

Ethics Opinion No. 85-4

Guardian Ad Litem Confidentiality.

This Committee has been asked whether the legal or ethical duties of an attorney to preserve the confidences or secrets of his client extend to an attorney acting as a guardian ad litem who is told something by the child in confidence, or whether the attorney may reveal this information to the court. Further, the question has been presented whether the same standard applies to a non-attorney performing as a guardian ad litem supervised by an attorney.

It is the opinion of this Committee that the attorney is not bound by the normal duty of confidentiality, but rather should act within the context of the proceeding and be responsive to the reason for his appointment, namely the best interest of the child. The attorney's duty of confidentiality to a minor child-client must be exercised in accordance with the intelligence, experience, awareness or age of the child and in view of the purpose of his appointment. The scope of representation and the duty of confidentiality are important, however, they do not stand without limitation or common sense restraint. Additionally, because of the nature of the relationship and how it is perceived by the child, the attorney must warn the child that any statements made or positions taken by the child may be disclosed to the Court if the attorney deems such disclosure to be in the child's best interest.

First, the standard attorney-client scope of representation is limited. On one hand, a lawyer's fiduciary duty to his client is of the highest order. *Smoot v. Lund*, 369 P.2d 933, 936 (Utah 1962). The lawyer shall act with undivided loyalty and as the legal champion for his client. *Grievance Committee v. Natter*, 203 A.2d 82, 84 (Conn. 1962). On the other hand, a lawyer is not required to pursue objectives or employ means simply because a client may wish that a lawyer do so. ABA Model Rules 1.2. The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences or loyalties. ABA Model Code EC 5-1.

Second, the duty of confidence is not without reasonable limitation. The obligation of a lawyer to safeguard client's confidences is based on the fiduciary relationship, and is essential to promote full disclosure of facts to the attorney. ABA Model Rules 1.6. The Model Rules concerning the principle of confidentiality differ from the corresponding provisions in the ABA Model Code. *Compare* Model Code DR 4-101. However, both the Model Rules and Model Code provide that the confidentiality rule is subject to limited exceptions. The lawyer's exercise of discretion requires consideration of such factors as (1) the nature of the lawyer's relationship to the client-child and (2) the interests of the child which might be adversely affected.

Third, the nature of the attorney-child relationship is similar to the general attorney-client association, and therefore analogous restrictions also apply. A guardian ad litem appointed by the court is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability. *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977). The guardian is appointed with the authority to represent the child's "best interest in the legal proceeding." AS 25.24.310(c). The best interests of the child are paramount. Lawyers thus appointed should consider the child as their "client" but should handle the proceeding in the best interests of the child, even when their handling of the case is not consistent with the expressed wishes of the child. See Mass. Bar Assn. Ethical Opn. 76-1, 61 Mass. L.Q. 54 (1976).

Fourth, the nature of the lawyer's responsibilities must be exercised within the peculiar relationship between the lawyer-guardian and client-child. The normal attorney-client relationship does not directly apply when the minor child may not be capable of making important decisions. Indeed, the court may appoint the lawyer as guardian ad litem when it feels the child cannot adequately act in his or her best interest. Model Rules 1.14. The law recognizes intermediate degrees of competency. The duty of the lawyer may vary in accordance with the intelligence, experience, awareness or age of the child. Model Code EC 7-11. The lawyer shall consider all circumstances then prevailing and act with care to safeguard and advance the best interests of the client-minor child. See Model Code EC 7-12.

Fifth, the child often perceives the guardian to be the child's attorney, to represent the child's interest as the child perceives that interest to be. The guardian sometimes will take a position adverse to the position stated by the child. The guardian should explain his/her role to the child, in a manner consistent with the child's age and understanding. The child's natural trust and perception must not be abused. In that regard, a guardian should immediately explain his/her role to the child, including (1) the fact that the guardian's role is to determine what is in the child's best interest, (2) the fact that the guardian may take a position contrary to the child's wishes, and (3) the fact that anything the child tells the guardian may be disclosed to the court if the guardian deems such disclosure to be in the child's best interests. If the guardian does take a position adverse to the position of the child, the guardian must disclose the child's position to the court. That is so that the court is fully advised in the matter before it and also so that the court may take any other action appropriate under the circumstances, such as appointing an attorney to represent the child to assert the child's expressed position.

Lastly, the Committee believes these same standards apply to a non-attorney serving as guardian ad litem when supervised by a member of the bar.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice. The lawyer shall seek the administration of justice and preserve the excellence of services rendered whether directly as guardian or only indirectly as supervisor for such a guardian. *See Model Rules, Preamble.*

In conclusion, the same reasons for the appointment of a guardian ad litem, namely the best interests of the child, also form the basis for the restraint placed on the duty of confidentiality. The lawyer appointed by the court to effect justice is not bound by the normal duty of confidence if he believes information gained from the child should be revealed to assist the court in achieving the best interests of that child.

Adopted by the Alaska Bar Association Ethics Committee on September 12, 1985.

Approved by the Board of Governors on November 8, 1985.