

Presented at

**21th Annual Probate
Guardianship and Elder law Conference**

**August 1-2, 2019
Moody Gardens
Galveston, Texas**

**THE
AD LITEM MANUAL
2019**

**FOR
GUARDIANSHIP & HEIRSHIP PROCEEDINGS
IN
TEXAS PROBATE COURTS**

STEVE M. KING
SENIOR PROBATE JUDGE
P.O.Box 101871
FORT WORTH, TEXAS 76109

TEXPROB8@ATT.NET

682-233-5301

REVISION DATE – JUNE 2019

FOR CURRENT REVISION - SEARCH FOR:
"THE AD LITEM MANUAL FOR TARRANT COUNTY"

GUARDIANSHIP
(From the Ad Litem's Perspective)

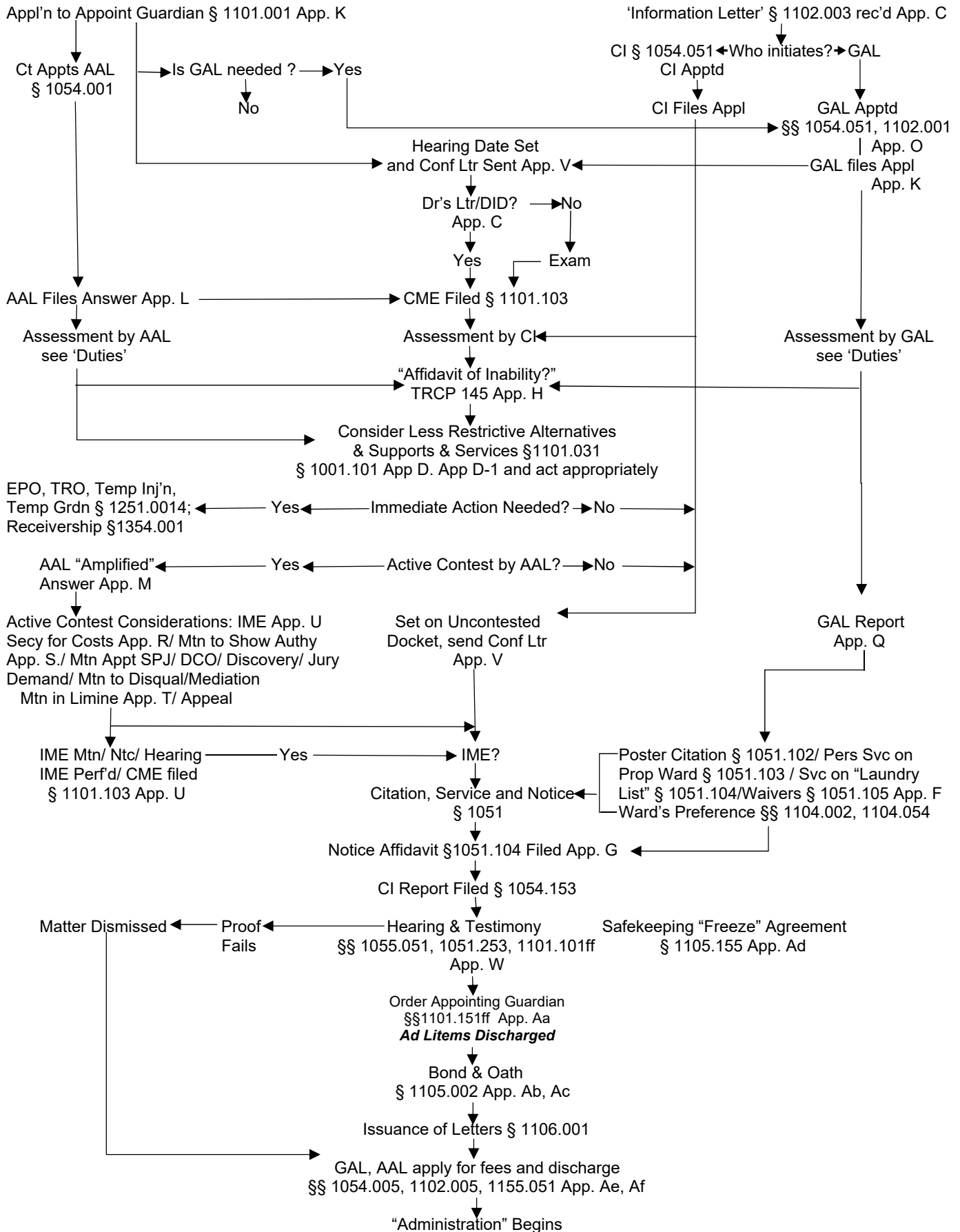


TABLE OF CONTENTS

GUARDIANSHIP (From the Ad Litem’s Perspective)	<i>Frontispiece</i>
I. INTRODUCTION	7
A. Initial Query: Why Should the Judge Care?.....	7
<i>Judicial Bonds</i>	7
B. Certification Requirements	7
C. Liability and Immunity	8
II. AREAS IN WHICH AD LITEMS ARE APPOINTED BY SPECIFIC STATUTE.....	9
A. Appointment of a Guardian.....	9
B. Restoration/Modification of Guardianship- Attorney Ad Litem.....	9
C. Removal of Community Administrator – Attorney Ad Litem	9
D. Heirship Determinations – Attorney Ad Litem	9
E. Disclaimers – Guardian Ad Litem	9
F. Probate of Will After Four Years – Attorney Ad Litem	9
G. Partition Actions – Guardian Ad Litem	9
H. Trust Construction or Modification Actions – Guardian Ad Litem	10
I. Mental Health Commitments – Attorney Ad Litem.....	10
J. Purchase of Estate Property by Guardian – Attorney Ad Litem	10
K. Sale of Minor’s Interest in Property	10
L. Sports and Entertainment Contracts Entered Into by Minors– Guardian Ad Litem	10
M. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem	10
N. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem	10
O. Proper Investment by Guardian – Guardian Ad Litem	10
P. Establishment of Pooled Trust Subaccount – Attorney Ad Litem	10
Q. Final Settlement of Guardianship Estate - Attorney Ad Litem	10
R. Judicial Bypass Proceedings– Guardian Ad Litem and Attorney Ad Litem.....	10
S. Family Code Appointments - Guardian Ad Litem and Attorney Ad Litem.....	11
T. “Utility Outfielder” Appointments - Attorney Ad Litem	11
U. “Utility Outfielder” Appointments - Guardian Ad Litem	11
III. EMBRACE THE TECHNOLOGY	11
A. Electronic Resources	11
B. E-Filing & E-Notice	11
<i>New! – Substituted Service Through Social Media</i>	11
IV. A to Z FOR AD LITEMS IN GUARDIANSHIP PROCEEDINGS.....	12
A. Study this Manual	12
B. Guardianship Summary.....	12
C. Can You Get There From Where You Are?.....	12
D. Mechanics of Appointment: The Ad Litem Wheel.....	12
E. The Language of Guardianship: Less Restrictive Alternatives & Supports and Services	12
F. Local Rules.....	13
G. Standing Orders.....	13
H. What Documents to Expect.....	13
I. Fundamentally Understand Your Role.....	13
<i>MAJOR CAVEAT: Scope of Appointment</i>	13
Notes on Medical Records.....	13
1. The Role of the Attorney Ad Litem	13
A. Legal Counsel	13
B. The Prime Directive	13
C. “But I don’t want a guardian”	13
D. Duties	14
<i>Note: – Proposed Discliplinary Rule Change: Clients with Diminished Capacity</i>	14
2. The Role of the Guardian Ad Litem.....	15
A. Defined	15
B. Personal Representative	15

