

Statewide Guardian ad Litem Office

**GUARDIAN AD LITEM
PROGRAM ATTORNEY
STANDARDS OF PRACTICE**

Effective

March 1, 2006

TABLE OF CONTENTS

PURPOSE	1
AUTHORITY	1
SCOPE	1
DEFINITIONS	1
GUARDIAN AD LITEM PROGRAM (GAL PROGRAM)	1
PROGRAM ATTORNEY	1
STANDARDS	1
1.0 PROFESSIONALISM	1
1.1 CLIENT RELATIONS	1
1.2 DECORUM	1
1.3 COMMUNICATION WITH OUTSIDE AGENCIES AND PROFESSIONALS	2
1.4 ETHICAL ISSUES	2
1.4.1 GAL PROGRAM AS CLIENT	2
1.4.2 VIOLATIONS BY GAL PROGRAM	2
1.4.3 CONFIDENTIALITY	2
1.5 ROLE OF THE SUPERVISING ATTORNEY	2
1.6 REPORTING REQUIREMENTS	3
1.7 CONFLICTS OF INTEREST	3
2.0 PRACTICE	3
2.1 COMMUNICATION WITH CLIENT	3
2.1.1 POLICY ISSUES	4
2.1.2 LEGAL STRATEGY	4
2.2 APPEARANCE	4
2.3 BEST INTEREST OF CHILD STANDARD	4
2.3.1 CONTINUANCES	4
2.4 COURT PREPARATION	5
2.4.1 TIMELY FILINGS	5
2.4.2 PREPARATION OF CLIENT	5
2.4.3 DISCOVERY	5
2.4.4 NOTICE AND SUBPOENAS	5
2.4.5 CHILD’S ATTENDANCE AND TESTIMONY	5
2.5 KNOWLEDGE OF THE LAW	6
2.6 COURT PROCEEDINGS	6
2.6.1 MOTIONS AND EVIDENTIARY OBJECTIONS	7
2.6.2 PUNITIVE ACTION TAKEN AGAINST THE GAL PROGRAM	7
2.6.3 PRESENTING AND CROSS-EXAMINING WITNESSES	7
2.6.4 PREPARING AND PRESENTING EXHIBITS	7
2.7 POST HEARING	7
2.7.1 REVIEW OF PROPOSED ORDERS	7
2.7.2 COMPLIANCE WITH ORDERS	8
2.8 APPEAL	8
2.8.1 EXPEDITED APPEAL	9
2.8.2 COMMUNICATE RESULT	9
3.0 EX PARTE COMMUNICATION	9

GUARDIAN AD LITEM PROGRAM ATTORNEY STANDARDS OF PRACTICE

PURPOSE:

To provide general standards of practice for Guardian ad Litem Program Attorneys.

AUTHORITY:

Chapter 39, Florida Statutes, and specifically § 39.8296, Florida Statutes (2005).

SCOPE:

These standards apply to Program Attorneys as defined below.

DEFINITIONS:

Guardian ad Litem Program (GAL Program): all individuals employed by and volunteering for the Guardian ad Litem Program, except for the purpose of these standards, Program Attorneys as defined below. GAL Program includes Program Directors and Circuit Directors (collectively, “Program Directors”), Case Coordinators, and Volunteers.

Program Attorney: all full-time State Employees, part-time State Employees, Contract Attorneys and Other Personnel Services (OPS) Employees providing legal counsel to the GAL Program.

STANDARDS:

1. Professionalism

The Program Attorney shall at all times act in a professional and ethically responsible manner.

1.1 Client Relations

It is the responsibility of the Program Attorney to regularly and frequently communicate with the GAL Program. This contact shall be verbal and written. The Program Attorney shall participate in all internal staffings and meetings held by the GAL Program as determined by the Supervising Attorney or Program Director. Program Attorneys shall maintain a courteous and respectful relationship with GAL Program volunteers. The Program Attorney shall be open and responsive to the concerns, opinions, and ideas of GAL Program volunteers.

