FORMAL OPINION NO. 2005-159

Competence and Diligence: Requesting a Guardian ad Litem in a Juvenile Dependency Case

Facts:

The Juvenile Court appoints guardians ad litem (GALs), who are often lawyers, for mentally ill parents in some dependency cases and termination-of-parental-rights cases.

Questions:

1. May a lawyer for a parent ethically request a GAL for the client?

2. When a lawyer acts as a GAL, does the lawyer have the same ethical duties, obligations, and powers as in a regular lawyer-client relationship?

3. After the appointment of the GAL for the mentally ill parent, is the lawyer obligated to take direction from the GAL?

Conclusions:

1. No, qualified.

2. No, qualified.

3. Yes, qualified.

Discussion:

It is generally accepted that it is error for a court to proceed without appointment of a GAL for a party when facts strongly suggest a lack of mental competency. *United States v. 30.64 Acres*, 795 F2d 796, 806 (9th Cir 1986). Similarly, it is a violation of due process to fail to appoint a GAL for a mentally incompetent parent in a termination-of parental-rights proceeding. *State ex rel Juv. Dept. v. Evjen*, 107 Or App 659, 813 P2d 1092 (1991).

1. *Seeking Appointment of a GAL.*

Although a marginally competent client can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and adjust representation to accommodate a client's limited capacity

before resorting to a request for a GAL. This is reflected, inter alia, in Oregon RPC 1.14, which provides:

> (a) 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.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
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> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Consequently, and as a general proposition, lawyers for parents should not invade a typical client's rights beyond the extent to which it reasonably appears necessary for the lawyer to do so. In other words, lawyers should request GALs for their clients only when a client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.[1]

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[1] It has been suggested that the parent's lawyer should seek a GAL only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and non-lawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client,* 1997 UTAH L REV 515, 566.

Counsel for other parties to the proceeding, however, may be obligated to advise the court of the parent's incompetence. In *United States v. 30.64 Acres,* 795 F2d 796, 806 (9th Cir 1986), the court stated:

> Rather, if it should appear during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if *pro se*), to consult with his lawyer with a reasonable degree of rational understanding, *Dusky v. United States,* 362 US 402, 80 S Ct 788, 402 L Ed2d 824 (1960) (standard for competency to stand trial in criminal case); *Thomas v. Cunningham,* 424 F2d 934, 938 (4th Cir 1963), or otherwise to understand the nature of the proceedings, *cf. Dusky,* 362 US at 402; *Thomas,* 313 F2d at 938, that information should be brought to the attention of the court promptly.

Although often referred to as determinations of the client's ability to aid and assist in their case, requests for GALs for parents in dependency proceedings are not governed by ORS 161.360, which governs the determination of whether a defendant in a criminal proceeding is unfit to proceed to trial due to his or her mental illness. In a criminal proceeding, due process prohibits a mentally incompetent defendant, who is unable to aid and assist in the defense, from being tried until the defendant becomes competent.[2] Thus, while the aid-and-assist motion may have other undesirable effects for the mentally ill criminal client, it does not permanently deprive the client of his or her right to a trial or representation by counsel. In contrast, in a juvenile dependency case or termination-of-parental-rights case, when a GAL is appointed for a parent the case proceeds to trial. Not only is the parent effectively deprived of counsel and the authority to make case decisions, but also the finding by the court that a GAL is required arguably establishes a parent's unfitness.

In determining whether the client can adequately act in his or her own interests, the lawyer needs to examine whether the client can give direction on the decisions that the lawyer must ethically defer to the client. Short of a client's being totally noncommunicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation. Standards for representation in juvenile dependency cases and termination-of-parental-rights cases recognize that the lawyer should always seek the lawful objectives of the client and should not substitute the lawyer's judgment for the client's in decisions that are the responsibility of the client.[3] However, the lawyer may make other necessary decisions consistent with the client's direction on these essential issues.

