

Melissa Lindquist King serves as Chief Deputy Clerk of the Probate Court of Mobile County. She has been practicing law in the Mobile community for over twenty years. After graduating from the University of Alabama School of Law, she was admitted to the Alabama State Bar in 2000. Melissa began her legal career as a law clerk to the Honorable John Lockett after which she joined the law firm of Sirote & Permutt and eventually became a sole practitioner. In 2021, she left the private practice of law to serve as the Judicial Division Chief of the Probate Court of Mobile County. Melissa and her husband, John, reside in the Midtown Mobile area with their three children, Matthew (19), William (15), and Gwendolyn (14).

Attorney/Vendor Requested Changes to Attorney/Vendor Information

Please return to two of the following:

Cherish Franklin: cfranklin@probate.mobilecountyal.gov

Renee Jerkins: rjerkins@probate.mobilecountyal.gov

Jennifer Glaude: jglaude@probate.mobilecountyal.gov

Fax: 251-574-6100

For questions, please call Cherish Franklin 251-574-6105, Jennifer Glaude 251-574-6104, or Renee Clarke 251-574-6101.

Attorney or Vendor Name: _____

Firm/Business Name (required if using EIN number issued by the IRS):

Mailing address: _____

Remittance Address (if different from mailing address):

Telephone number: _____

Fax number: _____

One of the following is required (Social Security number or Tax ID):

Certification: Under penalties of perjury, I certify that the number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me). I am not subject to backup withholding because I am exempt from backup withholding, I have not been notified by the IRS that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the IRS has notified me that I am no longer subject to backup withholding. I am a U.S. citizen or other U.S. person as defined by the IRS general instructions for Form W-9.

Signature: _____

Note: Attorney/Vendor name and Social Security number must match exactly to social security card.

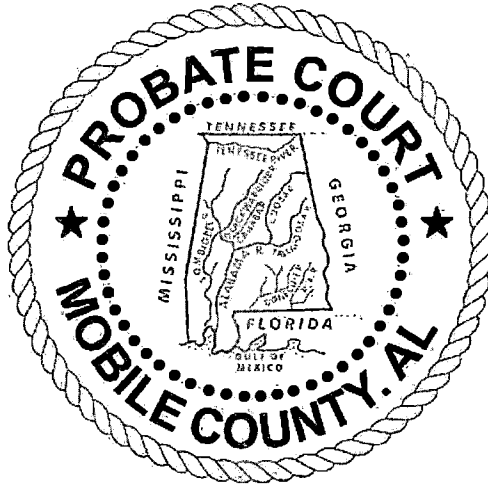
SSN: _____

Note: Firm name and Tax ID must match exactly as issued from the Internal Revenue Service

Tax ID: _____

Email address: _____

Priority Handling Cover Sheet



Please Include This Cover Sheet Along with Any Pleading Filed within 72 Hours Prior To a Hearing or Trial in Which the Pleading is to be considered by The Court

Hearing

Date: _____

Time: _____

Judge: _____

Attorney: _____

For: _____

Please staple, or otherwise attach this sheet to the pleading filed. This form may be reproduced by attorneys, but must be on bright colored paper stock. Thank you, MCPC.

EMPLOYEES PHONE NUMBERS & EMAIL ADDRESSES

Renee Jerkins	6101	Accounting	rjerkins@probate.mobilecountyal.gov
Cherish Franklin	6103	Accounting	cfranklin@probate.mobilecountyal.gov
Ethan Mitchell	6105	Accounting	emitchell@probate.mobilecountyal.gov
Jennifer Glaude	6104	Accounting	jglaude@probate.mobilecountyal.gov
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Accounting Fax	6100	Accounting	
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IT Fax	6098	IT	
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Judicial Commitment Fax	6004	Judicial	
Executive Suite Fax	6003	Judicial	
Probate Court Main Line	6000	Judicial	
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Recording Fax	6042	Recording	
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Records Fax	6072	Records	

Court Website: www.probate.mobilecountyal.gov Court Email Address: probatecourt@probate.mobilecountyal.gov

JUDICIAL FORMS
v2.0.2.4

Name	Description	Download
Attorney/Vendor Form	Attorney Requested Changes to Vendor Information	PDF
1- Expedited Handling Cover Sheet.pdf	Expedited Handling Cover Sheet	PDF
ADP - Alabama Minor Adoption Code Forms	Alabama Minor Adoption Code Forms	Directory
ADP - Alabama Adult Adoption Code Forms	Alabama Adult Adoption Code Forms	Directory
Adult APS Form.pdf	Alabama Elder And Adult In Need Of Protective Services	PDF
Appeal Forms	Forms for appeal to AL Court of Civil Appeals & AL Supreme Court	AOC E-Forms
COMMIT - Expense Voucher	Expense Voucher for GAL or Attorney for Petitioner	PDF
COMMIT - Petition for Involuntary Commitment.pdf	Petition for Involuntary Commitment	PDF
Confidential Proceedings - Requirements	Confidential Proceedings - Requirements for same	PDF
CONSERV - Motion to Restore Ward to Competency.pdf	Motion to Restore Ward to Competency	PDF
CONSERV - Petition for Appointment of Guardian.pdf	Petition for Appointment of Guardian	PDF
CONSERV - Petition for Letters of Conservatorship.pdf	Petition for Letters of Conservatorship	PDF
CONSERV - Petition for Partial Settlement.pdf	Petition for Partial Settlement	PDF
CONSERV - Petition for Single Transaction & Blocked Acct	Petition for Single Transaction and Blocked Account	PDF
CONSERV - Petition for Single Transaction Minor - Protective	Petition for Single Transaction Minor - Protective	PDF
CONSERV - Report Death of Ward & Petition for Final Settlement	Report of Death of Ward & Petition for Final Settlement	PDF
CONSERV - Report of Exhaustion of Assets & Petition	Report of Exhaustion of Assets & Petition for Final Settlement	PDF
CONSERV - Report of Restoration of Capacity & Petition	Report of Restoration of Capacity & Petition for Final Settlement	PDF
CONSERV - Waiver of Notice.pdf	Waiver of Notice	PDF
ESTATES - Allowances Prior to Adm.pdf	Allowances Prior to Adm	PDF
ESTATES - Annual Accounting & Petition for Partial Settlement.pdf	Annual Accounting & Petition for Partial Settlement	PDF
ESTATES - Authority to Open Safe Deposit Box.pdf	Petition for Authority to Open Safe Deposit Box	PDF
ESTATES - Exemptions - Allowances Prior to Adm.pdf	Exemptions - Allowances Prior to Administration	PDF
ESTATES - Inventory of Estate.pdf	Inventory of Estate	PDF
ESTATES - Motion to Appoint Commissioner.pdf	Motion to Appoint Commissioner	PDF
ESTATES - Motion to Construe Will & for Instruction.pdf	Motion to Construe Will and for Instruction	PDF
ESTATES - Motion to Produce Will.pdf	Motion to Produce Will	PDF
ESTATES - Motion to Sell Personal Property.pdf	Motion to Sell Personal Property	PDF
ESTATES - Objection to Estate Claim.pdf	Objection to Estate Claim	PDF
ESTATES - Petition for Discovery Prior to Adm.pdf	Petition for Discovery Prior to Administration	PDF
ESTATES - Petition for Exemptions & Allowances.pdf	Petition for Exemptions & Allowances	PDF
ESTATES - Petition for Final Settlement.pdf	Petition for Final Settlement	PDF
ESTATES - Petition for Final Consent Settlement & Order	Petition for Final Consent Settlement & Order Directing Distribution	PDF
ESTATES - Petition for Instructions.pdf	Petition for Instructions	PDF
ESTATES - Petition for Letters of Administration.pdf	Petition for Letters of Administration	PDF
ESTATES - Petition for Partial Settlement	Petition for Partial Settlement	PDF
ESTATES - Petition for Sale of Personal Property.pdf	Petition for Sale of Personal Property	PDF

ESTATES - Petition for Sale of Real Property.pdf	Petition for Sale of Real Property	PDF
ESTATES - Petition for Summary Distribution.pdf	Petition for Summary Distribution	PDF
ESTATES - Petition to Determine Heirs.pdf	Petition to Determine Heirs	PDF
ESTATES - Petition to Probate.pdf	Petition to Probate	PDF
ESTATES - Petition to Probate - CTA.pdf	Petition to Probate - CTA	PDF
ESTATES - Petition to Probate Foreign Will.pdf	Petition to Probate Foreign Will	PDF
ESTATES - Petition to Probate Lost Will.pdf	Petition to Probate Lost Will	PDF
ESTATES - Petition to Remove Personal Representative.pdf	Petition to Remove Personal Representative	PDF
ESTATES - Petition to Reopen Estate to Administer	Petition to Reopen Estate to Administer Unadministered Asset	PDF
ESTATES - Petition to Sell Real Property.pdf	Petition to Sell Real Property	PDF
ESTATES - Renunciation of Appt as Executor.pdf	Renunciation of Appt as Executor	PDF
ESTATES - Report of Compliance.pdf	Report of Compliance	PDF
ESTATES - Report of Sale of Personal Property.pdf	Report of Sale of Personal Property	PDF
ESTATES - Will Contest.pdf	Will Contest	PDF
Fee Voucher for Court Representative	Court Representative Expense Voucher	PDF
Fee Voucher for GAL, AAL & Special Atty	GAL, AAL & Special Attorney Expense Voucher	PDF
GIAS - General Info & Asset Summary	General Info and Asset Summary Sheet	PDF
Guardian Care Plan	Guardian Care Plan	PDF
Guardian Status Report / Annual Report	Guardian Status Report / Annual Report	PDF
GUARDIANSHIP - General Info and Asset Summary Sheet	General Information and Asset Summary Sheet	PDF
GUARDIANSHIP - Informational Affidavit	Informational Affidavit in Guardianships	PDF
GUARDIANSHIP - Notice Requirements & Petitioner's Notice of Hearing	Notice Requirements & Petitioner's Notice of Hearing	PDF
HANDBOOK - Conservator Handbook	Conservator Handbook	PDF
HANDBOOK - Intestate Estate Administrator Handbook	Intestate Estate Administrator Handbook	PDF
Land Condemnation Commissioners	Land Condemnation Commissioners	PDF
Lawsuit Settlement Approval Procedure Conservators	Lawsuit Settlement Approval Procedure Conservatorship Cases	PDF
Lawsuit Settlement Approval Procedure Decedents	Lawsuit Settlement Approval Procedure Decedents Estate	PDF
Legitimation Declaration.pdf	Declaration of Legitimation	PDF
Legitimation Form Package.pdf	Atty Legitimation Form Package	PDF
Lost Will Information Sheet	Lost Will Information Sheet	PDF
Minors - Vehicle Purchase	Minors - Vehicle Purchase	PDF
Name Change - Instructions relating to Minor Petitions	Name Change - Instructions relating to Minor Petitions	PDF
Name Change Petition [Adult].pdf	Adult Name Change Petition	PDF
Name Change - Petition for Minor Name Change	Name Change - Petition for Minor Name Change	PDF
Notices - Affidavit for Service by Publication.pdf	Affidavit for Service by Publication	PDF
Order to Appear - Subpoena	Order to Appear - Subpoena	PDF
Petition for Disclosure of Adoption Info.pdf	Petition for Disclosure of Adoption Info	PDF
Petition to Designate Person to Direct Disposition of Remains	Petition to Designate Person to Direct Disposition of Remains	PDF
Petitioner Financial Information Sheet	Petitioner Financial Information Sheet	PDF
Schedule "A".pdf	Schedule "A"	PDF

Summary Distributions Update	Summary Distributions Update	PDF
Summons - Probate	Summons - Probate	PDF
Why Has A Lawyer Been Appointed In This Case.pdf	Why Has A Lawyer Been Appointed In This Case	PDF
Nonparty Subpoena Handout.pdf	Nonparty Subpoena Handout	PDF

PROBATE COURT OF MOBILE COUNTY, ALABAMA

Style: JOHN SMITH, DEC.
Case No. 99999-2
Matter: SALE OF REAL PROPERTY
Hearing: FEBRUARY 27, 2025
Time: 1:30 PM COURTROOM 1, THIRD FLOOR

ORDER APPOINTING GUARDIAN AD LITEM

To: ***** , Esq.

Please take notice that you are hereby appointed GUARDIAN AD LITEM for ***** , who is interested in the matter referenced and which comes up for a hearing on the date set above. Done this 18th day of December, 2024.

DON DAVIS, Judge of Probate

Acceptance of Appointment:



Don Davis, Judge of Probate

GUARDIAN AD LITEM

INFORMATION AND INSTRUCTIONS:

Note 1: **Counsel of Record is: ****, Esq.**

Unless attached hereto, Counsel has been directed to furnish you with the pleading and other information necessary for you to prepare for this matter. Please contact said attorney directly and make arrangements accordingly.

Note 2: The Acceptance of Appointment must be filed with the Court no more than five (5) business days from the date of appointment.

Note 3: Any objection/response which you may have to the subject matter should be filed in writing with the Court and other counsel no later than three (3) business days from the scheduled hearing.

Note 4: Should you interpose no objections to the granting of the relief sought, you may inform the Court by filing a written statement to that effect. Written report must be filed at least three (3) business days before hearing. You must state in your report that you have complied with the GUARDIAN AD LITEM list of duties and responsibilities as issued by this Court previously and have consulted with counsel and the necessary parties. You may fax the report to the Court and counsel provided that it is placed in the mail the same day. Further, please forward with said report your time sheet form or other time records so that a fee may be set for your services. Please advise if you have any questions regarding this procedure.

Please see the Judicial Forms section in Benchmark WEB on the Court's Website at www.probate.mobilecountyal.gov for the Expense Voucher and the "Why Has A Lawyer Been Appointed In This Case" documentation.

Please sign and return this form to the Court at P.O. BOX 7, MOBILE, ALABAMA 36601 within five (5) business days. If you will be unable to serve, return form with a proper notation.

Please be advised that if your time exceeds 3.0 hours as GAL, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of \$140.00 for 1 hour of service.

PROBATE COURT OF MOBILE COUNTY, ALABAMA

Style: ***** , Deceased
Case No. 99999
Matter: PARTIAL SETTLEMENT DUE
Hearing: JUNE 23, 2025
Time: 3:45 PM COURTROOM 1, THIRD FLOOR

ORDER APPOINTING ADMINISTRATOR AD LITEM

To: ***** , Esq.

Please take notice that you are hereby appointed ADMINISTRATOR AD LITEM for ***** , who is interested in the matter referenced and which comes up for a hearing on the date set above. Done this 18th day of December, 2024.

DON DAVIS, Judge of Probate

Acceptance of Appointment:



Don Davis, Judge of Probate

ADMINISTRATOR AD LITEM

INFORMATION AND INSTRUCTIONS:

Note 1: **Counsel of Record is: ***** , Esq.**

Unless attached hereto, Counsel has been directed to furnish you with the pleading and other information necessary for you to prepare for this matter. Please contact said attorney directly and make arrangements accordingly.

Note 2: The Acceptance of Appointment must be filed with the Court no more than five (5) business days from the date of appointment.

Note 3: Any objection/response which you may have to the subject matter should be filed in writing with the Court and other counsel no later than three (3) business days from the scheduled hearing.

Note 4: Should you interpose no objections to the granting of the relief sought, you may inform the Court by filing a written statement to that effect. Written report must be filed at least three (3) business days before hearing. You must state in your report that you have complied with the ADMINISTRATOR AD LITEM list of duties and responsibilities as issued by this Court previously and have consulted with counsel and the necessary parties. You may fax the report to the Court and counsel provided that it is placed in the mail the same day. Further, please forward with said report your time sheet form or other time records so that a fee may be set for your services. Please advise if you have any questions regarding this procedure.

Please see the Judicial Forms section in Benchmark WEB on the Court's Website at www.probate.mobilecountyal.gov for the Expense Voucher and the "Why Has A Lawyer Been Appointed In This Case" documentation.

Please sign and return this form to the Court at P.O. BOX 7, MOBILE, ALABAMA 36601 within five (5) business days. If you will be unable to serve, return form with a proper notation.

Please be advised that if your time exceeds 3.0 hours as GAL, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of \$140.00 for 1 hour of service.

GUARDIAN AD LITEM (GAL)

I. A Guardian ad Litem:

- A. Is an attorney appointed by this Court to protect someone else's interest.
- B. Is an Officer of this Court.
- C. Is appointed for the limited duty of protecting the legal rights of a Minor ward or Incapacitated person in a proceeding.
- D. Gives no bond.
- E. Does not have charge or take possession of the ward's person or property.
- F. Has no powers either prior to the institution or after termination of the proceedings.