C. Assess & Recommend	15
D. Duties: Jiminy Cricket or Quarterback?	15
E. Additional Duties	16
J. Is Immediate Action Required?.....	16
K. Temporary Guardianships	16
L. AAL: File an Answer	17
M. Investigate: Finding the Black Box.....	18
N. Assess Capacity.....	18
Mandated Abuse Reporting	19
O. Independent Medical Exam.....	20
P. The Ad Litem's Dilemma	20
Q. Is the Application Timely Filed?.....	20
R. Who Picks Up the Tab? – Statement of Inability	20
First Responder and Veterans Exception.....	21
V. MEDICAL RECORDS	21
A. Federal and State Confidentiality Laws	21
B. The Physician's Certificate of Medical Examination.....	22
1. Basics: Incapacitated Proposed Ward	22
2. Modification and /or Restoration: CME to consider Supports and Services.....	22
3. Basics: Intellectually Disabled Potential Ward	22
4. Independent Medical Exam.....	23
5. Evidentiary Considerations	23
6. Maintenance of Guardianship Orders by Care Facilities	24
7. Defensive Considerations: The Answer May Depend on Who You Ask	24
VII. DEALING WITH THE COURT AND COURT PERSONNEL/ PREPARING FOR HEARING	25
A. Your Best Allies	25
B. Settings.....	25
C. Working the File	26
D. Ad Litem Reports	26
E. Citation and Notice: A Jurisdictional Foundation and the Laundry List.....	26
F. Getting Ahead of the Curve: Registration, Background Checks and Training	29
G. 'Paperwork' to Have on Hand.....	32
H. The Proposed Order: Powers of the Guardian/ Limitations of the Ward	32
Digital Assets.....	32
I. Appointment of Resident Agent.....	32
J. Copies.....	32
VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS	33
A. General Comments and Decorum	33
B. The Hearing at the Bench.....	33
<i>Rant: Examination of Witnesses by the Attorney Ad Litem</i>	33
C. Burden(s) of Proof.....	34
D. Bench Instructions and Mandatory Training.....	34
E. Contested Hearings (with a Court Reporter).....	34
F. Trainwrecks	34
G. Clerk's Follow-Up Duties	34
H. Say the Words, Take the Money, Go Home.....	35
I. Selling the Follow-Through	35
IX. ACTIVE CONTEST OF THE APPLICATION	35
Threshold Consideration	35
A. File an Answer!	36
B. Determine If Immediate Action is Necessary	36
C. Set the Hearing on the Contested Docket.....	36
D. Calling for Backup	36
E. Retained Counsel	36
F. Request a Statutory Probate Judge	37

G. Intervention by ‘Interested Persons’	37
H. Consider Seeking Security for Costs.....	37
I. Jury Demand	39
J. Pursue Adequate Discovery	40
K. Advocate for Mediation	40
L. Shutting the Gate: TROs, Temporary Guardianships, Notices of Lis Pendens & Receivers	40
M. “Interesting Challenge” – Interest for Standing vs. Adverse Interest	41
N. Challenging the Applicant – Disqualification	41
O. If Advantageous – Try to Have Your Client Appear at the Hearing.....	42
P. Consider Requesting a Closed Hearing.....	42
Q. The Order: Negotiate a Tactical Retreat	42
Disclosure Requirement: Right to Physical Possession of Ward.....	42
R. An Appealing Thought?.....	42
S. Potential Ancillary Litigation.....	43
T. More Practical Pointers	43
X. FEE CONSIDERATIONS	43
A. Introduction	43
B. Basic Premise	43
C. Burden of Proof.....	44
D. Question of Fact	44
E. Reasonableness	44
F. Guidelines, Not Elements.....	44
G. Evidence Required	44
H. Expert Testimony	44
I. No “Bonus” Factors	45
J. No Prior Objections Required	45
K. Limited Duties.....	45
L. Non-Compensable Activities	45
M. Going It Alone.....	45
N. Fee Applications.....	46
O. County-Pay Cases	46
P. Private Pay Cases	46
Q. Hourly Rates.....	46
R. Expenses.....	46
S. Do Not Bill For:	46
T. When to File.....	47
U. What to Do with the Fee Application.....	47
V. Separate Order.....	47
W. Specific Areas of Concern on Fee Applications	47
XI. HEIRSHIP PROCEEDINGS	47
XII. CLOSING THOUGHTS	47
A. Removal of an Ad Litem.....	47
B. Re-Activation of the Ad Litem.....	48
C. Changing Hats – Make an Appearance	48
D. <u>Real</u> Continuing Education	48
E. Think About Your Client: Person First Respectful Language	49
John Oliver’s Guardianship Rant	49

