**CHAPTER SIX**

**COMMUNICATIONS BY GUARDIAN AD LITEM WITH ATTORNEYS**

As part of the work necessary to provide the court with his or her report and recommendation for appointment, the guardian *ad litem* (“GAL”) will need to communicate with a number of people, including the attorney for the alleged incapacitated individual (A.I.I.), and the attorneys for the petitioner and any other represented parties. The following information is a suggested framework for these communications.

**Appropriate Communication with the A.I.I.’s Attorney**

Once the GAL has conducted the conflicts check and determined that he or she can serve, the GAL should contact the A.I.I.’s attorney to advise him or her of the GAL appointment and schedule an agreeable time to interview the A.I.I. The GAL should also remind the A.I.I.’s attorney of the GAL’s role in the guardianship and/or protective proceeding. Here, the GAL is guided by the best interests of the A.I.I., which may not necessarily align with the A.I.I.’s attorney’s role to advocate the A.I.I.’s desires. Even so, the GAL should ask about any preferences the A.I.I. may have regarding the proposed fiduciary and retaining the rights outlined in S.C. Code Ann. §§ 62-5-304(A) and 62-5-407.[[1]](#footnote-1)

In conjunction with the GAL’s investigative duties, the GAL should request permission to meet with the A.I.I. outside the presence of the A.I.I.’s attorney. In this regard, the GAL should inform the A.I.I.’s attorney that any information provided by the A.I.I. may appear in the GAL’s written report, and that this information may form a basis of the GAL’s recommendation to the court.

The GAL should maintain reasonable communication with the A.I.I.’s attorney in order to be kept reasonably informed of the status of the A.I.I.

**Appropriate Communication with the Petitioner’s Attorney**

The GAL should contact the Petitioner’s attorney to advise the Petitioner of the GAL appointment and schedule an agreeable time to interview the Petitioner. It is important to remind the Petitioner’s attorney of the GAL’s role in the guardianship and protective proceedings – that is, the GAL is tasked with conducting an independent investigation for the best interests of the A.I.I. to include recommending whether the appointment of the proposed fiduciary is necessary and appropriate.

The GAL should ask about the facts and circumstances that led the Petitioner to file the guardianship and protective proceedings. However, the GAL should inform the Petitioner’s attorney that any information provided by the Petitioner may appear in the GAL’s written report which may form a basis of the GAL’s recommendation to the court.

**Appropriate Communications with Other Respondents and Attorneys**

The GAL should contact the other respondents, through their respective attorneys, to advise each of them of the GAL appointment and schedule a time to interview the other respondents. It is very important that you contact the attorney first. If a party is represented by counsel you must have the permission of the attorney to discuss the case with his or her client. A non-lawyer GAL, while not technically bound by the S.C. Code of Professional Conduct (SCCPC), is an officer of the court acting on a quasi-legal basis, whose investigation will have ramifications for each party. The attorney is bound by the SCCPC, and he or she must have an opportunity to get informed consent from the client about what may be discussed with the GAL and advise the client about the interview, including the need to be truthful. The terms of the interview must be very clear: do you have permission to speak with the party outside of presence of his or her lawyer -- or not? Where may you interview the party? Do you need to contact the attorney each time you speak with his or her client? Similar to the discussion above, the GAL should inform the attorneys for the other parties that information provided to the GAL by any party may appear in the GAL’s written report.

The GAL should determine the relationship of the other involved parties to the A.I.I. and the Petitioner. Also, the GAL should ask each party, through their respective attorneys, of their knowledge of the facts of the guardianship and protective proceedings.

If you are refused access to a party, you have the option of asking for a court order to allow an interview, subject to any restrictions placed upon the interview by the court.

**When a non-attorney GAL should request an attorney**

The Probate Code allows the court to appoint an attorney for the GAL if requested by a non-attorney GAL at any point during the pendency of the guardianship and protective proceedings.[[2]](#footnote-2) These statutes contemplate cases when a GAL may need an attorney to assist the GAL during the guardianship and protective proceedings. However, a GAL should not immediately request the court to appoint counsel for the GAL, but only after careful consideration. Consideration should be given primarily to the court order appointing the GAL which would provide the necessary authority for the GAL to carry out the responsibilities and duties set forth under S.C. Code Ann. § 62-5-106. With the appointment order in mind, the GAL’s request for counsel should be made as a last resort in order to help minimize the expense of the guardianship and protective proceedings.[[3]](#footnote-3) For example, in cases where the GAL is having difficulty in accessing records and other information necessary to complete his or her written report, the GAL should first seek assistance from the court prior to requesting the assistance of an attorney. In some cases, it may be appropriate for the GAL to request that the court appoint an attorney for the GAL to assist in obtaining such requested records.