II. Before the hearing the Guardian ad Litem should:

- A. Examine and read the court file and all pleadings therein. Find out who is involved and what the case is all about.
- B. Contact and discuss the matter with his/her ward, if practicable.
- C. Contact the other attorney(s) and find out the facts.
- D. Where appropriate, research the law.
- E. Inspect and examine any accountings that may affect the ward's interest.
- F. Protect the ward's interest and assist the Court in solving any problems.
- G. Be prepared for the hearing and know how the ward will be affected by any action taken or decision made.
- H. Keep records, especially of his/her time expended.

III. In conservatorship and guardianship proceedings, the GAL should pay special attention to the following and respond accordingly, viz:

- A. The GAL should determine if it is in the best interest of his/her client that the petitioner, or person nominated, is the proper person to be appointed as conservator and/or guardian if the petition is granted. In so doing, the GAL should contact the attorney for the petitioner in advance of the hearing, or speak with the nominee directly, after first consulting with the attorney for the petitioner, as to any convictions of a crime of moral turpitude, any outstanding judgements, or the like, in which the nominee is or has been involved. If there are such, then the GAL should take appropriate action as he/she determines to further investigate the circumstances and file an appropriate pleading or inform the Court at the hearing as determined to be proper by the GAL.
- B. **NOTE:** If the evidence supports a finding for the person being incapacitated, the Court will need to address whether said party is also **mentally incompetent** and should be removed from the voter records. You are to consider this additional issue and offer comments or recommendations as to same in your report. Please note the following definition for mental incompetency being used by the Court:

A mentally incompetent person is one whose mental facilities have become so impaired as to make him/her incapable of protecting him/herself or properly managing his/her property.
- C. The Guardian ad Litem should investigate and determine if the adult alleged ward is capable of travel, especially outside of the State of Alabama, and if he/she possess the mental ability to determine for or against same. If no general travel restrictions are recommended by the Guardian ad Litem, but certain conditions should be in place, the GAL should inform the Court accordingly and provide details. However, if the GAL determines that travel would not be in the best interest of the ward, the said GAL should inform the Court and provide the basis for such determination.

IV. At the hearing the Guardian ad Litem should:

- A. Know the location, condition and situation of the ward.
- B. Protect the ward's interest. Ask questions that are pertinent to protecting the interest of the ward.
- C. Define the interests of the ward. Do not admit or waive any position that may sustain an adverse party's claim.
- D. Ascertain and assess from the ward and from other sources what are the legal and equitable rights of the ward. Bring these rights to the attention of the Court.
- E. Speak up; let the Court know if there are pertinent facts or law in the case that it may be unaware of.
- F. Address possible issue of **mental incompetency** noted above.
- G. Be prepared to tell the Court what he/she has done, how he/she has helped the ward and/or Court, and time expended.

V. After the hearing, the Guardian ad Litem should:

- A. Make sure the necessary orders and Decrees are issued to carry out all Court decisions.
- B. If practical and appropriate, notify ward of the results.

IN THE PROBATE COURT FOR MOBILE COUNTY, ALABAMA

In the matter of : Case No. 2024-****

***, :
(alleged) Incapacitated person

NOTICE OF APPOINTMENT OF COURT REPRESENTATIVE

TO: ****, Esq.

HEARING DATE: 2/14/25 at 1:30 P.M.

PLEASE TAKE NOTICE that on this date you were appointed Court Representative in the above cause. Pursuant to §26-2A-102(b) *Code of Alabama, (1975)*, you have the following duties and responsibilities, to-wit:

1. Interview the said alleged incapacitated person.
2. Interview petitioner(s) in this cause.
3. Interview the person nominated to serve as Guardian and Conservator.
4. Visit the present place of abode of said alleged and the place at which it is proposed that said alleged will be detained or residing.
5. **A written report of your findings must be filed at least THREE (3) DAYS before the hearing date.** Unless specifically requested by the Court or counsel, Court Representatives are not to attend hearings if their written report has been pre-filed.
6. **NOTE:** If the evidence supports a finding FOR the person being incapacitated, the Court will need to address whether said party is also mentally incompetent and should be removed from the voter records. You are to consider this additional issue and offer comments or recommendations as to same in your report. Please note the following, definition for mental incompetency being used by the Court:

A mentally incompetent person is one whose mental faculties have become so impaired as to make him/her incapable of protecting him/herself or properly managing his/her property.

7. Submit to the Court with the report a statement indicating the time spent in performing this service (not to exceed four (4) hours). If more than four (4) hours is anticipated to perform your duties, you are to advise the Court in writing and request approval. If a person you should interview resides outside the Mobile area, please consult with the Court in terms of the scope and extent of your assignment. If excessive travel is involved, mileage may also be submitted.

For information regarding names and places, etc., please refer to the attached petition or contact counsel for the petitioner(s).

It is **ORDERED** that all individuals, medical care providers, and others having custody of information [including, but not limited to, health history, any diagnosis, past or current treatment for any condition, prognosis relating to any past or current condition, behavioral or mental health services rendered in the past or currently being rendered] concerning the alleged incapacitated person shall promptly provide to the Court Representative any and all such information in their custody that may be requested.

It is further **ORDERED** that any medical information regarding the alleged incapacitated person or minor furnished to the Court Representative pursuant to this Order shall: (1) remain in the custody of the Court Representative; (2) not be copied or distributed by the Court Representative, except for use in a court proceeding concerning the alleged incapacitated person; and (3) be destroyed after conclusion of this proceeding unless ordered otherwise by the Court

Done and **ORDERED** this 1st day of December, 2024.

Don Davis, Judge of Probate

Acceptance of Appointment:

By _____

By _____
Court Representative (Sign and Return)

Please sign and return this form to the Court at P.O. Box 7, Mobile, AL 36601 at your earliest convenience. If you will be unable to serve, return form with a proper notation.
Please be advised that if your time exceeds 4.0 hours as Court Representative, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of \$140.00 for 1 hour of service.

IN THE PROBATE COURT OF MOBILE COUNTY, ALABAMA

In the Matter of _____ :
_____ : Case No.: _____
_____ : Date: _____

EXPENSE VOUCHER FOR COURT REPRESENTATIVE

Number of hours spent in Court (utilize one-tenth of hour time increment) _____

Number of hours spent in interviews, telephone calls, preparation of case, _____
review of pleadings and documents (utilize one-tenth of hour time
increments) _____

Total Number of Hours _____

Court Representative hourly rate is \$140⁰⁰.

Miscellaneous Expenses: \$ _____ *Total Due* _____

(Mileage: .655 as of 1/3/2023)

Reason: _____

I do hereby state that the above is true and correct and that I served in the capacity as Court Representative, pursuant to appointment made by the Probate Court of Mobile County, Alabama.

(Signature)

(Print Name)

NOTE: (1) If your time exceeds 4.0 hours or if you anticipate an objection to your fee request, attach an itemization for the time expended with a description of the service rendered. You should not "lump" your time or description of services rendered. Time should be recorded in one-tenth increments. (2) You should turn your expense voucher in at the time a written report is submitted and/or final hearing. (3) If a voucher is not filed within 48 hours, you will be awarded a flat hourly rate of \$140 for one hour's time.

IN THE PROBATE COURT OF MOBILE COUNTY, ALABAMA

In the Matter of _____ :
_____ : Case No.: _____
_____ : Date: _____

**EXPENSE VOUCHER FOR GUARDIAN AD LITEM, ADMINISTRATOR
AD LITEM OR SPECIAL ATTORNEY**

Number of hours spent in Court (utilize one-tenth of hour time increment) _____

Number of hours spent in interviews, telephone calls, preparation of case, review of pleadings and documents (utilize one-tenth of hour time increments) _____

Customary hourly rate you receive from other clients for similar services: \$ _____
(If no rate is specified a \$140 hourly rate will be utilized)

Total Number of Hours _____

Total Due _____

Miscellaneous Expenses: \$ _____
(Mileage: .655 as of 1/3/2023)

Reason:

I do hereby state that the above is true and correct and that I served in the capacity as (mark appropriate box) Guardian ad Litem, Administrator ad Litem, or Special Attorney to appointment made by the Probate Court of Mobile County, Alabama.

Date: _____

(Signature)

(Print Name)

NOTE: (1) If your time exceeds 3.0 hours or if you anticipate an objection to your fee request, attach an itemization for the time expended with a description of the service rendered. You should not "lump" your time or description of services rendered. Time should be recorded in one-tenth increments. (2) You should turn your expense voucher in at the time a written report is submitted and/or hearing if at all possible. (3) If a voucher is not filed within 48 hours, you will be awarded a flat hourly rate of \$140 for one hour's time.

Appointed Lawyer Training

11/29/2023

We are going to discuss how to get paid in a mental health commitment case. For you, this is done through a voucher and an attached supplemental timesheet to detail specifics on out of court time. Once this is received it is checked for required items and for mathematical accuracy, we then use that voucher along with invoices from the Mobile County Sheriff, court reporter, medical expert, etc... adding any court costs due and create a cost bill. Once the cost bill is complete, we create the reimbursement form required by the State of Alabama Comptroller's office for Judge Davis's signature. It is sent to the State Comptroller's office for review and processing. If no errors are found, a warrant is issued and a check is produced. Once the check is received and receipted by Probate Court, payment is made to attorneys and vendors at the end of the month. If you have not given us an attorney form including your tax identification number and your e-mail address, you will need to do that before we can process a payment to you. A copy of this form is available on the attorney page of the Probate Court website and one is included in the handout available today.

Some notes on vouchers and itemized timesheets. In the past, vouchers were required to be originals with original signatures but the State Comptroller's office is now accepting them from us electronically and no longer requiring originals to be mailed in. Vouchers should still be turned in within 72 hours of the final hearing. If there is a special circumstance that prevents you from turning in your voucher in the 72 hours, please let us know. We are holding you to 72 hours and reserve the right to bill without your voucher if your voucher is not submitted to us in a timely fashion. We do not want to hold up payments for vendors and other attorneys if at all possible. You should bill in tenths of an hour or 6 minute increments. The hourly rate is currently \$70.00 an hour. You should make sure you include on the voucher and the timesheet the respondents full name, the corresponding correct case number, and date you are submitting/completing the document along with your appointment date. On the itemized timesheet as back up for your out of court time, please make sure you include your name also. The time sheet is for itemization of out of court time only. You do not need to include in court waiting or hearing time in this itemization. Please make sure you note the hearing dates involved on the voucher and you track your time for each case. The State will reject it if the dates are not filled in and if names and case numbers do not match. If you do not need the second or third merit hearing lines, please leave them blank. In-Court Hearing time must match the other attorney in the case. Please make sure you discuss with them after court to come to a consensus on the time you are both putting on your vouchers. For in court waiting time, please do not include the time spent interviewing a client at the court house, reviewing a medical file at the courthouse, etc....Those should be included in out of court time and itemized on your timesheet. You can also bill for non-overhead reimbursable expenses. This includes mileage at the current IRS published rate, postage, and reasonable photocopying expenses. If you do include mileage, it has to be itemized showing dates with to and from information. Please make sure your total out of court time on the voucher matches the total of your out of court time on your timesheet. Please make sure the out of court time hourly itemization and dollar itemization matches and totals correctly. Please make sure you mileage is calculated and totaled correctly. The current rate

is .655 cents per mile. Please make sure the total number of miles matches the breakdown included in the itemization and is totaled correctly.

Some of your times to be included on your voucher have a maximum limit. For example, opening and closing the file is limited to a total of .5 an hour. Please refer to the guidelines established by the Office of Indigent Defense Services for reasonable maximum times. This information is available on the State Comptroller's website. Please be aware that you cannot bill for time prior to your appointment date. This is the date on the appointment letter you sign. It is not the date you receive an e-mail from Judicial. You should also not bill for time after the final hearing date unless there is a special circumstance. Even with a special circumstance, it would be up to the State Comptroller's office to determine if the special circumstance is reasonable. The general rule is they do not allow billing after the final hearing date. This includes closing the file.

On revocations and recommitments, a separate voucher and timesheet will be required. You will be able to tell because the case number will be followed by a -1. You will use this same procedure when billing on/for an appeal. Please note that on an appeal or not, the maximum amount that can be billed in total for time spent on a particular case is \$1,500.00. You can add non-overhead reimbursable expenses to the \$1,500 cap.

Please type your voucher and associated time sheets or write legibly.

Please respond to our e-mails, phone calls, or requests for corrections to your vouchers/timesheets as quickly as possible. Since vouchers are still submitted to the State electronically, you will have to correct any errors by creating a new document or changing the existing document and initialing the changes. The sooner we get everything ready for submission and we get the request sent to the State. The sooner you can get paid.

There is also a yearly State deadline for mental health commitment payments about 40 days after the end of each fiscal year. After this deadline, the State Comptroller's office will not process any more payments for the previous fiscal year.

IN THE MATTER OF
THE INVOLUNTARY COMMITMENT OF _____, Respondent

IN THE PROBATE COURT OF
MOBILE COUNTY, ALABAMA

Case No.: _____

Date: _____

Appointment Date: _____

**EXPENSE VOUCHER FOR GUARDIAN AD LITEM
OR ATTORNEY FOR RESPONDENT OR PETITIONER'S ATTORNEY**

IN COURT TIME

Probable Cause hearing

Date: _____

Number of hours spent in Court hearing _____ @ \$70.00/hr \$ _____
Number of hours spent in Court waiting _____ @ \$70.00/hr \$ _____

Merit hearing

Date: _____

Number of hours spent in Court hearing _____ @ \$70.00/hr \$ _____
Number of hours spent in Court waiting _____ @ \$70.00/hr \$ _____

If needed: 2nd-Merit hearing Date: _____

Number of hours spent in Court hearing _____ @ \$70.00/hr \$ _____
Number of hours spent in Court waiting _____ @ \$70.00/hr \$ _____

If needed: 3rd Merit hearing Date: _____

Number of hours spent in Court hearing _____ @ \$70.00/hr \$ _____
Number of hours spent in Court waiting _____ @ \$70.00/hr \$ _____

OUT OF COURT TIME

Total Number of hours spent in Out of Court legal services: _____ @ \$70.00/hr \$ _____
(Complete itemization of out of court legal services is attached:
Open/close file, review medical records, interviews, etc.)

Mileage Expenses: _____ miles @ \$.655/mile \$ _____
Reason: _____

TOTAL REQUEST \$ _____

CERTIFICATE UNDER PENALTY OF PERJURY

I do hereby certify that the aforesaid voucher is true and correct to the best of my information, knowledge and belief and under the penalty of perjury. I served as: ___ Guardian Ad Litem; ___ Attorney for the Respondent; or ___ Attorney for the Petitioner, pursuant to appointment made by the Probate Court of Mobile County, Alabama.

(Signature) _____

(Printed Name) _____

(Address) _____

(Address) _____

(Telephone) _____

IN THE MATTER OF
THE INVOLUNTARY COMMITMENT OF

IN THE PROBATE COURT OF
MOBILE COUNTY, ALABAMA

_____, Respondent ← Complete Name of Respondent

Case No.: _____ ← Correct Case Number XXXX-XXXX

Date: _____ ← Date voucher completed

Appointment Date: _____ ← Appointment Date

EXPENSE VOUCHER FOR GUARDIAN AD LITEM
OR ATTORNEY FOR RESPONDENT OR PETITIONER'S ATTORNEY

IN COURT TIME

Probable Cause hearing Date: Date of PC hearing

Number of hours spent in Court hearing Time spent in hearing-must match opposing counsel @ \$70.00/hr \$ _____
Number of hours spent in Court waiting Time spent in Court awaiting hearing @ \$70.00/hr \$ _____

Merit hearing Date: Date of Merit hearing

Number of hours spent in Court hearing Time spent in hearing-must match opposing counsel @ \$70.00/hr \$ _____
Number of hours spent in Court waiting Time spent in Court awaiting hearing @ \$70.00/hr \$ _____

If needed: 2nd-Merit hearing Date: Date of Merit hearing

Number of hours spent in Court hearing Time spent in hearing-must match opposing counsel @ \$70.00/hr \$ _____
Number of hours spent in Court waiting Time spent in Court awaiting hearing @ \$70.00/hr \$ _____

- Out of Court Time should reflect hours spent from the "Ordered and Decreed" date in the appointment letter through the date of final disposition (Final Hearing Date). All time should be billed in 6 minute increments (.1) and should adhere to Uniform Guidelines for Attorney Fee Declarations Recommended by the Indigent Defense Committee of the Alabama State Bar.
- Travel time can be billed along with mileage. Both mileage and travel time should be divided by the number of cases involved in same.
- **Original expense vouchers with original signatures are due within 72 hours of the final hearing.**
- Maximum amount billed, excluding reimbursable expenses, cannot exceed \$1,500.00.
- For questions concerning expense vouchers, please contact Cherish Franklin at 251-574-6103 or Renee Jerkins at 251-574-6101.

