

ETHICS OPINION

RO-00-02

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QUESTION:

“I am serving as an appointed guardian ad litem in a juvenile case. I have not attended any formal training or other courses pertaining to an attorney’s responsibilities as a guardian ad litem, however, I have read the guardian ad litem manual prepared for the Children’s Justice Task Force. I have become aware from other sources that certain jurisdictions consider it appropriate for a guardian ad litem to communicate directly and ex parte with the court.

This is a request for a formal opinion on the following question: Under the Alabama Rules of Professional Conduct, may a guardian ad litem communicate ex parte with the court?”

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ANSWER:

An attorney who has been appointed guardian ad litem is ethically prohibited from communicating ex parte with the trial judge concerning any substantive issue before the court.

DISCUSSION:

The argument has been advanced that guardians ad litem, rather than being advocates for their wards, are more appropriately considered advisors to the court, and, therefore, should be permitted to have ex parte communication with the judge. However, this is not the case in Alabama.

The Court of Civil Appeals of the State of Alabama has conclusively held that guardians ad litem are advocates for their wards and the role of the guardian ad litem in the adjudicatory process is not different from that of any other advocate.

“The guardian ad litem ... is an officer of the court and is entitled to argue his client’s case as any other attorney involved in the case.” S.D. v. R.D., 628 So.2d 817, 818 (Ala. Civ.App. 1993)

Additionally, the statutory provision which governs the appointment and payment of guardians ad litem in juvenile cases expressly states that it is the duty of the guardian ad litem to act as advocate for the ward. Code of Alabama, 1975, § 15-12-21(b) & (c), provides as follows:

- (b) If it appears to the trial court in a delinquency case, need of supervision case, or other judicial proceeding in which a juvenile is a party, that the juvenile is entitled to counsel and that the juvenile is not able financially or otherwise to obtain the assistance of counsel or that appointed counsel is otherwise required by law, the court shall appoint counsel to represent and assist the juvenile or act in the capacity of guardian ad litem for the juvenile. It shall be the duty of the appointed counsel, as an officer of the court and as a member of the bar, to represent and assist the juvenile to the best of his or her ability.

- (c) If it appears to the trial court that the parents, guardian or custodian of a juvenile who is a party in a judicial proceeding, are entitled to counsel and the parties are unable to afford counsel, upon request, the court shall appoint counsel to represent and assist the parents, guardian or custodian. It shall be the duty of the appointed counsel, as an officer of the court and as a member of the bar, to represent and assist the parties to the best of his or her ability. (emphasis supplied)

It is, therefore, the opinion of the Disciplinary Commission that attorneys who are appointed guardians ad litem are advocates for their wards just as, and in the same manner, as retained attorneys are advocates for their clients. Accordingly, guardians ad litem are subject to the same prohibition against ex parte communication with the court as are all other lawyers involved in the adjudicatory process.

The prohibition applicable to attorneys is codified in Rule 3.5 of the Rules of Professional Conduct which provides as follows:

**"Rule 3.5 Impartiality and Decorum
Of The Tribunal**

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;**
- (b) Communicate ex parte with such a person except as permitted by law;"**

A similar prohibition applicable to judges is found in the Canons of Judicial Ethics. Canon 3(A).(4) of the Canons of Judicial Ethics provides as follows:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications concerning a pending or impending proceeding."

While Alabama appellate courts have never specifically addressed the issue of ex parte communication with the court by a guardian ad litem, other jurisdictions have expressly ruled on this issue and have held such ex parte communication to be ethically prohibited. See, e.g., *Moore v. Moore*, 809 P.2d 261 (Wyo. 1991); *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977); *Riley v. Erie Lackawanna R. Company*, 119 Misc. 2d 619, 463 N.Y.S.2d 986 (1983); *De Los Santos v. Superior Court of Los Angeles County*, 27 Cal. 3d 677, 613 P.2d 233 (1980).

The question of ex parte communication by a guardian ad litem has also been addressed in a treatise on the role of the guardian ad litem.

“The guardians are usually afforded the same rights as the parties’ attorneys (e.g., of making opening statements and closing arguments). Guardians cannot be called as witnesses. Guardians ad litem may not have ex parte communications with the judge.” Podell, *The Role of the Guardian Ad Litem*, 25 Trial 31, 34 (April 1989).

For the reasons cited above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney who serves as a guardian ad litem may not have ex parte communications with the trial judge regarding any substantive issue before the court.

LGK/vf

7/10/00