The GAL may consider requesting an attorney in contested cases where a formal hearing and the taking of witness testimony is necessary. Moreover, the GAL should request an attorney if it is likely that the GAL may be called as a witness concerning his or her Report of GAL. In examples mentioned above, an attorney for the GAL would be necessary to subpoena witnesses, to examine and cross-examine the witnesses, and to file the appropriate pleadings in connection with the GAL’s responsibilities and duties. A non-attorney GAL must be mindful that certain actions, including filing “pleadings, and other papers incident to actions and special proceedings” might be considered the unauthorized practice of law.[[4]](#footnote-4) If the GAL believes counsel is necessary, he or she should contact the court in writing.

**Ethical Issues**

Potential ethical issues surround the appointment of a GAL. One potential issue is that there is no expectation of any privileged communication between the GAL and the A.I.I. or between the GAL and the remaining parties. The GAL functions as a representative of the court appointed to represent the best interest of the A.I.I.[[5]](#footnote-5) In complying with this responsibility, the GAL is tasked with, among other things, collecting information, interviewing all parties, and filing a written report with the court, with appropriate recommendations.[[6]](#footnote-6)

It is the GAL’s duty to gather information and gain the trust of the parties in order to have an honest dialogue concerning the best interests of the A.I.I. However, it is also the GAL’s duty to report back to the court with respect to these confidences in order to provide an accurate written report with appropriate recommendations that are in the best interests of the A.I.I. These competing duties collide when significant information is shared that form the basis of the GAL’s recommendation and a party objects to those recommendations. In such situations, the GAL may be required to testify concerning the basis of those recommendations.[[7]](#footnote-7) Best practice would be for the GAL to advise the parties that information shared with the GAL may be disclosed to the other parties and their attorneys.

Another potential issue is the possibility of confusing the role of the GAL. A GAL is appointed to assist the court in protecting the best interest of the A.I.I.[[8]](#footnote-8) In contrast, an attorney for the A.I.I. advocates for his or her expressed interests. The GAL conducts an independent investigation in the best interests of the A.I.I. without having to compete with the duty to advocate for the A.I.I.’s desires. In some situations, the A.I.I.’s desires may not be consistent with the what is in the best interests of the A.I.I. Accordingly, the GAL should take care to stay focused on the best interests of the A.I.I. while taking into consideration the A.I.I.’s desires.

As briefly mentioned above, there is the potential that actions taken by the GAL could be considered the unauthorized practice of law. The GAL does not represent the A.I.I. but is appointed by the court to perform a specific task for a specific timeframe to assist the court in protecting the best interests of the A.I.I. Thus, the GAL should not provide any legal advice to the A.I.I. or prepare any legal documents on behalf of the A.I.I., all of which may be considered the unauthorized practice of law.[[9]](#footnote-9)

**Summary**

In short, because the information gained from his or her communications with the persons involved in a case forms the basis for the GAL’s recommendation to the court, it is an important part of the GAL’s work. In reaching out to the A.I.I. and any other represented party, the GAL should first contact the attorney to make arrangements to speak with the party. In the event that the GAL is unable to perform his or her duties without assistance, the GAL should first contact the court for help, and if necessary, request the appointment of an attorney to represent the GAL. While there are ethical issues that can arise for a GAL, many of these can be navigated more easily by bearing in mind the GAL’s primary duty to gather the information needed in order to provide the court with an understanding of the best interests of the A.I.I.

1. For more information about the rights at stake in guardianship and conservatorship proceedings, see Chapters 3 and 4 of this Manual. [↑](#footnote-ref-1)
2. S.C. Code Ann. §§ 62-5-303B and -403B. [↑](#footnote-ref-2)
3. See Reporter’s Comments to S.C. Code Ann. § 62-5-403(B). [↑](#footnote-ref-3)
4. See *Brown v. Coe*, 365 S.C. 137, 139, 616 S.E.2d 705, 706-07 (2005) (*citing Doe v. McMaster*, 355 S.C. 306, 311, 585 S.E.2d 773, 773, 775-77 (2003). [↑](#footnote-ref-4)
5. *See Townsend v. Townsend*, 323 S.C. 309, 315, 474 S.E.2d 424 (1996); *Jennings v. Dargan*, 308 S.C. 317, 417 S.E.2d 646 (Ct. App. 1992). [↑](#footnote-ref-5)
6. S.C. Code Ann. § 62-5-106(A)(2)(a)-(m). [↑](#footnote-ref-6)
7. *Townsend*, 323 S.C. at 316, 474 S.E.2d at 429 (guardian ad litem has no absolute duty of confidentiality to his ward) (*citing State v. Good*, 308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992) (declining to find a testimonial privilege between guardian ad litem and his ward except where recognized by statute), cert. denied 1992; *see generally Collins v. Collins*, 283 S.C. 526, 530, 324 S.E.2d 82, 85 (Ct. App. 1984) (providing for the right to cross-examine the guardian ad litem in a custody case regarding the guardian ad litem’s recommendation, and providing the right to cross-examine any witness whose testimony formed a basis of the guardian ad litem’s recommendation). [↑](#footnote-ref-7)
8. S.C. Code Ann. §62-5-106(A)(1). [↑](#footnote-ref-8)
9. *See State v. Despain*, 319 S.C. 317, 319, 460 S.E.2d 576, 578 (1995). [↑](#footnote-ref-9)