

LEGAL ETHICS OPINION 1831

COMPENSATION OF GUARDIAN *AD LITEM* BY INSURER.

You have presented a hypothetical in which an attorney was appointed to serve as guardian *ad litem* for a minor plaintiff in a personal injury case. The insurer petitions the court for approval of the settlement of the minor's claim. The insurer is willing to pay the fee of the guardian *ad litem* for her services as a cost to the insurer of obtaining that settlement.

With regard to that hypothetical situation, you have asked the Committee to opine with regard to the following questions:

- 1) From whom may a guardian *ad litem* ethically accept fee payment when appointed by a court to represent a minor in a hearing in which a petitioning insurance company seeks court approval of the settlement of the minor's personal injury claim?
- 2) May the minor's parent give informed consent to the third party payment, in resolution of the potential conflict?

The purview of this Committee is exclusively to interpret the Rules of Professional Conduct. *See* Rules of the Virginia Supreme Court, Pt. 6, § IV, Para. 10. Determination of who should properly pay the fee of a guardian *ad litem* in a particular matter is a legal question. The Committee notes that Va. Code Section 8.01-424 grants the court the power to approve the settlement of the minor's claim and the distribution of the settlement proceeds. Consequently, the particulars regarding the payment of the guardian *ad litem*'s fee are subject to the court's approval.

Assuming the child is the "client" of the guardian *ad litem* for purposes of your inquiry,<sup>1</sup> you ask whether Rule 1.8(f) is applicable to the circumstances presented. Specifically, Rule 1.8(f) allows for payment of legal fees by third parties with the following requirements:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

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<sup>1</sup> The Committee does not hold that the child is the "client" of the guardian *ad litem*. That is a legal issue outside the purview of the Committee. Nevertheless, the Committee has opined that the Rules of Professional Conduct may apply to a guardian *ad litem* representing a child if the rules of conduct are not inconsistent with the lawyer's duties as guardian. *See* LEO 1729.

(3) information relating to representation of a client is protected as required by Rule 1.6.

Thus, if the attorney can comply with those requirements, including the requirement of consent, then the attorney may ethically accept payment of her fee by a third party.

Your request asks just who can provide the consent called for in this situation, as the client is a minor. Of course, a minor cannot provide that consent<sup>2</sup>, and the guardian cannot consent as it is the guardian's receipt of third party money that is at issue. In LEO 1725, an attorney in several matters represented the Department of Social Services (DSS) while simultaneously serving as guardian *ad litem* in other matters where DSS is a party. The opinion directs the attorney to disclose to the court appointing him as guardian that DSS is a client, and the court can decide whether to permit service as guardian. LEO 1725 explains:

It is the duty of the court to see that the GAL faithfully represents and protects the child's interests. To do so, the court must appoint a person...who is discreet and competent and who has no interest adverse to the child's interest....The court is a gatekeeper. If a lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest...then the attorney...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.

The Committee reiterates that advice for any attorney who will serve or is serving as a guardian *ad litem* with a potential conflict of interest, including the attorney in the present scenario if concerned about payment of her fee by the insurer in this instance.

The Committee takes guidance from LEO 1725. The Committee notes the court has appointed the GAL and the court will also approve the compromise or settlement of the minor's claim. Therefore, the issue of the payment of the GAL's fee is also a matter that should be disclosed to and approved by the court. The court's approval of the GAL's fee should address any concern about the "consent" required under Rule 1.8 (f).

The Committee further cautions that any attorney being paid by a third party (such as the guardian in the present scenario) should be mindful of the need to maintain professional independence from that third party payor. Specifically, Rule 5.4(c) provides that the lawyer shall not permit the payor to "direct or regulate the lawyer's professional judgment in rendering such services." The lawyer should be especially sensitive of the need to maintain this independence in a situation involving a minor child. Additionally, when a third party is to pay an attorney's fee, the attorney should be mindful that Rule 1.6, outlining the duty of confidentiality, carves out no exception to that client protection for disclosures to third party payors.

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<sup>2</sup> See LEO 1762 (noting that while a minor may never provide any consent required by the Rules, whether any individual such as a parent, guardian, or next friend can provide valid consent for a minor is a legal question outside the purview of the Committee).

Committee Opinion  
September 6, 2006

This opinion is advisory only, and not binding on any court or tribunal.