APPENDICES:

A.	Guardianship Summary	50
B.	Policy for Court-Initiated Guardianships	54
C.	Information Letter & Physician’s Certificate of Medical Exam (with DID)	56
D.	Less Restrictive Alternatives to Guardianship	63
D-1.	Supports & Services.....	73
E.	Investigator’s Checklist	74
F.	Waiver of Citation, Consent to Appointment & Request for Notification.....	75
G.	Affidavit Regarding Notice under § 1051.104(b).....	76
H.	Statement of Inability to Afford Payment of Court Costs or an Appeal Bond	77
I.	Application for Temporary Guardianship/ Fiat for Hearing.....	79
J.	Proof of Facts (Temporary Guardianship)	83
K.	Order Appointing Temporary Guardian	84
L.	Application for Appointment of a Guardian of the Person (and Estate).....	87
M.	Original Answer (Attorney Ad Litem).....	89
N.	Original Answer (“Contest”)	90
O.	Application & Order for Authority to Utilize Attorneys and Staff of Appointee’s Law Firm	91
P.	Motion for Appointment of Guardian Ad Litem and Order	94
Q.	Entry of Appearance of Guardian Ad Litem.....	96
R.	Report of Guardian Ad Litem	97
S.	Motion for Security for Costs & Order.....	98
T.	Motion to Show Authority, Show Cause Citation & Order	100
U.	Motion in Limine and to Dismiss Application.....	103
V.	Motion for Independent Medical Examination, Fiat & Order	104
W.	Handout: Registration, Criminal History Background Checks and Training	106
X.	Setting Confirmation.....	107
Y.	Proof of Facts (Guardianship).....	108
Z.	Exhibit: Evidence in Support of Requested Bond	109
Aa.	Exhibit: Evidence in Support of Requested Monthly Allowance	110
Ab.	Suggested Cross-Examination Questions for the Ad Litem	111
Ac.	Order Appointing Guardian of the Person (and Estate)	112
Ad.	Personal Surety Bond.....	116
Ae.	Oath of Guardian.....	117
Af.	Safekeeping (“Freeze”) Agreement (Pre-Appointment).....	118
Ag.	Fee Application & Order - County Pay (“Set Fee”)	119
Ah.	Fee Application & Order – Private or County Pay in Excess of Set Fee.....	120
Ai.	Practice Tips from the Probate Court One Investigators	122
Aj.	Court Instructions: Guardian of the Person/ Guardian of the Estate (English/Spanish)	123
Ak.	Ward’s Bill of Rights (English/Spanish) & Information to Be Furnished.....	133
Al.	Initial Report of the Guardian of the Person	136

The Ad Litem Manual 2018

I. INTRODUCTION:

GOALS: To help the reader to become familiar with:

1. the types of proceedings in which ad litem may be appointed;
2. the varying roles of the ad litem in different proceedings;
3. fulfilling the responsibilities of an attorney ad litem or guardian ad litem in the different proceedings;
4. how to before the bench and in dealing with court personnel; and
5. some specifics on fee applications.

This manual deal primarily with the uncontested aspects of a guardianship and only briefly with contests.

For more information on guardianship litigation, see:

1. State Bar of Texas Seminars on:
 - Advanced Estate Planning and Probate (Litigation Breakout Section)
 - Advanced Guardianship Course
 - Fiduciary Litigation Course
2. Tarrant County Probate Bar Association Probate Litigation Seminar in Fort Worth (every other fall).

