

## LEGAL AND ETHICAL ISSUES CONFRONTING GUARDIAN AD LITEM PRACTICE

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### *Abstract*

*Courts appoint guardians ad litem (GALs) to protect the interests of the courts' most vulnerable populations. This widespread utilization of GAL appointments results in GALs performing diverse tasks including fact investigator, mental health evaluator, next friend attorney, family mediator, and child's attorney. Their valuable work, however, is not without legal and ethical uncertainty. Incompatible ethical mandates, sparse statutory guidance, and undeveloped case law compound these quandaries. This Article explores several important legal and ethical issues impacting modern GAL practice. Part I briefly reviews the functions that GALs serve in the nation's family and juvenile courts. Part II examines a number of legal and ethical issues surrounding GAL practice, exploring the guidance given or predicaments created by various statutes, case law, and professional rules of conduct. In particular, dilemmas surrounding dual appointments, non-confidentiality warnings, third-party access to records, waiver of privilege for a minor's treatment records, the contents of the GAL report, and the safety of the GALs are considered. This Article brings to the forefront some difficult questions, compares differing approaches taken by jurisdictions, and discusses resolutions to these legal and ethical issues.*

### INTRODUCTION

A guardian ad litem (GAL)<sup>1</sup> is an individual appointed by the court to serve as an independent advocate who promotes the best interests of minors, elders, and legally incompetent persons in custody disputes, abuse and neglect cases, guardianships, and other court proceedings.<sup>2</sup> GALs generally have expertise as

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<sup>1</sup> The term "GAL" is used generically in this paper to refer to those appointed by the court to represent the best interests of a minor or other incapacitated individual. Other states similarly call the position a "special guardian," "best interests attorney," "special advocate," "court-appointed advisor," or "attorney ad litem."

<sup>2</sup> See, e.g., Nancy Neraas, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience*, 58 WASH. L. REV. 853, 853 (1983).

lawyers, mental health professionals or both. Over the last decade, scholars,<sup>3</sup> courts,<sup>4</sup> and legislatures<sup>5</sup> alike have acknowledged the important role that GALs serve in protecting children and other vulnerable populations.<sup>6</sup> Indeed, since the passage of the federal Child Abuse Prevention and Treatment Act in 1974,<sup>7</sup> the practice of appointing a GAL to represent the best interests of individuals has proliferated.<sup>8</sup> GALs now play a central role in the family and juvenile courts of every state.<sup>9</sup>

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<sup>3</sup> See, e.g., Barbara Glesner Fines, *Wells Conference on Adoption Law: Pressures Toward Mediocrity in the Representation of Children*, 37 CAP. U.L. REV. 411, 411 (2008) (The GAL is called upon to meet many needs, including an advisor and advocate for children, a monitor for families, and a neutral informant for the court).

<sup>4</sup> See, e.g., *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993) (“Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the ‘best interests of the child,’ has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents.”).

<sup>5</sup> See, e.g., H.R. Con. Res., 79th Gen. Assemb., 2d Sess. (Iowa 2002) (GALs “have an important role in protecting the best interest of a child in need of assistance, a child involved in a delinquency proceeding, or a child involved in another proceeding under the juvenile justice code.”).

<sup>6</sup> *But cf.* Robert N. Rosen, *Viewpoint: Getting Rid of the GAL: How to Save Your Client from Those Expensive, Unnecessary Official Intermeddlers*, 14 S. CAROLINA LAWYER 15, 15 (2003) (arguing that lawyers have a duty to do away with GALs in custody cases).

<sup>7</sup> Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5107(1988), § 5106a(b)(2)(xiii) (conditions federal funding of state child protective systems contingent on the provision of GALs to represent a child’s best interest).

<sup>8</sup> LaShanda Taylor, *American Bar Association Center on Children and the Law Bar-Youth Empowerment Project White Paper: A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 611 (2009).

<sup>9</sup> See, e.g., ALA. CODE § 12-15-304 (2010); ALASKA STAT. § 47.10.050 (2010); ARIZ. R. JUV. P. 70 (2010); ARK. CODE ANN. § 16-61-108 (2010); CAL. CIV. PROC. CODE § 372 (West 2010); COLO. REV. STAT. ANN. 19-1-111 (West 2010); CONN. GEN. STAT. ANN. § 45A-132 (West 2010); DEL. CODE ANN. tit. 12, § 3902 (West 2010); D.C. CODE § 20-108 (2010); FLA. STAT. § 39.822 (2010); GA. CODE ANN. § 15-11-9 (2010); HAW. REV. STAT. § 587-34 (West 2010); IDAHO CODE ANN. § 5-306 (West 2010); 755 ILL. COMP. STAT. ANN. 5/6-12 (2010); IND. CODE ANN. § 31-15-6-1 (West 2010); IOWA CODE ANN. § 633A.6306 (West 2010); KAN. STAT. ANN. § 38-2205 (West 2009); KY. REV. STAT. ANN. § 387.305 (West 2010); LA. REV. STAT. ANN. § 9:345 (2010); ME. REV. STAT. ANN. tit. 19A, § 1507 (2010); MD. CODE ANN., FAM. LAW § 1-202 (2010); MASS. GEN. LAWS ANN. ch. 190B, § 1-404 (West 2010); MICH. COMP. LAWS ANN. § 722.27 (West 2010); MINN. STAT. § 518.165 (2009); MISS. CODE ANN. § 93-5-13 (2009); MO. REV. STAT. § 211.462 (2009); MONT. CODE ANN., § 41-3-112 (2009); NEB. REV. STAT. § 43-265 (2009); NEV. REV. STAT. ANN. § 12.050 (West 2009); N.H. REV. STAT. ANN. 461-A:16 (2009); N.J. REV. STAT. § 3B:12-4 (2009); N.M. STAT. ANN. § 40-4-8 (2009); N.Y. C.P.L.R. 1202 (CONSOL. 2009); N.C. GEN. STAT. § 7B-1108 (2009); N.D. CENT. CODE, § 14-09-06.4 (2009); OHIO REV. CODE ANN. § 2111.23 (West 2009); OKL. ST. tit. 10 § 7003-3.7 (West 2010); Or. Supp. R. Multnomah Cnty. § 15.025 (2009); 42 PA. CONS. STAT. § 6311 (2009); R.I. GEN. LAWS § 34-15-11

