCR 3.130 (1.14) at Supreme Court Commentary (6).

[16]Id. at Commentary (5).

relationship with the client, and be guided by the wishes and values of the client to the extent known; the client's best interests, and *to make* the least restrictive intrusion into the client's decision-making process.[17]

Further, CR 3.130 (1.14) (c) reminds attorneys that information about a client with diminished capacity that is acquired through the representation is protected under the attorney-client confidentiality provisions set out in SCR 3.130(1.6). If an attorney is required to take protective action for the client, the Rule does 'impliedly authorize' the attorney to reveal information about the client to the extent reasonably necessary to protect the client's interest.[18] However, Commentary 8 to the Rule explains that because the disclosure of a client's diminished capacity could adversely impact the client's interests, the lawyer cannot disclose that information unless the client gives authority to do so. Thus, when an attorney undertakes protective action for the client by speaking with third parties, care must be taken to avoid that consultation adversely affecting the client and/or the client's interests in the matter. "The lawyer's position in such cases is an unavoidably difficult one."[19]

Furthermore, in those cases in which a lawyer is reasonably convinced that the client with diminished capacity wants a resolution of the matter at odds with what is actually in the client's best interest, the attorney must first explain to the client why he or she feels obligated not to pursue what the client desires, and, if the client agrees, advise the Court that the client disagrees with the attorney's assessment of the case, and what the client's position is regarding the matter. If the client does not agree to allow the attorney to inform the court of the substance of their disagreement, then the attorney may consider filing a motion with the court requesting removal as guardian ad litem citing only irreconcilable differences, "The rules do not preclude, however, an attorney's reasonable, good faith advocacy in a custody proceeding on behalf of the child's best interest (for example), even if the child disagrees with the advocate."[20]

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.

[17]See, SCR 3.130(1.14).

[18]SCR 3.130 (1.14) (c).

[19]Id. at Commentary (8).

[20]Morgan, supra at at 116.