

## **New Ethics Opinion on Dual Role GAL–Attorney Advocates in Juvenile Proceedings**

*This post was updated on September 6, 2022 in response to helpful reader feedback regarding the nuances that exist when determining whether there is a conflict of interest for a GAL program and, if so, the possible options available to cure that conflict. The amended portion can be found in the Conflicts of Interests section below.*

The State Bar has issued an ethics opinion discussing the role of attorneys who are appointed as a guardian ad litem (GAL) volunteer, GAL attorney advocate, or both, in juvenile abuse, neglect, dependency or termination of parental rights matters. See [N.C. State Bar, Formal Ethics Opinion 1 \(2022\)](#), hereinafter 2022 FEO 1. While the opinion does not specifically mention termination proceedings, G.S. 7B-601—the statute that details the duties of a GAL in an abuse, neglect, dependency matter—also applies to GALs in termination proceedings. G.S. 7B-1108. 2022 FEO 1 should be considered as applying to GAL appointments in both juvenile and termination proceedings. This ethics opinion places new obligations on the appointed attorney and includes a role for the district court judge making the appointment. Typically, the attorney appointed to serve as both GAL attorney advocate and volunteer is an attorney known to the juvenile court for representing parents. The guidance provided in 2022 FEO 1 is important for parent attorneys and all other court actors in juvenile proceedings.

### **Typical representation of a juvenile in juvenile proceedings**

Within the administrative Office of the Courts is an Office of GAL Services. When a department of social services (DSS) files a petition alleging abuse or neglect, the court appoints the GAL program to represent the juvenile. (If a petition only alleges dependency, the appointment is in the court's discretion. G.S. 7B-601(a).) The GAL program's purpose is to protect the legal rights of the juvenile. G.S. 7B-601(a). The GAL program typically includes an attorney advocate who represents the juvenile in court, a GAL volunteer who is a trained community member charged with investigating allegations and making recommendations as to the juvenile's best interests, and a local GAL program staff member who oversees the program's operation, including the training, retention, and management of GAL volunteers. G.S. 7B-1200. Collectively this group of individuals is referred to in practice as the GAL program. The GAL program can be thought of as team approach to the representation of a juvenile, a concept that has been acknowledged by the N.C. Supreme Court as being the intent of the legislature. See *In re J.H.K.*, 365 N.C. 171, 175 (2011).

The most common representation of juveniles in North Carolina involves Person A serving as attorney advocate and Person B serving as GAL volunteer. The attorney advocate performs traditional attorney tasks, such as calling and cross-examining witnesses, filing motions, and making arguments, and is subject to the usual Rules of Professional Conduct. The GAL volunteer performs various tasks such as investigating allegations, learning the juvenile's needs, and

identifying resources to help meet those needs. G.S. 7B-601(a). The GAL volunteer may observe hearings, confer with the attorney advocate, prepare written reports to be submitted into evidence, and testify.

*Note:* If Person A is serving as the attorney advocate and Person B as the GAL volunteer, but Person B happens to be an attorney, Person B's professional status as an attorney is irrelevant according to the State Bar. Person B's work as GAL volunteer is not subject to the Rules of Professional Conduct as no attorney-client relationship is formed between a juvenile and someone serving strictly as GAL volunteer. N.C. State Bar, [Formal Ethics Opinion 11](#) (2005).

### Conflicts of interest

[The following section was amended on September 6, 2022 to more clearly identify the nature of conflicts of interest relating to juvenile representation and the steps that may be taken to cure a conflict.] Sometimes, conflicts of interest arise that may prevent the GAL program, or a particular member of the program, from representing a juvenile. An attorney advocate, for example, likely cannot represent a juvenile if the advocate previously represented or currently represents another person whose interests differ from those of the juvenile. See N.C. Rules of Prof'l Conduct R. 1.7. (Unlike an adult, the juvenile cannot waive the conflict of interest by consenting to the representation. *Id.*) Consider a situation where a parent was once the juvenile at the center of a proceeding and was represented by the GAL program. The same attorney advocate who represented the parent as a minor should not later represent that parent's child in a new proceeding, as the parent is a former client. Whether the entire GAL program or just the attorney advocate is conflicted out from representing the juvenile depends in part on whether program staff and volunteers are the same individuals who were involved in the prior matter. A district court judge who is considering the appointment of a conflict attorney and who is in the process of defining that attorney's role or roles may consider the nature and extent of the GAL program's conflict as well as the availability of additional staff or volunteers to serve in the present matter.