1.2 Decorum

The Program Attorney shall wear professional and appropriate clothing. The Program Attorney shall maintain dignified, polite, and respectful behavior at all times.

1.3 Communication with Outside Agencies and Professionals

The Program Attorney shall protect and promote the GAL Program's credibility. The Program Attorney shall at all times communicate in a dignified, polite, and respectful manner with all outside agencies and professionals. The Program Attorney shall present a positive image of the GAL Program at community functions and meetings. The Program Attorney shall return phone calls, e-mails, and other correspondence in a timely manner.

1.4 Ethical Issues

The Program Attorney shall at all times comply with the Rules Regulating the Florida Bar, all of which are incorporated herein by reference.

1.4.1 GAL Program as Client

The Program Attorney represents the GAL Program as a legal entity, and the GAL Program is the client as referenced in Rule 4-1.13, Rules Regulating the Florida Bar.ⁱ The GAL Program is appointed to represent the child's best interests in dependency court proceedings. The Program Attorney provides counsel regarding the child's best interest and shall fully participate in the decisions regarding the child's best interests as indicated in Standard 4.6 of the GAL Standards of Operation.

1.4.2 Violations by GAL Program

The Program Attorney shall address all violations and potential violations of Florida law or other legal obligations by the GAL Program. In addressing such violations and potential violations, the Program Attorney shall report the matter to the Supervising Attorney who shall immediately advise the Program Director.

1.4.3 Confidentiality

Pursuant to state and federal law, the Program Attorney shall at all times strictly follow all laws and rules related to confidentiality. When appropriate, the Program Attorney shall assist the GAL Program in obtaining and protecting confidential information.

1.5 Role of the Supervising Attorney

The Supervising Attorney shall supervise the practice of law within the Circuit Program by making all efforts necessary to ensure that all Program Attorneys under his or her supervision conform to the highest standard of the profession and comply with these standards and the Rules Regulating the Florida Bar.ⁱⁱ

The Supervising Attorney shall at a minimum:

1. ensure that the Program Attorneys understand their roles and responsibilities;
2. ensure that the Program Attorneys implement and follow GAL Program policies and procedures;
3. ensure case coverage when the Program Attorneys are absent or unavailable;

4. work with the Program Director to allocate caseloads fairly;
5. work with the Program Director to ensure continuity of representation;
6. be available to provide in-house educational and training opportunities;
7. evaluate and mediate conflicts between the Program Attorneys and the GAL Program pursuant to the GAL Program Standards of Operation;
8. contribute to the development of GAL or State Office policies;
9. participate together with the Program Director in hiring and evaluation decisions relating to Program Attorneys; and
10. supervise law clerks, legal research assistants, and law school graduates that are not members of The Florida Bar.

1.6 Reporting Requirements

Unless otherwise agreed upon by the Program Director and State Office, the Program Attorney and the Supervising Attorney shall report to the Program Director regarding administrative issues. The Program Attorney shall report to the Supervising Attorney who shall report to the Office of the General Counsel regarding matters related to the practice of law.

1.7 Conflicts of Interest

The Program Attorney shall avoid all potential and actual conflicts of interest. The Program Attorney shall at all times comply with Rule 4-1, Rules Regulating the Florida Bar, and the Conflict of Interest Standard as detailed in Standard 2.4 of the GAL Standards of Operation.

2. Practice

This section governs key aspects of the Program Attorney's role but is not to be considered exhaustive, as position descriptions may specify additional tasks and responsibilities. In all cases, the Program Attorney shall act as an advocate and use every practice skill appropriate to obtain a result favorable to the child's best interests. If legal issues need to be explained to a child and the child is of appropriate level of maturity, the Program Attorney shall be available to discuss the nature of the proceedings with the child. The Program Attorney should use sound judgment and reasonable diligence when explaining the nature of the legal proceedings to the child. Prior to any communication with the child, the Program Attorney shall explain the role of the GAL Program and the Program Attorney, including the fact that no confidentiality provisions exist between the Program Attorney and the child.