OUT OF COURT TIME

Total Number of hours spent in Out of Court legal services: _____ @ \$70.00/hr \$ _____
(Complete itemization of out of court legal services is attached: Open/close file, review medical records, interviews, etc.)

Mileage Expenses: _____ miles @ \$.655/mile \$ _____

Reason: A detail of dates, points traversed and purpose of travel must be included. Please confirm mileage rates periodically at <http://comptroller.alabama.gov/mileage-rates> for current IRS rate.

TOTAL REQUEST \$ _____

CERTIFICATE UNDER PENALTY OF PERJURY

I do hereby certify that the aforesaid voucher is true and correct to the best of my information, knowledge and belief and under the penalty of perjury. I served as: _____ Guardian Ad Litem; _____ Attorney for the Respondent; or _____ Attorney for the Petitioner, pursuant to appointment made by the Probate Court of Mobile County, Alabama.

(Signature) _____

(Printed Name) _____

(Address) _____

(Telephone) _____



STATE OF ALABAMA
 Department of Finance
 Office of Indigent Defense Services



100 N. Union Street, Suite 680
 Montgomery, Alabama 36130
 (334) 242-7059
 www.OIDS.alabama.gov

Robert Bentley
 Governor

Chris E. Roberts
 Director

Bill Newton
 Acting Director of Finance

MEMORANDUM

To: All Indigent Defense Attorneys

From: Chris E. Roberts *CR*
 Director of Indigent Defense Services

Date: July 14, 2015

Re: To establish reasonable times allowances for certain standard billing entries

Pursuant to Act No. 2011-678, appointed counsel shall be entitled to receive for their services a fee to be certified by the trial court. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of seventy dollars (\$70) per hour for the time reasonably expended on the case. It has been determined by OIDS that reasonable maximum times should be established for certain standard procedures routinely occurring in cases. The maximum times are set out below and are derived from average billing practices of attorneys in regard to these specific activities.

Letter	.3 hour
Discovery Motion	.5 hour
Email to	.1 hour
Email from	.1 hour
Notice of Appearance	.5 hour
Motion to Continue	.5 hour
404(b) Request	.5 hour
Notice of Appointment	.1 hour
Motion to Withdraw	.5 hour
Preliminary Hearing Request	.5 hour
Calendar	.1 hour
Review Order	.3 hour
Open/Close/Bill File	.5 hour

Counsel may deviate above the listed maximum amounts when billing for these activities but such deviation should be accompanied by an explanation for the extra time. Said explanation shall be included in the electronic billing section related to the time entry.

COMPTROLLER'S GUIDELINES

FOR PAYMENT OF EXPENSES FOR COMMITMENT, DISCHARGE AND TRANSFER OF PERSONS IN STATE INSTITUTIONS UNDER SECTIONS 22-52.1.1 through 22-52-17, CODE OF ALABAMA.

SOURCES OF AUTHORITY FOR PAYMENT OF EXPENSES OF INVOLUNTARY COMMITMENT PROCEEDINGS

Judges of Probate – (Cites are to Code of Alabama, 1975, as amended)

- 22-52-12 All necessary expenses incurred in transporting a respondent for inpatient treatment are taxed as costs of the proceeding.
- 22-52-14 In any commitment proceeding, (1) the fees paid for representation of petitioner or respondent, as GAL and/or attorney, are to be paid at the rates set out in 15-12-21; (2) any expert employed to offer expert testimony shall be paid “such amounts as found to be reasonable by the probate judge; (3) all other costs allowable by law shall be paid by the state general fund upon order of the probate judge.”
- 22-52-17 When transporting a respondent for mental evaluation, the sheriff shall receive reimbursement for expenses in transporting the respondent to and from the facility at the rate allowed in 36-7-20. Further, the cost of conveying [respondent] shall be taxed as costs of the proceeding. **Please note** – 36-7-20 is entitled as “allowances for expenses other than transportation of persons traveling within state.” This statute covers per diem and meal allowances.

Comptroller – (Cites are to Code of Alabama, 1975, as amended)

- 41-4-50 Functions and duties include:
(4) To preaudit and *determine the correctness and legality* of every claim and account submitted for issuance of a warrant”
- 41-4-54 Accounts against state must be accurately and *fully itemized*.
- 41-4-61 Comptroller has authority to require information ... touching any claim or account he is required to audit.

GENERAL RULES ON EXPENSES SUBJECT TO PAYMENT FROM STATE TREASURY

~~Only expenses incurred after the filing of a petition are eligible for payment. Expenses incurred prior to a petition cannot be paid.~~

~~Expenses must be reasonable and necessary - All charges against the Treasury of the State must be necessary to the action in which they were incurred and must be reasonable in amount.~~

As recognized in Attorney General's Opinion 2012-055 : “There are no laws or statutes that determine or define a reasonable and necessary expense in any given situation.” That Opinion does provide the following guidance:

“According to Black's Law Dictionary, the term “reasonable” is defined as “[f]air, proper, or moderate under the circumstances According to reason [[H]aving the faculty of reason (a reasonable person would have looked both ways)]” BLACK'S LAW DICTIONARY 1379 (9th ed. 2009). Webster's Third New International Dictionary defines the term “necessary” as “items ... that cannot be done without; things that must be had; essentials.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510 (3rd ed. 2002). Accordingly, a reasonable and necessary expense is an expense that is essential and fair

under the circumstances. This particular definition provides an enigmatic explanation. Consequently, this Office has occasionally stated that whether an expense is reasonable and necessary is a factual determination to be made by an agency.

PROCEDURES

Probate Judge Fee Declaration Form- The original form bearing the Probate Judge's original signature must be submitted with the required supporting documentation attached in the order as listed on the form.

Case Numbers- Case numbers/names are required to prevent duplicate payments.

Final Disposition and Date- Specify the type of final disposition (commitment, recommitment or dismissal) and must have the date of final disposition.

Appointment Date- The appointment date is the date the attorney is appointed by the Probate Judge (Attorney's cannot be paid for work done prior to their appointment.)

Itemize Attorneys Fees- All attorney fees must be itemized and separated (in court/ out court) by date. Attorney Fee Declaration Forms (FRMS-MC1) can be found at www.comptroller.alabama.gov or www.alacourt.gov. Attorney Fees are paid pursuant to Code of Alabama, Section 15-12-21. Attorneys should follow the Uniform Guidelines established by the Alabama State Bar for itemizing their claims. These guidelines are available at www.comptroller.alabama.gov under the Indigent Defense section.

Evaluation/Expert Testimony –Invoices must list the respondent's name, the case number, the date of service and describe the services rendered by the expert. The invoice must be accompanied by a judge's order setting out the amount due the expert as well as a finding that the amount due is reasonable. The State will only pay for an evaluation after a petition is filed and for expert testimony during the hearing(s). A mental evaluation performed prior to a petition being filed is not payable by the State.

Itemize probate costs- All probate costs must be itemized in accordance with Code of Alabama, Sections 12-19-42 and 12-19-90. Flat rates are not acceptable.

Itemize transportation costs- Transportation costs must be itemized. [Specify number of miles multiplied by the mileage rate. Code of Alabama, Sections 22-52-12 for court ordered inpatient treatment; Section 22-52-17 for transport costs for mental evaluation. Flat rates are not acceptable.

Mileage rate is the current rate posted on the Comptroller's web-site per IRS guidelines.
www.comptroller.alabama.gov

Copies- The State Comptroller's Office will accept copies of required invoices.

Original Documents Required. The Probate Judges Fee Declaration form bearing the original signature of Probate Judge is required. On the Attorney Fee Declaration Form, the original signature of the Attorney is required.

Appeals – Are paid pursuant to Code of Alabama, Section 22-52-15. If the Probate Judge is learned in the law, please indicate this on the Probate Judge Declaration Form when submitting it to the Comptroller's Office for payment.



STATE OF ALABAMA
Department of Finance
Office of the State Comptroller

100 North Union Street, Suite 220
Montgomery, Alabama 36130-2620
Telephone (334) 242-7050 Fax (334) 242-7466
www.comptroller.alabama.gov

Robert Bentley
Governor

David A. Perry
Director of Finance

Thomas L. White, Jr.
State Comptroller

Janice A. Hamm
Deputy State Comptroller

MEMORANDUM

TO: All Probate Judges and Chief Clerks

FROM: Thomas L. White, Jr.
State Comptroller *[Signature]*

DATE: July 20, 2011

RE: Act 2011-678 – Provisions relating to Appointed Counsel for
Mental Commitments

On June 14, 2011, Governor Robert Bentley signed Act 2011-678 into law. This act represents a major change to the administration of the program that reimburses attorneys who provide indigent defense services. The act amends Code of Alabama, 1975; Title 12, Chapter 19 – Court Finances and Title 15, Chapter 12 – Criminal Procedure Defense of Indigents and creates the Office of Indigent Defense Services. A copy of the act is available for review through the website of the Office of the State Comptroller at http://comptroller.alabama.gov/pages/indigent_defense.aspx. Code of Alabama, Section 22-52-14 establishes the payment of costs for attorneys appointed to mental commitment cases. This memorandum addresses those provisions, which relate to "Appointed Counsel" in mental commitment cases through the Probate Court and are effective immediately.

- Rate changes are effective for all appointments made on or after June 14, 2011. The new billing rate for appointed counsel is \$70 per hour for time reasonably expended in-court and out-of-court on mental commitments through the Probate Court.
 - Previous billing rates were \$60 per hour for in-court and \$40 per hour for out-of-court time.
- Attorneys must use the prescribed form C-62D for their fees. The form can be found at <http://eforms.alacourt.gov>.
- Overhead will no longer be reimbursed.
 - Previously reimbursed office overhead expenses included professional license fees; malpractice, casualty, health, general disability, and workers' compensation insurance; office salaries; ad valorem taxes; supplies; rent; depreciation of equipment and furniture; continuing legal education expenses, including travel and lodging; utilities; bank fees and interest on loans; other professional fees.

July 20, 2011

- Non-overhead reasonably incurred expenses will be reimbursed, provided they are within the program standards, including being substantiated by original invoice/receipt.
 - ~~Examples of reimbursable non-overhead expenses include mileage, postage, and reasonable costs of photocopying.~~
- The Probate Judge will reimburse expert fees in such amounts as found to be reasonable.
- Statutory per case fee limits increased by \$500.00 for each case type.
 - ~~Mental commitment cases fall under the "other cases" category and are capped at \$1,500.~~
- Fees and expenses on an appeal case are covered under Code of Alabama, Section 22-52-15, "the costs of the proceedings in the reviewing court shall be taxed in the same manner as in the probate court."
- ~~Claims must be submitted to the Comptroller's Office for payment within a reasonable time, not to exceed 90 days of final disposition of the case.~~
 - ~~Any bills received after 90 days will not be paid.~~
- The attached prescribed Probate Judge Fee Declaration form must be used to submit your claims.
 - It is pertinent to include all required information on the form.

The court should make these new legal requirements and policies available to all parties involved in submitting claims for payment. Additional policies and procedures are currently under review and will be sent to you once finalized. In order for this office to expedite the relay of information to you, please furnish us with a contact name and e-mail address. You may send this to Ms. Margaret McGowan at margaret.mcgowan@comptroller.alabama.gov or Ms. Pam Harris at pam.harris@comptroller.alabama.gov. If you have any questions, please feel free to contact the Fiscal Management section at 334-242-2224.

TLWjr/PH/dt

CC: Mr. David Perry, Director, Alabama Department of Finance
Mr. Clinton Carter, Deputy Finance Director
Mr. Bill Newton, Assistant Finance Director
Mr. Mose Stuart, Finance Legal Division
Ms. Janice A. Hamm, Deputy State Comptroller
Ms. Pam Harris, Accounting Manager
File

Payment of Costs- All costs associated with mental commitment claims are reimbursed to the Probate Judge. No payments for the costs of a mental commitment will be paid directly to any vendor providing services through the Probate Court for these cases.

Department of Finance
State Comptroller's Office
100 N Union St, Suite 216
Montgomery, Al 36130

If you have any questions, please contact:

Pam Harris
Department of Finance Comptroller's Office
334-242-4225 or pam.harris@comptroller.alabama.gov

Amanda Leger
Department of Finance Comptroller's Office
334-242-7064 or Amanda.leger@comptroller.alabama.gov

Guardian ad Litem, Administrator ad Litem & Court Representative

Source materials

Probate Judges Handbook -

<https://alison.legislature.state.al.us/files/pdf/lisa/ALI/Publications/ProbateJudgesVolume2.pdf>

Rules of Civil Procedure IV Parties Rule 17

Code of Alabama Title 26-2A-52 Guardian ad Litem under Uniform Guardianship and Protective Proceedings Act

Code of Alabama Title 43-2-250 Administrators ad Litem

Code of Alabama Title 43-2-445 Guardian ad litem sale of lands in estate

See Index to Code under Guardian ad litem generally

Serving as a GAL in Family, Circuit and Probate Courts -Birmingham Bar Association 2021

https://cdn.ymaws.com/birminghambar.org/resource/resmgr/cle/2021_cle/6.4.21_cle_materials_-_servi.pdf

Discussion:

The opportunities for the Probate or Circuit Courts to appoint a Guardian ad litem, Administrator ad litem, or Court Representative are wide ranging and varied. The full discussion of the matter exceeds the time allotted today.

The Discussion today will focus on the practical aspects of the duties and responsibilities of the Guardian ad litem, Administrator ad litem and Court Representative.

Thoughts:

1. Receipt of appointment and review for conflict.
2. Time needed for appointment – do you have it.
3. Respond to the court promptly to accept or decline.
4. Obtain pleadings.
5. If a settlement, review the financial statements and bank records.

- a. Obtain copies or review at court
 - b. Review the audit report and as necessary talk with the auditor.
 - c. Do not rely on the audit report to find issues, look at the list of expenses
 - d. If there are problems, let Petitioner's counsel know as soon as possible.
 - e. Include any unanswered questions in your report.
6. Obtain all needed contact information from Petitioner's counsel.
7. Determine if a visit to the Ward/alleged is possible, generally GAL and Court Representatives will need to visit; an Administrator ad litem may not have anyone to visit but may have beneficiaries to contact and advise.
8. Go visit the alleged to determine whether the petition is correct in its allegations
9. Possible joint visit.
10. Special concerns for visit.
11. In a hospital, nursing home, or medical setting, review charts, patient histories and talk with either the doctor or nurses as to condition and changes of alleged/ward.
12. Let petitioner's counsel know of any issues and attempt to resolve them before the hearing.
13. File your report PROMPTLY.
14. Prior to hearing check to see if anything has changed.
 - a. You may need to revisit the alleged/ward.
 - b. You may need to amend the report.
 - c. You may need to acknowledge that your issues have been cleared.
 - d. Cross check with the guardian ad litem or Court Representative to confirm the status.
15. Best interest of ward/alleged
16. Court Representative will also report on the status and suitability of the place where the ward or alleged is to be placed.
17. Determine opinion as to mental ability to vote.
18. File time report as soon after the hearing as possible.

J. Gregory Carwie

Shareholder



Shareholder

Mobile

D +1 251 434 0101

greg.carwie@dentons.com

Overview

J. Gregory Carwie is a shareholder in Dentons Sirote's Mobile, Alabama office, where he is a member of the Trusts, Estates & Wealth Preservation practice group. Greg represents numerous individuals in handling probate estate administrations. His practice focuses on estate administration, probate, corporate and real estate matters for various clients. Greg is a frequent speaker at probate seminars, sharing and passing on his experiential knowledge to colleagues and young lawyers.

As a lawyer deeply invested in his local community, Greg serves as the General Conservator for Mobile County, Alabama, where he handles the financial affairs of approximately 250 minors, disabled veterans, senior citizens, and mentally and physically incapacitated persons. The most gratifying part of Greg's job is helping people in need. As General Conservator, he is often the last resort for individuals requiring vital legal assistance, especially for senior citizens who have no friends or family to handle their affairs, such as preparing nursing home Medicaid applications on their behalf.