For a very insightful commentary on dealing with ad litem, see Hopper, Craig, *Call in the Sheriff: Handling Overzealous Ad Litem and Other Outlaws*, 2010 Advanced Guardianship Course, State Bar of Texas. For an excellent discussion of the responsibilities of ad litem in areas outside of guardianship, see Smith, Dani D., *Attorney Ad Litem and Guardian ad Litem: An Overview of the Roles and Liabilities in Non-Guardianship Cases*, 2018 Advanced Estate Planning and Probate Course, State Bar of Texas.

A. Initial Query: Why Should the Judge Care?

Tex. Est. Code § 1201.003 provides that “A judge is liable on the judge’s bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect of the judge to use reasonable diligence in the performance of the judge’s duty under this subchapter.”

While this is not the same as personal liability (See *Twilligear v. Carrell*, 148 S.W.3d 502 (2004 Tex. App. Houston 14th District 2004) (pet. denied)), judges with probate jurisdiction, especially statutory probate judges, do not relish having a target on the back of their robes.

Active judicial oversight, requiring guardians to timely account, and employing ad litem to assist the court in enforcing the probate code, are the best defenses the courts have in minimizing loss to the wards and eventual distributees in probate.

Judicial Bonds – as of November 1, 2017, any county-level judge (Constitutional County Court or County Court at Law) who handles probate or guardianship matters must furnish a surety bond - In counties with a population of 125,000 or less, this bond must be \$100,000.00.

- In counties with a population of more than 125,000, this bond must be \$250,000.00.

- Judges of Statutory Probate Courts must furnish a bond of \$500,000.00, mandated by Tex. Govt Code § 25.00231 .

- The bond is to be conditioned that the judge will perform the duties required by the Texas Estates Code (i.e. follow-up on Inventories and Accountings, monitor guardianships)

- The bond is to provide coverage for losses caused by the gross negligence of county-level judge.

- In lieu of a bond, the county may elect to obtain insurance instead.

B. Certification Requirements:

An Attorney Ad Litem must be certified to obtain appointments in guardianship proceedings. A Guardian Ad Litem need not be so certified. Additionally, the attorney for the Applicant must be so certified. Tex. Est. Code §1054.201.

Certification requires completion of a State Bar of Texas-sponsored four hour CLE course on guardianship law and procedure, including one hour on alternatives to guardianship and supports and services available to proposed wards. Tex. Est. Code § 1054.201(b). These courses are available on videotape, in live presentations and via internet.

Once certification is obtained, a copy of the certificate should be forwarded to the appropriate courts. Re-certification is required every two (2) years until the attorney has been certified for four years, and then the certification is effective for a four (4) year period. Tex. Est. Code § 1054.202.

When a certificate has expired, a new certificate must be obtained for the attorney to be eligible for appointment as an Attorney Ad Litem. Tex. Est. Code § 1054.203.

The certification requirement applies during administration of the guardianship as well. In *Guardianship of Marburger*, 2010 Tex. App. LEXIS 10255 (Tex. App. Corpus Christi, December 30, 2010, no pet.).

An uncertified attorney has no authority to represent the Ward and lacks standing to bring an appeal. *Guardianship of Wehe*, 2012 Tex. App. LEXIS 8931 (Tex. App. Corpus Christi, October 25, 2012, no pet.).

A complaint about an attorney ad litem who is not properly certified is not a basis for a writ of mandamus, but could be raised by direct appeal or a statutory bill of review. *In Re: Cunningham*, 2014 Tex. App. LEXIS 13682 (Tex. App. Texarkana December 19, 2014)

A very troubling opinion from the Houston 1st court of appeals, *in re Kelm*, 2018 Tex. App. LEXIS 9481; 2018 WL 6053809 (Tex. App. Houston, 1st District, November 20, 2018, no pet.) held that the State Bar Guardianship Certification of Attorneys did not apply to retained counsel if an attorney ad litem is not discharged. The REPTL section attempted a legislative workaround in the 2019 legislative session, but the bill (SB 667) was vetoed by the Governor.