2.1 Communication with Client

The Program Attorney shall have regularly scheduled opportunities to meet with the GAL Program. The Program Attorney should be available for in-person meetings as well as telephone conferences. The Program Attorney shall respond to the GAL Program via e-mail or other written communication in a timely manner. When appropriate, the Program Attorney shall be available to explain the likelihood of achieving the GAL Program's goals and where appropriate, identify alternatives for consideration.

2.1.1 Policy Issues

The Program Attorney shall counsel the GAL Program on policy issues that affect individual cases or the GAL Program as a whole. Policy issues that may have statewide significance or implications shall be discussed with the Supervising Attorney and Program Director, who shall also notify the State Office.

2.1.2 Legal Strategy

The Program Attorney shall develop a legal strategy with the GAL Program to follow at hearings and all stages of the dependency proceeding. The Program Attorney and the GAL Program shall attempt to define the goals of the case and develop steps necessary to reach the desired outcomes.

The Program Attorney should encourage settlements to the extent that the proposed settlement is in the best interests of the child. The Program Attorney should oppose any proposed settlement agreement that is deleterious to the best interests of the child, despite the agreement of some or all of the parties. Prior to entering into any settlement negotiations or agreement, the Program Attorney should have sufficient knowledge of the strengths and weaknesses of the GAL Program's case, or of the issue under negotiation, to enable the Program Attorney to adequately advise the GAL Program of the risks and benefits of settlement. Case strategies that may have statewide significance shall be discussed with the Supervising Attorney and Program Director, who shall also notify the State Office.

If a conflict exists between the legal strategies of the Program Attorney and the GAL Program staff or volunteer, the Program Attorney shall notify the Supervising Attorney and Program Director, and follow the decision-making process contained in Standard 4.6 of the GAL Standards of Operation.

2.2 Appearance

The Program Attorney shall appear and participate in all court proceedings, mediations, depositions, negotiations, pretrial conferences, and staffings as directed by the Supervising Attorney or Program Director.

2.3 Best Interest of Child Standard

The Program Attorney shall at all times advocate for the best interests of the child. The best interests of the child standard, as determined by the Program and set forth in Standard 1.2 of the GAL Standards of Operation, shall be the paramount consideration in every decision or action of the Program Attorney.

2.3.1 Continuances

The Program Attorney shall advocate for timely hearings to ensure that permanency for the child is reached as quickly as possible. The Program Attorney shall only request case continuances in extraordinary circumstances, pursuant to Florida Statutes, and shall make reasonable efforts to expeditiously conclude litigation.

2.4 Court Preparation

The Program Attorney shall thoroughly and adequately prepare for all court proceedings.

2.4.1 Timely Filings

The Program Attorney shall timely file all appropriate pleadings, motions, GAL Program Reports, and legal memoranda.

2.4.2 Preparation of Client

The Program Attorney should communicate with the GAL Program before all hearings to discuss the GAL Program's position at the hearing and what will potentially occur during the hearing. This communication should occur far enough in advance of the hearing to allow the Program Attorney to determine whether additional preparation by the Program Attorney or GAL Program is required before hearing.

2.4.3 Discovery

The Program Attorney shall comply with all rules of discovery as specified in the Florida Rules of Juvenile Procedure, including the filing of demands for discovery where necessary or appropriate, replies to the discovery requests of other parties, and necessary discovery motions. The Program Attorney shall ensure that the GAL Program complies with all rules of discovery and shall assist in such compliance, including the timely redaction of work product from GAL Program files and the timely review and response to the discovery requests and motions of other parties.

2.4.4 Notice and Subpoenas

When necessary to advance the child's best interests, as determined by the GAL Program, the Program Attorney shall subpoena witnesses and documents according to the procedures specified in the Florida Rules of Juvenile Procedure.

