

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2006-5

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SYLLABUS: The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation.

OPINION: This opinion addresses questions regarding ethical restraints on communicating with represented persons or parties by an attorney serving in a *dual role* as a child's attorney and guardian ad litem. This opinion does not address the situation where an attorney is appointed to serve only as a guardian ad litem.

Does the DR 7-104(A)(1) restraint on communication with represented persons or parties apply to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child?

Is it proper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate with a represented person without permission of counsel?

Appointment as a child's attorney and guardian ad litem

A court may appoint an attorney to serve in a dual role as a child's attorney and guardian ad litem. Such dual appointments are authorized by law and rules of court. See e.g., Juv. R. 4(C) and R.C. 2151.281(H) (West 2005) authorizing a court to appoint an attorney as a child's attorney and guardian ad litem in juvenile court proceedings regarding an alleged or adjudicated abused, neglected, or dependent child and in termination of parental right and permanent custody proceedings. See also, Civ. R. 75 authorizing a court to appoint guardian ad litem and legal counsel, if necessary, in divorce, annulment, and legal separations

actions. For examples of local court rules addressing dual appointments see Rule 27(B) of the Local Rules of Procedure for Juvenile Court, Franklin County Common Pleas Court and Rule 15(B) of the Rules of the Domestic Relations Division, Franklin County Common Pleas Court, Rule 9.01(B)(3) Rules of Juvenile Court, Summit County Common Pleas Court.

A guardian ad litem's duty is to investigate and determine what is in the child's best interest. The duty of a child's attorney is to represent the child's interests and wishes.

The duty of a lawyer to his client and the duty of a guardian ad litem to his ward are not always identical and, in fact, may conflict. The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest. The role of the attorney is to zealously represent his client within the bounds of the law. DR 7-101; DR 7-102.

In re Baxter, (1985), 17 Ohio St.3d 229, 260.

An attorney 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. The duties conflict when a best interest determination differs from the client's wishes and interests.

Independent counsel is required in some proceedings. See *In re Williams*, 101 Ohio St. 3d 398, 403, 405, 2004-Ohio-1500 holding that a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and is entitled to independent counsel in certain circumstances. Under the facts of that case, a child repeatedly expressed a desire to remain with the mother, but the guardian ad litem recommended permanent custody be granted to the county job and family services agency. *Id.* at 399. See also *In re Baxter* (1985), 17 Ohio St.3d 229, 232-33, finding that a mother, whose appointed counsel also served as guardian ad litem was denied proper representation of counsel in a termination of parental rights proceeding in juvenile court. Under the facts of that case, the attorney/gal felt that the mother's wishes were not beneficial to the mother. *Id.* at 232.

When there is conflict between the two roles, the court shall appoint another person as guardian ad litem for the ward.

Juv.R. 4(C)(2) If a person is serving as guardian ad litem and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of guardian ad litem, the court shall appoint another person as guardian ad litem for the ward.

See also, Ohio Rev.Code Ann 2151.281(H) ("If a person is serving as guardian ad litem and counsel for a child and either that person or the court finds that a

conflict may exist between the person's roles as guardian ad litem and as counsel, the court shall relieve the person of duties as guardian ad litem and appoint someone else as guardian ad litem for the child.”)

Attorneys who serve in a dual role as an attorney and guardian ad litem are reminded that the highest duty is to the client.

[W]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause. If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him to withdraw as guardian. The court should not hesitate to grant such request.

In re Baxter (1985), 17 Ohio St.3d 229, 232.

Communication by an attorney/gal with represented persons and others

Attorneys who serve in a dual role as a child's attorney and guardian ad litem may question how the Ohio Code of Professional Responsibility applies in carrying out the dual responsibilities. At issue in this opinion is whether attorneys who serve in a dual role as a child's attorney and guardian ad litem are subject to the DR 7-104(A)(1) restraints on communication with represented persons or parties.

The question is of great importance since the duties of both an attorney and a guardian ad litem necessitate communication with various persons and parties. Some of the persons may be represented and some may not.

Responsibilities of a guardian ad litem might vary with each case, but typically include interviewing the child, observing each parent with the child, performing home visits, investigating and interviewing all significant persons, obtaining records, and attending depositions. See e.g., identical rules—Rule 27(D) of the Local Rules of Procedure for Juvenile Court, Franklin County Common Pleas Court and Rule 15(D) of the Local Rules of the Domestic Relations Division, Franklin County Common Pleas Court.

DR 7-104(A)(1) restrains communication with represented persons

DR 7-104(A)(1) is referred to as the anti-contact rule—it restrains communication with represented persons and parties. EC 7-18 explains that “[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to

law or rule of court or unless he has the consent of the lawyer for that person.” An ABA advisory committee notes that “the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests” (ABA Formal Op. 95-396 (1995) citing Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 325 (1992).

DR 7-104 (A) During the course of his [her] representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he [she] knows to be represented by a lawyer in that matter unless he [she] has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The restriction in DR 7-104(A)(1) applies to communication with a represented person, not just a represented party. See EC 7-18 (“[a] lawyer should not communicate on the subject of the representation of his client with a *person* he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.” Emphasis added. See also, OhioSupCt. Bd Commissioners on Grievances & Discipline, Op. 96-1 (1996).

[ABA Model rule 4.2 is similar to DR 7-104(A)(1), with the exception that by an amendment in August 1995 the word “party” was replaced by the word “person.” Even prior to that word change, ABA Formal Op. 95-396 advised that the prohibition as to communication with a represented party applied to represented persons.]

Thus, under DR 7-104(A)(1), during the course of representation of a client an attorney may not communicate on the subject of representation with a *person or party* represented by a lawyer *unless* there is consent by the lawyer or the communication is authorized by law.

The rule does not define communication “authorized by law” but EC 7-18 refers to it as communication made pursuant to law or rule of court. See also ABA Formal Ethics Op. 95-396 addressing the categories of communication that are “authorized by law” such communication made pursuant to a constitutional provision, statute, court rule, or in appropriate circumstances a court order.

Communication while serving in a dual role as a child’s attorney and guardian ad litem is subject to DR 7-104(A)(1)

The District of Columbia Bar considered the application of the anti-contact rule to a guardian ad litem whose responsibilities included acting as a child's lawyer in a child abuse and neglect proceeding. The bar committee advised that "[u]nder DC Rule 4.2, the guardian ad litem may not communicate about the subject of the representation with either of the child's parents without notification of and consent from the parent's lawyer. The guardian ad litem may communicate directly with a represented parent if the sole purpose of the communication is to obtain information about how to contact the child or to schedule a meeting with the child. Such communication would be administrative in nature and would not be 'about the subject of the representation.'" District of Columbia Bar, Op. 295 (2000).

This Board agrees that the anti-contact rule applies to communication on the subject matter of a representation by guardian ad litem who also serves as a child's lawyer.

Communication on the subject of representation by an attorney who serves in a dual role as a child's attorney and guardian ad litem is subject to DR 7-104(A)(1) because it is communication made by an attorney during the course of representation of a client. Whenever an attorney is appointed to serve in a dual role as a child's attorney and guardian ad litem, the child is a client represented by counsel and the anti-contact rule is triggered.

When the anti-contact rule applies, communication with represented persons or parties is improper unless there is consent of counsel or there is authorization by law, which would include a court order or court rule permitting the communication with the represented person or party.

Conclusion

The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court order or court rule. Communication that is administrative in nature, such as scheduling appointment or meetings, is not communication on the subject of the representation.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.