Despite this, or perhaps because of this wide-spread utilization of GAL appointments, GALs perform widely diverse, and occasionally concurrent, tasks.<sup>10</sup> These tasks include functioning as an investigator of facts, mental health evaluator, next friend attorney, family mediator, or child's attorney.<sup>11</sup> While GALs functioning in each of these roles are appointed in order to assist the court in resolving custody disputes, visitation schedules, temporary placements, or other matters,<sup>12</sup> legal and ethical issues arise in everyday GAL practice that have important implications for all parties involved.<sup>13</sup>

### I. GUARDIAN AD LITEM PRACTICE

Courts appoint GALs in cases where such appointments are statutorily required,<sup>14</sup> upon request by parties to the matter,<sup>15</sup> or *sua sponte* where a judge determines that such an appointment is in the ward's best interest.<sup>16</sup> Unlike the child's attorney whose role is generally to represent the stated wishes of the child, the GAL is generally expected to advocate for the best interests of the child, whether or not the child is in agreement.<sup>17</sup> Moreover, the GAL "owes his or her

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(2009); S.C. CODE ANN. § 63-9-720 (2008); S.D. CODIFIED LAWS § 26-8A-20 (2009); TENN. CODE ANN. § 36-4-132 (2009); TEX. FAM. CODE ANN. § 107.002 (West 2009); UTAH CODE ANN. § 78A-2-227 (West 2009); Vt. R. Fam. Proceedings 6.1 (2009); VA. CODE ANN. § 16.1-266 (2009); WASH. REV. CODE ANN. § 13.34.100 (West 2010); W. VA. CODE § 56-4-10 (2009); WIS. STAT. § 767.407 (2009); WYO. STAT. ANN. § 14-2-312 (2009).

<sup>10</sup> Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 262 (1998).

<sup>11</sup> *Id.*

<sup>12</sup> See Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 599 (1994).

<sup>13</sup> Jennifer Paige Hanft, *Attorney for Child Versus Guardian Ad Litem: Wyoming Creates a Hybrid, But Is It a Formula for Malpractice?*, 34 LAND & WATER L. REV. 381, 388 (1999). For example, it is not uncommon to see a GAL assume multiple roles during the pendency of a case. *Id.* Some have argued that a GAL assuming multiple roles in the case has an important symbiotic relationship that works to "better" the child's best interests. See Tara Lea Muhlhauser, *From Best to Better: The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 638-39 (1990).

<sup>14</sup> See, e.g., D.C. CODE § 16-2304 (b)(5) (2009) ("The Superior Court shall in every case involving a neglected child which results in a judicial proceeding . . . appoint a guardian ad litem . . . to represent the child in the proceedings.").

<sup>15</sup> See, e.g., MASS. GEN. LAWS ch. 190B, § 1-404(a) (2009) (The court may "appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor, mentally retarded person, autistic person, or person under disability or not ascertained or not in being . . .").

<sup>16</sup> See, e.g., FLA. STAT. § 61.401 (2009) ("[I]f the court finds it is in the best interest of the child, the court may appoint a guardian ad litem . . .").

<sup>17</sup> To clarify, GALs do consider the child's expressed wishes, but only as a component of determining the child's best interest. See Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1823 (1996).

primary duty to the court and not to the child-client alone.”<sup>18</sup> States have employed numerous GAL models, with variations found at the interstate level.<sup>19</sup> In general, however, five types of GAL roles exist, each with distinct functions ranging from fact-finding and reporting to representing and advocating for the ward’s wishes.<sup>20</sup> These roles include investigator, mental health evaluator, next friend attorney, mediator, or a hybrid form of a child’s attorney.<sup>21</sup>

The investigator role is by far the most common role for the GAL.<sup>22</sup> GAL investigator duties include:

[R]eviewing documents, reports, records and other information relevant to the case, meeting with and observing the children in appropriate settings, and interviewing the natural parents, foster parents or kinship caregiver, healthcare providers, such as doctors, hospital personnel, therapists for both children and parents, and any other person, such as school personnel, with knowledge relevant to the case.<sup>23</sup>

The GAL then consolidates the information gathered, includes her own observations and, if applicable, the results of any evaluations such as psychological testing. This is presented to the court in the form of a written report,<sup>24</sup> and is often accompanied with dispositional recommendations.<sup>25</sup> Depending on jurisdiction,

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<sup>18</sup> John Crouch, *The Child’s Attorney: New ABA Rules Clarify the Roles of Lawyers Who Represent Children*, 26 FAM. ADV. 31, 34 (2004).

<sup>19</sup> See Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 app. C at 1074–81 (2006).

<sup>20</sup> Lidman & Hollingsworth, *supra* note 10, at 262.

<sup>21</sup> *Id.* at 256–57.

<sup>22</sup> *Id.* at 277. See also MICH. COMP. LAWS § 712A.17d(1)(c) (2009) (The GAL’s duties include “determin[ing] the facts of the case by conducting an independent investigation.”); 750 ILL. COMP. STAT. 5/506 (2) (2006) (The GAL “shall investigate the facts of the case and interview the child and the parties.”); MASS. GEN. LAWS ch. 215, § 56A (2009) (“Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations . . .”).

<sup>23</sup> Juvenile Court of Banks, Barrow, and Jackson Counties, State of Georgia, Piedmont Judicial Circuit Standing Order, *In Re: Attorney-Guardian ad Litem*, (Feb. 2, 2009).

<sup>24</sup> See, e.g., MASS. GEN. LAWS ch. 215, § 56A (2009) (The GAL shall “report in writing to the court the results of the investigation”).

<sup>25</sup> See, e.g., Missouri Supreme Court, Standard 14.0, *In re: Standards with Comments for Guardians Ad Litem in Missouri Juvenile and Family Court Matters*, Sept. 17, 1996 (The GAL “shall present recommendations to the court on the basis of the evidence presented and provide reasons in support of these recommendations.”), available at <http://www.rollanet.org/~childlaw/galstd/mogalstd.htm#S-14.0>.

this report may or may not be shared with the parties to the case.<sup>26</sup> Only Wisconsin rejects the idea that a GAL would be appointed to serve a fact-finding mission. In that jurisdiction, a GAL operates as an attorney for the child.<sup>27</sup>

A second traditional role of the GAL is that of mental health evaluator.<sup>28</sup> In such cases, courts typically either identify the existence of mental health issues, or determine that a GAL with a mental health background can better assess the issues before the court.<sup>29</sup> GAL evaluators perform such functions as:

