San Diego County Bar Association
Opinion 2017-2

Questions Presented:

What are an attorney's ethical duties when the attorney believes that a guardian ad litem is not properly representing one client?

What are an attorney's ethical duties when one of two clients has the opportunity to settle separately, but the second client opposes the settlement?

Answers:

An attorney may properly petition the Court for appointment of a new guardian ad litem, but may not disclose confidential information that the existing guardian ad litem requests remain confidential.

An attorney may not ethically assist one client in settling a matter when another client in the same matter reasonably believes that the settlement will materially adversely affect the second client's matter, even if the impact would be based purely on an anticipated change in the perception by the finder of fact.

Background Facts:

Single Parent and minor Child are involved in an automobile accident. Parent decides to sue the driver of the other vehicle. Because Parent is a party to the litigation, Parent cannot serve as Child's guardian ad litem. So, Parent asks Friend to serve in that role and the Court approves Friend's application to serve as Child's guardian ad litem ("GAL")[1].

Attorney obtains a proper conflict waiver signed by Parent and Friend and serves as counsel for both Parent and Child. Parent ultimately decides that Parent wants to pursue a settlement position against advice of counsel. Although a pending offer to Child made outside of mediation that Attorney believes more than adequately compensates Child would not require Child to take a positon adverse to Parent, Parent believes that Child settling separately would negatively impact Parent's negotiation power. Friend tells Attorney that Friend will follow Parent's suit and refuse to settle at this time because of Friend's relationship with Parent, rather than out of an assessment of the fairness of the offer to Child. Attorney believes that Friend is not acting in the best interests of Child. Attorney is also seeking to withdraw from representing Parent if Parent does not change Parent's approach to litigation.

Authorities Addressed:

Bus. & Prof. Code, § 6068; Evid. Code, § 953; Rules Prof. Conduct, rules 3-100 and 3-700; *Berry v. Chaplin* (1946) 74 Cal.App 2d 652; *De Los Santos v. Super. Ct.* (1980) 27 Cal.3d 677; *In re Christina B.* (1993) 19 Cal.App.4th 1441; *McClintock v. West* (2013) 219 Cal.App.4th 540; *Torres v. Friedman* (1985) 169 Cal.App.3d 880; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; State Bar of Cal. Comm. On Prof. Resp. and Conduct, Formal Op. Nos. 1993-133 and 2016-195; Virginia State Bar Legal Ethics Opn. 1884

[1] In some instances, for example, where he or she is not injured, a parent may serve as a minor's guardian. That distinction, however, would not change the analysis contained within this opinion.

Discussion:

Attorney represents Child, not GAL.

GALs are in unique positions because they represent the "best interests" of a ward and not necessarily that person's wishes (even though such expressed wishes may be factored into what constitutes the ward's best interests and conveyed to the court). The GAL makes recommendations regarding best interest and the attorney is, in essence, the GAL's voice.

But, a lawyer is engaged to represent the individual, and to act in concert with the GAL to protect the ward's legal rights. The representation may be unconventional because it is done as a team, in cooperation with the GAL, and because the representation is of the individual's best interests.

So, here, Attorney's client is Child, not GAL. Although a lawyer may primarily communicate with guardian ad litem, who makes the relevant decisions for the minor, the GAL is a party representative appointed to protect the rights of the individual in court proceedings. He is not a party to an action.[2] (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1453.)

Attorney may take action adverse to Friend appointed as GAL to protect Child.

As set forth in *Berry v. Chaplin* (1946) 74 Cal.App.2d 652, the person named as guardian ad litem is an officer and agent of the court appointing him or her. (*Id*. at p. 657.) The GAL may make tactical and even fundamental decisions affecting the litigation, but all decisions must be in the best interests of the ward. (*In re Christina B.*, *supra*, 19 Cal.App.4th at p. 1454.)

Here, Attorney represents Child, and thus owes Child the fiduciary duties attendant to any attorney-client relationship. Attorney is concerned that Friend is not making decisions in the best interests of Child, Attorney's client and, therefore, is not fulfilling the obligations of a guardian ad litem. So, Attorney has a duty to act, which may include an obligation to Child to raise his concerns about Friend with the court. (*Berry v. Chaplin*, *supra*, 74 Cal.App.2d at p. 657 ["It is the duty of the guardian and the attorney to protect the rights of the minor, and it is the duty of the court to see that such rights are protected."].) Indeed, if necessary, the court can remove Friend as a guardian ad litem if Friend is not acting in the best interests of Child. (See, e.g., *McClintock v. West* (2013) 219 Cal.App.4th 540, 552.) Parent does not have the right to demand that Friend continue to serve as GAL. (See *Williams v. Super. Ct.* (2007) 147 Cal.App.4th 36, 51-52.)

Duty of confidentiality may limit petition to the court.

As described in detail in State Bar of California Committee on Professional Responsibility and Conduct Formal Opinion No. 2016-195, the duty of confidentiality (Bus. & Prof. Code, § 6068, subd. (e); Rules Prof. Conduct, rule 3-100(A)) extends far broader than the attorney-client privilege. It also includes client secrets, which are defined as "any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the

[2] This conclusion is also consistent with that reached in other states. (See, e.g., Virginia State Bar Legal Ethics Opn. 1884 ["The role of counsel for a child is the representation of the child's legitimate interests."].)

disclosure of which might be embarrassing or detrimental to the client." (*Ibid.* [citing State Bar of Cal. Comm. On Prof. Resp. and Conduct, Formal Op. No. 1993-133].)