Recognition

- *Best Lawyers*®
 - Litigation - Trusts and Estates "Lawyer of the Year" in Mobile (2017, 2019, 2021, 2023, 2025)
- *The Best Lawyers in America*®
 - Litigation - Trusts and Estates (2013–2025)
 - Trusts and Estates (2024-2025)
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Leadership Award, National Multiple Sclerosis Society, Mobile Chapter

Activities and Affiliations

- American Inns of Court, Mobile Chapter
- Class of 2006, Leadership Mobile
- Mobile Touchdown Club
- Mobile United
- General Conservator for Mobile County, Alabama
- Former Advisory Council, National Multiple Sclerosis Society, Mobile Chapter
- Senior Bowl Committee
- Alabama State Bar
- American Bar Association
- Mobile Bar Association
 - Chairman, Bankruptcy Section (2001)
 - Chairman, Probate Section (2009–2010)
 - Vice President (2015)
 - President Elect (2016)
 - President (2017)
- Board Member, Dentons Sirote (formerly Sirote & Permutt, PC), 2020, 2023–present

Prior and Present Employment

- Dentons Sirote (formerly Sirote & Permutt, PC), 2000–present

Areas of focus

Practices

- **Trusts, Estates and Wealth Preservation**

Education

- The University of Alabama School of Law, 1988, JD
- Tulane University, 1985, BSM

Admissions and qualifications

- Alabama

Languages

- English

PRACTICE TIPS FOR ATTORNEYS APPOINTED AS ADMINISTRATOR AD LITEM/GUARDIAN AD LITEM IN CONSERVATORSHIP CASES


Greg Carwie, Esq.

General Conservator of Mobile County

- Per *Ala. Code* §26-5-2, a conservator must file a partial settlement at least once every three years and upon filing a guardian ad litem “must be appointed.”
- *Alabama Code* §26-5-7 requires a final settlement upon the death, resignation, or removal of the conservator.
- Per *Alabama Code*, a settlement is an account of his or her conservatorship, accompanied with the “vouchers showing his or her receipts and disbursements, which must be verified by affidavit.” A voucher was recently defined by the Alabama Supreme Court “a receipt or release verifying payment of a bill or debt either by the ward's estate or to the ward's estate.”
- It is the guardian ad litem or administrator ad litem’s duty to review this accounting.
- The accounting is not located in the file but will be in the Accounting Division of the Probate Court. The appointed attorney can contact the Account Division to set up a time to review the accounting.
- There is an Audit Return Form located on the left side of the Court’s file that will aid you in your review. If you have any questions about a transaction, contact the conservator or the conservator’s attorney regarding it. The issue can frequently be resolved by further explanation or additional documentation.
- An objection should not be filed until the issue has been discussed with the conservator or the conservator’s attorney. If additional time is needed to investigate, a motion to continue, not an objection, should be filed.
- The Court can approve a conservator’s request for a certain amount to be an “allowance” for food or other needs of the ward. If this has been done, the conservator need not show individual receipts for those transactions.



Duane A. Graham – Armbrecht Jackson, LLP

 [ajlaw.com/attorneys/duane-a-graham/](https://www.ajlaw.com/attorneys/duane-a-graham/)

Duane A. Graham

Counsel

Phone: 251-405-1207

Fax: 251-432-6843

dag@ajlaw.com

VCARD



Education

- The University of Alabama School of Law, Tuscaloosa, Alabama, 1984, J.D.
- Honors: Order of the Coif, Alabama Law Review, Editor-in-Chief, 1983-1984
- University of Alabama, Tuscaloosa, Alabama, 1981, B.A., Summa Cum Laude
- University of South Alabama, Mobile, Alabama

Admitted In

- Alabama, 1984
- U.S. District Court for the Southern District of Alabama, 1984
- U.S. Court of Appeals for the 11th Circuit, 1987
- U.S. Supreme Court, 1987

Awards and Recognition

- Best Lawyers®(Mobile, AL) “Lawyer of the Year” Trusts and Estates, 2020; Litigation – Trusts and Estates, 2018, Business Organizations (including LLCs and Partnerships), 2017
- Best Lawyers®, listed since 2008, Business Organizations (including LLCs and Partnerships), Closely Held Companies and Family Business Law, Commercial Finance Law, Litigation – Trusts and Estates, Natural Resources Law, Trusts and Estates

Mr. Graham's practice areas include oil and gas law, real estate, trust and estates. In the oil and gas area, Mr. Graham has represented numerous oil and gas producing companies, as well as pipeline companies, in matters ranging from title evaluation, regulation by the State Oil and Gas Board, eminent domain, and litigation, especially litigation concerning royalty disputes, drainage claims, and coalbed methane issues. He has particular expertise concerning Alabama severance taxes due on the production of oil and gas and has litigated numerous assessment and refund claims in this area. He has spoken numerous times at the annual seminar sponsored by the State Oil and Gas Board of Alabama. In the real estate area, Mr. Graham has significant experience in title evaluation, commercial leasing, and eminent domain proceedings, and he has served as an adjunct professor of real estate law at the University of South Alabama. In the trusts and estates area, Mr. Graham advises clients on estate and tax planning areas, including the drafting of wills, trusts, and powers of attorney. He also represents clients in connection with the administration of trusts and estates, including litigation associated with both trusts and estates.

Representative Cases

- *Ankor Energy, LLC v. Jerry M. Kelly, Sr.*, 271 So. 3d 798 (Ala. 2018)
- *Regions Bank v. Lowrey*, 154 So. 3d 101 (Ala. 2014)
- *Regions Bank v. Lowrey*, 101 So. 3d 210 (Ala. 2012)
- *Ex parte Exxon Mobil Corp.*, 926 So. 2d 303 (Ala. 2005)
- *State v. Amerada Hess Corp.*, 788 So. 2d 179 (Ala. Civ. App. 2000)
- *State v. Union Oil Co.*, 686 So. 2d 284 (Ala. Civ. App. 1996)
- *NCNB Texas National Bank v. West*, 631 So. 2d 212 (Ala. 1993)
- *State Oil and Gas Board v. Anderson*, 510 So. 2d 250 (Ala. Civ. App. 1987), *cert. denied*, 510 So. 2d 250 (Ala. 1987)

Professional Affiliations

- Mobile Estate Planning Council
- Standing Trust Committee of the Alabama Law Institute

Areas of Practice

- Alternative Dispute Resolution, Mediation, Arbitration
- Oil, Gas, Minerals & Natural Resources
- Real Estate, Construction & Development
- Tax, Estate & Probate

PROBATE COURT OF MOBILE COUNTY
APPOINTED LAWYERS SEMINAR
December 19, 2024

Duane A. Graham
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Mobile, AL 36601
251-405-1300

1. SERVICE OF NOTICE ON PARTIES OF INTEREST

A. Basic Rule is Rule 4, A.R.C.P.

Under Act No. 91-131, which grants the Probate Court of Mobile County statutory equity jurisdiction in cases involving estates and conservatorships, the Rules of Civil Procedure apply, although this does not foreclose application of other statutory probate procedures. Under the 2013 amendment to Rule 1 of the Rules of Civil Procedure, the rules apply in probate courts “so far as the application is appropriate and except as otherwise provided by statutes.” Consequently, Rule 4, and its collateral Rules 4.1 – 4.4, are the principal guides for determining how to serve notice. The fundamental concept of constitutional due process is the driving force behind the notice requirement. Even though probate courts frequently function as quasi in rem courts, constitutional requirements dictate that all parties having a legitimate interest in the proceedings should be notified thereof, at least if possible. Due process does not require that each interested party in fact receive notice, but it does require that reasonable efforts be made to provide such notice. It should always be borne in mind that even if the court is effectuating the service of notice, it is ultimately the petitioner or movant, just as it is the plaintiff in circuit court, who bears the burden of making sure interested parties are served.

B. Service by Sheriff

Under Rule 4(i), service by the sheriff’s office on persons who reside in Alabama is the default means of service, and the probate court frequently uses this means, at least initially. Notices are forwarded to the sheriff’s office, and a deputy is dispatched to attempt service. For parties in other counties, notices can be forwarded to the sheriff’s office in the relevant county. Typically, a deputy attempts service at the stated address for perhaps three times. If unsuccessful, the notice is returned “not found” or with some other message such as “wrong address” and the service had not been completed.

C. Service by Private Process Server

Under Rule 4(i), service can also be effectuated by a designated person outside the sheriff’s office who is at least 19 years of age and not a party or a relative of a party. Typically, this means of service is used when a party has either been difficult to serve or is expected to

refuse service by other means. The petitioner has to pay the private process server for his or her efforts, although charges for this in the Mobile area tend to be quite reasonable.

D. Service by Certified Mail

Under Rule 4(i), service can also be attempted by certified mail, which has the advantage of being sent nationwide. The receipt of the “green card” showing delivery is required before notice is deemed complete. For individuals, the “green card” should be signed by the individual being served.

E. Service by Publication

If all else fails, service can be made by publication in a newspaper under Rule 4.3. An affidavit must be filed with the court attesting to the efforts made to serve the party by other means that have been unsuccessful. Thus, service by publication is never the first type of service attempted. Moreover, in *Lovell v. Costigan*, No. 2140522 (Ala. Civ. App., July 10, 2015), the Court of Civil Appeals held that it was improper to serve a defendant by publication unless the affidavit submitted by the plaintiff alleged specific facts to the effect that the defendant was avoiding service. Specifically, the Court held that it was insufficient to allege merely that the defendant was not found at his last known address and that various internet and telephone efforts to locate defendant’s new address had been unsuccessful. The Probate Court upholds the requirements of this case.

Note that some probate proceedings (*e.g.*, petitions for final settlement, petitions to sell real property for payment of debts) require a general publication notice in addition to service on interested parties. These general publications are intended to provide notice to persons who are unknown to the petitioner or to creditors and this does not substitute for notice on interested parties. If an interested party cannot be served by any method but publication, this general publication will not suffice and a separate publication will be required for the specific interest party.

2. IMPORTANT RULES OF CIVIL PROCEDURE IN PROBATE PRACTICE

A. Rule 4 – for purposes of notifying interested parties

The application of Rule 4 in Probate Court has been discussed above.

B. Rule 17(d) – GAL cannot be suggested or nominated by petitioner

Probate Court proceedings are often unique in the frequency with which they involve matters where minors or mentally incapacitated persons have an interest. These persons have to be notified as well as represented in the proceedings. This representation is accomplished by appointment of a guardian ad litem (“GAL”) to represent the minor or incapacitated person. Rule 17 addresses the appointment of GAL’s. It should be noted that Rule 17(d) specifically

says that a person cannot be appointed as GAL if that person has been suggested or nominated by the petitioner. On the other hand, a minor of 14 years of age or older can nominate his or her own GAL within 30 days of service.

C. Rule 45 – Subpoenas

The methods for obtaining documents from non-parties and for compelling the attendance of witnesses at a hearing is accomplished through subpoenas. Probate Court follows the general rules outlined in Rule 45.

D. Rule 56 – Summary Judgment

In contested matters, motions for summary judgment are often a good vehicle for testing the sufficiency of a claim and perhaps avoiding a trial. Probate Court applies the same rules as circuit courts – specifically the requirements of Rule 56 – in ruling on such motions.

3. HOW TO ADMIT DOCUMENTS INTO EVIDENCE

A. Authentication

To be admitted into evidence, documents must be authenticated. Rule 44 and Rules 901 through 903 of the Rules of Evidence generally govern the requirements for how to authenticate a document. Fundamentally, the concept of authentication requires a showing that the document is in fact what it purports to be. The rules dictate numerous ways in which this showing can be made, such as a certification of a governmental or court document, an attestation of a business record custodian for a business, or simply testimony that the document is what it appears to be. Probate Court often has a pretrial order in particular cases that essentially treats all documents submitted as exhibits as being authenticated automatically unless timely objection is made.

B. Avoidance of Hearsay Rule

Documents constitute potential hearsay almost by definition – they are in fact “out of court” happenings. Fortunately, many exceptions to the hearsay rule exist under which many documents can easily be admitted into evidence notwithstanding their hearsay tendencies. Rules 801 through 806 of the Rules of Evidence specify what is either not considered hearsay to begin with or what constitutes an exception to the hearsay rule. Rules that often can be employed to overcome the hearsay rule for documents include the following:

-admissions by an opponent, which are declared not to constitute hearsay under Rule 801(d), so a relevant document containing “admission” by an opponent is likely to be admissible.

-business records and public records exceptions provided by Rule 803. Rule 803 of the Rules of Evidence contains numerous exceptions to the hearsay rule, many of which apply to documents. The “business record” exception is found in Rule 803(6) and requires a showing that the document was maintained by a business “in the course of a regularly conducted business

activity” and that “it was the regular practice of that business entity to make such record.” Public records, such as deeds, court orders, and the like are clear exceptions to the hearsay rule.

4. IMPORTANT RULES OF EVIDENCE IN PROBATE PRACTICE

A. Rule 502 – Attorney-Client Privilege

While the attorney-client privilege is important for all legal proceedings, it has some special applications in Probate Court, namely in the exceptions to the rule noted in Rule 502(d). The most significant of these is subsection (2), which provides that an exception to the privilege exists as to the following:

Claimants Through the Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.”

Ala. R. Evid. 502(d)(2). This has particular application in a will contest proceeding or a proceeding in which the meaning of a particular clause of a will or trust agreement is under scrutiny. Rule 502(d)(4) also creates an exception to the privilege as to communications relevant to the intention or competence of a client who executes a document that the attorney attests as a witness.

B. Rule 601 – Killing the Dead Man’s Rule

While Rule 601 of the Rules of Evidence is relatively obscure – providing only that every person is competent to be a witness except as otherwise provided, the comments to the rule make clear that this rule was intended, among other things, to abolish the so-called “dead man’s statute” or “dead man’s rule.” Under that rule, a person was deemed “incompetent” to testify as to certain communications or transactions of a dead person (although there were certain exceptions) on the theory that the dead person was unavailable to contradict such testimony. The thrust of Rule 601 is thus that evidence concerning the statements or actions of a deceased person are, if otherwise relevant, admissible in a Probate Court proceeding notwithstanding the death of the person.

5. PROVING A WILL

A. ELEMENTS

The elements required to constitute a valid will go back to the days of Henry VIII, the most significant of which is that there must be two witnesses. Any person named as executor or beneficiary in the will, any other person interested in the estate, or any person having custody of the will may seek the probate thereof. Ala. Code § 43-8-160. There is a five-year statute of limitations on probating a will that has not otherwise been probated in another state, territory, or country where the decedent resided. Ala. Code § 43-8-161. Notice of the hearing to probate the

will must be given to those persons who would constitute the decedent's heirs at law at least 10 days before the hearing, the logic being that these are the persons who may be adversely affected by the dispositive provisions in the will. Ala. Code § 43-8-164. These are also the persons entitled to contest a will. Ala. Code § 43-8-190. A guardian ad litem must be appointed to represent any minor or incompetent heir. Ala. Code § 43-8-165. An adult heir waive the notice requirement, and this is often done in cases were the interested parties all support the probate of the will.

Once the hearing date has arrived, it must be determined whether the will is self-proving under Ala. Code § 43-8-132. If so, no evidence is required. If not, the testimony of at least one of the witnesses to the will must be procured. Ala. Code § 43-8-167. If the witnesses are dead or reside out-of-state, testimony verifying the handwriting of the testator's signature and that of at least one witness can be provided in substitution of witness' testimony. *Id.* For out-of-state witnesses or those unable to come to court, the court may also issue a "commission" to take the "deposition" of the witness. Ala. Code § 43-8-168. The "commission" is an order appointing some person as a type of notary public who is authorized to place the particular named witness under oath. The "deposition" is a written set of questions that the witness must answer and sign under oath.

When the original will is not available, the will can still be admitted to probate under certain circumstances. Essentially, the proponent of a lost will must (1) prove that a valid will was executed, (2) establish the contents of that will, (3) account for the original, and (4) establish nonrevocation by the testator. *See, e.g., Tyson v. Tyson*, 521 So. 2d 956 (Ala. 1988). If a copy of the will is available, items (1) and (2) can easily be established. Because the absence of the original is presumed to be due to the testator's destruction thereof for purposes of revoking it, adequate evidence must be presented to account for why the original is missing but should be presumed revoked. *Id.*

B. ASSESSING WHETHER TO CONTEST

Wills can be contested for basically one of three reasons: (1) improper execution; (2) lack of testamentary capacity; and (3) undue influence. Improper execution was basically addressed above.

It is presumed that every person has the capacity to make a will, and the contestant has the burden to prove lack of testamentary capacity. *Johnston v. Johnston*, 57 So. 450, 452 (Ala. 1912). As stated by the Alabama Supreme Court:

In order to execute a valid will, one must possess mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty, and the disposition which she wished to make—to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other.

