

## ETHICS ADVISORY OPINION

**09-12**

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **Factual Background:**

A lawyer is appointed by the court to serve as a guardian *ad litem* for three minor children. The guardian ad litem conducts home visits with the custodial parties and maintains regular contact with the custodial parties throughout the course of the DSS proceeding. The family court issues an order granting permanent custody to the custodian (biological father of 2 children and the grandfather of 1 child) who had physical custody of the children throughout the DSS proceeding. DSS closes the case and the guardian's services are no longer required.

### **Questions Presented:**

Is the lawyer who previously served as the guardian ad litem for three minor children prohibited from later serving as counsel to the custodial parent/grandparent if this person later wishes to bring a private action to enforce or modify child support since the action that would be brought would be for the benefit of the children for whom the guardian ad litem previously served?

### **Summary:**

A lawyer who previously served as the guardian *ad litem* for three minor children in an abuse and neglect action should not represent the custodial parent/grandparent in a later action to enforce or modify child support.

### **Opinion:**

This committee previously issued Ethics Advisory Opinions addressing the responsibilities and obligations of a guardian ad litem. In abuse and neglect proceedings, the lawyer who serves as a guardian *ad litem* is responsible for protecting the child's interests during litigation. As advised in Opinion 04-08, the guardian's special position in these cases allows the guardian to obtain information that may not be available to others. This opinion also relied on Townsend v. Townsend, 323 S.C. 309; 474 S.E.2d 424 (1996), where the guardian *ad litem* for the child in a divorce action later sought to represent the father in an action for a reduction. In Townsend, the conflict is more obvious as the lawyer, in advocating for a reduction or termination, is taking a position more easily recognizable as adverse to the best interests of the child. According to Townsend, although the lawyer guardian is not the child's lawyer, the court will treat the child as a former client for purposes of conflict analysis.

When the former guardian *ad litem* is asked to now serve as the lawyer for the custodian, the conflict is less clear as enforcing or increasing child support may be in the child's best interests. However, while the lawyer has been relieved as guardian *ad litem* as the abuse and neglect action has been closed, the lawyer obtained information as the guardian *ad litem* that is likely very relevant to the current action including significant financial information from the parties. An action to enforce or modify child support is substantially related to the initial abuse and neglect action under the test in Comment 3 to Rule 1.9. It states that "[m]atters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Under Rule 1.9, then, if there is material adversity between the child and the custodian, the lawyer is prohibited from now representing the current custodian. Because the role of guardian *ad litem* is unique, the existence of material adversity is typically difficult to ascertain. Thus, the committee recommends against the proposed conduct.

Although a lawyer is not as likely to be called as a witness in a child support action as in a custody action (discussed in Ethics Advisory Opinion 04-08), the possibility still exists. With limited exceptions, Rule 3.7 requires that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.

This committee's prior opinions found that a guardian *ad litem* could not also represent the child (Ethics Advisory Opinion 08-04) and that a guardian *ad litem* could not later represent a non-custodial parent in a child support reduction action (Ethics Advisory Opinion 04-08). Because of the special nature of a guardian *ad litem*'s role, the guardian *ad litem* also may not represent a custodial parent in a later action for enforcement or modification of child support.