NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 656 (38-93)

Topics: Communication by attorney with adverse party

Digest: Attorney for parent in child custody proceeding may not communicate with child for whom court has appointed a law guardian without law guardian's consent

Code: DR 7-104(A)(1)

QUESTION

May the attorney for a parent in a child custody proceeding question a child for whom the court has appointed a law guardian without the law guardian's consent?

OPINION

This opinion addresses the applicability of the restrictions of DR 7-104(A)(1) on communications between the attorney for a parent and a child for whom the court has appointed a law guardian in connection with custody proceedings.

DR 7-104(A)(1) provides:

> During the course of the representation of a client a lawyer shall not: 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in the matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The instant question turns on whether the relationship of a child to a law guardian is equivalent to the client-attorney relationship for purposes of the rule, and if so, whether the rule's use of the word "party" encompasses a client who is not formally a party to a proceeding. We conclude that the purposes of the rule are plainly served by its application to a child for whom a law guardian has been appointed, and that all of the requisites of the rule are satisfied in the circumstances of the question presented.

1

New York State's Family Court Act, which authorizes the appointment of law guardians for children, was enacted to ensure that children would be represented by counsel rather than by more traditional guardians ad litem[1] when the protection of their interests so warranted. Family Court Act §241 specifies that law guardians are "counsel" who "help protect" children's "interests," while §242 instructs that they must be attorneys. Several commentators have noted that the Act's drafters apparently envisioned law guardians to be "the equivalent to legal counsel," even if the term "guardian" assigns to these lawyers some of the additional investigative and parental functions of the guardian ad litem. Merril Sobie, *The Representation of Children: A Summary and Analysis of the Bar Association Law Guardian Study,* 57 N.Y.S.B.J. 41, 42 (1985), *citing* Jacob Isaacs, *The Role of the Lawyer Representing Minors in the Family Court*, 12 Buffalo L. Rev. 501 (1963); Besharov, *supra*, at 185 (law guardian marries the dual function of guardian ad litem and the attorney). *See also Scott L. v. Bruce N.,* 134 Misc.2d 240, 241-43, 509 N.Y.S.2d 971, 972-74 (Fam. Ct. 1986) (while law guardian's and guardian ad litem's functions sometimes overlap, the roles often diverge because the former must perform more as a traditional attorney-advocate of his client's wishes) . Appointment of a guardian ad litem, therefore, cannot substitute for the naming of a law guardian when the latter is required. *Anonymous v. Anonymous*, 70 Misc.2d 584, 585, 333 N.Y.S.2d 897, 899 (Fam. Ct. 1972)

In short, whatever other custodial functions he or she may carry out given the client's infancy, the law guardian must be considered the child's legal counsel for purposes of DR 7-104.

2

The chief purpose for the Disciplinary Rule has been described as the need to prevent "a lawyer from taking advantage of a lay person to secure admissions against interest …." 2 Geoffrey C. Hazard, Jr. & William W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §4.2:100, at 730 (2d ed. Supp. 1992). It has been noted that "[t]he profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law." ABA 359 (1991). The child is, even more than an

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[1] In New York, a guardian ad litem need not be an attorney. Such a guardian traditionally is assigned the more general role of protecting the infant's welfare, rather than the attorney's role of advocate in an adversarial proceeding. *See generally*, N.Y. Civ. Prac. R. 1201-02 (McKinney's 1976); Douglas J. Besharov, Practice Commentaries, N.Y. Family Court Act §241 (McKinney 1983) at 183. According to one formulation, the guardian ad litem should "act toward the juvenile in the proceeding as would a concerned parent," ABA Inst. of Judicial Administration, Juvenile Justice, Pretrial Court Proceedings §6.7(c), and may, in New York, be the child's parent, *see, e.g., Sutherland v. City of New York*, 66 N.Y.2d 800, 497 N.Y.S.2d 906, 488 N.E.2d 837 (1985).

adult, precisely the sort of "lay person" whom DR 7-104(A)(1) seeks to protect.[2]