Bolan v. Bolan, 611 So.2d 1051, 1057 (Ala. 1993) (internal quotations omitted); *Smith v. Vice*, 641 So.2d 785, 786 (Ala. 1994). As such, testamentary capacity is a relative low standard.

The question whether there was testamentary capacity is determined by the testator's mental condition at the time he or she executed the will. *Burke v. Thomas*, 211 So.2d 903 (Ala. 1968).

A contestant bears the burden of proof with respect to her allegation of undue influence. *Kelly v. Donaldson*, 456 So.2d 30, 33 (Ala. 1984). The elements necessary to prove an undue influence claim under Alabama law are:

(1) that a confidential relationship existed between a favored beneficiary and the testator; (2) that the influence of or for the beneficiary was dominant and controlling in that relationship; and (3) that there was undue activity on the part of the dominant party in procuring the execution of the will.

Clifton v. Clifton, 529 So.2d 980, 983 (Ala. 1988). A "favored beneficiary" in this context is "[o]ne who, in the circumstances of the particular case, has been favored over others having equal claim to the testator's bounty." *Cook v. Morton*, 1 So.2d 890, 892 (1941). For purposes of this rule, "[t]he 'equal claim' of others refers not to the laws of descent and distribution but to the facts of the particular case." *Clifton*, 529 So. 2d at 983. In other words, a child does not become a "favored beneficiary" solely because he or she receives something greater than his or her intestate share of an estate.

Any would-be contestant needs to consider that attorneys' fees will likely be assessed against an unsuccessful contestant under the provisions of Ala. Code § 43-8-196.

C. PROBATING A LOST WILL

When the original will is not available, the will can still be admitted to probate under certain circumstances. Essentially, the proponent of a lost will must (1) prove that a valid will was executed, (2) establish the contents of that will, (3) account for the original, and (4) establish nonrevocation by the testator. *See, e.g., Tyson v. Tyson*, 521 So. 2d 956 (Ala. 1988). If a copy of the will is available, items (1) and (2) can easily be established. Because the absence of the original is presumed to be due to the testator's destruction thereof for purposes of revoking it, adequate evidence must be presented to account for why the original is missing but should be presumed revoked. *Id.* What evidence is sufficient for this purpose is determined on a case by case basis by the court in its discretion.

J. LUKE ENGERISER, M.D.

AltaPointe Health Systems: Residency Program Director, Assistant Professor of Psychiatry, and Deputy Chief Medical Officer

Dr. Engeriser attended medical school at Northwestern University in Chicago, Illinois. His psychiatry residency training was at Tripler Army Medical Center in Honolulu, Hawaii. During his final year of residency, Dr. Engeriser received the Al Glass Award, the military's highest psychiatry resident research award, for his paper exploring the psychological effects of warfare. Dr. Engeriser served an additional three years in the Army at Fort Benning, Georgia, where he held the position of Chief, Department of Behavioral Health. After separating from the Army, Dr. Engeriser was Medical Director of Mid-Coast Mental Health Center/PenBay Psychiatry in Rockland, Maine. Prior to attending medical school, he completed a Master of Arts in Divinity at the University of Chicago in the History of Religions and worked as a teacher of English at the Teacher Training College in Torun, Poland. He is board certified in Adult Psychiatry.

Key points concerning mental illness for lawyers

1

Mental illness in the US

- ▶ About 43 million adults experience mental illness in the US in a given year
- ▶ 1 in 5 adults in America experience a mental illness
- ▶ Nearly 1 in 25 live with a serious mental illness
- ▶ One half of chronic mental illnesses begin by age 14; ¾ by the age of 24
- ▶ Schizophrenia 1.1% of Americans
- ▶ Bipolar Disorder 2.6 %
- ▶ Depression 6.9 %
- ▶ Anxiety disorders 18.1 %

2

Inpatient commitment

- ▶ A. Respondent is mentally ill
- ▶ B. As a result of the mental illness, the Respondent poses a real and present threat of substantial harm to self and/or others
- ▶ C. The Respondent will, if not treated, continue to suffer mental distress and experience deterioration of the ability to function independently
- ▶ D. The Respondent is unable to make a rational and informed decision as to whether treatment for mental illness would be desirable
- ▶ E. The proposed commitment is the least restrictive and available means of treatment OR if no treatment is presently available, the proposed commitment is necessary to prevent harm to the Respondent and others

3

Outpatient commitment

- ▶ A. Respondent is mentally ill
- ▶ B. The Respondent will, if not treated, continue to suffer mental distress and experience deterioration of the ability to function independently
- ▶ C. The Respondent is unable to make a rational and informed decision as to whether treatment for mental illness would be desirable
- ▶ D. The proposed commitment is the least restrictive means of treatment available

4

Serious mental illnesses

- ▶ Schizophrenia and other psychotic disorders
 - ▶ Schizophrenia (paranoid, disorganized, catatonic, undifferentiated, and residual types)
 - ▶ Schizophreniform Disorder
 - ▶ Schizoaffective Disorder (bipolar type, depressive type)
 - ▶ Delusional Disorder
 - ▶ Brief Psychotic Disorder
 - ▶ Shared Psychotic Disorder
 - ▶ Psychotic Disorder NOS (unspecified psychotic disorder)
- ▶ Mood disorders (major)
 - ▶ Major Depressive Disorder (single episode, recurrent)
 - ▶ Bipolar I Disorder (manic, hypomanic, mixed, depressed, unspecified)
 - ▶ Bipolar II Disorder
 - ▶ Bipolar Disorder NOS
- ▶ Anxiety disorders (severe)
 - ▶ Panic Disorder (with and without Agoraphobia)
 - ▶ Agoraphobia without history of Panic Disorder
 - ▶ Obsessive-Compulsive Disorder

5

Dementia (Major Neurocognitive Disorder)

- ▶ One diagnosis that we commonly encounter is dementia, but it is not designated a serious mental illness

- ▶ "no treatment is presently available for the respondent's mental illness, but confinement is necessary to prevent the respondent from causing harm to himself and others."

6

Psychotic Disorders

- ▶ Schizophrenia (paranoid, disorganized, catatonic, undifferentiated, and residual types)
- ▶ Schizophreniform Disorder
- ▶ Schizoaffective Disorder (bipolar type, depressive type)
- ▶ Delusional Disorder
- ▶ Brief Psychotic Disorder
- ▶ Shared Psychotic Disorder
- ▶ Psychotic Disorder NOS (unspecified psychotic disorder)

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Psychotic Disorders

- ▶ Illnesses that can present with psychosis:
 - ▶ Schizophrenia
 - ▶ Schizoaffective Disorder
 - ▶ Delusional Disorder
 - ▶ Major Depressive Disorder with psychotic features
 - ▶ Bipolar Disorder (depressed or manic) with psychotic features
 - ▶ Dementia (Major Neurocognitive Disorder)
 - ▶ Delirium
 - ▶ Substance use or withdrawal
 - ▶ Other medical issues

8

Common symptoms of psychosis

- ▶ Delusions—strong beliefs that are unlikely to be true, and that may seem irrational to others
- ▶ Hallucinations—seeing, hearing, or physically feeling things that are not actually present
- ▶ Disorganized speech
- ▶ Disorganized behavior
- ▶ Thought blocking—being unable to complete thoughts, or losing track of thoughts

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Duration of psychotic symptoms

- ▶ Can vary depending on the cause, and the patient
- ▶ Psychotic symptoms can last only a few days, and completely resolve, or persist
- ▶ Brief psychotic disorder by definition lasts less than 30 days
- ▶ Schizophreniform disorder lasts between 30 days and 6 months
- ▶ Schizophrenia lasts longer than 6 months
- ▶ Even with medication, some psychotic symptoms can persist. The goal is to make the symptoms manageable.
- ▶ Psychotic disorders can be chronic, lifelong illnesses

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Treatment of psychosis

- ▶ Antipsychotic medications—medications like Haldol, Prolixin, Risperdal, Abilify, Zyprexa, Invega (and many others).
- ▶ May use other medications along with antipsychotics to make them more effective or decrease side effects—Cogentin, Benadryl, antidepressants, mood stabilizers
- ▶ Psychotic symptoms caused by drugs or medical problems may subside on their own. May still treat psychotic symptoms like this with medication to make them subside faster, but treatment with medication likely not required long term

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Other treatments for psychosis

- ▶ Therapy
- ▶ Family therapy
- ▶ Social skills training
- ▶ Cognitive skills training
- ▶ Vocational rehabilitation
- ▶ Supported housing (boarding homes, group homes, independent supported apartments)

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Mood disorders

- ▶ Major Depressive Disorder (single episode, recurrent)
- ▶ Bipolar I Disorder (manic, hypomanic, mixed, depressed, unspecified)
- ▶ Bipolar II Disorder
- ▶ Bipolar Disorder NOS

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Depression symptoms

- ▶ Depressed or sad mood
- ▶ Lack of energy
- ▶ Decreased or increased sleep
- ▶ Decreased or increased appetite
- ▶ Poor concentration
- ▶ Lack of interest in things
- ▶ Hopelessness
- ▶ Low self esteem
- ▶ Suicidal thoughts
- ▶ Psychotic symptoms can be present

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Mania symptoms

- ▶ Increased energy
- ▶ Reduced sleep (and feels rested on little sleep)
- ▶ Elevated ("too good") or irritable mood
- ▶ Grandiose delusions
- ▶ Impulsive and unpredictable behavior
- ▶ Increased activity
- ▶ Increased speech
- ▶ Psychotic symptoms
- ▶ Hypomania is similar, but less severe, and patients are often able to function more normally

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Major Depressive Disorders

- ▶ Can have only one episode, or many episodes
- ▶ Can have psychosis associated with it, which improves when the depressive symptoms improve
- ▶ Can become completely symptom free over time ("in remission") or continue to have residual symptoms for years
- ▶ Can have associated symptoms or diagnoses (anxiety, PTSD, substance use, personality disorders) which can affect outcome and prognosis

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Treatment of Major Depressive Disorders

- ▶ Antidepressants—SSRI (Prozac, Paxil, Zoloft, Celexa, Lexapro), SNRI (Effexor, Cymbalta, Pristiq), NDRI (Wellbutrin), other types (Remeron, Elavil, Trintellix)
- ▶ Treatment for associated psychosis, anxiety, sleep disturbances
- ▶ ECT or transcranial magnetic stimulation
- ▶ Light therapy
- ▶ Therapy
- ▶ Family therapy

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Bipolar I vs Bipolar II

- ▶ Bipolar I—both manic and major depressive episodes over the course of the illness (but a single episode of mania can qualify for the diagnosis before a documented depressive episode).
- ▶ Bipolar II—major depressive episodes and hypomanic episodes.
- ▶ Bipolar I Disorder generally more severe than Bipolar II in the manic or hypomanic symptoms
- ▶ Depressive symptoms can be equally severe in Bipolar II. Patients can become so severely depressed that they require hospitalization in Bipolar I or II, but in Bipolar II, the symptoms of hypomania usually are not so severe as to prevent the patient from functioning, and don't usually require hospitalization.

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Bipolar Disorder NOS

- ▶ Also called Unspecified Bipolar Disorder
- ▶ Symptoms of both mania/hypomania and depression are present, but don't meet full diagnostic criteria for Bipolar I or Bipolar II
- ▶ Treatment is the same
- ▶ Over a longer period of time (months to years), Unspecified Bipolar Disorder diagnosis may become more specific

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Treatment of Bipolar Disorders

- ▶ Mood stabilizers (lithium, Depakote, Trileptal, Tegretol, Lamictal)
- ▶ Antipsychotics—used to treat associated psychosis, can also be used alone as mood stabilizers
- ▶ Medications for associated anxiety, sleep disturbances, side effects
- ▶ Therapy
- ▶ Family therapy

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Duration of illness for mood disorders

- ▶ These can be EPISODIC disorders, so it is not unreasonable for patients to come off medication under advisement from their physicians after a period of time (6 months to a year)
- ▶ Patients may need indefinite treatment if they have many episodes (or a longer duration of treatment before trying to come off medication).

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Anxiety Disorders

- ▶ Panic Disorder—with and without agoraphobia
- ▶ Agoraphobia without panic disorder
- ▶ Obsessive-Compulsive Disorder

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Obsessive-Compulsive Disorder

- ▶ Obsessions—repetitive, unwanted, intrusive thoughts
 - ▶ Ex: thoughts about harming or having harmed someone, doubt that one has performed an important action (locking door, turning off stove), fears of saying inappropriate things in public
- ▶ Compulsions—irrational, excessive urges to perform certain actions, temporarily relieve the stress brought on by obsessions
 - ▶ Ex: handwashing, counting, checking
- ▶ Symptoms last more than an hour a day

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Treatment of anxiety disorders

- ▶ Antidepressants—SSRI's such as Prozac and Zoloft, and SNRI's such as Effexor are the first line medications for anxiety disorders
- ▶ Anti-anxiety medications—benzodiazepines (Klonopin, Ativan, Valium, Xanax; generally used sparingly due to abuse potential and side effects), Benadryl, Vistaril, Buspar
- ▶ Therapy

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Other Impairing Illnesses

.....BUT NOT CLASSIFIED AS "SERIOUS MENTAL ILLNESS"

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Posttraumatic Stress Disorder (and other trauma-related disorders)

- ▶ Symptoms of PTSD can resemble mood, anxiety, and psychotic disorders
- ▶ Not designated as serious mental illnesses by the state
- ▶ Can be quite disabling and require treatment, both inpatient and outpatient
- ▶ Patients with PTSD often have comorbid depressive disorders, anxiety disorders, and substance use disorders

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Intellectual Disability

- ▶ Not considered a serious mental illness
- ▶ No treatment available for intellectual disabilities
- ▶ Medications used to treat serious mental illnesses (antipsychotics, mood stabilizers, antidepressants, anxiety medications) are often used to reduce the behaviors associated with intellectual disabilities, but do not constitute an effective treatment that can alter the course or prognosis

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Personality Disorders

- ▶ Not considered to be serious mental illnesses
- ▶ Related to inherent personality structure and tend to be consistent over time
- ▶ Can be improved with intensive long-term psychotherapy, but often are made worse by inpatient hospitalization
- ▶ Medications used to treat serious mental illnesses (antipsychotics, mood stabilizers, antidepressants, anxiety medications) are often used to reduce the behaviors associated with personality disorders, but do not constitute an effective treatment that can alter the course or prognosis

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Borderline Personality Disorder

- ▶ Pervasive pattern of unstable interpersonal relationships and self-image
- ▶ Typically experience severe mood lability and impulsivity with episodes of intense rage
- ▶ Can have recurrent self-destructive, self-harming, and suicidal behaviors
- ▶ The intensity of inpatient hospitalization can be destabilizing and typically makes symptoms worse, not better

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Antisocial Personality Disorder

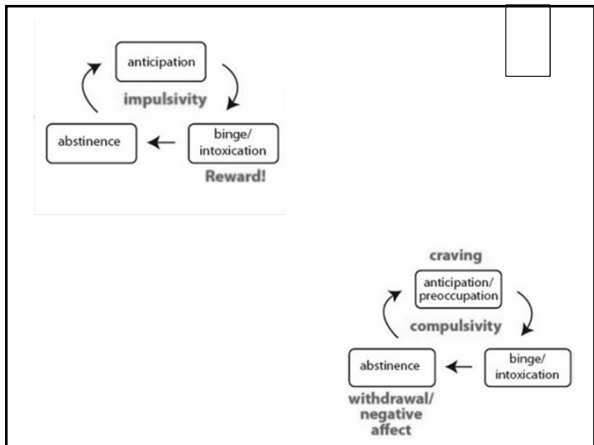
- ▶ Pervasive pattern of disregard for and violation of the rights of others
- ▶ Prototypic character trait is a lack of empathy for others and lack of remorse for actions
- ▶ Can have recurrent violent and criminal behaviors
- ▶ Can be very manipulative- either aggressive/annoying or charming
- ▶ Incarcerated individuals with disorder may prefer to be at a hospital rather than in jail

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Alcohol and Drug Addiction

- ▶ Drugs of abuse have different effects, but all have the final pathway of giving us an artificial sensation of pleasure

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Alcohol and Drug Addiction

- ▶ Behaviors such as lying, manipulation, stealing, and ignoring responsibilities are symptoms of the disorder
- ▶ Loss of relationships, occupation, financial security, housing, and even life are often outcomes of untreated addiction

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Alcohol and Drug Addiction

- ▶ Effective treatment programs and even medications for some types of addiction are available
- ▶ Can be impairing and even life threatening, but we are unable to legally force treatment in Alabama

ETHICS

“SOMETIMES, IT REALLY IS EASIER TO ASK FOR PERMISSION THAN TO BEG FOR FORGIVENESS”

A. Rule 18, Alabama Rules of Disciplinary Procedure

"Rule 18, Conduct not subject to disciplinary action

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, to the General Counsel, said inquiry, shall be considered confidential. Additionally, if said lawyer receives a formal or informal opinion from the Office of General Counsel that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action."