Data collection and analysis . . . regarding each child’s developmental needs; the quality of attachment to each parent and that parent’s social environment . . . includ[ing]:. . . [r]eviewing pertinent documents related to custody. . . . [o]bserving parent-child interaction. . . . [i]nterviewing parents conjointly, individually, or both . . . to assess. . . . [c]apacity for setting age-appropriate limits and for understanding and responding to the child’s needs. . . . [h]istory of involvement in caring for the child. . . . History of child abuse, domestic violence, substance abuse, and psychiatric illness. . . . Conducting age-appropriate interviews and observation with the children. . . . [c]ollecting relevant corroborating information or documents. . . . and. . . . [c]onsulting with other experts . . . .<sup>30</sup>

GAL evaluators also owe a primary duty to the court and submit a report, often including specific recommendations.<sup>31</sup> Since GAL evaluators are often mental health professionals whose presence in the matter might be construed by the parties as therapeutic and therefore confidential,<sup>32</sup> GAL evaluators may be required to

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<sup>26</sup> See, e.g., 750 ILL. COMP. STAT. 5/506(2) (2009) (The GAL “shall testify or submit a written report to the court regarding his or her recommendations . . . [t]he report shall be made available to all parties.”); *c.f.*, *In re Kalil*, 931 A.2d 1255, 1258 (N.H. 2007) (finding that a GAL report was properly sealed despite father’s request to review the report).

<sup>27</sup> See *Hollister v. Hollister*, 496 N.W.2d 642, 645 (Wis. Ct. App. 1992) (rejecting that the GAL has a “fact finding mission,” rather viewing the GAL role as that of the child’s attorney).

<sup>28</sup> Mary J. McCurley, Kathryn J. Murphy & Jonathan W. Gould, *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 J. AM. ACAD. MATRIMONIAL LAW. 277, 277 (2005).

<sup>29</sup> For example, child custody disputes may involve issues such as child development and emotional needs, parenting behaviors or capacity, psychopathology, emotional well-being, and other mental health issues that forensic mental health assessments can contribute insight to. See Randy K. Otto, John F. Edens & Elizabeth H. Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM. & CONCIL. CTS. REV. 312, 312 (2000).

<sup>30</sup> CAL. CT. R. 5.220(e)(2) (2009).

<sup>31</sup> Dana R. Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIMONIAL LAW. 35, 35 (2002).

<sup>32</sup> *Id.* at 37–38.

warn the parties that disclosures made are not privileged and will be disclosed to the court.<sup>33</sup>

A third GAL role, that of GAL mediator, operates in sharp contrast to the roles discussed above. Despite being appointed or referred by the court,<sup>34</sup> GAL mediators attempt an amicable resolution of a particular matter within the court's subject matter jurisdiction.<sup>35</sup> GAL mediators do not disclose to the court what the parties revealed during the mediation, nor do they independently investigate facts or evaluate the circumstances.<sup>36</sup> Rather, their role is to "reduce acrimony which may exist between the parties and to . . . develop an agreement assuring the child's close and continuing contact with both parents after the marriage or the domestic partnership is dissolved."<sup>37</sup> Although GAL mediator appointments are less frequent than other types of GAL appointments, there is an increasing trend in favor of utilizing mediation.<sup>38</sup>

The remaining two GAL functions resemble more traditional attorney roles. Since minors lack the legal capacity to sue on their own behalf, next friend attorney GALs<sup>39</sup> allow a child (or another incompetent individual) to initiate or intervene in an ongoing legal matter when the child's interests appear to diverge from that of his/her parents.<sup>40</sup> Despite the next friend GAL's role in representing

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<sup>33</sup> See, e.g., *The Lamb Warning in Commonwealth v. Lamb*, 311 N.E.2d 47, 51 (Mass. 1974).

<sup>34</sup> See, e.g., FLA. STAT. § 61.183(1) (2009) ("In any proceeding in which the issues of parental responsibility, primary residence, access to, visitation with, or support of a child are contested, the court may refer the parties to mediation. . . ."); N.C. GEN. STAT. § 50-13.1(b)(2009) ("Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter . . . shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation . . .").

<sup>35</sup> Lidman & Hollingsworth, *supra* note 10, at 281-83.

<sup>36</sup> *Id.*; see also, e.g., ARIZ. REV. STAT. § 25-381.16(D) (LexisNexis 2009) ("All communications, verbal or written, from the parties to the judge . . . in a proceeding under this article shall be deemed confidential communications, and shall not be disclosed without the consent of the party making such communication.").

<sup>37</sup> WASH. REV. CODE (ARCW) § 26.09.015(1) (2009); see also CAL. FAM. CODE § 3161 (Deering 2010) ("The purposes of a mediation are as follows: (a) To reduce acrimony that may exist between the parties. (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child . . . (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.").

<sup>38</sup> Lidman & Hollingsworth, *supra* note 10, at 281-83.

<sup>39</sup> While some jurisdictions use the terms interchangeably, technically a "next friend" is appointed to represent a minor or incapacitated individual as a plaintiff, while a GAL is appointed to protect a minor or incapacitated individual as a defendant. See Mary A. Hohmann & James W. Dwyer, *Guardians ad Litem in Wisconsin*, 48 MARQ. L. REV. 445, 445 (1964).

<sup>40</sup> See Ann M. Haralambie, *Kids' Causes of Action*, 27 FAM. ADV. 30, 30-31 (2005); see, e.g., IND. R. TRIAL P. 17(C) ("An infant or incompetent person may sue or be sued in

the child in litigation, these GALs nevertheless owe their primary duty of allegiance to the court and their obligation is to advocate for the child's best interests.<sup>41</sup> A jointly appointed child's attorney/GAL,<sup>42</sup> on the other hand, truly assumes the function of the traditional attorney, duty-bound by the client's expressed wishes and to uphold attorney-client privilege.<sup>43</sup> However, if her duty to advocate for the child's wishes creates a conflict with her duty to advocate in the child's best interests, she (or someone else) may request that another GAL be appointed.<sup>44</sup> The process through which this must occur, however, is not without controversy. Since it is often the attorney/GAL that needs to bring to the court's attention the need for a separate GAL, doing so may compromise the attorney's obligation to the child.<sup>45</sup>

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any action. . . . in his own name by a guardian ad litem or a next friend."); 755 ILL. COMP. STAT. 5/11-13(d) (2009) ("[A]ny court [may] appoint a representative or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any proceeding in his behalf."); ME. R. CIV. P. 17(b) ("A minor or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem.").

<sup>41</sup> Moore, *supra* note 17, at 1842.

