

**CHAPTER SIX – ETHICAL  
DILEMMAS FACED BY AN  
ATTORNEY GUARDIAN AD LITEM**

Several conflicts exist between the Rules of Professional Conduct and an attorney guardian *ad litem*'s role in representing the best interests of a child. There are three primary areas of conflict. The first pertains to an attorney acting as both an advocate and a witness. The second involves the confidentiality of communications between the child and the attorney. The third involves the duty to abide by a client's decisions versus representing the best interests of the child.

As of June 10, 2002, the statutory duties of an attorney guardian ad litem have been further clarified as a result of a year long effort between OCA and the Office of Disciplinary Counsel.

29 Del. C. § 9007A(c) now begins with the following: "The attorney GAL's duty is to the child. The scope of the representation is the child's best interests. The attorney guardian ad litem shall have the duty of confidentiality to the child unless disclosure is necessary to protect the child's best interests."

What the first two sentences mean is that the child is your client. However, your scope of representation of that child is the child's best interests. **Rule 1.2** addresses scope of representation. When you initially get a case, you need to make sure you explain that to your child in terms the child can understand. Make sure to explain that while the scope includes the wishes of the child, there are also many other things you must consider. See 13 Del.C. § 722 for guidance. And always remember, if your recommendations to the Court on the child's best interests and the

child's expressed wishes conflict, please call OCA immediately so we can decide how best to proceed.

The third sentence indicates that you and your child client have confidentiality unless disclosure is necessary to protect the child's best interests. **Rule 1.6** supports this by allowing disclosure "to comply with other law or court order." OCA is also mentioned in the comments following Rule 1.6. This is not to say, however, that you should routinely violate your client's confidentiality. This disclosure piece should be used in rare circumstances primarily where there is no other way to protect your client's safety.

The OCA statute also clarifies that you are not a witness in the case, and that you should NOT take the stand nor file a report with the Court. **Delaware Rule of Professional Conduct 3.7** prohibits an attorney from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. § 9007A(c)(4) states that the attorney GAL should "present evidence to the Court in support of his or her position", eliminating any reference to an oral or written report. In participating in Court hearings regarding your client, you should be prepared to call witnesses, cross-examine witnesses and introduce evidence. In closing argument, you can then make a best interests recommendation based on the evidence presented to the Court.