B. Write – Alabama State Bar, P.O. Box 671 Montgomery, Alabama 36101-0671

C. Call – 334-269-1515

1- 800-354-6154

D. Formal and Informal Opinions

OVERVIEW

The Role of the Guardian Ad Litem

Guardian ad litem - “A licensed attorney appointed by a juvenile court to protect the best interests of an individual without being bound by the expressed wishes of that individual.” Ala. Code § 12-15-102(10).

Child’s attorney - “A licensed attorney who provides legal services for a child, or for a minor in a mental commitment proceeding, and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child or minor as is due an adult client.” Ala. Code § 12-15-102(5).

A child’s attorney is bound by the child’s decisions concerning the objectives of the representation. Rule 1.2(a), Alabama Rules of Professional Conduct. However, a child’s guardian ad litem is not bound by the child’s expressed interests, but must act to protect the best interests of the child. Thus, the guardian ad litem is saddled with the additional, and often overwhelming, responsibility to exercise judgment and make decisions for the child-client that lawyers in an ordinary lawyer-client relationship do not have to make.

The guardian ad litem is an advocate and the role of the guardian ad litem in the adjudicatory process is not different from that of any other advocate. Formal Opinion of the Disciplinary Commission of the Alabama State Bar, RO 00-02, citing, Ala. Code § 15-12-21, and *S.D. v. R.D.*, 628 So.2d 817 (Ala. Civ. App. 1993). However, in the overall context, the role and responsibilities of a guardian ad litem are much more complex.

Generally, the guardian ad litem has the same ethical responsibilities as any other lawyer. However, the law as well as the Rules of Professional Conduct must recognize that in addition to serving as an advocate, the guardian ad litem also often serves as mediator, investigator, protector, promoter, caretaker, and facilitator. Traditionally, the guardian ad litem functioned as a friend of the court, assigned by the court to investigate and evaluate the facts and circumstances, and to formulate opinions and recommendations for the court, exercising independent judgment to promote the best interests of the child. In many cases those opinions, recommendations, or judgments do not coincide with the preferences of the child.

The combination of the roles of lawyer-as-advocate and lawyer-as-guardian ad litem is problematic. A guardian ad litem cannot be effective unless he understands his role and responsibilities. Resolving the legal, ethical, social and moral dilemmas presented by the duality of lawyer-advocate and lawyer-guardian is critical to effective representation and avoidance of legal and ethical problems.

In defining the rights of child in dependency and termination of parental rights proceedings, *The Juvenile Justice Act* sets out minimal duties and responsibilities for the child's guardian ad litem. Ala. Code § 12-15-304(b), provides:

“(a) In all dependency and termination of parental rights proceedings, the juvenile court shall appoint a guardian ad litem for a child who is a party to the proceedings and whose primary responsibility shall be to protect the best interests of the child.

“(b) The duties of the guardian ad litem include, but shall not be limited to, the following:

“(1) Irrespective of the age of the child, meet with the child prior to juvenile court hearings and when apprised of emergencies or significant events impacting the child. In addition, the guardian ad litem shall explain, in terms understandable to the child, what is expected to happen before, during, and after each juvenile court hearing.

“(2) Conduct a thorough and independent investigation.

“(3) Advocate for appropriate services for the child and the family.

“(4) Attend all juvenile court hearings scheduled by the juvenile court and file all necessary pleadings to facilitate the best interests of the child.

“(c) Before being appointed by the juvenile court, every guardian ad litem appointed in juvenile dependency or termination of parental rights cases shall receive training appropriate to their role.

“(d) Nothing in this section shall prohibit the juvenile court from appointing trained volunteers in addition to guardians ad litem in promoting the best interests of the child.

“(e) A guardian ad litem may be appointed to protect the best interests of more than one child of the same parent. A guardian ad litem also may be appointed to protect the best interests of both a minor (or otherwise incapacitated) parent and the child.”

Comment

“This subsection will mandate that guardians ad litem be appointed to represent children in all dependency and termination of parental rights cases and clarify that the responsibility of a guardian ad litem is to protect the best interests of the child, as required by federal and state law. *See* 42 U.S.C. § 5106a(b)(2)(A)(~~viii~~) (sic) (B)(~~xiii~~)(providing that in order to receive federal funding for child abuse and neglect prevention and treatment programs, a State must provide a certification by the chief executive officer that the State has “provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, . . . , shall be appointed to represent the child in such proceedings . . . (II) to make recommendations to the court concerning the best interests of the child”); Ala. Code § 26-14-11 (2007) (“In every case involving an abused or neglected child which results in a judicial proceeding, an attorney shall be appointed to represent the child in such proceedings. Such attorney will represent the rights, interests, welfare and well-being of the child, and serve as guardian ad litem for said child.”).

“This subsection was added to provide some minimum duties for guardians ad litem, based on standards promulgated by the American Bar Association. *See* American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), at Stds. C-1, C-2, C-3, C-4, and D-1.

“As required by federal law, this subsection will provide that guardians ad litem representing children must receive training appropriate to their role. *See* 42 U.S.C. § 5106a(b)(2)(A)(~~xiii~~)(sic)(B)(~~xiii~~) (requiring, as a condition of eligibility for federal funding, that “in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special

advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings”).

“This subsection will confirm that a juvenile court may appoint trained volunteers, such as Court Appointed Special Advocates (“CASAs”), to assist a guardian ad litem in promoting the best interests of a child.

“This subsection will clarify that a single guardian ad litem (“GAL”) may be appointed to protect the best interests of more than one child of the same parent. A single GAL may also be appointed to protect the best interests of both a minor (or otherwise incapacitated) parent as well as his or her child.”

T.M. v. K.M.G., 68 So.3d 849 (Ala.Civ.App. 2011).

“We note that the Alabama Legislature recently totally revised and reorganized the statutory provisions pertinent to juvenile proceedings with the passage of the Alabama Juvenile Justice Act, § 12-15-101 et seq., Ala. Code 1975 (“the Act”), which took effect on January 1, 2009. Article 3 of the Act extensively modified the provisions relating to dependency and termination-of-parental-rights actions. *See* § 12-15-301 through § 12-15-324.

The pertinent statutory provision referenced by the father states: “In all dependency and termination of parental rights proceedings, the juvenile court *shall* appoint a guardian ad litem for a child who is a party to the proceedings and whose primary responsibility shall be to protect the best interests of the child.” Ala. Code 1975, § 12-15-304 (a) (emphasis added). That language replaced the former provision that read: “The court, at any stage of a proceeding under this chapter, *may* appoint a guardian ad litem for a child who is a party to the proceeding if he has no parent or guardian or custodian appearing on his behalf or their interests conflict with those of the child.” Ala. Code 1975, former § 12-15-8 (a) (emphasis added). The plain language of the statute now in effect mandates what was previously a discretionary appointment of a guardian ad litem whenever a child is a party to a dependency or termination-of-parental-rights action, regardless of whether that child has a “parent or guardian or custodian appearing on his behalf.”

Ala. Code § 12-15-308(c) provides, “It is the responsibility of the guardian ad litem to present evidence supporting the best interests of the child.”

GENERAL DUTIES

- Investigation
 - Thorough and independent
 - Court file
 - Agency records
 - Law enforcement records
 - School records
 - Medical records
 - Other collateral sources
 - In-person interviews
 - Child
 - Parents or guardians
 - Other relatives
 - Other third parties with relevant knowledge

- Determine Best Interests
 - Protect the child's best interests
 - Advocate for appropriate services for child and family
 - Maintain objectivity
 - Maintain independence

- Document
 - Time and Expenses
 - Contacts and Interviews
 - Opinions and Recommendations

- Be Present
 - Attend all hearings
 - File necessary pleadings to facilitate the child's best interests

- Communicate
 - Nature of the proceedings
 - Role and responsibilities
 - Confidentiality and privilege
 - Contact information
 - Child
 - Parent or Guardian
 - Other Attorneys
 - Court

SPECIAL SITUATIONS

Loyalty and Confidentiality v. Best Interests

- Q: What is the guardian ad litem's ethical responsibility when duties of loyalty and confidentiality collide with the best interests of the child?
- A: The Alabama Rules of Professional Conduct recognize that there are times when a lawyer's duties of loyalty and confidentiality collide with the best interests of the client.

Rule 1.14, Ala. R. Prof. C., provides:

“(a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

“(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

“(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

“Comment to Rule 1.14

“The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. The fact that a client

suffers diminished capacity does not lessen the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should, as far as possible, accord the represented person the status of client, particularly in maintaining communication. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not the client's family members, to make decisions on the client's behalf. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent the guardian's misconduct. See Rule 1.2(d).

“Taking Protective Action

“If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measure could include: consulting with the client's family members, using a reconsideration period to permit clarification or improvement of circumstances using voluntary surrogate decision-making tools such as valid durable powers of attorney or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or conservator or the entry of another protective order is necessary to serve the client's best interests. Thus, if a client with diminished capacity has substantial

property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. Whether the appointment of a legal representative is justified under the circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

“Disclosure of Client's Condition

“Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b) of this rule, the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

“Emergency Legal Assistance

“In an emergency where the health, safety, or financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise to avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer with respect to a client. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as with any client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.”

Guardian Ad Litem’s Role and Responsibilities

M.R.J. v. D.R.B., 34 So.3d 1287 (Ala.Civ.App. 2009) (Juvenile Court exceeded its discretion in awarding the guardian ad litem sole discretion in determining the mother's visitation. The trial court order provided: "Mother is awarded liberal visitation, which shall be established by the guardian ad litem and submitted to the court in writing for inclusion in the file." "A guardian ad litem is an attorney entitled to argue his or her client's case to the court as is any other attorney, but he or she is not delegated any special authority of the court. *K.D.H. v. T.L.H.*, 3 So.3d 894, 899-900 (Ala.Civ.App. 2008))

Pratt v. Pratt, 56 So.3d 638 (Ala.Civ.App. 2010) (Court's order granting discretion over supervised visitation to Guardian ad litem and visitation supervisor is error)

Client Objectives or Best Interests?

Q: Lawyer was appointed as counsel for minor, not guardian ad litem. The minor has been charged with DUI, possession of marijuana and possession of drug paraphernalia. There are jurisdictional problems and fatal errors in the charging documents. The DUI was dismissed because of the errors. However, the prosecutor has offered a 90 day suspended sentence, six month license suspension on the marijuana and drug paraphernalia charges. The minor does not want to accept the plea offer and want a trial. Lawyer wants to make sure he is clear on his role to advocate what his client desires, rather than what he thought or others thought might be in the best interest of his client.

A: Under the new juvenile justice act, if he was appointed as defense counsel, as opposed to guardian ad litem, then he was responsible to pursue the objectives of his client.

Duty to Act in Other Proceedings

Q: What is my duty in a dependency case as the GAL? Child was conceived by two seventeen year olds. Prior to birth of the child father is killed in a car accident and the family receives either life insurance and/or a cash settlement. A trust is established for the child. The grandparents petitioned to be administrators of the estate in the probate court, but nothing has progressed from that point in probate court. Due to various circumstances, DHR filed a dependency petition on behalf of the child and the child's mother since she is also a minor. Child is adjudicated dependent and DHR is given custody. The grandparents apparently have some authority or access to the trust and I have received information that they are "running through" the money. They are not parties to the dependency case but hired a lawyer, supposedly with money taken from the trust, and have filed a petition for custody. My question is since I am not the GAL in the probate court matter, do I have a duty, responsibility, or even jurisdiction to protect the child's trust account or is this DHR's responsibility as the custodian or the probate court's job to appoint a GAL in their matter? Am I liable or responsible in some way, if the grandparents blow all the money in the trust?

A: As guardian ad litem for the child you have a duty to act to protect the best interests of the child. If you have information that indicates that funds held in trust for the benefit of the child are being misappropriated, then you may take protective action, which might include, but need not be limited to, notifying the appropriate court; notifying counsel for DHR; or filing an action with the appropriate court to request an accounting and an order to protect the financial interests of your client.

Communication With Your Client

Q: Lawyer is the guardian ad litem in a case. The lawyer for the mother has instructed Lawyer that he cannot meet with his client (the child) without the mother and the lawyer for the mother present.

A: Lawyer has been appointed to represent the child, as guardian ad litem. Lawyer is entitled to meet with his client in private without the presence of others. If the child's mother and mother's lawyer does not cooperate, then file motion with the court asking for assistance.

Communication With Party Represented by Counsel

Q: What are the ethical responsibilities of a guardian ad litem who takes an active role in investigating a matter where that investigation necessarily includes interviewing a party represented by counsel?

A: Rule 4.2(a), Alabama Rules of Professional Conduct, 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 by law to do so.”

A guardian ad litem may not communicate with a “person the lawyer knows to be represented” by a lawyer without that lawyer’s consent. However, communications merely incidental to the representation that do not concern any substantive matter, such as scheduling, transportation, or notice, etc. would not violate this rule.

Rule 4.2 would not prohibit an attorney for a parent in a juvenile dependency or termination of parental rights proceeding from consulting with or interviewing a social worker for the Department of Human Resources outside the presence and/or without first contacting an attorney for the Department. The comment to Rule 4.2 states:

“[A]lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law

include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.”

This office has interpreted Rule 4.2, as informed by this comment, to allow direct contact by attorneys with social workers employed by DHR. This is not to say that the lawyer for DHR cannot instruct DHR social workers not to communicate with a lawyer for a represented person or party without his presence or prior permission. It simply means that Rule 4.2 does not apply to prohibit a lawyer from attempting to communicate with a DHR case worker about the subject matter of the representation, even where DHR is a party and is represented by counsel.

Communication With an Unrepresented Party

Q: What if the party is not represented by counsel?

A: Rule 4.2 prohibits communication with a person represented by counsel. If the person is not represented by counsel, then the guardian ad litem may communicate with the unrepresented party about the subject of the representation, subject to the provisions of Rule 4.3.

Rule 4.3(a), Ala. R. Prof. C., 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.”

If the role of the guardian ad litem is unclear to lawyers and judges, then the role of the guardian ad litem will easily be misunderstood by a layperson. A guardian ad litem should explain his dual role as an advocate for the ward and as a protector or guardian of the best interests of the ward. A guardian ad litem should also explain that information provided to the guardian ad litem will not be considered confidential, i.e., the guardian ad litem only owes a duty of confidentiality and loyalty to the ward.

Communication With a Non-Party

Q: What about communications with persons (non-parties)?

A: Unlike the ABA Model Rules of Professional Conduct, the Alabama rule uses the term “party” rather than “person.” There is an argument that Rule 4.2, by its terms, does not apply to prohibit communications by a lawyer with non-parties. However, the comment to the rule provides that the rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter. Certainly, if the person is represented by counsel, the

guardian ad litem should obtain the permission of counsel before communicating with the person whether or not they are a named party. This same rationale applies to prohibit communications by a lawyer representing a party with a child represented by a guardian ad litem, even where the child is not a party to the proceedings. Communications with non-represented persons are subject to the provisions of Rule 4.3.

Ex Parte Communications With the Court

Q: Can the guardian ad litem communicate ex parte with the trial court?

A: No. An attorney who has been appointed a guardian ad litem is ethically prohibited from communicating ex parte with the trial judge concerning any substantive issue before the court. See RO-00-02.

Ex Parte R.D.N., 918 So. 2d 100 (Ala. 2005) (Guardian ad litem admitted in brief to the court that she had private conversations with the trial judge regarding her opinions and recommendations. The Court stated, the "guardian ad litem's recommendation that the child remain with the mother was not presented as evidence produced in open court and was based on information that may or may not have been properly presented to the court." Neither party had had the opportunity to examine the guardian ad litem or to present evidence in support of or contradicting her recommendation. Therefore, the court concluded that it could not say that the father's rights had not been prejudiced and held that the ex parte communication between the guardian ad litem and the trial court had violated the father's rights to procedural due process.)

M.G. v. J. T., 90 So.3d 762 (Ala. Civ. App. 2012)

Dependency proceeding. Mother was never served. Court merely reviewed the pleadings and had discussions with the Guardian ad litem.

Nature and Scope of Advice and Recommendations

Q: Is the guardian ad litem limited solely to legal analysis in representing and protecting the best interests of the ward?