Another common example of a situation where a conflict arises occurs when DSS files a petition on a juvenile whose parent is also a minor in the custody of DSS. The GAL attorney advocate--and, depending on the circumstances, possibly the entire GAL program--cannot simultaneously represent both the minor parent and the juvenile, as their interests may differ. Similarly, a conflict of interest also exists in cases involving allegations of abuse by one sibling against another sibling. Alleged perpetrators and victims require separate representation.

In these situations, a local attorney who is not affiliated with the GAL program and does not have a conflict of interest in the matter will be appointed to represent the juvenile. G.S. 7B-1202. If the attorney is appointed to serve as both attorney advocate and GAL volunteer, the requirements of 2022 FEO 1 come into play.

### One person with two roles

Where there is a conflict of interest for the GAL attorney advocate or program (or a lack of GAL volunteers, a common issue in rural areas), an attorney may be appointed to serve in both the GAL volunteer and attorney advocate roles. These dual-role attorneys act as both fact witnesses and attorneys. A recent N.C. Supreme Court opinion, *In re R.D.*, 376 N.C. 344 (2020), discussed the potential ethical barriers to the appointment of attorneys in both roles. The opinion generated questions about what the representation should look like, which have now been answered by 2022 FEO 1. I break down the opinion and its impact in the questions and answers below.

**Do the Rules of Professional Conduct apply to an attorney serving as both GAL volunteer and attorney advocate?** Yes. The Rules of Professional Conduct apply to anyone who is acting as an attorney in North Carolina. Here, the individual is practicing law as an attorney advocate and is not serving only as GAL volunteer. 2022 FEO 1.

**What is Rule of Professional Conduct 3.7, and why is it relevant to an attorney serving as both GAL volunteer and attorney advocate?** Lawyers are generally prohibited from serving in an advocacy role in a trial in which the lawyer is likely to be a necessary witness. N.C. Rules of Professional Conduct R. 3.7. One reason is that combining the attorney and witness roles risks confusing or misleading the court. *Id.* 2022 FEO 1 emphasized this concern:

“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. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”

2022 FEO 1, *quoting* Rule 3.7, cmt 1.

If someone other than the attorney advocate is appointed as the GAL volunteer, the GAL volunteer may be called by a party or by the court sua sponte to testify about their investigation, observations of people and places, and other potentially valuable information. If the GAL volunteer and attorney advocate roles are both performed by the same lawyer, however, that lawyer risks violating Rule 3.7's prohibition against a lawyer advocating in a trial in which they also may be a necessary witness.

**Given the ethical considerations, what should an attorney who is appointed as both GAL volunteer and attorney advocate do in response to the appointment?** 2022 FEO 1 requires the attorney to inform the court that the appointment creates a conflict and that they are unable to serve in the dual role given the likelihood they will need to testify. The attorney must ask the court to limit the appointment to either GAL volunteer or attorney advocate, not both. *Id.* If the attorney is going to serve as the attorney advocate, the attorney must request that someone else be appointed as the GAL volunteer. Conversely, if the attorney is appointed as GAL volunteer, the attorney must request that a different attorney be appointed to serve as attorney advocate. *Id.*; see

also [N.C. State Bar, Formal Ethics Opinion 9 \(2013\)](#) (holding that an attorney appointed to represent a child in a custody or visitation action who may be called to testify must remind the court of the relevant professional conduct limitations and should decline the appointment if the court does not clarify the attorney's responsibilities).

