

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
Opinion 2001-1
May 8, 2001**

**THIS OPINION IS MERELY ADVISORY AND IS NOT BINDING ON THE
INQUIRING ATTORNEY, THE COURTS OR ANY OTHER TRIBUNAL.**

A member of the Delaware Bar (the “Inquiring Attorney”) has requested an opinion concerning the ability of a lawyer who is appointed an attorney guardian *ad litem* to comply with the corresponding statutory duties and responsibilities outlined in the legislation creating the Office of the Child Advocate, 29 *Del. C.* Ch. 90A without violating the attorney’s ethical obligations under the Delaware Lawyers Rules of Professional Responsibility (“Rules of Professional Responsibility”).

SUMMARY OF THE FACTS

In 1999 the General Assembly enacted legislation creating the Office of the Child Advocate, 2000 Del. Laws, Ch. 451; 29 *Del. C.* § 9001A et seq. (the “Child Advocate Statute”). The purpose of the office is to safeguard the welfare of the children of Delaware through advocacy and the implementation and coordination of a program to provide legal representation on behalf of a child. The office fulfills the representation responsibility through the appointment of attorneys to act as an “attorney guardian *ad litem*”. The legislation defines a “guardian *ad litem*” as follows:

Guardian *ad litem* means an individual appointed by the Court to represent the best interests of a child whether or not that reflects the wishes of the child, who by his or her appointment, shall be a party to the child welfare proceeding. The guardian *ad litem* is charged with obtaining a clear understanding of the situation and needs of the child and making recommendations to the Court as to what is in the best interests of the child. The office is directed to coordinate with the Family Court and the Court appointed special advocate program to implement and administer a program for guardian *ad litem* representation of children.

29 Del. C. § 9007A(1)(a).

In the event that a Family Court judge determines, pursuant to the conditions set forth in § 701(c) of Title 13 of the *Delaware Code*, that an attorney guardian *ad litem* should be

appointed, the legislation directs the Family Court judge to sign an order appointing the attorney guardian *ad litem*. 29 Del. C. § 9007A(2)(a). The appointing order imposes on the attorney guardian *ad litem* all the duties, rights and responsibilities set forth in section 9007A. 13 Del. C. § 701(c). Subsection 3 of § 9007A sets forth the rights and duties of the attorney guardian *ad litem* and provides inter alia that the attorney guardian *ad litem* shall:

- (a) represent the best interests of the child in all child welfare proceedings;

* * *

- (c) provide independent factual information to the Court regarding the cases to which he/she is appointed. To that end, the attorney guardian *ad litem* shall conduct an independent investigation of the circumstances surrounding a case of appointment. This investigation shall include interviews and/or observations of the child and relevant individuals as well as a review of all relevant records or reports;
- (d) submit a written or oral report to the Court for any Court proceedings;
- (f) participate in all depositions, negotiations, discovery, pretrial conferences, hearings, and appeals;

* * *

- (m) ascertain the wishes of the child and make the child's wishes known to the Court. If the attorney guardian *ad litem* concludes that the child's wishes differ from the position of the attorney guardian *ad litem*, he or she will notify the Court of the conflict.

29 Del. C. § 9007A(3) (emphasis supplied). The inquiring attorney is concerned whether adherence to the statutory duties and responsibilities outlined above will bring the attorney into violation with the Rules of Professional Responsibility. The inquiring attorney's concerns focus on three principal areas:

1. Whether the attorney guardian *ad litem*'s duty to represent the best interests of the child will bring the attorney into conflict with Rule 1.2 charging the attorney with representing his or her client's interests and abiding by their decisions;
2. Whether the attorney guardian *ad litem*'s duty to ascertain the wishes of the child and make the child's wishes known to the Court and otherwise participate in the

proceedings will run afoul of Rule 1.6 governing an attorney's confidentiality obligations to a client;

3. Whether the attorney guardian *ad litem's* investigatory and reporting obligations conflict with Rule 3.7 prohibiting an attorney from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness.

CONCLUSION

It is the Committee's opinion that an attorney guardian *ad litem* does not serve directly as counsel for the child under a traditional attorney/client relationship, but rather serves as counsel for the guardian *ad litem*. We think this construction complies with the intent expressed in the enabling legislation and promotes the lawyer's ability to meet his professional conduct obligations while carrying out the duties and responsibilities set forth in the statute. Thus, it is the Committee's opinion that a lawyer may carry out the statutory duties and responsibilities prescribed in the Child Advocate Statute without violating Rules 1.2, 1.6 or, with certain limitations, Rule 3.7.

