



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-06
May 2013

Subject: Communications with Represented Person; Guardians and Guardianship

Digest: A lawyer, serving as a guardian ad litem of minors in an adoption proceeding, must obtain the consent of the lawyer for the petitioning parties before interviewing the petitioners and likewise must obtain consent before contacting the petitioners to request an interview with the minors.

Reference: Illinois Rule of Professional Conduct 4.2

Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J. L. & Family Stud. 43 (2011)

D.C. Bar Opinion 295 (2000)

Illinois Adoption Act, 750 ILCS 50/13(B)(a)

Wisconsin Formal Opinion E-89-14 (1989)

Disciplinary Proceedings against Kinast, 192 Wis. 2d 36, 43-44, 530 N.W.2d 387, 390-91 (1995)

In re Galic, Commission No. 02 CH 104, pp. 16-17, 2004 Ill. Atty. Reg. Disc. LEXIS 334, *26 (ARDC Hearing Board, August 18, 2004)

Illinois Supreme Court Rules 900 and 907(b)

FACTS

In a proceeding for the adoption of minors, the court has appointed an attorney as guardian ad litem (GAL). The petitioners are represented by an attorney. Following receipt by the GAL of the order of appointment, the GAL sends a letter directly to the petitioners instead of their attorney, requesting an interview with the petitioners. After receiving the letter, the petitioners contact the GAL, who interviews the petitioners and requests an interview with the children whose adoption is sought.

QUESTION

After being appointed by the court to serve as GAL in an adoption proceeding, does the GAL need to obtain the consent of the lawyer representing the petitioners prior to contacting the petitioners?

OPINION

The question posed requires the consideration of RPC 4.2, which provides as follows:

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 in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RPC 4.2, Comment [1], sets forth the purposes of the rule:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

Given the text of the rule and its purposes, the Committee concludes that any communication between the GAL and the petitioners, related to the adoption proceeding, must be with the consent of the petitioners' attorney. (Under the facts presented, it is assumed that there is no legal authority or court order permitting petitioners' counsel to be bypassed.)

By its terms, Rule 4.2 applies only to a lawyer "representing a client." Broadly speaking, a GAL "...is an individual appointed by the court to serve as an independent advocate who promotes the best interests of minors, elders, and legally incompetent persons in custody disputes, abuse and neglect cases, guardianships, and other court proceedings." Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J. L. & Family Stud. 43 (2011). Absent a conflict between the best interests of a minor and the minor's self-interest (it is assumed in the present inquiry that there is

no such conflict), the GAL serves the dual role of fact-finder for the court and representative of the child's best interests. See D.C. Bar Opinion 295, p. 2 (2000).

While the GAL-ward relationship does not bear all of the attributes of the attorney-client relationship as it is traditionally understood, the GAL's function in an adoption case is sufficiently akin to the role of representing a client that the Committee considers Rule 4.2 to be applicable to the factual situation described. Even if a GAL should be appointed strictly for the purpose of serving as an investigator, the GAL's obligation to serve the minor's best interests is a form of representation. Indeed, the statute under which a GAL is appointed in an adoption case requires a licensed attorney to be appointed as guardian ad litem to represent a child sought to be adopted. 750 ILCS 50/13(B)(a).

In the circumstances posed, the Committee concludes that the GAL's conduct, in sending the letter to the petitioners and then interviewing them without the knowledge and consent of their attorney, is in contravention of Rule 4.2. Wisconsin Formal Opinion E-89-14 (1989) ("May a guardian ad litem communicate with a represented person in a proceeding without the knowledge or consent of that person's attorney?" Answer: No). Obviously the interview of petitioners concerns the subject of the GAL's representation, i.e., the adoption of the children. It cannot be assumed that the petitioners consulted with their attorney before contacting the GAL in response to his letter. Nor can it be assumed that the petitioners' attorney would not need to counsel his clients in advance of an interview, given the fact that parental rights are at stake in the adoption proceeding. Thus, the purposes of the rule are furthered by requiring GALs to contact counsel in the first instance, just as an attorney for an interested party is required to contact a minor's GAL in order to interview the minor. See *Disciplinary Proceedings against Kinast*, 192 Wis. 2d 36, 43-44, 530 N.W.2d 387, 390-91 (1995).

The second aspect of the question presented concerns the GAL's request to interview the children whom he represents. While such contact in some instances may be viewed as administrative in nature and seemingly innocuous, that may not always be the case because the contact could lead to a substantive conversation. Consequently, the Committee believes that the petitioner's lawyer should be notified, and consent obtained, before such a contact is initiated—even if arranging the minor's interview were the sole purpose of the contact. "There is no provision in Rule 4.2 which requires that the communication must be substantive, only that it must be on the subject of the representation." *In re Galic*, Commission No. 02 CH 104, pp. 16-17, 2004 Ill. Atty. Reg. Disc. LEXIS 334, *26 (ARDC Hearing Board, August 18, 2004). The interview request is a communication about the subject of the GAL's representation because it is motivated by the GAL's role in the adoption proceeding, and therefore it is prohibited by Rule 4.2.

This opinion is limited to the situation in which the GAL represents a minor in an adoption proceeding, and may not apply to a child custody proceeding under statutes such as the Juvenile Court Act and the Marriage and Dissolution of Marriage Act. Such child custody proceedings are subject to Illinois Supreme Court Rules 900 through 908, including Rule 907(b), which provides in part: "Every child representative, attorney for a minor child and guardian ad litem shall have the right to interview his or her client(s) without any limitation or impediment."

Those rules, however, do not address proceedings under the Adoption Act. The Rule 900 Committee Comments of the Special Supreme Court Committee on Child Custody Issues state: “The Special Committee believes that adoption is qualitatively different from the child custody proceedings addressed in the Rule 900 series.” Accordingly, this opinion applies only to GALs involved in adoption proceedings.

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