

## **ETHICS ADVISORY OPINION**

**08-04**

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:**

In abuse and neglect proceedings, South Carolina Code Section 63-7-1620, formerly 20-7-110(1), provides that children must be appointed legal counsel and a guardian ad litem by the court. The statute requires that when the guardian ad litem is an attorney, the appointed person serves as both the guardian ad litem and legal counsel. The court must not appoint additional legal counsel to represent an attorney guardian ad litem, absent extraordinary circumstances. The appointed attorney must petition the family court for the appointment of legal counsel and set forth the extraordinary circumstances, when necessary.

### **Question Presented:**

Is a conflict of interest created if a lawyer who serves as child's guardian ad litem also represents both the child and himself in his capacity as GAL in an abuse and neglect proceeding in family court?

### **Summary:**

A lawyer may serve as a guardian ad litem and legal counsel for the guardian ad litem but must exercise caution. A lawyer must not serve as the guardian ad litem and lawyer for the child and consequently cannot serve in three roles as the guardian ad litem, lawyer for the child and lawyer for the guardian ad litem.

### **Opinion:**

A guardian ad litem in abuse and neglect proceedings may be a lawyer or a non-lawyer volunteer. The guardian ad litem is responsible for protecting the child's interests during the litigation. Historically, both a guardian ad litem and a lawyer for the guardian ad litem have been appointed. A guardian ad litem investigates the matter to determine the best interests of the child. The duties include interviews with parents and other persons involved with the child. A guardian ad litem communicates with the child as appropriate depending on the age and maturity of the child. Communications with the child may be revealed and are not protected by attorney

client privilege.

A lawyer may serve as the guardian ad litem as well as the lawyer for the guardian ad litem. This parallels the situation where a person represents him/herself in court. A guardian is required to submit reports and recommendations. A guardian may testify and be cross-examined. A lawyer, when also acting as a guardian ad litem, may present evidence, make objections, cross examine other witnesses and make arguments to the court. Rule 3.7, SCRPC, allows a lawyer to act as an advocate and witness in limited circumstances. One exception is when the matter is uncontested, and the dual role would be appropriate in an uncontested abuse and neglect proceeding. Another exception allows the lawyer to be a witness when disqualification of the lawyer would work substantial hardship on the client. The Comments provide that the tribunal may object when the trier of fact may be confused or misled. Opposing counsel may object where the combination of roles may prejudice that party's rights. Comment (2) states that 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. When one person serves as advocate and witness, the delineation of responsibilities is blurred. Comment (4) further expands on the dual role, noting the importance and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will conflict with that of other witnesses. A guardian ad litem serves a critical role in abuse and neglect proceedings, and the reports and recommendations are essential to the process. The very nature of the guardian's role creates the possibility of conflict between the testimony of a guardian and the testimony of other witnesses.

The Committee previously addressed the lawyer as a witness in Ethics Advisory Opinion 91-26 concerning the commitment of a minor to a mental health facility. In that opinion, the Committee stated, "[i]f the attorney will likely be a witness as to his findings while serving as Guardian ad Litem, he is disqualified to serve as counsel of a minor during judicial or emergency commitment proceedings." This conflict results when representing the minor and serving as the guardian ad litem.

The Comments to Rule 3.7 then direct one to the potential for a conflict of interest under Rule 1.7. The potential for conflict must be scrutinized in accordance with the requirements of Rule 1.14, Client with Diminished Capacity. Children are considered to have diminished capacity simply by reason of minority. The Comments recognize that age and maturity impact a child's ability to make important decisions. While less potential for conflict exists with infants, there is greater concern as a child matures and is able to make and express decisions. A lawyer serving in the dual role of the guardian ad litem and the lawyer for the guardian ad litem assists the court in determining and protecting the child's best interests. Ethics Advisory Opinion 98-02 states that a guardian ad litem assists the court in protecting the interest of an incompetent person and may reveal confidences as a guardian ad litem. This lawyer can not serve the additional role of representing the child. The statute authorizes the guardian ad litem to make motions and petition the court for relief. One of the required actions may be the request for counsel to be appointed for a child to advocate the child's position which is in conflict with the guardian ad litem's view

of the best interests of the child. The appointment of a guardian ad litem is not a substitute for appointment of counsel for a child in these circumstances, as one lawyer can not advocate for both positions.

Undertaking representation of a child when already serving as a guardian ad litem creates a conflict of interest under Rule 1.7 as the representation of one client would be directly adverse to another client. Although a lawyer may represent a client even if there is a concurrent conflict of interest, the requirements of 1.7 (b)(3) and 1.7(b)(4) can not be overcome to allow the representation. This representation directly involves the assertion of a claim by one client, the guardian ad litem, against another client, the minor child. Both can not be represented by the one lawyer in the same litigation before the family court as this violates Rule 1.7(b)(3). As the child has diminished capacity by reason of minority, the child could not give informed consent, confirmed in writing, which is required under Rule 1.7(b)(4).