<sup>42</sup> See, e.g., CONN. GEN. STAT. § 46b-129a (2) (2008) ("[A] child shall be represented by counsel knowledgeable about representing such children who shall be appointed by the court to represent the child and to act as guardian ad litem for the child. The primary role of any counsel for the child including the counsel who also serves as guardian ad litem, shall be to advocate for the child . . ."); MICH. COMP. LAW; § 712A.17d (2009) ("The lawyer-guardian ad litem's powers and duties include at least all of the following: (a) The obligations of the attorney-client privilege. (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child. (c) To determine the facts of the case by conducting an independent investigation. . . . (d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case. . . ."). The potential ethical issues involved in the joint appointment of a single attorney as both the child's GAL and attorney is explored in more detail below.

<sup>43</sup> See, e.g., Diane Geraghty, *Conference on Ethical Issues in the Legal Representation of Children in Illinois: Foreword: Conference on Ethical Issues in the Legal Representation of Children in Illinois*, 29 LOY. U. CHI. L. J. 289, 291-92 (1998).

<sup>44</sup> See, e.g., OHIO REV. CODE ANN. § 2151.281(H) (LexisNexis 2010) (Providing that if the GAL for a child is also an attorney, the GAL may serve as counsel to the ward unless the GAL or the court finds a conflict of interest exists between the dual roles of GAL and counsel, in which case the court shall appoint a separate GAL); see also Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 802-03 (2006).

<sup>45</sup> Sobie, *supra* note 44, at 799-800 (citing *In re Griffin*, No. 18432, 2001 WL 43106, at \*5 (Ohio Ct. App. Jan. 19, 2001)) ("Because a guardian ad litem has a duty to recommend what is in the best interests of the child, and an attorney has a duty to zealously represent his client, it is easy to see that a conflict could arise any time a child's desire is not what he deemed in his 'best interests.'").

GALs in their various roles serve an important function in protecting the legal rights of minors (and other legally incompetent individuals). In difficult economic times, it is tempting to assign the dual roles of the child's attorney and GAL to one individual, but can these roles be truly compatible? Must attorney GALs warn that their conversations are not confidential? Should parties be obligated to produce their medical or mental health records to the GAL and/or opposing parties? If they do not, how are the relevant issues evaluated? What information should be included in the GAL report? How can the GAL protect her own safety while advocating for the child's best interests in a high-conflict situation?

## II. LEGAL AND ETHICAL ISSUES IN GAL PRACTICE

As the above questions highlight, GAL practice is rife with yet unanswered questions that pose serious ethical concerns throughout the GAL's involvement in a case. In this section, the GAL role is broken down into its basic components: the GAL appointment, the GAL's data collection process, the GAL report, and post-report activity. Potential legal and ethical and issues are present at each of these stages.

### A. *The GAL Appointment*

#### 1. *Attorney/Guardian ad Litem Hybrid Appointments*

While all states acknowledge that children should have a "voice" in legal matters,<sup>46</sup> states vary greatly in what procedural avenue is available to ensure the child is heard.<sup>47</sup> Increasingly, financial pressures have resulted in many states entertaining dual appointments for child representatives, especially attorney/GAL appointments.<sup>48</sup> Despite the financial benefits,<sup>49</sup> the potential for conflicting obligations in the course of representation is uncomfortably palpable in the hybrid appointment model.<sup>50</sup>

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<sup>46</sup> Barbara A. Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 184-85 (2005) [hereinafter Atwood, *Workable Standards*].

<sup>47</sup> Barbara A. Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 63 n.1 (2008) [hereinafter Atwood, *Uniform Representation*]. See also Am. Bar Ass'n, *Appointment Laws in Adoption, Guardianship, Unmarried Parent, and Divorce Cases*, 40 FAM. L.Q. 591, 601 (2007) [hereinafter Am. Bar. Ass'n, *Appointment Laws*].

<sup>48</sup> Am. Bar Ass'n, *Appointment Laws*, *supra* note 47, at 601 (states which allow hybrid appointments include California, Georgia, Illinois, Michigan, Pennsylvania, and Wyoming).

<sup>49</sup> Peters, *supra* note 19, at 1025 (estimating that dual appointment systems can save up to 50 percent of the money that would be spent otherwise).

<sup>50</sup> Atwood, *Workable Standards*, *supra* note 46, at 200.

On a basic level, GALs share a number of core responsibilities with children's attorneys.<sup>51</sup> Both roles typically include independent factual investigation, communication with the child client, interview of relevant witnesses and collaterals, active participation in court hearings, and sometimes advocacy for a particular result.<sup>52</sup> In many cases, an individual serving the functions of a GAL and a child's attorney can perform both without contradiction.<sup>53</sup> And yet, the potential for conflict looms in every case and many courts acknowledge that the hybrid attorney/GAL role poses inherent ethical challenges.<sup>54</sup> Indeed, courts and legislatures continue to struggle to define the duties of the hybrid attorney/GAL in a manner that is consistent with the ethical obligations of lawyers in three core areas, discussed below: (1) advocating for the wishes of the client regarding the objectives of representation; (2) maintaining client confidentiality; and (3) avoiding an advocacy role when the lawyer is likely to become a necessary witness.<sup>55</sup>

Ethical rules governing a lawyer's scope of representation require lawyers to consult with their clients and follow the client's direction.<sup>56</sup> While a child's attorney charged with advancing the child's wishes in court<sup>57</sup> avoids a conflict regarding the scope of representation, the position of the hybrid attorney/GAL is less clear. Pennsylvania, for example, statutorily charges the hybrid attorney/GAL with the representation of both the "legal interests and the best interests of the child at every stage of the proceedings."<sup>58</sup> Even in states such as Wyoming, where the duties of the hybrid attorney/GAL are more narrowly defined,<sup>59</sup> courts still struggle with the role of the hybrid attorney/GAL in the courtroom absent a "modified application of the Rules of Professional Conduct."<sup>60</sup> In fact, some jurisdictions have used the hybrid nature of the attorney/GAL role to excuse "strict adherence to

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<sup>51</sup> Atwood, *Uniform Representation*, *supra* note 47, at 81–82.

<sup>52</sup> Atwood, *Workable Standards*, *supra* note 46, at 199.

<sup>53</sup> *See id.*

<sup>54</sup> Peters, *supra* note 19, at 1025–26.

<sup>55</sup> Atwood, *Workable Standards*, *supra* note 46, at 200.

<sup>56</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2009) (directing a lawyer to abide by the client's decisions regarding the goals of representation and how the client wishes those goals to be pursued.).

