
E-89-13 Conflicts: Dual role as guardian ad litem and attorney

Question

Does an inherent conflict of interest exist for an attorney simultaneously acting as attorney of record and as guardian ad litem?

Opinion

No. The Wisconsin Supreme Court does not perceive an inherent conflict of interest in an attorney simultaneously serving as attorney of record and as guardian ad litem. *See* Wis. Stats. § 803.01(3)(a). *See also* Wis. Stats. § 757.48(1) (i.e., “If the attorney of record is also the guardian ad litem . . .”) In such circumstances the attorney-guardian ad litem “shall be entitled only to attorney fees. . . .” Wis. Stats. § 757.48(1). And, in cases involving the compromise or settlement of actions or proceedings in which minors or incompetent persons are parties, judicial safeguards exist to protect the minor or incompetent interests. Wis. Stats. § 807.10.

Nevertheless, circumstances may arise in which the dual roles of attorney of record and guardian ad litem may conflict. SCR 20:1.2, for example, requires that “(a) lawyer . . . abide by a client’s decisions concerning the objectives of representation . . . and . . . consult with the client as to the means by which they are to be pursued.” And SCR 20:1.14(b) acknowledges the propriety and necessity of seeking the appointment of an independent guardian ad litem under appropriate circumstances.

A few ethics opinions from other jurisdictions have dealt with these issues, acknowledging that situations may arise in which client (i.e., minor or incompetent) consent would be required, which only an independent guardian ad litem could appropriately give and, generally, situations in which a lawyer could not exercise independent professional judgment serving in the dual role. *See, e.g.*, Standing Committee on Legal Ethics of the Virginia State Bar, Opinion 932 (6/11/87); and Committee on Rules of Professional Conduct of the State Bar of Arizona, Opinion 86-13 (11/11/86). As the Arizona opinion correctly points out, the lawyer’s duty to follow his or her client’s wishes as far as ethically and legally

possible may conflict in some cases with the guardian ad litem's duty to pursue the best interests of the minor or incompetent.

When this conflict between client wishes and best interests is or, to a reasonably prudent and competent attorney, should be reasonably apparent, the attorney-guardian ad litem should petition the court for a substitution as guardian ad litem. Then, if the independent guardian ad litem finds that the course of conduct pursued by the attorney consistent with client wishes is contrary to client best interests, the matter should be presented to the court for resolution. *See generally* SCR 20:1.2(a), SCR 20:1.14 and SC 20:2.1; and Arizona Ethics Opinion 86-13, *supra*, in accord.

In summary, acting simultaneously as attorney of record and as guardian ad litem is not only a common practice, judicially sanctioned and monitored but one that is compatible with the rules of conduct under most circumstances. However, when a reasonably prudent and competent lawyer detects, or should detect, a divergence between client wishes and best interests of any consequence, the lawyer should seek judicial severance of the dual roles.