2.4.5 Child's Attendance and Testimony

When the child is of the appropriate level of maturity, as determined in consultation with the GAL Program, the child shall be made aware of his or her right to be present at hearings, pursuant to Florida Rules of Juvenile Procedure 8.255(b). If the child wishes to be present, the Program Attorney shall file a motion to require the presence of the child, unless the child's attendance should be excused pursuant to Rule 8.255(b).

If the child has been subpoenaed by another party to testify at hearing, the Program Attorney and the GAL Program shall determine whether it is appropriate for the child to testify, considering the necessity, possible benefits, and repercussions of the child's testimony. Consideration should also be given to the availability of other evidence, including evidence admissible through hearsay exceptions that may substitute for direct testimony.

If the GAL Program and Program Attorney determine testifying to be contrary to the child's best interests, the Program Attorney shall seek agreement of all parties to refrain from calling the child as a witness. In the absence of such agreement and when appropriate, the Program Attorney shall seek other remedies, such as court orders limiting the scope or circumstances of the child's testimony. If the child is compelled to testify, the Program Attorney should seek to minimize the negative consequences of such testimony by seeking appropriate accommodations allowed by law, such as in camera testimony or testimony via closed circuit television.

If the child is compelled to testify, the Program Attorney shall ensure the child is prepared to testify. If an attorney ad litem is appointed to the child, preparation for court testimony should be conducted in collaboration with the child's attorney.

2.5 Knowledge of the Law

The Program Attorney shall fully understand and comply with all relevant state and federal statutes, regulations, policies, rules, and case law including but not limited to the following:

1. Chapter 39, Florida Statutes;
2. Florida Rules of Juvenile Procedure;
3. Florida Evidence Code;
4. Interstate Compact on Placement of Children;
5. Florida Rules of Professional Conduct;
6. Florida Rules of Appellate Procedure;
7. Regulations and Internal Operating Procedures of the Department of Children & Families relating to dependency cases and placement issues;
8. Adoption and Safe Families Act, Adoption Assistance and Child Welfare Act, Child Abuse Prevention and Treatment Act, Indian Child Welfare Act, Multiethnic Placement Act, regulations promulgated pursuant to these federal Acts, and other statutes, regulations, policies, and procedures regarding child abuse and neglect; and
9. Relevant state and federal case law regarding child abuse and neglect.

2.6 Court Proceedings

The Program Attorney shall appear and participate in all court proceedings related to his or her cases. The Program Attorney should present at every hearing all facts relevant to the child's best interests, appropriate dispositional remedies, and appropriate court orders. The Program Attorney shall ensure the facts and arguments are presented to the court which address the appropriate aspects of the litigation, including but not limited to:

1. analysis of any allegations of abuse, neglect, or risk;
2. analysis of facts to be considered in a determination related to custody and visitation, including sibling visitation;

3. placement of the child;
4. services to be made available to the child and family;
5. dispositional alternatives for the child or parents;
6. the child's wishes; and
7. other issues the GAL Program deems essential to the child's best interests.

2.6.1 Motions and Evidentiary Objections

The Program Attorney shall make any and all appropriate motions and evidentiary objections to advance the GAL Program's position during court proceedings. When appropriate, the Program Attorney should file briefs in support of the GAL Program's position. The Program Attorney shall preserve all legal issues for appeal.

2.6.2 Punitive Action Taken Against the GAL Program

Any and all motions filed by any party directed to the GAL Program requesting fees, costs, sanctions or a finding of contempt as well as orders to show cause directed to the GAL Program by the court shall be immediately brought to the attention of the Supervising Attorney who shall immediately notify the Program Director and forward the motion or order to the Office of the General Counsel.