<sup>57</sup> Atwood, *Uniform Representation*, *supra* note 47, at 82–83.

<sup>58</sup> *See* 42 PA. CONS. STAT. § 6311 (2009) (Charging the GAL with advising the court of the child's wishes and presenting evidence to support the child's wishes and stating, "a difference between the child's wishes . . . and the recommendations . . . shall not be considered a conflict of interest" for the GAL).

<sup>59</sup> *See* *Clark v. Alexander*, 953 P.2d 145, 153-54 (Wyo. 1998). It is important to note that this isn't synonymous with the attorney/GAL owing a duty to the court. Some jurisdictions, such as Michigan, statutorily provide that "[a] lawyer-guardian ad litem's duty is to the child, and not the court." MICH. COMP. LAWS § 712A.17d(1) (2009).

<sup>60</sup> *See* *Clark*, 953 P.2d at 153-54 (acknowledging that the hybrid attorney/GAL model necessitates "a modified application of the Rules of Professional Conduct").

some rules of professional conduct.”<sup>61</sup> In those jurisdictions that alter the traditional ethical requirement to abide by the client’s wishes in order to accommodate the hybrid role, the attorney/GAL is typically charged with advocating for the best interests of the child, “regardless of whether the lawyer-guardian ad litem’s determination reflects the child’s wishes.”<sup>62</sup> Those jurisdictions typically also require attorney/GALs to “inform the court as to the child’s wishes and preferences” when they diverge from the best interests.<sup>63</sup>

The hybrid attorney/GAL also confronts ethical uncertainty concerning the use of evidence, such as a child’s well-being, that is appropriate to the role of the GAL but incompatible with the trial strategy of the child’s attorney.<sup>64</sup> Whereas a child’s relationship with the attorney is privileged, the relationship with the GAL is not.<sup>65</sup> Like the ethical rule regarding the scope of representation, some jurisdictions have also modified confidentiality and privilege rules in order to accommodate the hybrid attorney/GAL role.<sup>66</sup> Wyoming, for example, has decided that “[w]hile it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child’s consent.”<sup>67</sup> However, not all jurisdictions that

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<sup>61</sup> *Id.* See also *In re J.P.B.*, 419 N.W. 2d 387, 391–92 (Iowa 1988) (noting the difficulty of the attorney/GAL role when the child’s expressed wishes conflict with the attorney/GAL’s best interests determination, but concluding that a modification of the traditional lawyer-client relationship best serves the child’s best interests).

<sup>62</sup> MICH. COMP. LAWS § 712A.17d(1)(d)(i) (2009) (Lawyer-GAL duties include “[t]o make a determination regarding the child’s best interests and advocate for those best interests according to the lawyer-guardian’s understanding of those best interests, regardless of whether the lawyer-guardian’s determination reflects the child’s wishes.”). See also *Clark*, 953 P.2d at 153–54 (“Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client’s expressed preferences, but by the client’s best interests.”); COLO. REV. STAT. 14-10-116(2) (2009) (“the legal representative of the child is not required to adopt the child’s wishes in his or her recommendation or advocacy for the child unless such wishes serve the child’s best interest . . .”).

<sup>63</sup> MICH. COMP. LAWS § 712A.17d (2009) (“Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child’s wishes and preferences”). See also *Clark*, 953 P.2d at 153–54, (citing *In re Marriage of Rolfe*, 699 P.2d 79, 86–87 (Mont. 1985)) (If the attorney/GAL “determines that the child’s expressed preference is not in the best interests of the child, both the child’s wishes and the basis for the attorney/guardian ad litem’s disagreement must be presented to the court.”).

<sup>64</sup> Peters, *supra* note 19, at 1025. See also MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009) (providing three limited situations in which a lawyer may reveal information relating to a client’s representation).

<sup>65</sup> Peters, *supra* note 19, at 1025.

<sup>66</sup> See *Clark*, 953 P.2d at 154 (modifying the confidentiality inherent in the attorney-client relationship such that relevant information provided by the child may be brought to the court’s attention.).

<sup>67</sup> *Id.* (Noting that the attorney/GAL, as legal counsel to the child, must explain to the child that the attorney/GAL is charged with the child’s best interests which may result in

employ the hybrid attorney/GAL model subscribe to this policy. Michigan, for instance, statutorily provides that the obligations of the attorney-client privilege apply to the hybrid attorney/GAL, noting that “a lawyer-guardian ad litem’s duty is to the child, and not the court.”<sup>68</sup>

While some courts and legislatures have modified their ethical rules of professional conduct in order to accommodate the hybrid attorney/GAL role, there are still ethical impediments to lawyers advocating in cases in which they may also be called to testify.<sup>69</sup> This is problematic in the hybrid attorney/GAL model as GALs are routinely called upon to testify regarding their investigation and observations, while an attorney for a party is not. As the District of Columbia Court of Appeals explained, the primary reason for prohibiting an attorney from acting as both an attorney and a witness is to “avoid conflicts that arise when an attorney puts his or her own credibility at issue in litigation . . . [s]uch conflicts may prejudice the client when the attorney’s testimony is impeached on cross-examination, or may prejudice the opposing party, when the attorney’s testimony is given undue weight by the factfinder as a result of his dual role.”<sup>70</sup> However, as the Supreme Court of Illinois explained in *In re Marriage of Bates*, there is also another important reason: the right of the parties to procedural due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution.<sup>71</sup>

In *Bates*, a state statute empowered the child’s court-appointed representative to make recommendations consistent with the best interests of the child.<sup>72</sup> In a sealed report to the court, the child’s representative detailed his observations and conversations with the parties and provided recommendations.<sup>73</sup> The report was admitted into evidence, but the parent was unable to challenge adverse recommendations as the statute expressly prohibited the child’s representative from being called as a witness.<sup>74</sup> The court, in finding that the parent’s right to

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the disclosure of information that would traditionally be protected by the attorney-client relationship).

<sup>68</sup> MICH. COMP. LAWS SERV. § 712A.17d (LexisNexis 2009) (describing the powers and duties of the lawyer/GAL).

<sup>69</sup> See *Clark*, 953 P.2d at 154 (noting that although some rules require compromise in order to allow for the dual attorney/GAL role, there would be no compromise of the rule prohibiting a lawyer from advocating in a case in which he is likely to be called as a witness. See also MODEL RULES OF PROF’L CONDUCT R. 3.7 (2009) (“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”).

<sup>70</sup> *S.S. v. D.M.*, 597 A.2d 870, 877(D.C. App. 1991) (error to allow attorney/GAL to act as attorney and witness).

