

LEGAL ETHICS OPINION 1810 CONFLICT OF INTEREST – ATTORNEY
SERVING AS GUARDIAN AD LITEM WHEN
OPPOSING COUNSEL IN THE DIVORCE
MATTER WAS A FORMER PARTNER.

You have presented a hypothetical involving a potential conflict of interest in a custody dispute. Previously, Attorney A and Attorney B were in the same firm. During that time, Attorney B represented the husband in a divorce. Attorney A did no work on the matter and learned no information about it. Attorney B left the firm, continued to represent that husband, and the divorce became final. That client and his ex-wife then had a custody dispute. Attorney B represents this father in that dispute. Originally, Attorney C represented the mother. The court appointed Attorney A as the guardian ad litem for the child. Attorney A presented to the court that he had been in a firm with Attorney B at the start of the divorce, but never worked on the case and learned no information. The mother orally waived any conflict before the judge. The judge permitted Attorney A to remain as guardian. The mother has subsequently changed attorneys, hiring Attorney D. Attorney D raises an objection to Attorney A's service as guardian as Attorney D maintains that it presents an impermissible conflict of interest.

Under the facts you have presented, you have asked the committee the following questions:

- 1) Does Attorney A have a conflict in continuing as guardian ad litem?
- 2) Does the mother waive any potential conflict by her prior actions?

The appropriate and controlling ethical rules applicable to this scenario are Rules 1.7, 1.9 and 1.10(a), which provide as follows:

Rule 1.7 (Conflict of Interest: General Rule)

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 (Conflict of Interest: Former Client)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Rule 1.10 (Imputed Disqualification: General Rule)

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

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There is no express provision in the Rules of Professional Conduct addressing the unique circumstances of the role of guardian ad litem. In LEO 1729¹, this committee opined that

Where fulfilling a specific duty of the guardian ad litem conflicts with the 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.

The committee opines that the present scenario is of the latter sort. The usual rules provisions regarding conflicts of interest do not conflict with this guardian ad litem's duties. Resolution of this conflicts issue depends upon an application of Rules 1.7, 1.9, and 1.10(a) to Attorney A's representation (as guardian) of the child.

Attorney D charges that Attorney A has an impermissible conflict of interest in representing the child as guardian ad litem. The committee opines that Rule 1.7, when applied to Attorney A's representation, does not establish a conflict of interest. Attorney A does not represent the husband; thus, Attorney A does not have a conflict under paragraph (a) of the rule, regarding direct adversity between current clients. Also, the committee opines that Attorney A does not have a conflict of interest under paragraph (b) of the rule, regarding a lawyer's own interests. That Attorney A previously worked with Attorney B is not such a strong connection as to "materially limit" Attorney A's ability to represent the child.

Rule 1.9 also does not trigger a conflict of interest for Attorney A. That rule can only apply regarding a former client. The husband was never a client of Attorney A; therefore, Attorney A does not have a Rule 1.9 conflict of interest here.

Applying Rules 1.7 and 1.9 directly to Attorney A is not the end of the analysis for determining whether Attorney A has a conflict of interest preventing this representation. Rule 1.10 (a) imputes conflicts of interest to other members of an attorney's firm. Thus, the question becomes, does Attorney B's representation of the husband, either now or previously while with Attorney A's firm, preclude Attorney A from involvement as guardian. The two attorneys were in a firm together at the time Attorney B initiated his representation of the father in the divorce. As outlined above, Rule 1.7 precludes an attorney from representing one client directly adverse to another client in that matter. If that rule precludes any attorney in a firm from representing a particular client, Rule 1.10(a) extends that bar to every other attorney in the office. Thus, no member of Attorney B's present firm can represent anyone else in B's client's domestic matter.

¹ LEO 1729 makes reference to the Code of Professional Responsibility, which were the ethics rules in effect at the time of that opinion. The change to the Rules of Professional Responsibility, effective January 1, 2000, does not change the committee's position stated in LEO 1729.

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While Attorneys A and B were in the same firm in the past, Attorney B left that firm. Comment 7 to Rule 1.10 explains the application of the imputation concept to a law firm where an attorney has left the firm. Comment 7 states, in pertinent part, that:

Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with a firm.

Paragraph (b) of the rule establishes that a law firm may represent any client previously represented by a firm attorney who has left the firm so long as no attorney currently in the firm has confidential information about that representation. In applying Rule 1.10 to Attorney B's representation of this client, the imputation of conflicts of interest is limited to those attorneys in the firm together *now*. See LEO 1806. Attorney B's current representation of this father cannot trigger any conflict of interest for Attorney A as Attorney A and Attorney B are now in two different firms and Attorney A did not learn any confidential information about the representation.²

Similarly, Rule 1.9(a) could only reach Attorney A, through the imputation language of Rule 1.10(a), if some member of his current firm used to represent a party in the matter; that is not the case. Attorney A would also not have a conflict of interest under Rule 1.9(c) regarding use of information gained in a prior representation. Attorney A himself received no confidential information from the father. To reiterate, Rule 1.10 does not impute Attorney B's information to members of the firm he left. Thus, Rule 1.10 does not impute the information gained by Attorney B to Attorney A as they are no longer in the same firm.

The committee opines that Attorney A has no conflict of interest in serving as the guardian ad litem for the child in the custody case even though his former partner represents the father.

Your second question asks whether the mother has waived any conflict of interest here by her prior actions. The scenario and question contemplate that the mother's oral assent to Attorney A's appointment as guardian may have operated as such a waiver. The committee opines that this position is unfounded for two reasons.

First, the committee opined in response to question one, above, that appointment as guardian ad litem triggers no conflict of interest for Attorney A. Accordingly, there is no conflict in need of a waiver or consent.

² The hypothetical scenario provided no facts suggesting that unlike Attorney A, some other member of his firm did learn confidential information about Attorney B's representation of the husband while at the firm. Accordingly, the committee reads the facts that Attorney A *like all members of his firm* received no such information while Attorney B was with the firm.

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Secondly, were Attorney A concerned about a possible conflict of interest in this situation, it would not be the mother's consent that he would need. In LEO 1725, this committee opined that if:

A lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest, either because of a personal interest ... or a multiple representation...then the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation.

Thus, the proper course for Attorney A if concerned about a possible conflict of interest would be to present the circumstances to the court for resolution. According to the scenario of this request, Attorney A did exactly that and the court approved his appointment. The mother's consent was neither sufficient, nor necessary.

The committee opines that Attorney A permissibly serves as guardian ad litem in this custody dispute; no conflict of interest precludes that service.