2.6.3 Presenting and Cross-Examining Witnesses

The Program Attorney shall present all witnesses as necessary to prove the prima facie elements of the legal position determined by the GAL Program to serve the child's best interests. The witnesses should be prepared in advance, and the Program Attorney must be aware of the evidence to be provided through the witness. The Program Attorney shall also be prepared to cross-examine other parties' witnesses in an effective manner.

2.6.4 Preparing and Presenting Exhibits

The Program Attorney shall prepare and present exhibits as necessary to prove the prima facie elements of the legal position determined by the GAL Program to serve the child's best interests. The Program Attorney must be prepared to establish the necessary foundation for admitting documents, photographs, and physical objects into evidence. When deemed appropriate, the Program Attorney should also be prepared to challenge exhibits offered by other parties.

2.7 Post Hearing

When appropriate, the Program Attorney shall prepare requested findings of fact, conclusions of law, and proposed orders. All post-hearing submissions shall be drafted in such a manner as to preserve issues for appeal. All counsel of record must receive a copy of post-hearing submissions filed by the Program Attorney.

2.7.1 Review of Proposed Orders

The Program Attorney shall review all proposed orders submitted to the court to ensure that the proposed orders are accurate, preserve appellate issues, and clearly

state desired outcomes. If a proposed order is drafted incorrectly, the Program Attorney shall act in a timely and appropriate manner to correct the record, such as by filing objections to the proposed order or by filing a separate proposed order.

2.7.2 Compliance with Orders

The Program Attorney shall follow all court orders and shall make reasonable efforts to ensure that the GAL Program complies with all court orders. If compliance with a court's order will jeopardize the child's best interests, the Program Attorney should consider filing a motion for rehearing or an appeal.

If the failure of another party to comply with a court order affects the best interests of the child, the Program Attorney shall: 1) contact counsel for the offending party (or contact the offending party when unrepresented) to provide notice of the violation and to provide notice of the GAL Program's intent to seek enforcement of the order; 2) determine whether to file a motion to compel compliance with the order and obtain a ruling from the court if the violation is not remedied; and 3) consult with the Supervising Attorney who shall consult with the Program Director to determine whether to file a motion for an order to show cause if the offending party fails to remedy the non-compliance after being ordered to comply.

2.8 Appeal

When an appellate issue arises, the Program Attorney should discuss the appellate issue with the Supervising Attorney or Program Director. In appropriate circumstances, the Program Attorney, the Supervising Attorney, or Program Director may also consult the State Office. Where a case involves an appellate issue that poses potential statewide implications, the Program Attorney, Supervising Attorney, or Program Director shall notify the State Office at the earliest opportunity.

The Program Attorney shall notify the State Office within five (5) days of the filing of an appeal by any party. Notice shall be provided on the prescribed Report of Appeal form.

The Program Attorney shall consider and discuss with the GAL Program the possibility and necessity of appeal in appropriate cases. The decision to appeal is a joint decision between the Program Attorney and the GAL Program, and there must be an appropriate legal basis.

After the decision to appeal is made and the Program Attorney has notified the State Office, unless otherwise directed or agreed, the Program Attorney shall timely file required appellate pleadings, motions, and briefs.

Appellate briefs shall comply with all Rules of Appellate Procedure and rules and administrative orders specific to the appellate court. If oral argument is

scheduled, the Program Attorney shall be prepared, organized, and direct. If an attorney other than the Program Attorney that was present at the hearing is handling the appeal, both attorneys shall work together to ensure that all appropriate issues are addressed on appeal.

If the Program Attorney feels he or she lacks the necessary experience or expertise to handle an appeal, the Program Attorney shall notify the Supervising Attorney or Program Director.

2.8.1 Expedited Appeal

In cases where a lengthy appeal will compromise the child's best interests, the Program Attorney shall request an expedited appeal, oppose requests for extensions of time when appropriate, and file all appellate pleadings and briefs on behalf of the GAL Program as quickly as possible pursuant to the Florida Rules of Appellate Procedure 9.146(g).

