

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/15
Conflict of Interest: Guardian Ad Litem Representation for a Civil Suit
March 9, 1989

RULE REFERENCES:

- *Rule 1.6
- *Rule 1.7
- *Rule 3.7

SUBJECTS:

- *Adverse Representation
- *Attorney-Client Privilege
- *Attorney-Client Relationship
- *Client Communications
- *Confidentiality
- *Conflict of Interest
- *Court Appointed Lawyers
- *Guardian Ad Litem
- *Minors
- *Witnesses

ANNOTATION:

An attorney-guardian ad litem who is appointed to represent a child in a criminal matter and who acquires information in that criminal matter from the defendant, may later commence a civil action against the defendant on behalf of the child-client. (Rule 1.6; Rule 1.7).

An attorney shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness, subject to certain exceptions. (Rule 3.7).

BACKGROUND:

The inquiring attorney was appointed Guardian Ad Litem pursuant to Superior Court Rule 93-A to represent two minor children who were the victims of a felonious sexual assault. During the course of his representation the inquiring attorney participated in the plea negotiations that took place with the Defendant's attorney and the County Attorney. The cases against the Defendant were disposed of by the Defendant entering pleas of *nolo contendere* on two misdemeanor assault charges.

QUESTION:

May the inquiring attorney represent the two minor children, through their mother and best friend, in a civil suit against the criminal defendant?

RESPONSE:

Superior Court Rule 93-A permits the appointment of a Guardian Ad Litem to represent the interests of the alleged victim in sex related offenses involving minor victims.

Rule 1.7 of the Rules of Professional Conduct generally provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, and that 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 to a third person or by the lawyer's own interests.

Rule 1.6 of the Rules of Professional Conduct provides that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation subject to certain exceptions.

It is open to question whether the Guardian is viewed as a party to the proceeding or whether he is an attorney representing a client, namely the alleged minor victims. In *Ross v. Gadwah*, 131 NH 391, 554 A.2d 1284 (1988), decided December 30, 1988, the Supreme Court ruled, at least in child custody cases, that the Guardian Ad Litem does not act in the capacity of a lawyer for the child but rather as a full party to the litigation. However, it is not clear that *Ross v. Gadwah* is applicable to the inquiry which did not involve a child custody case but rather a criminal case, and whether the Guardian Ad Litem's fundamental role is different in that type of proceeding.

In the Committee's opinion, whether the inquiring attorney was a party to the criminal proceeding, or acted in the role of attorney for the minor victims is not determinative with respect to the question presented by the inquiry. Regardless of the capacity in which the inquiring attorney functioned, he at no time acquired confidential information from the Defendant nor did he acquire a duty to the Defendant, then or now, that would inhibit his abilities to represent the minor children in a civil action against the Defendant.

However, the inquiring attorney should determine whether it is likely that he or she may be a witness in the event of trial of the civil action in which case the prohibition contained in Rule 3.7 might apply.

SUMMARY:

There is no ethical prohibition to the inquiring attorney representing the minor children through their mother and best friend in a civil suit against the criminal defendant.