A: Rule 2.1, Ala. R. Prof. C., provides:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

This rule recognizes that a lawyer does not provide legal advice in a vacuum. Moral, economic, social, and ethical considerations affect legal questions and the

application of the law. Thus, a lawyer is not limited to the provision of purely technical legal advice. However, this does not allow the guardian ad litem to ignore relevant objective facts or law. The guardian ad litem's conduct and opinions must be rationally related to the facts and circumstances and the applicable law. The dual obligations of a guardian ad litem necessarily impose a higher degree of objectivity on a guardian ad litem than is imposed on a lawyer for a competent adult.

Guardian Ad Litem as Witness

Q: Can a guardian ad litem be called as a witness in the proceeding in which they represent the ward?

A: There is no ethical rule that prohibits a guardian ad litem from being called as a witness in a proceeding in which the guardian ad litem represents a ward. Whether the guardian ad litem may be called as a witness is a legal question subject to determination by the court. Rule 3.7, Ala. R. Prof. C., provides:

“(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- (1) The testimony relates to an uncontested issue;
- (2) The testimony relates to the nature and value of legal services rendered in the case; or
- (3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.”

Rule 3.7 prohibits a lawyer from undertaking representation where facts exist that will make it more likely than not that the lawyer's testimony will be necessary to establish a claim or defense on behalf of the client. The rule does not prohibit a lawyer who is likely to be called as a necessary witness from representing a client in the pre-trial stages of litigation nor does it require disqualification of a lawyer who is called as a witness by the adverse party, as long as the lawyer's testimony is consistent with the client's interest.

Although jurisdictions are split regarding whether a guardian ad litem can be called as a witness, the majority view appears to be that they may be called as a witness. Testimony by guardians ad litem appears to be an accepted practice in Alabama. See e.g., *Scroggins v. Templeton*, 890 So.2d 1017 (Ala.Civ.App. 2003). Certainly, if the guardian ad litem proffers facts, conclusions and opinions in the

guardian ad litem's report and recommendation, the adverse parties would be entitled to cross-examine this report and the author as they would any other report offered into evidence or considered by the court.

However, the fact that a guardian ad litem may be subject to cross-examination does not destroy lawyer-client confidentiality or attorney-client privilege. The guardian ad litem walks a fine line in this regard. When a guardian ad litem is placed in the position of advocate/witness, the better practice would be to assert client confidentiality and privilege where appropriate, obtain a ruling from the court, and then make only those disclosures reasonably necessary to comply with the court's order.

P.D. v. S.S., 67 So.3d 128 (Ala.Civ.App. 2011)

M.J.C. v. G.R.W, et al., etc., 69 So.3d 197 (Ala.Civ.App. 2011)

The Guardian Ad Litem's Report

Q: What are the ethical considerations concerning the content of the guardian ad litem's report and recommendation?

A: Rule 3.4, Ala. R. Prof. C., provides, in part:

“A lawyer shall not:

* * *

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; . . . “

A guardian ad litem's report necessarily contains hearsay and other evidence that would generally be inadmissible if offered through the testimony of the guardian ad litem at trial. However, guardians ad litem should be careful not to use or allow the guardian ad litem's report to be used as a vehicle for the introduction of gratuitous, patently inadmissible and highly inflammatory evidence. Prior to submission to the court, the guardian ad litem should provide a copy of the report to counsel for all parties. Upon submission of the report, the guardian ad litem subjects herself and the report to cross-examination by the parties. Additionally, the parties should be allowed the opportunity to call additional witnesses to dispute and correct alleged factual inaccuracies in the report.

The guardian ad litem's report also necessarily includes confidential and privileged information provided by the ward, disclosure of which is impliedly authorized in order to carry out the representation. However, where disclosure of confidential information is not necessary to protect the best interests of the ward or impliedly authorized, the better practice would be for the guardian ad litem not to disclose this confidential information unless and until directed to do so by the court.

M. B. v. R. P., 3 So. 3d 237 (Ala. Civ. App. 2008) (The father argued that under the authority of *Ex parte R.D.N.*, 918 So.2d 100 (Ala.2005), the guardian ad litem should not have been allowed to make a recommendation regarding the issues of dependency, custody, and visitation because the guardian ad litem was not present at the final, dispositional hearing. The guardian ad litem was present for the hearings that occurred before the final hearing on the merits. The guardian ad litem had also interviewed the parties and numerous witnesses. However, due to scheduling conflicts, the guardian ad litem was present in the courtroom for only a few minutes of the first day of the October 2007 hearing on the merits, and he missed the entire second day of the final hearing due to illness. The father pointed out to the juvenile court at the close of the hearing, the guardian ad litem had missed the presentation of the father's case and the testimony of the witnesses called to testify on behalf of the father. At the close of the final day of testimony, the juvenile court gave the parties permission to submit written arguments or letter briefs. The maternal grandparents submitted a letter brief to the juvenile court on November 6, 2007, and the father submitted his letter brief on November 7, 2007. The guardian ad litem also submitted a letter, dated November 6, 2007, to the juvenile court in which he opined that the child was dependent and in which he recommended that the maternal grandparents receive custody of the child. The guardian ad litem's recommendation states:

"As the Court is well aware, I was unable to attend all of the final hearing due to illness. I was made aware by [the maternal grandparents'] counsel that all parties stipulated to going forward with the hearing in my absence. As a result, I cannot give a recommendation based on the merits of the final hearing. However, I have been present at every other hearing conducted by this Honorable Court. I have also had many opportunities to meet with the parties and their attorneys in this matter. I have also conducted my own investigation regarding the best interests of the minor child. I believe I have obtained enough knowledge of this matter to make a recommendation to this Court."

In this case, as in *Ex parte R.D.N.*, the guardian ad litem apparently formed his opinion before the case was presented at trial. In *Ex parte R.D.N.*, our supreme court found that the trial court's reliance on the guardian ad litem's recommendation, which was not based on any consideration of the evidence presented at the final hearing, resulted in a deprivation of the father's "right to contest the accuracy, substance, impartiality, and quality of the guardian ad litem's recommendation." *Ex parte R.D.N.*, 918 So.2d at 105. On the authority of *Ex parte R.D.N.*, supra, we must similarly conclude that the juvenile court erred in considering the recommendation of the guardian ad litem when the guardian ad litem was not present at, and therefore could not consider the evidence presented at, the final hearing.)

Conflicts of Interest

Q: Lawyer is the guardian ad litem in a domestic relations case, which involves three children and has been ongoing for about three years. The case was recently set for review. Lawyer has since accepted employment as a part-time Assistant District Attorney and has recently been assigned to prosecute a criminal case against the mother. Can he prosecute that case?

A: Lawyer cannot simultaneously serve as a GAL for the three children and prosecute the mother in a criminal case.

Q: Lawyer has a contract with DHR and represents DHR on cases in juvenile court, some of which involve termination of parental rights. Lawyer's contract with DHR is not exclusive and, therefore, Lawyer represents other parties in juvenile court. There is presently pending a TPR case, in which DHR is represented by another part-time contract lawyer. Lawyer has been appointed to serve as guardian ad litem. Can Lawyer serve as a guardian ad litem in cases in which DHR is a party when lawyer simultaneously represents DHR in other similar, but unrelated matters?

A: No. Rule 1.7(a), Alabama Rules of Professional Conduct, prohibits a lawyer from representing a client if that representation of the client will be directly adverse to another current client. A part-time lawyer attorney representing the interests of DHR would be prohibited from simultaneously representing any other client whose interests are adverse to DHR. A lawyer engaging in the simultaneous representation of DHR and a ward is presented with a situation that is fraught with conflict. Initially engaging in this dual representation presents a situation where, over the course of the representation, the lawyer may be required to make recommendations to the court that are adverse to DHR.

Q: Lawyer represents County DHR on a routine basis and recently represented County DHR in a termination of parental rights case. In the subsequent adoption proceeding, he has been appointed as guardian ad litem and wanted to know if that was a conflict.

A: Yes. See Rules 1.9 and 1.11, Alabama Rules of Professional Conduct. The proposed representation in the adoption case is substantially related to the former representation of County DHR in the TPR case.

Q: Lawyer represented a child as a guardian ad litem. She is about to graduate from high school and lawyer wants to know if it would be appropriate if he gave her a nominal graduation gift.

A: Certainly.

PRACTICE TIPS FOR GUARDIAN AD LITEM AND ADVOCATES IN MENTAL HEALTH COMMITMENT CASES

The probate judge shall appoint an attorney to serve as the advocate in support of the petition to commit in all matters regarding a petition to commit. Ala. Code § 22-52-5

At the time when any petition has been filed seeking the involuntary commitment of a respondent, the probate judge shall appoint a guardian ad litem to represent and to protect the rights of the respondent,... Ala. Code § 22-52-4(a)

PROBABLE CAUSE HEARING:

1. Any person may file a petition seeking the involuntary commitment of another person. Ala. Code §22- 52-1.2. The petition shall be filed in the county where the respondent is located. The petition must be in writing, signed under oath and state that the petitioner believes the respondent has a mental illness based on “specific behavior, acts, attempts or threats” which are described in detail.
2. If it appears from the face of the petition or from testimony of the petitioner that the petition is without merit, the petition shall be dismissed. Ala. Code §22-52-2.
3. No limitations shall be placed upon the respondent’s liberty nor treatment imposed upon the respondent unless such limitations are necessary to prevent the respondent from doing substantial and immediate harm to himself or to others or to prevent the respondent from leaving the jurisdiction of the court. Ala. Code §22-52-7(b).

Practice Tips:

1. Review the petition prior to Court
2. Arrive early
3. Speak with your respective client (petitioner or respondent) before the hearing:
 - Discuss the contents of the petition
 - Discuss respondent’s prior mental health treatment or diagnosis

At the hearing:

Petitioner’s advocate: ask questions and present testimony to establish probable cause.

Guardian ad Litem: determine if client will testify at hearing, offer no testimony, or stipulate to the contents of the petition and waive the hearing.

MERIT HEARING

1. The final hearing shall be held within 30 days of the date that the respondent was served with a copy of the petition seeking to commit the respondent.” Ala. Code § 22-52-8(b).
2. (a) If at the final hearing on a petition seeking to involuntarily commit a respondent, the judge of probate finds, based on clear and convincing evidence, that the respondent meets the criteria for involuntary commitment, an order shall be entered for either of the following:
 - (1) Outpatient treatment.
 - (2) Inpatient treatment.
- (b) The least restrictive alternative necessary and available for the treatment of the respondent's mental illness shall be ordered.
- (c) The petition for involuntary commitment shall be dismissed if the criteria for commitment is not proved. Ala. Code § 22-52-10.1

Practice Tips:

1. Review the recommendations prior to Court.
2. Review the medical records prior to Court.
3. Discuss the recommendation with your respective client (petitioner or respondent) before the hearing.
4. Address any questions or concerns regarding the recommendation.

At the hearing:

Petitioner’s advocate:

1. Qualify your medical expert in psychiatry and mental health.
2. Establish the doctor as the designated representative of the evaluation team at EastPointe Hospital for purposes of the merit hearing.
3. Inquire whether the expert has possession of the medical records and is familiar with those records.
4. Ask the doctor whether he or she had the opportunity to meet with the respondent personally and to describe the evaluation process.

5. Ask the doctor to state the diagnosis.
6. Ask the doctor to describe the behaviors that led to this diagnosis.
7. Ask the doctor whether any medication was prescribed. Ask the doctor whether this medication resulted in improvement of symptoms.
8. Inquire whether the respondent has any insight into their mental illness.
9. Ask the doctor whether the respondent cooperated with treatment.
10. If recommended by the treatment team, establish the necessary elements under Alabama law for the court to enter an order for commitment to inpatient treatment under Ala Code §22-52-10.4:
 - a) A respondent may be committed to inpatient treatment if the probate court, based upon clear and convincing evidence, finds that all of the following are true:
 - (1) The respondent has a mental illness.
 - (2) As a result of the mental illness, the respondent poses a real and present threat of substantial harm to self or others.
 - (3) The respondent, if not treated, will continue to suffer mental distress and continue to experience deterioration of the ability to function independently.
 - (4) The respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable.
 - (b) If the probate judge finds that no treatment is presently available for the respondent's mental illness, but that confinement is necessary to prevent the respondent from causing substantial harm to himself or herself or to others, the order committing the respondent shall provide that, should treatment for the respondent's mental illness become available at any time during the period of the respondent's confinement, the treatment shall be made available to him or her immediately.
 - (c) In determining whether an individual poses a real and present threat of substantial harm to self or others, all available relevant information shall be considered, including any known relevant aspects of the individual's psychosocial, medical, and psychiatric history, in addition to the individual's current behavior.

An order for inpatient treatment may not exceed 150 days. Ala Code §22-52-10.5. A renewal of an inpatient commitment order may not exceed one year. Ala Code §22-52-10.6.

11. If recommended by the treatment team, establish the necessary elements for the court to order outpatient commitment under Ala Code §22-52-10.2.
 - (a) A respondent may be committed to outpatient treatment if the probate court, based upon clear and convincing evidence, finds all of the following:
 - (1) The respondent has a mental illness.

(2) As a result of the mental illness, the respondent, if not treated, will suffer mental distress and experience deterioration of the ability to function independently.

(3) The respondent is unable to maintain consistent engagement with outpatient treatment on a voluntary basis, as demonstrated by either of the following:

a. The respondent's actions occurring within the two-year period immediately preceding the hearing.
b. Specific aspects of the respondent's clinical condition that significantly impair the respondent's ability to consistently make rational and informed decisions as to whether to participate in treatment for mental illness.

12. The court may renew the order for outpatient treatment if:

(b) Upon a recommendation made by the designated mental health facility currently providing outpatient treatment that the respondent's outpatient commitment order should be renewed, a probate court may enter an order to renew the commitment order upon the expiration of time allotted for treatment by the original outpatient treatment order if the probate court finds, based upon clear and convincing evidence, all of the following:

(1) The respondent has a mental illness.

(2) As a result of the mental illness, the respondent, if treatment is not continued, will suffer mental distress and experience deterioration of the ability to function independently.

(3) The respondent remains unable to maintain consistent engagement with outpatient treatment on a voluntary basis. Ala Code §22-52-10.2.

An order for outpatient treatment shall not exceed 150 days unless the order pertains to a renewal of an outpatient commitment order up to one year. Ala Code §22-52-10.3

13. Inquire whether the treatment team contacted the Petitioner and whether the Petitioner consents to the treatment plan. Ask the doctor when the next appointment is scheduled, when the next injection is scheduled if applicable, and whether the respondent will have any assistance with transportation and medication upon discharge.

14. Establish who the respondent will be going to live with if outpatient commitment is the recommendation.

15. Inquire about the long term prognosis of the respondent if the recommended treatment plan is followed.

16. If the respondent is committed to inpatient treatment, the judge of probate shall immediately forward the order to the Alabama Law Enforcement Agency. The Alabama Law Enforcement Agency shall as soon as possible thereafter enter the order in the National Instant Criminal Background Check System (NICS) and the information shall be entered into the NICS Index Denied Persons File. The records maintained pursuant to this section shall only be used for purposes of determining eligibility to purchase or transfer a firearm. Ala Code §22-52-10.8.

Guardian ad Litem:

1. Listen to the direct examination.
2. Ask the doctor about questions or concerns noted from review of the medical records.
3. Inquire about respondent's cooperation with medication, such as forced medication orders or PRN's.
4. If respondent has expressed side effects from medication, ask doctor if/ how that has been addressed.
5. Inquire about any dual diagnosis or relevant secondary diagnosis.
6. Ask if recommendation was discussed with respondent and whether respondent agrees with treatment plan.

Waiving Presence of Respondent:

The respondent shall be present unless, prior to the hearing, the attorney for the respondent has filed in writing a waiver of the presence of the respondent on the ground that the presence of the respondent would be dangerous to the respondent's physical or mental health or that the respondent's conduct could reasonably be expected to prevent the hearing from being held in an orderly manner, and the probate judge has judicially found and determined from evidence presented in an adversary hearing that the respondent is so mentally or physically ill as to be incapable of attending such proceedings. Ala. Code § 22-52-9 (1)

QUALIFICATION AND EXAMINATION OF A MEDICAL EXPERT WITNESS

Alabama law provides that the rules of evidence applicable in other judicial proceedings in this state shall be followed in involuntary commitment proceedings. See Ala. Code §§ 22-52-9, 22-52-37(a) 9 (1975). Therefore an expert's role in the Mental Health Hearing is the same as any other expert. As such, the key rules relevant when qualifying and examining a medical expert witness in an involuntary commitment case are Alabama Rules of Evidence 702, 703, 704, 705, and 803(6).