<sup>71</sup> *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004) (statute allowing child representative to submit recommendations in a sealed report to the court but prohibited the calling of the representative as a witness deprived the parent of her due process right to challenge an adverse recommendation through cross-examination).

<sup>72</sup> *Id.* at 513. The pertinent statutory language as it existed at the time of litigation is documented in the case.

<sup>73</sup> *Id.* at 506.

<sup>74</sup> *Id.* at 510. The parent challenged the admission of the report, arguing that the child representative had acted as both an advocate and a fact finder.

procedural due process was violated by the statute, noted that “[t]he representative, like any other witness, is not immune from error in observation and from inadvertent bias . . . [c]ross-examination is likely to affect the trial court’s assessment of the worth of the representative’s recommendations in many cases.”<sup>75</sup> The Illinois statute has since been modified to provide that “[t]he child representative shall not render an opinion, recommendation, or report to the court,” but continues to prohibit the calling of the child’s representative as a witness.<sup>76</sup>

Because of these representational challenges, many jurisdictions have found that the role of attorney and GAL are distinct and cannot be carried out concurrently. The Supreme Court of Montana, for example, recently held that “an attorney appointed by the court to represent a child is not also the guardian ad litem,” noting that the GAL role is “different from the traditional advocacy role played by attorneys.”<sup>77</sup> New Jersey, reaching the same result, held that,

[t]he role of the representative attorney is entirely different from that of a guardian ad litem. The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.<sup>78</sup>

Despite the overlapping duties and economic incentives, most courts have concluded that this hybrid model is just not tenable.

### *B. The GAL’s Data Collection Process*<sup>79</sup>

#### *1. GAL Interviews and Non-Confidentiality Warnings*

Both attorney and mental health professional GALs are routinely charged with interviewing parents, children, and relevant collateral sources such as

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<sup>75</sup> *Id.* at 513–14. Although the court noted that the statute deprived her of her due process right to cross-examination, the court ultimately decided that the deprivation was harmless error.

<sup>76</sup> 750 ILL. COMP. STAT. 5/506 (2009). The statutory history reflects that the 2005 amendment by P.A. 94-640, effective Jan. 1, 2006, rewrote the section.

<sup>77</sup> *Jacobsen v. Thomas*, 100 P.3d 106, 111 (Mont. 2004) (Noting that a GAL may be an attorney but is not required to be one). *See also* FLA. STAT. § 61.403 (2009) (A GAL “shall act as next friend of the child, investigator or evaluator, not as attorney or advocate but shall act in the child’s best interest”).

<sup>78</sup> *In re M.R.*, 638 A.2d 1274, 1284 (N.J. 1994) (citing Supreme Court Judiciary Surrogates Liaison Committee, *Guidelines for Attorneys Appointed to Represent Individuals with Developmental Disabilities* (tentative draft) at 3 (Fall 1993)).

<sup>79</sup> While attorney/GAL hybrid appointments present unique ethical issues beyond appointment, the remainder of this Article focuses on the more traditional GAL investigator or evaluator appointments.

relatives, close friends, teachers, psychologists, and physicians.<sup>80</sup> Similarly, GALs are often expected to tender recommendations and to report their interview findings to the court.<sup>81</sup> In order to ensure that parties understand that these professionals are not acting in the capacity of a therapist but instead have a duty to report to the court, GALs are commonly required to provide non-confidentiality warnings prior to interviewing parties in a case.<sup>82</sup> This obligation, especially as applied to mental health professionals, has been consistently upheld, even in the course of court-ordered examinations.<sup>83</sup> For this reason, scholars have noted the need to immediately inform the parties in a matter that information provided to a mental health professional GAL is not confidential.<sup>84</sup> Moreover, states such as Massachusetts extend the requirement of non-confidentiality warnings to court investigators and all GALs, regardless of whether they are mental health professionals.<sup>85</sup>

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<sup>80</sup> Hollis R. Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1094 (2006). *See, e.g.*, IOWA CODE § 232.2(22)(b) (2008) (explaining that the GAL has a duty to conduct interviews with the child, each parent, and any person providing medical, mental health, social, educational, or other services to the child).

<sup>81</sup> Lidman & Hollingsworth, *supra* note 10, at 269.

<sup>82</sup> Baerger, *supra* note 31, at 38–39.

<sup>83</sup> *See, e.g.*, CONN. GEN. STAT. § 52-146c(c)(1) (2008) (providing that a judge may rule communications made to a psychologist in a court-ordered examination are admissible if the individual was informed that the communications would not be privileged); KY. R. EVID. RULE 507(c)(2)(2009) (providing no privilege for communications made to a psychologist after being informed that those communications wouldn't be privileged); R.I. GEN. LAWS § 5-37.3-6(b)(3)(2009) (providing no privilege for communications with a psychiatrist if informed that the communications would not be privileged); MASS. GEN. LAWS ch.233, § 20B(b) (2009) (providing no privilege for communications made to a psychotherapist after the patient has been informed that those communications would not be privileged).

<sup>84</sup> Baerger et al., *supra* note 31, at 38–39.

<sup>85</sup> Massachusetts Probate and Family Court Department, Standing Order 1-05, Standards for Guardians ad Litem/Investigators, p. 3, *available at* <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/standingorder105gal.pdf>; Massachusetts Probate and Family Court Department, Standards for Category F Guardian ad Litem Investigators [hereinafter Category F Standards], *available at* <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/galstandards012405.pdf> (“The GAL investigator is not a clinical evaluator and shall not perform clinical assessments of other clinical functions. The GAL should provide descriptive information without clinical interpretations, even if the GAL is a mental health professional”). Amy M. Karp & Pauline Quirion, *Court Investigators and Guardians ad Litem*, Child Welfare Practice in Massachusetts, Vol. I (Ch.5) Mass. Cont. Legal Ed. 2009 24 (“The court investigator must explain his/her role and the purpose of the interview to the party . . . including the fact that information the party gives to the investigator is not confidential.”); *Id.* at 39–40 (“The GAL must provide a “*Lamb* warning” that explains there are no “off the

Non-confidentiality warnings are required not only for adults in a custody matter but for the children as well.<sup>86</sup> In order to discern the best interests of the child, the GAL must be able to communicate with the child in a way that will establish trust and create an environment where the child feels comfortable being candid with the GAL.<sup>87</sup> Establishing trust is no small task for the GAL.<sup>88</sup> parents may instruct the child to not speak about certain matters; the child may not speak easily to strangers; or the child may try to manipulate the interview to achieve a desired result. Regardless of the cause, GALs commonly encounter children who are reluctant to speak openly with them,<sup>89</sup> and warnings of non-confidentiality only exacerbate this difficulty.

