

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

Opinion No. 09-06

The Ethics Committee received a request for an opinion on what ethical limitations may arise when an attorney communicates with a child of a client in matters of custody disputes.

I. FACTS.

The requesting attorney indicates that he believes it is common practice for attorneys to obtain affidavits from the children of custodial or non-custodial client parents when factually appropriate. In particular, the requesting attorney indicates that affidavits from the child of a client may be necessary to establish a prima facie case for modification of primary residential responsibility under N.D.C.C. § 14-09-06.6. According to the requesting attorney this would involve the client bringing the child to the attorney's office for this purpose. The requesting attorney asks whether any Rules of Professional Conduct would bar communicating with the child of a client in this fashion.

II. DISCUSSION.

The Rules of Professional Conduct do not directly address the issue of communicating with children who are the subject of a custody action. Rather, the same rules and principles that apply to attorney conduct in general must be considered and applied to the setting of custody disputes.

Rule 4.2 of the Rules of Professional Conduct addresses communication with persons who are represented by counsel. The Rule provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." When a guardian ad litem has been appointed to represent a child's best interests, it is the opinion of the Ethics Committee that Rule 4.2 would prohibit communication with the child without the consent of the guardian ad litem or court order. A guardian ad litem appointed under N.D.C.C. § 14-09-06.4 must be a licensed attorney and functions independently in the same manner as an attorney for a party to the action. N.D.R.Ct. 8.7.

When a child does not have an appointed guardian ad litem or legal counsel, communication with the child is not prohibited but must comport with the general requirements on transactions with third persons. Rule 4.1 *Truthfulness in Statement to Others*, Rule 4.3 *Dealing with Unrepresented Person*, and Rule 4.4 *Respect for Rights of Third Persons*, apply equally to the child of a client as with other third persons.

Rule 4.3 of the Rules of Professional Conduct provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer

knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

In fulfilling these obligations, the age and maturity of the child as well as the purpose of any communication must be carefully reviewed. Explaining the attorney's role and lack of relationship with the child may prove difficult in some circumstances.

In an informal opinion, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility explained some considerations that an attorney should take into account:

As in any litigation involving a significant unrepresented witness, the lawyer in custody cases in which the child is a potential witness should consider whether the child should be interviewed as well as the content of the interview. . . . The lawyer must always be sensitive to the potential argument that the child was unduly influenced by the attorney interviewing the child.

Pa. Eth. Op. 95-134 (1996).

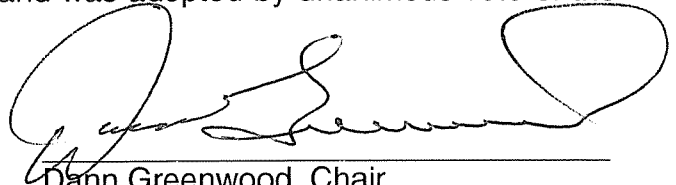
Ultimately, each attorney, after consulting with their client, must carefully consider the need for and content of any communication with a child in a custody matter. Any communications must remain consistent with an attorney's obligations in transactions with third parties which may require careful review of the unique circumstances involved including the age, maturity level and ability of the child to understand the attorney's role.

III. CONCLUSION.

An attorney is not ethically prohibited from communicating with an unrepresented child of a client. However, the attorney must ensure that any communication is

consistent with the attorney's obligations to third parties including the requirements of Rule 4.3 of the Rules of Professional Conduct. If the child is represented by a guardian ad litem, the requirements of Rule 4.2 of the Rules of Professional Conduct must be followed and an attorney must first obtain consent from the guardian ad litem or a court order prior to communicating with the child.

This Opinion was drafted by Tag Anderson and was adopted by unanimous vote of the Committee members present.



Dann Greenwood, Chair