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March 26, 1999

LEGAL ETHICS OPINION 1729 — GUARDIAN AD LITEM AS VISITATION SUPERVISOR AND WITNESS IN SAME MATTER.

You have presented a hypothetical situation in which an attorney is involved in litigation in which a guardian ad litem has served as the visitation supervisor. There are contested issues of material fact involving events which occurred during a visitation, and the guardian ad litem will have to testify in that regard. The guardian ad litem's testimony may be impeached or contradicted by the testimony of one of the parties present during the visitation.

Under the facts you have presented, you have asked the committee to opine as to whether a guardian ad litem (GAL) can represent the client and testify as a witness to disputed issues of material fact, or whether a new GAL must be appointed.

The appropriate and controlling disciplinary rule relative to your inquiry is:

> DR:5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness.
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> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR:5-101(B)(1) through (3).
>
> (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The committee has previously opined that an attorney who discovers, after undertaking employment, that he must testify as to a material matter if he is to serve the best interests of his client, must withdraw from the representation of that client. LE Op. 462. *See also* LE Op. 901 (wife's attorney may not continue to represent wife in case involving enforcement of property settlement agreement which husband repudiated, where attorney was a party to the negotiations and attorney's testimony would likely be required). There are exceptions to this “witness-advocate” rule, but none of these exceptions apply to your inquiry.[1]

[1] The exceptions to the “witness-advocate” rule are set out in DR:5-101(B), permitting the testifying lawyer and his firm to remain as trial counsel if: (1) the testimony will relate solely to an uncontested matter or to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (2) the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (3) recusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

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The Code of Virginia requires that the court appoint a "discreet and competent attorney-at-law" to serve as guardian ad litem . . . or if no such attorney be found willing to act, the court will appoint some other discreet and proper person. Va. Code § 8.01-9. However, Va. Code § 16.1-266(A) expressly limits any such appointment in the juvenile and domestic relations district court to "a discreet and competent attorney-at-law. . . ." The GAL "shall represent the child . . . at any such hearing and at all stages of the proceedings unless relieved or replaced in the manner provided by law." Va. Code § 16.1-288. Va. Code § 8.01-9 states that "every guardian ad litem shall faithfully represent the estate of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such defendant is so represented and protected." The court may enforce this duty by removing the guardian ad litem and appointing another one. In regard to the obligations of the guardian ad litem, the Court of Appeals of Virginia has observed:

> We note that the duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interest of the child by making a bona fide examination of the facts and if he does not faithfully represent the interest of the infant he may be removed. . . .

Norfolk Division of Social Services v. Unknown Father, 2 Va. App. 420, 425 n.5, 345 S.E.2d 533, 536 n.5 (1986). The guardian has functions that may require him or her "to assume an adversarial role in the litigation" and to pursue "an affirmative course of action." Virginia Rule of Court 8:6 for the Juvenile and Domestic Relations District Courts provides:

> When appointed for a child, the guardian ad litem shall vigorously represent the child fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

In determining the ethical duties of an attorney serving as a GAL, this committee has recognized that the relationship of the GAL and child is different from the relationship of attorney and client. *See* LE Op. 1725. In reconciling the differences between the traditional ethical duties an attorney owes to a client, and the legal obligations that a GAL must discharge, the committee believes that where fulfilling a specific duty of a guardian ad litem conflicts with traditional duties required of an attorney under the Code of Professional Responsibility, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the GAL should follow the traditional course of action required under the Code of Professional Responsibility.

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In the facts you present, the committee believes there is a conflict between the attorney's ethical obligations under the "witness-advocate" rule and the attorney's duty as a GAL to report facts to the court that were learned during the GAL's appointment and investigation, and to make recommendations to the court based upon such facts. If the GAL cannot report to the court what the GAL has observed or learned during the visitation, for fear of violating the "witness-advocate" rule, then the GAL cannot discharge the legal obligations of his appointment.

The attorney serving as GAL is charged with the duty of "fully protecting the child's interest and welfare." Va. S. Ct. Rule 8:6. The Order for Appointment of Guardian Ad Litem (DC-514) provides that the guardian ad litem is appointed "to protect and represent the interests of [child] in connection with all proceedings involved in this matter." The Order of Appointment provides further that the guardian ad litem "perform the duties . . . specified on the reverse and incorporated by reference into this order." The duties incorporated by reference include:

> 1. Represent the child in accordance with Rule 8:6 of the Rules of the Supreme Court of Virginia.
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> 2. Advise the court relative to the following: (a) the results of the guardian ad litem's investigation of the case; (b) the guardian ad litem's recommendation as to any testing necessary to make an effective disposition of the case; (c) the guardian ad litem's recommendation as to the placement of the child and disposition of the case; (d) *the results of the guardian ad litem's monitoring of the child's welfare and of the parties' compliance with the court's orders*; (e) the guardian ad litem's recommendation as to the services to be made available to the child and family or household members.

(Emphasis added). Thus, the GAL is required to investigate the case and "advise the court" regarding "the results" of the investigation. This requires the GAL to provide the court with material facts that may be disputed by some party in the instant proceeding. The GAL is required to provide the court with his "opinion" as to "what is in the child's interest and welfare." Rule 8:6, *supra*.

Enforcing the "witness-advocate" rule in the context of a GAL complying with his legal mandate to report to the court the results of his investigation does not serve the purpose for which the rule was intended. One of the purposes of the "witness-advocate" rule is to protect the client's interests in not having testimony produced on a contested issue from a witness (lawyer) who is obviously interested in the case's outcome and is thus subject to impeachment for that reason. LE Op. 1709. The GAL is not "interested" in the case's outcome in the same manner as an advocate for one of the parties, who is hired as an advocate to accomplish a party's goal or objective, i.e., win custody of the child for a

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parent. Another purpose of the rule is to preserve the integrity of the judicial system, by avoiding any public perception that a testifying advocate has distorted the testimony to further his or her client's cause. LE Op. 1709, *supra*. The committee believes that such an appearance of impropriety is not present in the context of a GAL making his report to the court and making recommendations which he believes to be in the child's best interest.

Accordingly, it is the opinion of the committee that DR:5-102 is not violated under circumstances described in your inquiry as the rule should not apply in this context.

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