2.8.2 Communicate Result

The Program Attorney shall communicate the decision of all appeals to the GAL Program and to the assigned GAL volunteer and explain its implications. The Program Attorney shall follow all orders of the appellate court. When following the order of the appellate court jeopardizes the child's best interests, the Program Attorney should consider filing a motion for rehearing or seeking review by a higher court.

3. Ex Parte Communication

The Program Attorney shall avoid ex parte communication with the court unless absolutely necessary to immediately protect the best interests of the child. The Program Attorney shall counsel GAL Program staff and volunteers to avoid ex parte communications with the court. In circumstances in which ex parte contact occurs, the Program Attorney shall comply with Rule 4-3.3, Rules Regulating the Florida Bar, regarding ex parte communication.ⁱⁱⁱ

ⁱ RULE 4-1.13 ORGANIZATION AS CLIENT

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

(b) Violations by Officers or Employees of Organization. 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 that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Resignation as Counsel for Organization. If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.

(d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. 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 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an

appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The entity as the client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to other rules

The authority and responsibility provided in subdivision (b) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rule 4-1.2(d) can be applicable.

Government agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority. See note on scope.

Clarifying the lawyer's role

There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent and discussions between the lawyer for the organization and the constituent may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Dual representation

Subdivision (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, rule 4-1.7 governs who should represent the directors and the organization.

Representing related organizations

Consistent with the principle expressed in subdivision (a) of this rule, an attorney or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representations adverse to affiliates of an existing or former client.

ⁱⁱ **RULE 4-5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER**

(a) Duties Concerning Adherence to Rules of Professional Conduct. A member of the bar who is a partner, proprietor, shareholder, member of a limited liability company, officer, director, or manager in an authorized business entity, as defined elsewhere in these rules, or who has supervisory authority over another lawyer in the law department of an enterprise or government agency, shall make reasonable efforts to ensure that the authorized business entity, enterprise, or government agency has

in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct.

(b) Supervisory Lawyer's Duties. Any lawyer in an authorized business entity, enterprise, or government agency having supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) Responsibility for Rules Violations. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the specific conduct or, with knowledge thereof, ratifies the conduct involved; or

(2) the lawyer is a partner, proprietor, shareholder, member of a limited liability company, officer, director, partner, or manager in an authorized business entity, as defined elsewhere in these rules, or has supervisory authority over another lawyer in the law department of an enterprise or government agency, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Subdivisions (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership, proprietors, shareholders, members of a limited liability company, as well as lawyers having supervisory authority in the law department of an enterprise or government agency, and lawyers who have intermediate managerial responsibilities in an authorized business entity.

The measures required to fulfill the responsibility prescribed in subdivisions (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated supervising lawyer or special committee. See rule 4-5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the rules.

Subdivision (c) (1) expresses a general principle of responsibility for acts of another. See also rule 4-8.4(a).

Subdivision (c)(2) defines the duty of a lawyer having ~~direct~~ supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners, proprietors, shareholders, members of a limited liability company, officers, directors, and managers have at least indirect responsibility for all work being done by the firm, while a partner, shareholder, member of a limited liability company, officer, director, and manager in charge of a particular matter ordinarily has authority over other firm lawyers engaged in the matter. Appropriate remedial action would depend on the immediacy of the partner's, shareholder's, member's (of a limited liability company), officer's, director's, or manager's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of subdivision (b) on the part of the supervisory lawyer even though it does not entail a violation of subdivision (c) because there was no direction, ratification, or knowledge of the violation.

Apart from this rule and rule 4-8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, shareholder, member of a limited liability company, officer, director, manager, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

ⁱⁱⁱ **Rule 4.3.3 Candor Toward the Tribunal**

(d) Ex Parte Proceedings. In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

Ex parte proceedings

Ordinarily, an advocate has the limited responsibility of presenting 1 side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary injunction, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes is necessary to an informed decision.