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2 In a juvenile dependency proceeding, a lesser degree of due process applies because the rights of the parent must be balanced against the best interests of the child. Thus, in a dependency proceeding, the required fundamental fairness is met by providing a GAL for the parent and proceeding with the case so that the child does not languish in foster care.

3 Indigent Defense Task Force Report, *Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases* (OSB 9/25/96). Standard 3.3 specifies the decisions that are the client's to make and includes whether to admit the allegations of the petition; whether to agree to jurisdiction, wardship, and temporary commitment to SOSCF; whether to accept a conditional postponement; or whether to agree to specific services or placements.

2. *Distinguishing the Role of GAL and Lawyer.*

There is no requirement that a GAL be a lawyer, and nonlawyers frequently serve as GALs. Thus, when a lawyer acts as a GAL, the lawyer is performing a nonlawyer function and does not have the same ethical duties, obligations, and powers in the guardian-ward relationship as in a lawyer-client relationship, although both a lawyer and a GAL have a fiduciary relationship with the client or ward.

Oregon courts have indicated that a GAL has authority to settle claims on behalf of an incapacitated person and, with prior court approval, a GAL may confess judgment on behalf of the incapacitated person. *Alvarez v. Salvation Army*, 89 Or App 63, 66, 747 P2d 379 (1987); *see* GUARDIANSHIPS, CONSERVATORSHIPS, AND TRANSFERS TO MINORS §3.13 (Oregon CLE 2004). The GAL's authority essentially substitutes for the incapacitated person's authority to make these decisions in the proceeding. "In the law of adult incompetents, the role of the GAL has sometimes been held to incorporate the concept of substituted judgment, whereby the GAL attempts to make decisions for the ward based on what the GAL thinks the particular ward would have wanted had the ward not been incompetent." Ann M. Haralambie, *The Child's Lawyer: A Guide to Representing Children in Custody, Adoption and Protection Cases* (ABA 1993).

3. *Taking Direction from Client's GAL.*

Because the rationale for the appointment of a GAL is to have someone who can make decisions for the incompetent client, after the appointment of the GAL the lawyer for the parent generally must take direction from the GAL and can make stipulations and agreements and do other acts at the GAL's direction that the parent could do if the parent were competent. It is improper for the parent's lawyer to act contrary to the direction of a GAL who is adequately asserting the client's interests. *See, e.g., Brode v. Brode*, 298 SE2d 443 (SC 1982) (improper and beyond scope of lawyer's authority for lawyer to appeal from decision authorizing sterilization of profoundly retarded handicapped minor, when GAL did not choose to appeal); *Developmental Disabilities Advocacy Ctr. Inc. v. Melton*, 521 F Supp 365 (DNH 1981), *vacated and remanded on other grounds*, 689 F2d 281 (1st Cir 1982) (lawyers in agency established by statute to advocate for rights of disabled persons may not act independently of incompetent client's GAL).

When a GAL is appointed for an incompetent client, "appointment of a parent or other adult does not absolve the lawyer of the duty to make an independent determination of the client's interests." Martha Matthews,

Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class Action Cases, 64 FORDHAM L REV 1435, 1446 (1996). Parents' lawyers should serve as a monitor to assure that the GAL adequately asserts the incapacitated client's interests. Furthermore, the lawyer has a responsibility to inquire periodically whether the client's competence has changed and, if appropriate, request removal of the GAL. Such inquiries should occur at every critical stage in the proceeding.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§18.12–18.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§20, 24 (2003); and ABA Model Rule 1.14.

FORMAL OPINION NO. 2005-41

Competence and Diligence: Client with Diminished Capacity

Facts:

For many years, Lawyer has represented Client on business matters. Recently, however, Lawyer has begun to observe extraordinary behavior by Client that appears to be out of character with Client's former behavior and contrary to Client's own best interests. Based on these observations, Lawyer becomes reasonably concerned that Client is no longer capable of handling Client's own affairs. When Lawyer discusses these concerns with Client, however, Client tells Lawyer to mind Lawyer's own business.

