

2022 FORMAL ETHICS OPINION 1

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ATTORNEY SERVING DUAL ROLE OF GUARDIAN AD LITEM AND ADVOCATE

Adopted: April 22, 2022

Opinion rules that an attorney appointed by the court as the guardian ad litem and the attorney advocate in an abuse, neglect, and dependency proceeding may not testify as a witness unless directed to do so by the court.

Background Information:

The North Carolina Guardian ad Litem (GAL) Program, which was established through N.C. Gen. Stat. § 7B-1200, represents juveniles in district court proceedings involving allegations of abuse, neglect, and/or dependency. When a county department of social services agency files a petition alleging that a juvenile is abused or neglected, the GAL Program is appointed to represent the juvenile. When dependency is the sole allegation in a petition, the appointment is discretionary. Under N.C. Gen. Stat. § 7B-601(a), an attorney advocate must be appointed “to assure protection of the juvenile’s legal rights” in every case where a nonattorney is appointed as the guardian ad litem. In all cases where an appointment occurs, the appointment must be made through the GAL Program, pursuant to N.C. Gen. Stat. § 7B-601 and N.C. Gen. Stat. § 7B-1200. However, as per N.C. Gen. Stat. § 7B-1202, the court may appoint “any member of the district bar to represent the juvenile” if “a conflict of interest prohibits a local program from providing representation.”

Facts:

A conflict of interest is present that precludes the GAL Program from being appointed to serve a juvenile in abuse/neglect/dependency (AND) proceedings. As a result, an attorney who is not associated with the GAL Program is appointed to serve the dual role of GAL volunteer and GAL attorney advocate. The appointed attorney is required to fulfill the statutory obligations of the GAL Program and the GAL volunteer as well as the legal and ethical duties of the GAL attorney advocate. In performing the statutory duties of the GAL volunteer, the attorney will, among other things, interview and communicate with the child-client, the placement provider, and other collateral sources; draft and submit to the court GAL court reports, and testify about his/her investigation and recommendations to protect and promote the juvenile’s best interests.

The GAL court reports contain firsthand observations of the attorney and statements made to the attorney by the child-client that are intended to be communicated to the court and statements made by the placement provider, teachers, and other collateral contacts. The GAL court reports also include recommendations to the court about all aspects of the child-client’s life and the case including the placement and custody of the child-client and services that should be provided to the child-client, the parents, or other parties. In some instances, the court will not admit the GAL court report into evidence without the attorney providing the appropriate foundation through their sworn testimony or affirmation.

Inquiry #1:

May the attorney file with the court and offer a GAL court report into evidence that he/she drafted?

Opinion #1:

Yes, if the court appoints the attorney solely in the GAL role. However, if the court appoints the attorney in the dual role of GAL and attorney advocate, the attorney may only proceed if the attorney informs the court of the ethical concerns associated with the attorney’s dual role and the court concludes that the attorney may proceed in the dual role.

Generally, when an attorney is appointed in a purely GAL role, the attorney does not have an attorney-client relationship with the child and therefore most of the Rules of Professional Conduct do not apply. 2004 FEO 11. However, when an attorney is appointed to serve the dual role of GAL and attorney advocate, the Rules of Professional Conduct apply. For example, except under limited circumstances, attorneys are prohibited from acting as an advocate at a trial if the attorney is likely to be a necessary witness. Rule 3.7. Therefore, the attorney must inform the court that the attorney cannot serve as a GAL and the advocate if the court will call upon the attorney to testify. The attorney must ask the court to limit the attorney’s role to either the GAL or the advocate. The attorney must also ask the court to either appoint a nonlawyer to serve as the GAL or appoint a second attorney to serve as the attorney advocate.

The Ethics Committee previously addressed a similar issue. In 2012 FEO 9, the ethics committee opined that an attorney appointed to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the attorney's role and specifies the responsibility of the attorney. The opinion directs the attorney to remind the court of the attorney's professional limitations regarding testifying as a necessary witness under Rule 3.7 and assist the court with defining the attorney's role. The same is true here. If the attorney is appointed to the dual role of GAL and advocate, the attorney must immediately inform the court that he has a conflict under Rule 3.7 and ask the court to clarify the attorney's role.

If the court appoints the attorney solely as the GAL, the duties of the GAL are outlined in N.C. Gen. Stat. § 7B-601. The statute provides:

The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure [*sic*] that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C. Gen. Stat. § 7B-601.

An attorney may only prepare the GAL report and testify if the court is informed by the attorney of the conflict created by the dual roles (e.g., that an attorney cannot serve as a necessary witness and simultaneously serve as the advocate) and the court permits the attorney to serve dual roles in the proceeding.

Inquiry #2:

If the court declines the attorney's request to limit the appointment to one role, do the North Carolina Rules of Professional Conduct, specifically Rule 3.7, permit the attorney to be a witness and be subject to cross-examination?

Opinion #2:

No, unless at the time of appointment the attorney has asked the court to clarify the attorney's role, and the court orders the attorney to serve the dual role of GAL and attorney advocate. *See* Opinion #1. Rule 3.7(a) provides that an attorney 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; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Rule 3.7 prohibits an attorney from serving as both an advocate and a witness in a trial to eliminate the confusion that may result for the trier of fact when an attorney serves in both roles. The comment to the rule describes this as "the ambiguities of the dual role" and observes, "[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others." Rule 3.7, cmt. [2]; *see also* 2011 FEO 1.

An attorney who is identified as a witness has a professional responsibility, pursuant to Rule 3.7, to determine whether he or she is "likely to be a necessary witness" and, as such, is disqualified from acting as an advocate at the trial. It is generally agreed that when the anticipated testimony is relevant, material, and unobtainable by other means, the attorney's testimony is "necessary." *See* Ann. Model Rules of Professional Conduct R. 3.7 (6th ed. 2007), p. 361 (internal citations omitted); 2012 FEO 15.

Notwithstanding the above, the purpose of the prohibition set out in Rule 3.7 is to avoid confusing the trier of fact. In AND cases, the only trier of fact is the judge, and no jury is impaneled. It is unlikely the judge will be confused by the attorney's role. Moreover, the court has concurrent jurisdiction on matters of ethics and maintains inherent powers to deal with its attorneys. *See* N.C. Gen. Stat. § 84-36. Therefore, if the judge decides that in the interest of judicial efficiency the attorney will serve dual roles, the attorney may serve dual roles and prepare and file a GAL court report, testify as to his findings in the GAL court report, and simultaneously serve as the attorney advocate for the children. Under this limited circumstance, the attorney may be called as a witness and be subject to cross-examination.

Inquiry #3:

What is the court's role, either within a hearing or through local rules, in resolving issues about whether the attorney may file a GAL court report or testify?

Opinion #3:

It is outside the purview of the Rules to determine the court's role. However, N.C. Gen. Stat. § 84-36 provides, "[n]othing contained in this Article [Chapter 84] shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." Because the court has concurrent jurisdiction on matters of ethics, the court may in its discretion determine whether the attorney may file a GAL court report and whether the attorney's testimony is necessary. *See* Opinion #2.