A narrow reading of DR 7-104(A)(1) would apply the Rule only to an attorney's contacts with "a *party* [he] knows to be represented by a lawyer …," (emphasis supplied), that is, to "the party plaintiff or defendant … [while] all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties." *Black's Law Dictionary* 1122 (6th ed. 1990). A number of cases interpreting DR 7-104 (A) (1) have turned on the question of who is considered a "party" for purposes of that phrase in the Rule. *See*, *e.g.*, *Niesig*, [citation]; Elkan Abramowitz & Frederick N. Saal, *Can We Talk? The Need to Reform DR 7-104(A) (1), N.Y.L.J.,* May 4, 1993, at 3, 10. At least one court has ruled that a child in a custody proceeding is not a "party" for purposes of the caption of the case or the obligation of parties to serve pleadings and other papers, but is instead a "nonparty with an interest in the proceeding." *Borkowski v. Borkowski*, 90 Misc.2d 957, 961, 396 N.Y.S.2d 962, 965 (Sup. Ct 1977).

We have not previously embraced such a narrow interpretation of DR 7-104(A) (1) and do not do so in this context. Instead, we have described DR 7-104's scope as applicable to represented "persons," not merely technical parties. Thus, in N.Y. State 463 (1977), we declared:

> Where a person is represented by counsel, there is an absolute proscription which serves to bar any and all communications relating to the matter for which that person has retained counsel …. If a person is represented by counsel, absent such counsel's consent, the ethics of our profession require that no lawyer other than his own communicate with him on the subject of the representation and all forms of communications are proscribed.

Similarly, in N.Y. State 650 (1993), we applied DR 7-104 in circumstances in which no formal legal proceedings existed and, accordingly, the represented client could not be a technical "party."

Clarifying that DR 7-104(A)(1) applies to children represented by court-appointed law guardians aligns this Committee with the opinions of other state bar associations that have concluded that DR 7-104(A)(1) (or the equivalent Model Rule 4.2)[3] serve to

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[2] A secondary purpose of DR 7-104(A)(1) is the protection of the attorney-client relationship itself and of privileged information. Cases interpreting DR 7-104(A)(1)'s application to communication between attorneys and employees of the adverse party have turned, in part, on whether the employees could be brought under the privileged attorney-client relationship of the attorney with the defendant corporation. *Niesig v. Team I*, [citation]; *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625, 629 (S.D.N.Y. 1990). Courts have affirmed that the child's relationship to the law guardian is one of client-attorney, and is therefore privileged. *Bentley v. Bentley*, 86 A.D.2d 926, 927, 448 N.Y.S.2d 559, 560 (3d Dep't 1982); *see also* Besharov, *supra*, at 186; *Matter of Karl S.*, 118 A.D.2d 1002, 1003, 500 N.Y.S.2d 209, 210 (3d Dep't 1986).

[3] The disciplinary rule is "substantially identical" to Model Rule 4.2. ABA 359 (1991); *see also* Hazard & Hodes, *supra*, at 730 (asserting that Rule 4.2 "is taken virtually verbatim from DR 7-104(A)(1)"; *Polycast*, *supra*, 129 F.R.D. at 623.

bar contact between a parent's attorney and a child for whom a law guardian or other legal counsel or guardian has been appointed by the court, even in proceedings in which the child is not an adverse party in the narrow sense of the term. *See, e.g.,* Wisconsin E-89-14 (1989), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 901:9110 (lawyer for a party or witness in a proceeding may not communicate with guardian ad litem's ward without the knowledge or consent of the guardian ad litem); Arizona 87-8 (1987), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 901:1405 (attorney for man charged with criminal assault cannot interview the alleged victim, the man's 15 year-old daughter, without consent of the alleged victim's court-appointed attorney for the assault proceeding or for a related dependency matter, even with the alleged victim's and her mother's permission); North Carolina 61 (1989), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 901:6611 (lawyer defending stepfather on charges of felonious sex crimes against his seven year-old stepdaughter may interview the child only with the consent of the court-appointed guardian ad litem). *See also* West Virginia 83-9 (1983), indexed in ABA/BNA Lawyers' Manual on Professional Conduct at 801:9004 (lawyer defending parents in defense of a petition alleging neglect or abuse of children may not arrange, or encourage the parents to arrange, for psychological and medical examination of the children who are represented by appointed counsel).

In light of the purposes of the rule, the presence or absence of consent by the child's parent for the parent's attorney to speak with the child is not pertinent; the rule requires that the consent of the child's law guardian be obtained before counsel for either parent may communicate with the child.

CONCLUSION

For the reasons given, the question posed is answered in the negative.