Notwithstanding this, providing the child with a non-confidentiality warning is critical to ensure the child's right to be heard.<sup>90</sup> Thus, prior to collecting information, the GAL must discuss her role in advocating for the best interests of the child while also advising the child in a meaningful way that the communications are not confidential.<sup>91</sup> In so doing, it is essential to ascertain that the child understands the warning in order to make an informed decision regarding what information to disclose.<sup>92</sup> Scholars, however, have noted the risks of giving the child a warning, principally that the child will neither speak honestly nor divulge important information to the GAL.<sup>93</sup> Despite these risks, scholars point out that the risks of not warning the child, including a loss of trust, potential for psychological damage, and the child's right to due process, far outweigh the risks of the child not divulging important information once warned.<sup>94</sup>

This situation becomes further complicated if the child, after receiving a non-confidentiality warning, thereafter discloses significant information, only to insist

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record" discussions and any information collected by the GAL may appear in the GAL report, be disclosed in court or to the other party.").

<sup>86</sup> See Roy T. Stuckey, *Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *FORDHAM L. REV.* 1785, 1792 (1996).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* Conversations between children and their GALs have had a long history of non-confidentiality, and this tradition continues today in most jurisdictions. Stuckey, *supra* note 86, at 1792. *C.f.* N.H. REV. STAT. ANN. § 169-C:25.(2009) (a New Hampshire statute which provides that GALs shall only disclose child communications as required by the court). Scholars have recognized that these GAL duties are inconsistent with a lawyer's ethical obligation of confidentiality. Jennifer Renne, *Ethical Issues in the Practice of Child Welfare Law*, Revised versions of three chapters from *Legal Ethics in Child Welfare Cases* (ABA Center on Children and the Law) Mar. 30, 2007, at 3, available at <http://www.abanet.org/child/legalrep-13.pdf>.

<sup>90</sup> Renne, *supra* note 89, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Peterson, *supra* note 80, at 1109.

<sup>94</sup> *Id.*

it be kept “off the record.”<sup>95</sup> In these situations, the GAL’s ethical obligations are unclear. She can remind the child that information disclosed must be reported to the court, watch for non-verbal cues, and help the child work through the worrisome information.<sup>96</sup> Even then, the GAL faces the ethical quandary of what to do with information already disclosed.<sup>97</sup> Such confidences may not be maintained as part of the GAL role and once revealed, information generally needs to be reported.<sup>98</sup> However, if the child genuinely would not have revealed the information if he understood the warning, and such information could cause emotional harm to the child,<sup>99</sup> the GAL must weigh these variables. This decision is more difficult than when an adult ignores a non-confidentiality warning and discloses information anyway; such information is generally included in the GAL’s report. The rules concerning children, however, are more fluid<sup>100</sup> and some jurisdictions have modified their confidentiality requirements,<sup>101</sup> or will appoint an attorney for the child.<sup>102</sup> It is thus not surprising to find inconsistencies between states regarding the implementation of confidentiality warnings, as this area requires a sophisticated balancing between privacy interests, knowing and voluntary disclosure, and protection of children.

While there is much support for requiring GALs to provide non-confidentiality warnings to parties in a case, the issue of whether GALs must warn collateral sources (non-parties who have information about the family) is fraught with disagreement. This issue touches on the core of the GAL role as GALs routinely interview and rely upon collateral sources during the course of their investigations.<sup>103</sup> Not surprisingly, scholars differ in their approach and there is

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<sup>95</sup> Tania M. Culley, *What Does it Mean to Represent Delaware’s Abused, Neglected, and Dependent Children?*, 4 DEL. L. REV. 77, 89–90 (2001).

<sup>96</sup> Peterson, *supra* note 80, at 1108.

<sup>97</sup> *Id.* at 1109.

<sup>98</sup> *See id.*

<sup>99</sup> *See id.* at 1110.

<sup>100</sup> *Id.*

<sup>101</sup> Massachusetts, for example, allows GALs to report child maltreatment. Karp et al., *supra* note 85, at 39–40 (Noting that while many mental health professionals are required to file reports of suspected maltreatment, even those individuals who are not mandated reporters, such as lawyers, may report suspected maltreatment.). Notably, states such as Maine and Montana, statutorily require GALs who suspect child maltreatment to report that maltreatment. ME. REV. STAT. tit. 22 § 4011-A (2010); MONT. CODE ANN. § 41-3-201(2)(i) (2009).

<sup>102</sup> Culley, *supra* note 95, at 89.

<sup>103</sup> William G. Austin, *A Focus on Child Custody Evaluations: Guidelines for Utilizing Collateral Sources of Information in Child Custody Evaluations*, 40 FAM. CT. REV. 177, 177 (2002). Indeed, a number of states including Maine and South Carolina statutorily require GALs to interview collateral sources. *See, e.g.*, ME. REV. STAT. tit. 22 § 4005 (1)(b)(5) (2009); 42 PA. CONS. STAT. § 6311(b)(5)(2009); S.C. CODE ANN. § 63-3-830(A)(2)(d) (2008). Indeed, many states statutorily provide that the GAL may interview collateral sources without the consent of the parents. *See, e.g.*, COLO. REV. STAT. § 14-10-127 (II)(2) (2009); IND. CODE ANN. § 31-17-2-12 (b) (2009); W. VA. CODE § 48-9-301(b)

little judicial guidance.<sup>104</sup> Some authors conclude that there is a duty of confidentiality between GALs, particularly evaluator GALs, and third-party sources, thus requiring a warning.<sup>105</sup> Others conclude that since the relationship is not one that is protected by legal privilege, information provided to the GAL by collateral sources is not confidential and therefore no warning is required.<sup>106</sup> This matter is still laden with inconsistency and subject to case-by-case review.

## 2. *Waiver of Therapeutic Privilege on Behalf of a Minor*

A GAL's ability to access information concerning the child is essential. When mental health providers are treating the child or family, review of treatment records is often an informative part of the GAL investigation.<sup>107</sup> This valuable information, however, is typically not available solely by virtue of the GAL appointment.<sup>108</sup> Indeed, statutory provisions allowing GALs access to such records are absent in a majority of states.<sup>109</sup> Further, mental health treatment for children and adults is generally afforded a higher level of privacy protection and often requires the permission of the privilege-holder<sup>110</sup> (often a parent who is a party to the proceedings) to disclose confidential information.<sup>111</sup> The presence of mental health information for a child raises two issues: whether it is available to the GAL, and if so, whether it is in the best interest of the child to access the information.