The designation of "attorney guardian *ad litem*," however, does carry potential ambiguity, as evidenced by the analysis of a similar scheme by the Wyoming Supreme Court. Under a different Wyoming statutory scheme that combines the role of guardian *ad litem* with attorney for the child when a lawyer is appointed an "attorney guardian *ad litem*", the lawyer owes attorney/client obligations directly to the child. The foregoing analysis of compliance with the Delaware Rules of Professional Conduct would be different under the Wyoming interpretation of the attorney guardian *ad litem* role. Consideration should be given to providing clarification in Delaware: either through an interpretive guideline that the attorney guardian *ad litem* does not stand in a direct attorney/client relationship with the child, or through revisions of the Rules of Professional Conduct expressly to permit an attorney guardian *ad litem* to have a hybrid role. The Child Advocate Statute is a commendable effort to protect the best interests of children, and it needs the efforts of competent, knowledgeable, public spirit-minded attorneys to carry out those objectives. Those attorneys should not be required to operate under a handicap of

uncertainty whether their representation efforts will comply with the Rules of Professional Conduct.

DISCUSSION

The answer to the foregoing questions begins with an analysis of who is the client for the lawyer appointed an attorney guardian *ad litem*. Several authorities and commentators who have considered the question have noted the potential ambiguity in roles that arises when a lawyer is appointed as guardian *ad litem*, as distinct from a being appointed as the child's attorney. *Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, Chapter 2 (1997). A lawyer appointed the child's attorney is a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due an adult client, subject only to the modifications of Rule 1.14 (Client under a disability). In contrast, a lawyer appointed as "guardian *ad litem*" for a child is generally regarded as an officer of the court appointed to protect the child's best interests without being bound by the child's express preferences. *Id.*, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (approved by the American Bar Association House of Delegates, February 5, 1996). The potential for greater uncertainty is created when a lawyer is appointed as "attorney guardian *ad litem*." *See, e.g. Peters, supra* at § 2-3(b).

The intent of the Delaware statute appears to contemplate that the lawyer appointed "attorney guardian *ad litem*" will serve in the traditional "guardian *ad litem*" role and to the extent the guardian *ad litem* requires legal services, also serve as attorney for himself or herself in the capacity of guardian *ad litem*. Although the distinction between representing a guardian *ad litem* (who is charged with representing the best interests of the child) and representing the child himself is a subtle distinction, it is a distinction apparently intended by the General Assembly in establishing the attorney guardian *ad litem* position and a distinction that has important consequences in analyzing the attorney guardian *ad litem*'s ability to comply with the Rules of Professional Responsibility.

While maintenance of so fine a distinction is not free from doubt, several factors support the validity of the distinction. First, the Family Court’s appointment authority lies in Section 701(c) of Title 13. 29 Del. C. § 9007A(2)(a). Section 701(c) provides in pertinent part: Any child who is the subject of a custody, visitation, guardianship, termination of parental rights, adoption or other related proceeding in which the Division of Family Services is a party should have a guardian *ad litem* appointed by the Court to represent the best interests of the child. The Court in its discretion may also appoint an attorney to represent the child’s wishes. The guardian *ad litem* shall be an attorney authorized to practice to law in the state or a court appointed special advocate. The rights, responsibilities and duties of the attorney serving as guardian *ad litem* are set forth in § 9007A of Title 29 and the rights responsibilities and duties of the Court appointed special advocate serving as guardian *ad litem* are set forth in Chapter 36 of Title 31 (emphasis added).

Thus, the authorizing statute maintains a distinction between the role of the guardian *ad litem* who is appointed to represent the best interests of the child and the role of an attorney appointed to represent the child’s wishes. That is, this section and § 9007A recognize that representation of the best interests of the child in a child welfare proceeding may not necessarily entail representing the child’s wishes. The obligation of the attorney guardian *ad litem* is to represent the best interests of the child; while the obligation of the attorney for the child is to carry out the child’s wishes.¹

Second, this analytical distinction is maintained in the legislation establishing the Office of Child Advocate and prescribing the duties and responsibilities of the attorney guardian *ad litem*. The statute requires the attorney guardian *ad litem* to represent the best interests of the child; requires the attorney guardian *ad litem* to provide “independent” factual information to the

¹ While this model of legal representation in child welfare proceedings is sometimes criticized as being unduly paternalistic and failing to give due regard to the child’s wishes (e.g., *Peters, supra*), the Delaware model has been constructed to avoid most of those concerns in practice. For example, the child’s “best interest” includes consideration of the child’s expressed wishes when the child is mature enough to verbalize his wishes. 13 Del. C. § 722. Moreover, in those rare instances where a child’s wishes may conflict with what the guardian *ad litem* determines to be the child’s best interests, the attorney guardian *ad litem* still must advise the court of the child’s wishes. 29 Del. C. §9007A(3)(n). Further, if a conflict arises the Court has discretion to appoint separate counsel for the child. 13 Del. C. §701(c).

