JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

December 1, 2016

Re: JIC Advisory Opinion 2016-30

Dear

Your recent request for an advisory opinion to Counsel was reviewed by the Judicial Investigation Commission. W. Va. Code § 48-9-301(a) states that the court may order a written investigation and report to assist it in determining any issue relevant to proceedings under Chapter 48, Article 9 (Allocation of Custodial Responsibility and Decision-Making Responsibility of Children). The investigation and report may be made by a guardian ad litem under the terms of the same statute. W. Va. Code § 48-9-301(c) provides that "[a]ny party to the proceeding may call the investigator and any person the investigator has consulted for cross-examination." Similarly, W. Va. Code § 48-9-302(a) indicates that "the court may appoint a guardian ad litem to represent the child's best interests." The court is required to specify the terms of the appointment including the guardian's role, duties, and scope of authority.

Rule 47(b) of the Rules of Practice and Procedure for Family Court states in pertinent part:

> Rule 21 of the West Virginia Trial Court Rules for Trial Courts of Record, Rule 47 of the Rules of Practice and Procedure for Family Court, and the Guidelines for Guardians Ad Litem in Family Court set forth in Appendix B of these rules shall govern the appointment of guardians ad litem in family court cases.

Meanwhile, Rule 47(c) states that "[t]he guardian ad litem acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child." This rule also provides that "[a] court-appointed guardian ad litem's services are provided to

the court on behalf of the child." Lastly, Rule 47(b) states that "[i]f the Guidelines for Guardians Ad Litem in Family Court conflict with other rules or statutes, the Guidelines shall apply."

In light of these provisions, you want to know if a judge may consult and communicate with a court-appointed guardian ad litem off the record and outside the presence of the parties and/or their attorneys without running afoul of the prohibitions against *ex parte* communications.

To address the question which you raised, the Commission has reviewed Rule 2.9(A) of the Code of Judicial Conduct which states:

Rule 2.9 Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

1. When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

   (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

   (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

2. A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

3. A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges,

provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

4. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

5. A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

The Supreme Court of Appeals of West Virginia addressed the duties and obligations of guardians ad litem in abuse and neglect cases in *In re Christina W.*, 219 W. Va. 678, 639 S.E.2d 770 (2006) where the Department of Health and Human Resources ("DHHR") petitioned to remove the attorney from further representation of a child who had accused her mother's boyfriend of inappropriately touching her. Following the initial disclosure, the child recanted the accusations. Shortly thereafter, a multi-disciplinary treatment team meeting was held. The MDT agreed to a non-custodial improvement period for the mother and boyfriend that would also include weekly daytime unsupervised visits.

Following the meeting, the guardian ad litem met with the child who questioned her about the attorney/client privilege and sought assurances that any information she revealed about sexual misconduct by the boyfriend would not be shared. Thereafter, the child told the guardian that the boyfriend had in fact touched her inappropriately but that she was okay and wanted to go home to her mother. The child also stated that she would not testify about the alleged misconduct. Following a hearing, a post-adjudicatory improvement period was granted the mother and boyfriend upon agreement by all parties including the guardian. A few months later, prior to another MDT meeting, a DHHR case-worker told the guardian ad litem that the child had revealed the alleged abuse to a foster-care agency worker and her. She also stated that the child had informed them of her prior disclosure to the guardian ad litem.

Thereafter, the DHHR petitioned the circuit court to remove the guardian ad litem. The court found that the lawyer/client privilege was applicable to the relationship between a child and his or her guardian and denied the motion. The DHHR then filed the appeal to the State Supreme Court. In affirming the lower court decision, the Court stated:

> While a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].

Syl pt. 4, *Christine W., supra.*

Based upon the foregoing, the Commission is of the opinion that in the vast majority of cases, a judge should obtain the consent of the parties before speaking with the guardian ad litem. However, the Commission recognizes that where a child may be exposed to a high risk of probable harm, the guardian ad litem may need to make a quick ex parte disclosure to the judge in order to safeguard that child's best interest. The judge should be mindful that in such circumstances, he/she will need to make reasonable efforts to avoid receiving factual information that is not part of the record and that the judge does not nullify his/her responsibility to decide the matter.

It is hoped that this opinion fully addresses the issue raised by you. If there is any further question regarding this matter do not hesitate to contact the Commission.

Sincerely,

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat