

L.E.I. 83-9

(October 21, 1983)

**DUTY OF A PARENT'S LAWYER TO NOTIFY A  
GUARDIAN AD LITEM IN NEGLECT OR  
ABUSE PROCEEDINGS**

The following inquiry has been presented to the Committee for its advisory opinion:

A petition has been filed with the Department of Human Services, pursuant to W. Va. Code § 49-6-1, alleging that three infant children are believed to be neglected or abused. Attorney X was employed to represent the parents of the children. Temporary custody of the children has been vested in the Department of Human Services pursuant to W. Va. Code § 49-6-3, but the children were allowed to continue to reside with their parents until a preliminary hearing could be conducted. By separate order, the court appointed Lawyer Y to represent the three children and Lawyer Y continues to represent the children. Lawyer X now wishes to present medical, psychological and psychiatric evidence to support his clients' position that their children are not neglected or abused. Lawyer X inquires as to whether or not he may arrange for psychological examination and testing of the children and, further, whether he has a duty to advise Attorney Y of the proposed action of the parents in arranging for medical examination of the children.

Provisions in the Code of Professional Responsibility of The West Virginia State Bar which must be considered are DR 1-102(A)(2), (5) and DR 7-104(A)(1). DR 1-102(A)(2) requires

that a lawyer may not circumvent a disciplinary rule through the actions of another. DR 1-102(A)(5) indicates that a lawyer should not engage in conduct that is prejudicial to the administration of justice. DR 7-104(A)(1) indicates that in the representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer unless he has the prior consent of the lawyer or is otherwise authorized by law to do so. West Virginia Code § 49-6-1(a) provides that upon the filing of a petition alleging neglect or abuse the court is authorized to appoint counsel. Subsection (b) of that same statute clarifies that the children involved in neglect and abuse proceedings have a right to counsel. A reading of W. Va. Code § 49-6-2(a) seems to indicate a legislative policy that the attorney representing the child should be loyal to only the child and "Under no circumstances may the same attorney represent both the child and the other party or parties . . ." It is also noted that W. Va. Code § 49-6-4 provides for just the type of examination which the inquiring attorney wishes to be made of his clients' children.

The Committee is aware that public policy generally favors location and use of all available evidence in matters of importance, particularly when difficult decisions regarding the welfare of children are involved.

Of course, the overall policy behind DR 7-104 of the West Virginia Code of Professional Responsibility is that lawyers representing adverse parties should not be allowed to influence

improperly parties to litigation to the extent that they might obtain admissions or injurious information from those parties or information which such party might not be willing to give if provided with the advice of counsel. It is the view of the Committee that the proposed examination procedure would constitute "communication on the subject of the representation with a party." It is obvious that the purpose of the communication is to create evidence which Attorney X's clients will use in the hearing on the neglect or abuse petition. The action is made no more acceptable if the lawyer simply steps out of the process and directs the parents to organize such an interview with physicians.

It should be observed that the wisdom of DR 7-104(A)(1) is illustrated in the present inquiry in both a general and a very specific sense. First, the person appointed as counsel for the child generally is an alter ego for the child during the period of the neglect and abuse proceedings. It is assumed that the child cannot exercise appropriate judgment with regard to his own interests in the matter and that those interests must be protected without undue influence from others. For this reason, the court appoints a lawyer to look after the full range of interests and activities of the child during the litigation. The wisdom of the "no contact" rule is illustrated by the practical questions which exist concerning the manner of the proposed psychological and medical examination. The selection of the particular psychologist to perform the interviews proposed could, practically speaking, directly result in a more or less favorable interpretation of the

childrens' statements concerning their parents and their homes. The distribution and review of reports with regard to the medical interview also would be much more objective and fair should the childrens' guardian ad litem be involved in the proceeding and aware of the medical examination in advance of the hearing required by W. Va. Code § 49-6-3.

In light of the above considerations, it is clear that the lawyer appointed to represent the interests of the child cannot do an adequate job for that child unless allowed to review the qualifications and possible bias of the physician selected to perform the proposed medical testing and is also allowed to receive and carefully evaluate the test results in advance of any hearing. Based upon its understanding of the statutes and disciplinary rules applicable to the inquiry presented, it is the opinion of the Committee that a lawyer representing parents in neglect and abuse proceedings may not directly or indirectly arrange for medical examination of children who are the subject of the proceedings without first obtaining the permission of the lawyer appointed guardian ad litem of those children.

NOTE: The facts and subject matter contained in this letter are confidential by rule of the West Virginia Supreme Court of Appeals.