Here, Attorney owes a duty of confidentiality to both clients, Child and Parent, but not to Friend. Accordingly, Attorney need not be concerned whether the information disclosed to the court is embarrassing or detrimental to Friend, who is serving as the GAL. That does not mean, however, that Attorney may petition the court for a new GAL without regard to any communications with Friend.

Even though Friend is not Attorney's client, communications with a GAL are considered protected by the attorney-client privilege—and are, therefore, protected as confidential—because they are "reasonably necessary for the transmission of information or the accomplishment of the purpose" of the representation. (*De Los Santos v. Super. Ct.* (1980) 27 Cal.3d 677, 684.)

Without a valid waiver of the attorney-client privilege, Attorney may not disclose confidential communications with Friend to the court. And until replaced, Friend, as the representative of Child, would have the right to enforce or waive the attorney-client privilege. (*De Los Santos v. Super. Ct.*, *supra*, 27 Cal.3d at p. 682; Evid. Code, § 953, subd. (b).) If Friend will not waive the privilege, then Attorney may not reveal the communication with Friend disclosing that Friend was following Parent's decisions rather than independently assessing what was in Child's best interests. But, Attorney would be able to recite actions that Friend had taken that Attorney believes were not in the Child's best interests and Attorney could offer an opinion that those actions were against Child's best interests. In doing so, Attorney could not reveal any information that was potentially embarrassing or detrimental to Child or Parent.

<u>Duty of loyalty to Parent may limit what Attorney may do for Child</u>

The facts that Attorney believes that Parent is making a mistake regarding Parent's approach to litigation in general, or the settlement, in particular, and that Attorney is considering withdrawing do not impact the ongoing duty of loyalty owed to Parent. Indeed, even if Attorney does withdraw from representing Parent and continues to represent Child, Attorney will still owe a duty to Parent regarding the subject of the litigation. "An attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574.)

Often, representing multiple family members involved in a personal injury incident will be permissible with a conflict waiver. Indeed, one was obtained here. But there are situations where a conflict might be unwaivable. In general, those are where the lawyer may no longer resolve the matter on terms compatible with each client's interests. The most common example of an unwaivable conflict is where settlement is conditioned on taking a position adverse to another client's interests.

Here, the facts do not indicate such a scenario. But it is still possible that Attorney may not attempt to settle around one client without the consent of the other.

It is unclear whether the interests of Attorney's two clients actually conflict. For guidance we look to Model Rule 1.7(a)(2).[3] In part, it provides that a conflict of interest exists where "there is a significant

[3] The ABA Model Rules are not binding in California but may be used for guidance by lawyers where

risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." The facts do not provide sufficient information to determine whether settling Child's claim against Parent's wishes would materially limit Attorney's representation of Parent.

Child settling independently without entering into any factual stipulations regarding Parent does not change either the tortfeasor's liability to Parent or Parent's damages. In theory then, Child settling should not affect Parent or Parent's rights.

In certain situations, however, the presentation of multiple claims may have an emotional impact, whether in negotiations or at trial. The chance of this happening, however, is likely lessened if the Child is still able to testify about the automobile accident, the injuries sustained, changes in the relationship with Parent that arose from the accident, and changes in Parent's conduct around the home. To the extent that some of these subjects would be subject to exclusion from presentation to the finder of fact, then Parent's claims could be materially impacted by Child's settlement if such testimony would reasonably be likely to increase the valuation of Parent's damages. Here, Parent believes that a better deal may be had if Child and Parent hold out for a global resolution. But, due to the absence of a change in the ability to present Parent's case with the same facts and arguments based on Child remaining a party to the litigation, it is unclear whether that belief is a reasonable one.

Finally, the fact that clients may take a differing position regarding settlement is a staple in many conflict waivers. Accordingly, it well may have been waived in this scenario. But if it has not, Attorney concludes that Parent's claims could reasonably be impacted by Child settling, and the differing settlement positions of Child and Parent cannot be resolved, then Attorney may need to withdraw. [4]

Withdrawal

In the event that Attorney concludes that Attorney must withdraw from representing either or both clients, Attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients. (Rules of Prof. Conduct, rule 3-700(A)(2).) The relationship an attorney has with a minor represented by a GAL differs from the typical relationship an attorney has with a client. A primary difference is that the GAL's control of the litigation and directions to counsel are subject to the court's approval. (See, e.g., *Torres v. Friedman* (1985) 169 Cal.App.3d 880, 887.) And because a guardian ad litem cannot act on behalf of a ward without assistance of counsel, Attorney can withdraw from representation of Child only with court approval. (*Id.* at p. 888.) So, Attorney should take reasonable steps to ensure the GAL, whether Friend or otherwise, has sufficient time to identify and engage substitute counsel. This may include, for example, seeking extensions or a stay to accommodate the transition.

---

there is no direct California authority and the ABA Model Rules do not conflict with California policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852.)

[4] We note that Attorney's withdrawal will likely have little benefit to Parent since new counsel for Child will presumably complete the settlement if they agree that the deal is in Child's best interests.