

# 2002 FORMAL ETHICS OPINION 8

## Search Adopted Opinions

### DIRECT CONTACT WITH LAWYER APPOINTED GUARDIAN AD LITEM FOR MINOR PLAINTIFF

*Adopted: January 24, 2003*

*Opinion rules that a lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.*

#### Inquiry #1:

An action alleging medical malpractice was brought on behalf of Child, who was injured, and Child's Mother and Father. Plaintiff-Attorneys represent Child, Mother, and Father. The defendants are represented by Defense-Attorneys. A private lawyer (Guardian Ad Litem) was appointed by the court to serve as guardian ad litem for the minor. At mediation, Defense-Attorneys asked to meet privately with Guardian Ad Litem to discuss Child's case. Plaintiff-Attorneys denied the request, maintaining that Guardian Ad Litem is their client and, pursuant to Rule 4.2(a) of the Rules of Professional Conduct, Defense-Attorneys may not communicate with their represented client without their consent. Defense-Attorneys contend that, as a lawyer, Guardian Ad Litem "represents" Child and, therefore, has a professional responsibility to exercise independent professional judgment on behalf of Child, which includes making an independent inquiry of Defense-Attorneys' proposals and positions. Defense-Attorneys further contend that Plaintiff-Attorneys may not interfere with Guardian Ad Litem's decision on whether to communicate privately with Defense-Attorneys.

If a guardian ad litem is a lawyer, is he or she still a client represented by counsel for the purposes of Rule 4.2, thus prohibiting direct contact by opposing counsel without consent of the guardian ad litem's lawyer?

#### Opinion #1:

Rule 17(a) and (b) of the North Carolina Rules of Civil Procedure require an action to be brought by the "real party in interest" and, in the case of a minor, by a general guardian or, if there is none, by an appointed guardian ad litem. As a party, the guardian ad litem may choose to be represented by legal counsel and permit legal counsel to make decisions about the strategy for the litigation. See Rule of Professional Conduct 1.2, cmt. [1] ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues...."). The fact that the guardian ad litem is a lawyer does not make him or her co-counsel for the purpose of litigating the case. Therefore, opposing counsel must comply with Rule 4.2 and respect the decision of the guardian ad litem's trial counsel to deny a request to communicate privately with their client, the guardian ad litem.

The role and responsibilities of a guardian ad litem are established by the court making the appointment as well as by statute and case law. See, e.g., N.C.G.S. 1A-1, Rule 17; *Satler v. Purser*, 12 NC App 206, 182 SE 2d 850 (1971). These remain the same whether the person appointed is a lawyer or not. Nevertheless, if a lawyer is appointed, he or she must fulfill the responsibilities of the guardian ad litem in a manner that is consistent with the requirements of the Rules of Professional Conduct. This means that the lawyer must be honest, avoid conflicts of interest, and exercise professional judgment in making decisions about matters that are within the purview of the guardian ad litem such as whether a settlement proposal should be accepted.

#### Inquiry #2:

If separate legal counsel represents a guardian ad litem who is a lawyer, is the guardian ad litem entitled to a court-awarded attorney's fee?

#### Opinion #2:

Whether a guardian ad litem who is a lawyer is entitled to a court-awarded fee is a question for the court and not for the Ethics Committee. See Rule .0102(g) of the Procedures for Ruling on Questions of Legal Ethics, 27 N.C.A.C. 1D, Section .0100 (Ethics Committee generally does not respond to inquiries that seek opinions on issues of law).