The better course of action in a similar fact situation might be for the attorney ad litem to file a Rule 12 motion (see below) to better crystalize the issue for the trial judge and the court of appeals.

No certification is required for Attorneys Ad Litem in other proceedings, such as heirship or trust matters.

C. Liability and Immunity:

1. Attorney Ad Litem - Like any other attorney, an Attorney ad Litem must exercise the same due diligence and vigor and astuteness required of an attorney as in any other representation. *Estate of Tartt*, 531 S.W.2d at 698. Otherwise, there is the potential for a claim for legal malpractice.

In *Ex Parte Parker*, 2014 Tex. App. LEXIS 36 (Tex. App. Amarillo, January 3, 2014, no pet.), the appeals court noted that allegations of ineffective assistance of an appointed Attorney ad Litem would be reviewed under the same standard as in cases regarding termination of parental rights.

The standard (applied by both the Texas Supreme Court and the U. S. Supreme Court) requires a complainant to demonstrate 1) the counsel's assistance fell below an objective standard of reasonableness and 2) that the ad litem's deficient assistance prejudiced the Ward's case. Such allegations must be firmly founded in, and affirmatively demonstrated by, the court's record.

In *Guardianship of Humphrey*, 2009 Tex. App. LEXIS 1100 (Tex. App. Tyler, Feb. 18, 2009, pet. denied), the appellants were required to raise the issue of the Attorney ad Litem's ineffective assistance to the trial court.

2. Guardian Ad Litem - Tex. Est. Code § 1054.056 provides for immunity from civil damages for a Guardian Ad Litem (appointed under §§ 1054.051, 1102.001, or 1202.054) from recommendations made or opinions given as a Guardian Ad Litem. (Except for willfully wrongful, reckless, bad faith, malicious and grossly negligent statements.) Cf. *Kabbani v. Papadopolous* 2009 Tex. App. LEXIS 1320 (Tex. App. Houston 1st Dist, February 26, 2009, pet. denied) (court upheld similar statutory immunity for a Guardian Ad Litem under the Texas Family Code) and *Wilz v. Sanders*, 2005 Tex. App. LEXIS 1503, (Tex. App. - Waco 2005, no pet.) February 23, 2005 (Memorandum) (Immunity of Guardian Ad Litem upheld where appointed under federal statute).

In addition, Tex. R. Civ. Proc. 173 governs ad litem appointments of Guardians Ad Litem other than pursuant to a specific statute, such as the Family Code and the Estates Code, or by other rules, such as the Parental Notification Rules.

The responsibility of the Guardian Ad Litem under these circumstances is very limited, and the Guardian Ad Litem is specifically not to participate in the underlying litigation (even reviewing the discovery or litigation files) except to the limited extent of the division of settlement proceeds. *Jocson v. Crabb*, 133 S. W. 3d 268 (Tex. 2004) (per curiam), *on remand*, 196 S.W.3d 302 (Tex. App. Houston 1st Dist. 2006, no pet.). A Guardian Ad Litem may, of course, choose to actively participate in the litigation and discovery, but compensation is not to be awarded for such activity.

Only in extraordinary circumstances does the rule contemplate that a Guardian Ad Litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Tex. R. Civ. Proc. 44.

Unlike the immunity conferred for a Guardian ad Litem in a guardianship proceeding, there is no statutory immunity for a Guardian ad Litem appointed under the non-guardianship provisions of the Texas Estates Code or for a Guardian ad Litem appointed under the Trust Code (Tex. Prop. Code § 115.014). In those cases, the issue of possible derived judicial immunity must be examined. Derived judicial

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The Ad Litem Manual

Also available as part of the eCourse

[2019 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the
21st Annual Estate Planning, Guardianship and Elder Law Conference session
"Role of the Ad Litem"