**Despite these ethical considerations, can a court still appoint one attorney to serve in both roles?** Whether to appoint one attorney as both the GAL volunteer and attorney advocate is in the court's discretion, given the court's inherent power over attorneys and proceedings and concurrent jurisdiction on matters of ethics. 2022 FEO 1 (recognizing a court's innate authority over officers of the court and matters being presided over); see also G.S. 84-36 (acknowledging a court's "inherent powers...to deal with its attorneys.").

**If, after being informed of the potential ethical concerns of serving as both GAL volunteer and attorney advocate, the court proceeds to appoint one attorney to both roles, what are that attorney's responsibilities?** 2022 FEO 1 warns of the difficult ethical tensions that exist for an attorney appointed in such a dual role. The opinion recognizes the reality that attorneys may still find themselves being dually appointed, and it directs the attorney to follow the guidance provided in the opinion, discussed above. As for what the responsibilities are for an attorney if required by the court to serve in both roles, the opinion states: "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 other words, the attorney must perform the duties that would normally be carried out by the entire GAL program to ensure adequate representation of the juvenile.

**An attorney appointed solely as GAL volunteer can prepare a written report to be filed and submitted into evidence. 2022 FEO 1; see also G.S. 7B-601. Can an attorney appointed as both GAL volunteer and attorney advocate do the same?** Yes, with a caveat. "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." 2022 FEO 1. This caveat is further evidence of the need for attorneys to follow the opinion's guidance on how to respond to a dual-role appointment. The attorney needs to take the steps outlined in the opinion and this post to ensure that they can fully perform the duties of their appointment (e.g., to prepare a written report as a GAL volunteer).

**Can an attorney serving as both GAL volunteer and attorney advocate testify and be subject to cross-examination?** Generally, an attorney cannot advocate in a trial in which they are likely to be a necessary witness. N.C. Rules of Prof'l Conduct R. 3.7. But the recent ethics opinion, in discussing Rule 3.7's purpose of preventing confusion for the trier of fact, notes that juvenile matters are heard by judges—not juries—which reduces the risk of confusion. Therefore, if a judge decides that an attorney will serve dual roles, the attorney may testify and be subject to cross-examination. 2022 FEO 1.

Ethically, the opinion makes clear that a dually appointed attorney can testify if the requirements provided in 2022 FEO 1 are satisfied. An open question remains as to whether a judge can appoint an attorney to a dual role but then prohibit the attorney from testifying. A GAL volunteer is ordinarily a fact witness. Appointing an attorney to serve as both attorney advocate and GAL volunteer, but then prohibiting someone who is normally a fact witness from testifying, seems problematic. The prohibition against someone serving as a GAL volunteer from testifying may deny the court access to valuable information. The prohibition may also give rise to due process concerns for parties who want to present evidence obtained by a person serving as a GAL volunteer. A party who is denied the ability to call a dually appointed attorney to testify or to cross-examine such a person should consider objecting on the record on the basis that the decision amounts to a constitutional violation of due process. *In re R.D.*, 376 N.C. at 253. This complicated situation is an example of the challenges posed by dual-role appointments and why appointing separate individuals whenever possible is the cleanest approach.

### Conclusion

Whether the appointment occurs because of a conflict of interest, a shortage of available GAL volunteers, or some other reason, an attorney who is appointed to serve as both a juvenile's GAL volunteer and attorney advocate should take the steps discussed in this post to comply with the Rules of Professional Conduct as explained in 2022 FEO 1. The State Bar opinion suggests that dual-role appointments should be avoided when possible. Separating the appointments allows an attorney advocate to perform familiar lawyerly tasks, comfortably sure that they are acting within the Rules of Professional Conduct. Separate appointments also allows the GAL volunteer to perform their statutorily required duties without blurring the lines with the roles and restrictions of attorneys. The GAL volunteer can investigate and make recommendations regarding the juvenile, the parties can argue about the value of the GAL volunteer's positions, and the court can hear the evidence and render a judgment.

Those attorneys who find themselves between a rock and a hard place, serving as both GAL volunteer and attorney advocate, should pay attention to the responsibilities of both roles. It is a tricky path to navigate, but 2022 FEO 1 sheds some light on the course to take. Feel free to reach out to me if you would like to chat about your role and responsibilities.