Question:

Notwithstanding Client's directions, may Lawyer take steps to protect what Lawyer believes to be Client's best interests?

Conclusion:

Yes, qualified.

Discussion:

As a general proposition, lawyers owe their clients a duty of competent and diligent representation as well as a duty to preserve information relating to the representation. See, e.g., Oregon RPC 1.1, 1.3, and 1.6, discussed in OSB Formal Ethics Op Nos 2005-18 and 2005-17. Although these duties are nearly absolute, Oregon RPC 1.14 provides an exception:

> (a) 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.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interests.

A lawyer in such a situation must reasonably believe that there is a need for protective action and then may take only such action as is reasonably necessary under the circumstances. If, for example, Lawyer expects that Client's questionable behavior can be addressed by Lawyer raising the issue with Client's spouse or child, a more extreme course of action, such as seeking the appointment of a guardian, would be inappropriate.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see THE ETHICAL OREGON LAWYER §§7.23, 18.11–18.21 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§16–24 (2003); and ABA Model Rule 1.14.

See also OSB Formal Ethics Op No 2005-159, which states that (1) a lawyer representing a mentally ill parent in a dependency or termination-of-parental-rights case should seek the lawful objectives of the client and not substitute the lawyer's own interest and (2) a lawyer may seek appointment of a guardian to speak for the client, or may take other protective action for the client as limited by the disciplinary rule, if the client cannot act in his or her own interests.

Paragraph (c) applies the vicarious disqualification that would be imposed under DR 5-105(G) to a DR 5-109 conflict; the screening provision is broader than DR 5-105(I), which is limited to lawyers moving between firms.

Paragraph (d) has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, except that it requires screening substantially in accordance with the specific procedures in Rule 1.10(c). It deviates slightly to clarify that (b) applies to staff lawyers who do not perform traditional "law clerk" functions.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Adopted 01/01/05

Amended 12/01/06:
Paragraph (b) amended to conform to ABA Model Rule 1.13(b).

Defined Terms (see Rule 1.0):

"Believes"
"Information relating to the representation"
"Knows"
"Matter"
"Reasonable"
"Reasonably"
"Reasonably believes"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended in August 2003, except that in paragraph (g), the words "may only" replace "shall" to make it clear that the rule does not require the organization to consent.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) 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.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Information relating to the representation of a client"
"Reasonably"
"Reasonably believes"
"Substantial"

Comparison to Oregon Code

Paragraph (b) is similar to DR 7-101(C), but offers more guidance as to the circumstances when a lawyer can take protective action in regard to a client. Paragraph (a) and (c) have no counterparts in the Oregon Code, but provide helpful guidance for lawyers representing clients with diminished capacity.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges or meeting minimum balance requirements on that account, but only in amounts necessary for those purposes.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Adopted 01/01/05

Amended 11/30/05:
Paragraph (a) amended to eliminate permission to have trust account "elsewhere with the consent of the client" and to require accounts to conform to jurisdiction in which located.
Paragraph (b) amended to allow deposit of lawyer funds to meet minimum balance requirements.

Amended 12/01/10:
Paragraph (c) amended to create an exception for fees "earned on receipt" within the meaning of Rule 1.5(c)(3).

Defined Terms (see Rule 1.0):

"Law firm"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a)-(e) contain all of the elements of DR 9-101(A)-(C) and (D)(1), albeit in slightly different order. The rule is broader than DR 9-101 in that it also applies to the property of prospective clients and third persons received by a lawyer. Paragraph (c) makes it clear that fees and costs paid in advance must be held in trust until earned unless the fee is denominated "earned on receipt" and complies with the requirements of Rule 1.5(c)(3).

Comparison to ABA Model Rule

Paragraph (a) has been modified slightly from the Model Rule, which applies only to property held "in connection with a representation,"