Court and to conduct an “independent” investigation of the circumstances surrounding a case of appointment. 29 *Del. C.* § 9007A(3)(a)(c) and (n).

Third, the legislation notes that if the attorney guardian *ad litem* concludes that the child’s wishes differ from the position of the attorney guardian *ad litem* as to the child’s best interests, the guardian *ad litem* will notify the Court of the conflict. Presumably, it is in this conflict setting that the Court would be in a position to exercise its discretion under 13 *Del. C.* § 701(c) to appoint an attorney to represent the child’s wishes.

Finally, it bears noting that the Child Advocate Statute was adopted after the Delaware Supreme Court’s decision in *In the Matter of the Petition of Samantha Nicole Frazer*, Del. Supr. 721 A.2d 920 (1988) (“*Frazer*”). In *Frazer*, the Delaware Supreme Court said that a guardian *ad litem* was required to advance the wishes and desires of the child for whom appointed. The Child Advocate Statute made clear, however, that the guardian *ad litem* was obligated to act in the child’s best interests, whether or not those interests were consistent with the child’s wishes. But addressing a concern of *Frazer*, the statute requires the Guardian *ad litem* to advise the court if the child’s wishes differ from the guardian’s best interest determination. Thus, the drafters of the Child Advocate Statute were mindful of the distinction drawn herein and sought to clarify the interests that the guardian *ad litem* was charged with protecting.

As noted previously, the distinction under discussion is a subtle one and one that must be clearly understood by the Court, the parties involved and, the child who is able to comprehend the proceedings. Without such a clear understanding the typical or frequent coincidence of the best interests of the child and the child’s wishes and the close relationship between the efforts of the guardian *ad litem* on behalf of the child will allow the distinction to become blurred and lead to misunderstanding about whether the attorney guardian *ad litem* owes the child all of the duties a lawyer owes a client under the Rules of Professional Responsibility. To summarize, a lawyer appointed attorney guardian *ad litem* acts as an attorney for himself in his capacity as guardian *ad litem* charged with representing the best interests of the child; he does not act directly as attorney for the child in a pure attorney/client relationship.

Having determined who is the client of a lawyer appointed attorney guardian *ad litem*, we consider one further preliminary matter before turning to a resolution of the three specific ethical concerns raised by the Inquiring Attorney. The second preliminary consideration concerns the legal effect of statutory provisions within the Office of Child Advocate statute which would authorize or mandate a lawyer appointed as an attorney guardian *ad litem* to take action otherwise inconsistent with the Rules of Professional Responsibility. To the extent a conflict exists between the statutory mandate and the Rules of Professional Responsibility (an issue addressed in further detail below), the Rules of Professional Responsibility would govern the lawyer's role as an attorney in carrying out an attorney guardian *ad litem* appointment. Stated otherwise, it is no answer to an apparent ethical dilemma for an attorney to rationalize that the statute authorizes or mandates behavior that would otherwise violate the Rule of Professional Conduct.

Under the Delaware Constitution and the separation of powers provided within the Constitution, one branch of government may not exercise powers exclusively belonging to another branch. The Delaware Supreme Court has sole and exclusive jurisdiction over all matters affecting governance of the Bar. *In re Appeal of Info Technology, Inc.*, Del. Supr., 582 A.2d 215, 218 (1990); *In re Petition of Richard W. Neno*, Del. Supr., 471 A.2d 815, 819 (1983). Here the Delaware Supreme Court in exercising its exclusive power over governance of the Bar promulgated the Delaware Lawyers Rules of Professional Conduct to regulate the ethical conduct of attorneys. In general, the Delaware Legislature, through the Child Advocate Statute or otherwise, may not modify or abrogate the ethical obligations imposed on lawyers. While it is true that the separation of powers doctrine has been flexibly applied to achieve maximum efficiency in the State's constitutional system and to allow for the occurrence of practical exigencies, *e.g.*, *Connolly v. Labowitz*, Del. Super., 1984 WL 14132, Bifferato, J. (1984), citing *Opinion of Justices*, Del. Supr., 380 A.2d 109 (1977), it is no answer to say that a direct violation of the Rules of Professional Conduct has been authorized by a specific provision in the Child Advocate Statute. Such a direct conflict in the application of ethical rules enacted by the

Delaware Supreme Court for the governance of the attorneys it regulates, would squarely invoke the separation of powers doctrine.

