

**THE DUTY OF COUNSEL TO TREAT ALL PERSONS REPRESENTED
BY A GUARDIAN *AD LITEM* THE SAME AS ANY OTHER PERSON
OR PARTY IN TERMS OF PROHIBITED DIRECT CONTACT**

In varied and numerous types of proceedings in West Virginia, both family court judges and circuit court judges are vested with authority to appoint a *guardian ad litem* who is charged with representing the interests of a child or any person² who is the subject of the proceedings, or whose rights or responsibilities may be affected. This occurs in custody proceedings in family court, in abuse and neglect proceedings and divorce proceedings in circuit court, and otherwise. In many instances, the appointing of a *guardian ad litem* by the Court is a mandatory requirement set forth in Court rules or statutes.

A previous L.E.I. that was issued October 21, 1983 (LEI: 83-9 DUTY OF PARENT'S LAWYER TO NOTIFY GUARDIAN AD LITEM IN NEGLECT OR ABUSE PROCEEDINGS), addressed in a limited way the duties of an attorney representing a parent in an abuse and neglect proceeding with regard to contacting the *guardian ad litem* to set up medical examinations for the children. The question was answered definitively that an attorney for parents accused of abuse and neglect may not arrange for a medical or

¹ Formerly L.E.O. 2013 - 02 when draft was published for public comment.

² This would include persons who are incarcerated, or persons who are not competent and need the protection of the Court. In Syl. Pt. 2, *State of West Virginia ex rel. Scott Ash, Prosecuting Attorney of Mercer County West Virginia v. The Honorable Derek C. Swope, Judge of the Circuit Court of Mercer County, West Virginia, and Chubby Hoston*, ___ W.Va. ___, 751 S.E.2d 751 (2013), the Supreme Court held that "Because many aspects of a guardian ad litem's representation of an incarcerated person in a family court proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation."

psychological examination without first notifying the *guardian ad litem* and seeking his or her approval and input.

This instant L.E.O. is written to expand upon L.E.I. 83-9 and state that a *guardian ad litem* is both alter ego and attorney for a child or protected person once appointed by a court.

Rule 4.2 of the Rules of Professional Conduct states clearly:

“In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.”

This rule applies with the same vigor to children or protected persons and their attorneys (*guardian ad litem*s). The comment to the rule removes any doubt:

“This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.”

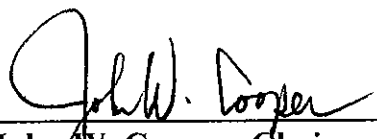
Moreover, the Supreme Court of Appeals has held that the Rules of Professional Conduct generally apply to a *guardian ad litem*'s representation of a child. *See*, Syllabus Point 3, In re Christina W., 639 S.E.2d 770, 219 W.Va. 678 (2006).

The role of a *guardian ad litem* is unique because the attorney is an adult speaking both as attorney and testifying as alter ego for the child. Often a *guardian ad litem* is appointed in proceedings where the parents are attacking each other and the *guardian ad litem* is considered “neutral”. Children are often not “parties” to the proceedings at issue, leading to further confusion about appropriate roles and conduct. Similarly, parents or others who are parties with substantial and sometimes conflicting rights have custody and control

over the child and think they are within their rights to do things for their own attorney without notifying the child's attorney (i.e. the *guardian ad litem*).

Given all of that, this L.E.O. should serve to put all attorneys on notice, in any case involving a child or protected person, where that child or protected person is represented by counsel, that all matters "about the subject of the representation" must be communicated through the child or protected person's lawyer. At the risk of limiting Rule 4.2, which is nonambiguous, this L.E.O. will not attempt to enumerate all of the various ways that this issue might arise. This L.E.O. does suggest that situations of contact with a child about a subject matter upon which a child is represented should all be evaluated in light of the clear mandate of Rule 4.2 that a lawyer shall not communicate directly with another person, adult or child, about matters upon which that party or individual is represented by counsel.

APPROVED by the Lawyer Disciplinary Board on the 17th day of January, 2014, and
ENTERED this 23rd day of January, 2014.



John W. Cooper, Chairperson
Lawyer Disciplinary Board