The medical expert is testifying as to their expert opinion about the facts of the case. Therefore, their testimony must include the following:

- Their qualifications as an expert
- The facts upon which their opinion is based
- Their opinion
- An explanation of that opinion

A. STEP ONE - ESTABLISHING THE QUALIFICATIONS OF THE WITNESS

Rule 702 - Testimony by experts

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Compliance with Rule 702(a) requires laying a foundation which establishes the expert's knowledge, skill, experience and the manner in which that expertise was acquired. Therefore the educational and professional background of the person being proffered as an expert must be in the record in each case. The questions should address the following information:

- Educational and Professional background
- Specialized training in the field of expertise
- Licensed to practice in the field; Board certifications
- Practiced in the field for a sufficient period of time
- Previously testified in such cases and been accepted as an expert.

Case law supports the position that - whether a witness is qualified as an expert and whether, if so qualified, that witness may give expert opinion or testimony on the subject in question - is left largely to the discretion of the trial judge. *Hagler v. Gilliland*, 292 Ala. 262, 292 So.2d 647 (1974).

Following the establishment of the expert's qualifications, the witness should be offered as an expert in the field of psychiatry and mental health. Following the acceptance of the witness as an expert, the petitioner's attorney must propound additional questions to the expert in order

to meet the Business Records Exception under Alabama Rule of Evidence 803(6).

B. STEP TWO - BUSINESS RULE EXCEPTION UNDER ALABAMA RULE OF EVIDENCE 803(6).

Hearsay is not admissible except as provided by the Alabama Rules of Evidence, or by other rules adopted by the Supreme Court of Alabama or by statute. Ala. R. Evid. 802. Alabama Rule of Evidence Rule 803 sets out the exceptions to the general exclusionary rule.

The physician in a commitment hearing will be providing testimony based on their personal knowledge of the respondent's medical condition and on their knowledge of the information contained in the respondent's medical records. The authority for allowing the physician to testify outside of their first hand observations is Alabama Rule of Evidence 803(6).

Rule 803(6) - RECORDS OF REGULARLY CONDUCTED ACTIVITY

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The historic basis for accepting business records as reliable lay in the belief that business records were made by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." See Fed.R.Evid. 803(6) advisory committee's note.

Ala.R.Evid. 803(6) carries through this same principle by the requirement that the document must have been kept in the course of regularly conducted business activity, with it being the regular practice of the business to make the record. Indeed, all parties participating in making the record should be acting within the routine of the business in question. "Advisory Committee's Notes to Amendment to Rule 803(6)". It is important to note that there is no requirement that the authenticating witness be the custodian, entrant, or maker of the record. See *Hammett v. State*, 482 So.2d 1330, 1334 (Ala.Crim.App.1985).

Rule 803(6) vests discretion in the trial court to exclude records for a lack of trustworthiness even if the customary elements are satisfied. Such exclusion is in order when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." See Ala. R. Evid. Rule 803(6) advisory committee's note.

Foundational requirements:

Doctor are you acquainted with the respondent
How do you know the respondent
Are you a member of the respondent's treatment team
Have you reviewed the respondent's medical records
Are you familiar with the contents of those records
When was the last time you reviewed the records
Are those records kept in the ordinary course of business at the facility
Are the notations in the respondent's medical records made contemporaneously with the treatment or event being charted or within a reasonable time thereafter
Are the respondent's medical records available in court to refresh your recollection should you need to do so

C. STEP THREE - BASIS FOR THE OPINION, DIAGNOSIS, AND RECOMMENDATION FOR TREATMENT

Testimony should be elicited from the physician that establishes the physician's personal knowledge of the respondent's medical history, diagnosis, and treatment during the current hospitalization. It should be clear that the witness participated in the process of diagnosis and treatment:

1. Basis for the Opinion

What occasions did you personally interact with the respondent
Please describe your evaluation process with respect to the respondent
Does the respondent have a past history of mental illness; were those records reviewed
Have you had sufficient contact with the respondent to determine if they suffer from a mental illness
What is the diagnosis
What treatment did the respondent receive
Respondent's behavior during hospitalization and response to treatment

2. Opinion regarding further treatment

The physician must state their recommendation for treatment. The options are dismissal, out-patient commitment, or in-patient commitment. The physician must provide testimony in support of their recommendation as set out in §§ 22-52-10.1, 10-52-10.2, 10-52-10.4.

3. Required Elements

§22-52-10.1 - Findings

a) If at the final hearing on a petition seeking to involuntarily commit a respondent, the probate judge finds, based on clear and convincing evidence, that

the respondent meets the criteria for involuntary commitment, an order shall be entered for:

- (1) Outpatient treatment; or
- (2) Inpatient treatment.

The least restrictive alternative necessary and available for the treatment of the respondent's mental illness shall be ordered.

(b) The petition for involuntary commitment shall be dismissed if the criteria for commitment is not proved.

Ala. Code § 22-52-10.1 (1975)

§ 22-52-10.4 - Findings necessary for in-patient treatment

(a) A respondent may be committed to inpatient treatment if the probate court finds, based upon clear and convincing evidence that all of the following are true:

- (1) The respondent has a mental illness.
- (2) As a result of the mental illness, the respondent poses a real and present threat of substantial harm to self or others.
- (3) The respondent , if not treated, will continue to suffer mental distress and continue to experience deterioration of the ability to function independently.
- (4) The respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable.

Ala. Code § 22-52-10.4 (1975)

§ 22-52-10.2 - Findings necessary for outpatient treatment

(a) A respondent may be committed to outpatient treatment if the probate court finds, based upon clear and convincing evidence, all of the following:

- (1) The respondent has a mental illness.
- (2) As a result of the mental illness, the respondent , if not treated, will suffer mental distress and experience deterioration of the ability to function independently.
- (3) The respondent is unable to maintain consistent engagement with outpatient treatment on a voluntary basis, as demonstrated by either of the following:
 - a. The respondent's actions occurring within the two-year period immediately preceding the hearing.
 - b. Specific aspects of the respondent's clinical condition that significantly impair the respondent's ability to consistently make rational and informed decisions as to whether to participate in treatment for mental illness .

Ala. Code § 22-52-10.2 (1975)

Mark Erwin has been Chief Clerk of the Mobile County Probate Court since April 2017 replacing long-time Chief Clerk Joe McEarchern following his retirement. Mark had previously served the Court five years as the Chief of Staff/Chief Deputy Clerk.

Mark grew up in Saraland, Alabama and graduated from Mobile Christian High School in 1986. He earned an Associate of Applied Science from Faulkner University in Montgomery and a Certificate in Biomedical Equipment Technology from the School of Health Related Professions at UAB. He completed his Bachelor of Arts undergraduate degree in Biblical Studies at Freed-Hardeman University in Henderson, TN. He earned his Juris Doctor degree from the University of Alabama School of Law in 1998.

Mark began his legal career as law clerk to Circuit Court Judge Joseph S. "Rusty" Johnston. After two years as an associate with the Janecky Newell firm he practiced nine years as a founding member and partner of the Satterwhite & Erwin firm. He joined the Probate Court staff fulltime in May 2012. In private practice Mark had represented the Mobile County Commission as retained outside counsel, the City of Creola as City Attorney/Prosecutor, the Mobile County Racing Commission and the Strickland Youth Center. He had also served as a Temporary Judge of Probate for six years and is in his tenth year serving part-time as the Municipal Judge of the City of Saraland.

Mark has been active in the Mobile Bar Association having served on the memorial resolution committee, legislation committee (chair), the CLE committee, three years on the officer nomination committee, and the executive committee. He is member of the Alabama Association of Municipal Judges as well as the Alabama Probate Chief Clerks Association and is a frequent presenter at seminars and conferences.

Mark is a member of the 2015 class of Leadership Mobile. He has served ten years on the Board of Trustees of Mobile Christian School and has served on various other civic boards and committees. Mark and his wife Silvia recently celebrated their 25th anniversary and are the parents of three children, Emma Dixon (21), Sargent (19) and Barton (16).

Alabama Rules of Civil Procedure

IV. PARTIES

Rule 17.

Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Capacity to sue or be sued.* The capacity of a party, including one acting in a representative capacity, to sue or be sued shall be determined by the law of this state.

(c) *Minors or incompetent persons.* Whenever a minor has a representative, such as a general guardian or like fiduciary, the representative may sue in the name of the minor. Whenever an incompetent person has a representative such as a general guardian or a like fiduciary, the representative may sue or defend in the name of the incompetent person. If a minor or an incompetent person does not have a duly appointed representative, that person may sue by that person's next friend. The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person. When the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest. Moreover, if a case occurs not provided for in these rules in which a minor is or should be made a party defendant, or if service attempted upon any minor is incomplete under these rules, the court may direct further process to bring the minor into court or appoint a guardian ad litem for the minor without service upon the minor or upon anyone for the minor.

(d) *Guardian ad litem; how chosen.* Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint to serve in that

capacity some person who is qualified to represent the minor or incompetent person in the capacity of an attorney or solicitor, and must not select or appoint any person who is related, either by blood or marriage within the fourth degree, to the plaintiff or the plaintiff's attorney, or to the judge or clerk of the court, or who is in any manner connected with such plaintiff or such plaintiff's attorney, or who has been suggested, nominated, or recommended by the plaintiff or the plaintiff's attorney or any person for the plaintiff. If the guardian ad litem is to be appointed for a minor fourteen (14) years of age or over, such minor may, within thirty (30) days after perfection of service upon the minor in such cause, have the minor's choice of a guardian ad litem to represent the minor in said cause certified by an officer authorized to take acknowledgments, but if such minor fails to nominate a guardian ad litem within the thirty- (30-) day period or before any hearing set in the action, whichever is earlier, the court shall appoint a guardian ad litem as before provided. In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for services rendered in such cause, to be taxed as a part of the costs in such action, and which is to be paid when collected as other costs in the action, to such guardian ad litem.

(dc) *District court rule.* Rule 17 applies in the district courts except that the thirty- (30-) day time period in Rule 17(d) is reduced to fourteen (14) days.

[Amended eff. 10-1-95; Amended eff. 8-1-2004.]

Committee Comments on 1973 Adoption

Subdivision (a). This subdivision omits the Federal Rule 17(a) which deals with statutes of the United States. This subdivision specifically provides that substitution of plaintiffs in order to bring the real party in interest before the court shall have the same effect had the action been commenced in the name of the real party in interest. This, in effect, makes the doctrine in relation back of amendments changing parties applicable to plaintiffs and is the companion to similar treatment for defendants found in Rule 15.

Subdivision (b). Since capacity to sue is governed by substantive law, subdivision (b) clearly states that proposition.

This subdivision has been modified from the Federal counterpart in order to conform with present Alabama practice. It is not possible in Alabama to speak in general terms about actions by and against infants in the same breath with actions by and against incompetents. This subdivision preserves the present

situation wherein the action against an incompetent who has a general guardian can be maintained against the general guardian while an action against an infant who has a general guardian will still require the appointment of a guardian ad litem. Nothing in this subdivision is to be construed to alter present practice wherein an action may be maintained against an infant in his name with a prayer in the Complaint for the appointment of a guardian ad litem.

Subdivision (d). This subdivision, setting out the mechanics for appointment of a guardian ad litem has no counterpart in the Federal Rules. But a number of states, in adapting these rules from state adoption, have thought it desirable to carry over into the rules their prior statutory provisions of the mechanics of appointment. A similar course has been followed here. The subdivision is based on the provisions as to appointment of a guardian ad litem now contained in Tit. 7, §§ 177-181, Code of Ala., which statutes will be superseded by the Rule.

**Committee Comments to October 1, 1995,
Amendment to Rule 17**

The amendment changed the word "infant" in the rule to "minor." All other changes are technical. No substantive change is intended.

**Committee Comments to Amendment to Rule 17(a)
Effective August 1, 2004**

The second paragraph of Rule 17(a), which never existed in the corresponding Federal Rule, is deleted. Subrogation (e.g., when rights of subrogation arise, and the extent of those rights) is an issue of substantive, not procedural, law. Procedural issues relating to subrogation can appropriately be decided within the confines of Rules 19 and 17(a) (first paragraph), as they are in the federal courts.

Note from the reporter of decisions: The order amending Rules 4, 4.1, 4.2, 4.3, 4.4, 6(a), 7(b)(2), 17(a), 22(c), and 26(b), Alabama Rules of Civil Procedure, effective August 1, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 867 So.2d.

The Code of Alabama 1975

Section 10A-10-1.23	<u>Section 26-2A-52</u>
Section 10A-10-1.24	Guardian ad litem.
<u>Title 11</u> COUNTIES AND MUNICIPAL CORPORATIONS.	At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor or other person if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.
<u>Title 12</u> COURTS.	
<u>Title 13A</u> CRIMINAL CODE.	<i>(Acts 1987, No. 87-590, p. 975, §1-403.)</i>
<u>Title 14</u> CRIMINAL CORRECTIONAL AND DETENTION FACILITIES.	
<u>Title 15</u> CRIMINAL PROCEDURE.	
<u>Title 16</u> EDUCATION.	
<u>Title 17</u> ELECTIONS.	
Section 17-13-3	

Section 26-2A-102**Court appointment of guardian for incapacitated person.**

- (a) Except as provided by subsection (e), an incapacitated person or any person interested in the welfare of the incapacitated person may petition for appointment of a limited or general guardian.
- (b) After the filing of a petition, the court shall set a date for hearing on the issue of incapacity so that notices may be given as required by Section 26-2A-103, and, unless the allegedly incapacitated person is represented by counsel, appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit a report in writing to the court. The person alleged to be incapacitated also shall be interviewed by a court representative sent by the court. The court representative also shall interview the person who appears to have caused the petition to be filed and any person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the appointment is made and submit a report in writing to the court. The court may utilize the service of any public or charitable agency as an additional court representative to evaluate the condition of the allegedly incapacitated person and to make appropriate recommendations to the court.
- (c) A person alleged to be incapacitated is entitled to be present at the hearing in person. The person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or other qualified person and any court representative, and upon demand to trial by jury as provided in Section 26-2A-35. The issue may be determined at a closed hearing if the person alleged to be incapacitated or counsel for the person so requests.
- (d) Any person may apply for permission to participate in the proceeding, and the court may grant the request, with or without hearing, upon determining that the best interest of the alleged incapacitated person will be served thereby. The court may attach appropriate conditions to the permission.
- (e) The custodial parent or parents or an adult custodial sibling of an adult child who is incapacitated by reason of an intellectual disability, may file, in lieu of a petition, a written request to be appointed guardian of his or her adult child or his or her adult sibling in order to continue performing custodial and other parental responsibilities or family responsibilities, or both responsibilities, for the child after the child has passed his or her minority. The court may waive any or all procedural requirements of the Uniform Guardianship Act, including notice and service, and appointments, and interviews. The adult child alleged to be incapacitated shall have had an examination by a physician or other qualified person and furnish a written report of the findings to the court.

In lieu of a hearing, the probate court shall hold an informal hearing with the custodial parent or custodial parents or custodial adult sibling requesting the guardianship, the adult child for whom the guardianship is sought, and a guardian ad litem for the adult child chosen by the judge of probate.

Following the interview, the court may do any of the following:

- (1) Issue an order appointing the custodial parent or custodial parents or custodial sibling as guardian of the adult child as in any other proceeding pursuant to this section.
- (2) Deny the request for appointment as guardian pursuant to the special proceedings allowed only for a custodial parent or custodial parents or custodial sibling.
- (3) Delay a determination on the request to gather additional information in compliance with one or more of the usual requirements for appointments, interviews, or examinations by physicians or other qualified persons.

(Acts 1987, No. 87-590, p. 975, §2-203; Act 2000-711, p. 1507, §1.)

The Code of Alabama 1975

Section 10A-10-1.23	<u>Section 26-2A-136</u>
Section 10A-10-1.24	Permissible court orders.
<u>Title 11</u> COUNTIES AND MUNICIPAL CORPORATIONS.	(a) The court shall exercise the authority conferred in this division to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure.
<u>Title 12</u> COURTS.	
<u>Title 13A</u> CRIMINAL CODE.	(b) The court has the following powers that may be exercised directly or through a conservator in respect to the estate and business affairs of a protected person:
<u>Title 14</u> CRIMINAL CORRECTIONAL AND DETENTION FACILITIES.	(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice, the court may preserve and apply the property of the person to be protected as may be required for the support of the person or dependents of the person.
<u>Title 15</u> CRIMINAL PROCEDURE.	
<u>Title 16</u> EDUCATION.	(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and business affairs of the minor which are or may be necessary for the best interest of the minor and members of minor's immediate family.
<u>Title 17</u> ELECTIONS.	
Section 17-13-3	