We now turn to a consideration of the three specific areas of ethical concern raised by the Inquiring Attorney. In analyzing the issues we do so (i) from the perspective of the attorney acting as counsel for himself in his capacity as guardian *ad litem* and not in a direct attorney client relationship with the child, and (ii) with the further understanding that the attorney guardian *ad litem*'s conduct under the Child Advocate Statute must conform to the strictures of the Rules of Professional Conduct.

Rule 1.2 - Scope of Representation.

Under Rule 1.2 of the Rules of Professional Conduct, “a lawyer shall abide by a client’s decisions concerning the objectives of representation ...” One normally would expect that representation of a child’s best interests would result in a lawyer abiding by a client’s decisions concerning the objectives of representation. However, it is possible and has been noted by commentators and other legal authorities that a guardian *ad litem*'s determination of a child’s best interests may not be consistent with the child’s expressed wishes. To the extent the lawyer is in an attorney/client relationship with the guardian *ad litem* as opposed to the child, no violation of Rule 1.2 is involved. Moreover, where there is a conflict between what the guardian *ad litem* determines to be the child’s best interests and the child’s expressed wishes, the statute provides guidance for the lawyer. The attorney guardian *ad litem* should make the conflict known to the Court 29 *Del. C.* § 9007A3(n), and the Court has discretion to appoint an attorney to represent the child’s expressed wishes. 13 *Del. C.* § 701(c).

In other jurisdictions where the relationship between the attorney guardian *ad litem* and the child is less clear than it is in Delaware, this difficult issue has resulted in modification of the state’s ethical rules. For example, in *Clark v. Alexander*, Wy. Supr., 953 P.2d 145 (1998) the Wyoming Supreme Court noted that the Wyoming statutory scheme combines the role of counsel for the child and guardian *ad litem*. Where the role of attorney for the child and guardian *ad litem* are combined into a hybrid role as they were in Wyoming, the Wyoming

Supreme Court found that the hybrid role necessarily excused the strict adherence to some rules of professional conduct.

We believe that the costs attending the appointment of both an attorney and a guardian *ad litem* would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process. Thus, we too acknowledge the hybrid nature of the role of attorney/guardian *ad litem* which necessitates a modified application of the Rules of Professional Conduct. 953 P.2d at 153.

The Court proceeded to impose modifications to its ethical rules which would excuse the attorney from being bound by the client's expressed preferences if the attorney guardian *ad litem* determines that the child's expressed preference is not in the best interests of the child. In that instance, the Wyoming Supreme Court required the attorney guardian *ad litem* to present the child's wishes and the basis for the attorney guardian *ad litem*'s disagreement to the Court. Similarly, the Wyoming Supreme Court modified the confidentiality relationship required by attorney/client relationship to the extent that relevant information provided by the child should be brought to the Court's attention.

While it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian *ad litem* is not prohibited from disclosure of client communications absent the child's consent. As legal counsel to the child, the attorney/guardian *ad litem* is obligated to explain to the child, if possible, that the attorney/guardian *ad litem* is charged with protecting the child's best interests and that information may be provided to the Court which would otherwise be protected by the attorney/client relationship. 953 P.2d at 154.

The Court found these modifications to be compromises necessary to effect the dual roles of attorney and guardian *ad litem* under the Wyoming statutory scheme. Under the Committee's analysis of the Delaware statute, however, no such compromise is required if the attorney is viewed as representing the guardian *ad litem*. A guardian *ad litem* represented by counsel generally eliminates the need for a child to have separate counsel and is a representation model designed to provide effective protection of the child's best interest. If a conflict occurs between the child's best interest as determined by the attorney guardian *ad litem* and the client's

expressed wishes, the conflict may be disclosed, and the Court in its discretion may appoint counsel for the child should that be necessary.

Rule 1.6 - Confidentiality of Information.

Rule 1.6 generally prohibits a lawyer from revealing information relating to representation of the client unless the client consents after consultation.² To the extent an attorney/client relationship exists between the attorney and the guardian *ad litem* rather than between the attorney and the child, the attorney guardian *ad litem* can fulfill his disclosure obligations to the Court as contemplated by the Child Advocate Statute without violating any confidentiality obligations to the child, who is not the attorney guardian *ad litem*'s client. To be sure, the potential exists for misunderstanding whether the attorney guardian *ad litem* acts as a lawyer for the child. However, this can be dealt with by the attorney guardian *ad litem*'s compliance with Rule 4.3, which concerns dealing with unrepresented persons. Rule 4.3 provides as follows:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

A court-appointed Delaware attorney guardian *ad litem* could communicate to the child that he represents the child's best interests and that he will use information gained in interviews with the child and others to further the child's best interests. He should go on to explain however, that he may be required to disclose to the Court information revealed to him by the child if relevant to the best interest determination and that if they disagree, he will so advise the Court. In this way, the attorney guardian *ad litem* can fulfill his statutory "officer of the court" role while protecting to the maximum extent possible the child's interests and rights without violating Rule 1.6.

