DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

DISSENT TO OPINION 2001-1

May 8, 2001

We dissent from the above opinion. The Opinion of the Committee is thorough, and examines all the appropriate issues. Indeed, we agree with the Committee's discussion through page eight, and the Committee's analysis of Rule 1.2 (see pages nine through eleven, and concluding that a lawyer can act as guardian *ad litem* without violating Rule 1.2 because, inter alia, the lawyer is in an attorney/client relationship with the guardian ad litem). As discussed below, however, we disagree with the reasoning and/or conclusions of the remainder of the opinion.

RULE 1.6

First, we disagree with the Committee's reasoning with respect to whether a lawyer can be appointed as attorney guardian *ad litem* without violating Rule 1.6 (generally prohibiting a lawyer from revealing information relating to the representation of the client unless the client consents after consultation).

The Committee properly recognizes that the potential exists for misunderstanding whether the attorney guardian ad litem acts as a lawyer for the child. Opinion, at 11. In my mind, this potential is very real. The Committee goes on to suggest that any potential misunderstanding on the part of the child to believe that the lawyer is representing her can be ethically addressed by application of Rule 4.3. Specifically, the Committee suggests that the lawyer can communicate to the child the nuances and fine distinctions between representing the child, and representing the child's best interests. See generally, Opinion, at 12.

We seriously doubt whether as a factual or legal matter, these nuances and distinctions can be adequately disclosed and explained to a child. As a factual matter, a child will be hard pressed to understand that the lawyer, who develops over an extended period of time a close and personal relationship with the child, is not actually representing her. Moreover, as a legal matter, it is not clear to me that a child has the competence to understand the above-discussed distinctions for the purposes of satisfying obligations of the attorney that may exist under Rule 4.3.

Indeed, the Committee, up until this section of the Opinion, takes express and persuasive pains to state the difficulty of the distinctions. Compare Opinion, at pages three ("the designation of 'attorney guardian ad litem,' however does carry potential ambiguity"); page five ("the distinction between representing a guardian ad litem . . . and . . . the child himself is a subtle distinction"); page seven ("the distinction . . . is a subtle one").

RULE 3.7

We disagree with the Committee's conclusion that a lawyer can be appointed as attorney guardian ad litem without violating Rule 3.7. This Rule states "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."

The obligations of the attorney under 29 Del. C. § 9007A(1)(a) (the "Statute" or "Delaware Statute") include the following:

(c) provide independent factual information to the Court . . . . To that end, the attorney guardian ad litem shall conduct an independent investigation . . . . This investigation shall include interviews and/or obervations of the child and relevant individuals . . . .

(d) submit a written or oral report to the Court for any Court proceedings.

We believe the fact finding and fact reporting responsiblities of the attorney guardian *ad*

litem are thus material and integral to the contemplated role of this person under the statutory scheme. These responsibilities cannot be delegated, circumvented, or eliminated from the responsibilities of the attorney guardian *ad litem* without vitiating a central purpose of the statute.

Indeed, the Committee recognizes that there is a possibility that the attorney will need to seek to withdraw as counsel. We believe that this possibility is "likely," and that therefore the lawyer "shall not act as advocate."

The Committee suggests that the likelihood can be diminished through certain practices. The suggestion that an attorney can have an assistant accompany him on interviews does not cure the bar of Rule 3.7, for several reasons. First, it simply may not be practical to have an assistant present at all independent investigations, interviews and/or obervations of the child and relevant individuals. Second, as we read the Statute, it is the attorney who must testify as to his beliefs as to what is in the best interests of the child, and why. It would be highly inappropriate for the "assistant" to somehow become the mouthpiece for the attorney, or to be utilized to make the wishes of the child known.[1] Third, we disagree that the attorney can fulfill the role contemplated by the Statute by limiting his written reports to only legal argument.

The Committee points out that the Wyoming Supreme Court in Clark v. Alexander refused to modify its Rules of Professional Conduct to permit a Wyoming lawyer to testify as a witness, but could still advocate effectively on behalf of the child's best interests. Opinion at page 12. The Committee concludes that similarly a Delaware attorney could advocate effectively on behalf of the child's best interests without being required to testify. Id. at 13. This analysis begs the question of

[1]The Committee does not consider the possibility that the assistant will draw different conclusions from the interviews she attends.

the proper role of a Delaware attorney under the Statute. As previously discussed, the role of an attorney guardian *ad litem* is much more comprehensive than that of a mere advocate. The Committee's analysis also assumes that the statutory role of an attorney under the Wyoming statute is the same as the role of an attorney under the Delaware Statute. We do not believe this is the case.

The Committee has narrowly construed portions of the Statute in order to avoid a conflict with Rule 3.7. Given the apparent purposes of the Delaware Statute, and the somewhat similar practice in the Court of Chancery where attorneys have been appointed guardians *ad litem*, we believe the construction is incorrect. More importantly, we believe it is inappropriate of the Committee to attempt to rewrite the statute in an attempt to avoid a conflict with the Delaware Lawyers Rules of Professional Responsibility. As the Committee essentially concedes, if the attorney in written or oral argument relies solely on his own observations and investigations, he would violate Rule 3.7. Opinion, at 13.

In conclusion, the Statute, through its language as currently drafted, and apparent purpose, place the attorney in the dilemma of either violating Rules 1.6 and 3.7 of the Delaware Lawyers Rules of Professional Responsibility (the "Rules"), or not fulfilling her role as attorney guardian *ad litem*. Only through either (1) a Supreme Court clarification or modification of the Rules, or (2) a Legislative clarification of the Delaware Statute, can the attorney comply with both the Rules and the Statute.