Rule 3.7 - Attorney as Witness.

Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness as to contested or material issues. This prohibition comes into

² Exceptions to the confidentiality obligation exists under circumstances not relevant here. Rules of Professional Conduct, Rule 1.6(b).

play whether the attorney is viewed as counsel for the guardian *ad litem* and/or counsel for the child. The Wyoming Supreme Court in *Clark v. Alexander, supra*, refused to modify its Rules of Professional Conduct to permit the lawyer to testify as a witness when serving a hybrid attorney guardian *ad litem* role. The Court found that a compromise of this Rule was not necessary in order to permit the attorney guardian *ad litem* to advocate effectively on behalf of the child's best interests and participate in the proceedings.

Although the above rules require compromise in order to effect the dual roles of attorney and guardian *ad litem*, we do not find the same need applies to Wyoming Professional Conduct Rule 3.7. Our holding in *Moore*, 809 P.2d 261, clearly mandates that the attorney/guardian *ad litem* is to be an advocate for the best interests of the child and actively participate at the proceedings. As counsel, the attorney/guardian *ad litem* has the opportunity and the obligation to conduct all necessary pretrial preparation and present all relevant information through the evidence offered at trial. Recommendations can be made to the Court through closing argument based on the evidence received. It is therefore unnecessary to allow the attorney/guardian *ad litem* to place his or her own credibility at issue. Consequently, we join those jurisdictions which hold that an attorney/guardian *ad litem* may not be a fact witness at a custody hearing. 953 P.2d at 154.

In carrying out the attorney guardian *ad litem*'s obligation under subsection (c) to "provide independent, factual information to the Court regarding the case as to which he or she is appointed," we believe the attorney guardian *ad litem*, with the limitations discussed below, can continue to conform to Rule 3.7. That is, the attorney guardian *ad litem* ought to respect his role as an advocate and provide independent factual information to the Court through the testimony and exhibits of others. To protect against becoming a material witness, the attorney guardian *ad litem* can have an assistant accompany him to interviews of others. To the extent the attorney guardian *ad litem* inadvertently becomes a material witness whose testimony is required, he should comply with Rule 3.7 and seek to withdraw as counsel and testify only as a witness.³ As to the requirement of Section 9007A(3)(d) that the attorney guardian *ad litem* "submit a written or oral report to the Court for any proceeding", we think this report should be in the nature of a pre or post trial brief that argues the child's best interests based on the evidence the attorney guardian *ad litem* expects to present or that has been presented. That is, the attorney guardian *ad*

³ Such withdrawal may be excused by the Court if the Court finds under Rule 3.7(3) that withdrawal will substantially prejudice the client.

litem should confine his report and argument, as should any attorney, to arguing a point of view based upon the evidence received or to be received by the Court. To the extent the attorney guardian *ad litem* would rely upon the provisions of subsections (c) and (d) of Section 9007A to present his own observations and investigative results which have not been and are not expected to be otherwise received into evidence, we believe the attorney guardian *ad litem* would violate Rule 3.7.

The Committee recognizes that its opinion (particularly with respect to the limitations imposed by Rule 3.7) will limit the ability of this attorney guardian *ad litem* to act to the full extent of the statutory authority. We recognize as well that the practice in the Court of Chancery where attorneys have been appointed guardians *ad litem* for the elderly or infirm is to act as an officer of the court and express personal observations and views in an effort to assist the court in its determination whether to appoint a guardian of the person or property.⁴ Under the circumstances, the Committee recommends that the Delaware Supreme Court consider whether a modification of Rule 3.7 of the Rules of Professional Responsibility is appropriate to permit attorneys acting as guardians *ad litem* to testify in the sense of restating their personal observations and opinions to the appointing Court on the matter at hand.

Note of the Committee Co-Chair, Adam Singer: Nine members of the Committee joined this Opinion, which constitutes a bare majority of the Committee considering this Attorney Inquiry. Five members abstained. Three members joined the Dissent, which is attached.

⁴ We express no opinion whether the Chancery Court practice complies with Rule 3.7, but do note that in such cases the appointed person typically acts only as guardian *ad litem* and not also as a lawyer.