Preserving or waiving a child's psychotherapist privilege is a matter that is separate from the content of the information held by the therapist. For some children, the psychotherapist can serve as an alternative source of sensitive

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(2009); 750 ILL. COMP. STAT. 5/605(b) (2010). Note however, that some states still require that the GAL obtain consent from the parents prior to interviewing collateral sources. *See, e.g.,* MINN. STAT. § 518.167(2)(a) (2009) (“[t]he investigator may consult with and obtain information from medical, psychiatric, school personnel, or other expert persons who have served the child in the past after obtaining the consent of the parents or the child’s custodian or guardian.”).

<sup>104</sup> *See, e.g.,* Austin, *supra* note 103, at 179.

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> Dayle D. Deardurff, *Representing the Interests of the Abused and Neglected Child: The Guardian ad Litem and Access to Confidential Information*, 11 U. DAYTON L. REV. 649, 651 (1985).

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> 1 JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* 157 (3d ed., John Wiley & Sons, Inc. 1997). The psychotherapist-patient privilege is recognized statutorily in every state. *See* Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499, 500 (2009).

<sup>111</sup> Deardurff, *supra* note 107, at 659.

information, speaking on behalf of the child,<sup>112</sup> bringing information before the court without requiring a child to do so directly. This may avoid forcing a child to provide information that is contrary to the wishes of his/her parents.<sup>113</sup> For other children, however, the therapeutic relationship is one that is expected to be private and protected from disclosure, and waiver of the child's therapeutic privilege could severely damage therapeutic progress, terminate the therapeutic relationship altogether or even shatter a child's trust in the therapeutic process.<sup>114</sup> As the U.S. Supreme Court recently acknowledged, "psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment."<sup>115</sup> For those children, waiver of the privilege risks causing more damage than benefit to the child.

The second "waiver" issue is one of procedure: who is the privilege-holder, legally entitled to assert or waive the child's therapeutic privilege and consent (or not) to the release of the child's records.<sup>116</sup> In the usual course of events, parents make medical decisions on behalf of their children and are generally entitled to health information.<sup>117</sup> The rules concerning mental health information vary from state to state, and often afford a child an increasing level of confidentiality as the child gets older.<sup>118</sup> Further, when a child's mental health information is relevant to litigation *about the child*, some courts hold that parents are no longer the presumptive privilege-holders and the court must determine whether release of mental health information is in the *child's* best interest.<sup>119</sup> In that case, the court or its appointee (generally a separate GAL) becomes the legal decision maker as to whether the child's privilege should be waived.<sup>120</sup>

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<sup>112</sup> See, e.g., Alicia F. Lieberman and Patricia Van Horn, *Giving Voice to the Unsayable: Repairing the Effects of Trauma in Infancy and Early Childhood*, 18(3) CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 707 (2009).

<sup>113</sup> This aspect is discussed more in detail in The GAL Report section of this Article. See *infra* Part C.

<sup>114</sup> See, e.g., Lieberman et al., *supra* note 112, at 707.

<sup>115</sup> *Jaffee v. Redmond*, 518 U.S. 1, 6 (1996) (recognizing a psychotherapist-patient privilege).

<sup>116</sup> *Myers*, *supra* note 110, at 157.

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> For example, while the child does not wish to have their therapist's records disclosed, the custodial parent would likely use the records to demonstrate that the child is well-settled in their current environment and the other parent wishes to use the records to establish the custodial parent's undue influence over the child. See Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 380 (2008).

<sup>120</sup> See, e.g., *Carney v. Carney*, 525 So. 2d 357 (La. Ct. App. 1988) (one parent cannot assert child's privilege in custody modification proceeding to prevent disclosure of child's statement to professional); *Nagle v. Hooks*, 296 Md. 123, 460 A.2d 49 (1983) (custodial parent could not assert child's psychotherapist-patient privilege in custody proceeding); *Ellison v. Ellison*, 919 P.2d 1, 3 (Okla. 1996) (custodial parent cannot invoke child's privilege in modification of custody proceeding to prevent testimony of child's physician

In some states, a child who demonstrates the maturity to understand and articulate a position may waive or assert the privilege herself.<sup>121</sup> This option is set forth either by case law or statute and requires a sufficient showing of maturity and understanding to enable a child to waive (or preserve) his/her own psychotherapeutic privilege.<sup>122</sup> A separate hearing<sup>123</sup> may be required, which can be quite invasive, to aid the court in determining the child's maturity.<sup>124</sup>

When the child is too young to make a mature determination, and in those states that do not recognize maturity to waive a therapeutic privilege, the courts may appoint a separate GAL to determine whether the privilege should be asserted or waived.<sup>125</sup> Although some states such as New Hampshire permit the existing GAL to make this determination,<sup>126</sup> others hold that the existing GAL has a

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or psychotherapist); *In re D.K.*, 245 N.W.2d 644, 648 (S.D. 1976) (when the conduct of child's parents in issue, "it would be an anomalous result to allow them to exercise the privilege"). By an analogous argument, a state agency that has legal custody of a child is an equally inappropriate party to make a privilege waiver on behalf of the child. *See* Amy M. Karp, Massachusetts Continuing Legal Education, Inc. 2009, Child Welfare Practice in Massachusetts Volume I, Chapter 9, Privilege and Confidentiality.

<sup>121</sup> *See, e.g., Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 307–08 (Fla. Dist. Ct. App. 2001) (holding that the child can assert their own privilege); *Nagle*, 460 A.2d at 51 (noting that if minor is not too young, the child may personally waive the privilege).

<sup>122</sup> *See, e.g., Parents of D.K.*, 780 So. 2d at 307–08 (Fla. Dist. Ct. App. 2001) (holding that the child can assert their own privilege); *Nagle*, 460 A.2d at 51 (noting that if minor is not too young, the child may personally waive the privilege); *see also, e.g., CAL. WELF. & INST. CODE* § 317(f) (West 2010) ("Either the child or the counsel for the child. . . if the child is found by the court to be of sufficient age and maturity. . . may invoke the psychotherapist-client privilege").

<sup>123</sup> The Court did, however, provide some guidance: "in finding that the child is sufficiently mature to make a sound judgment, the trial judge must consider the following factors: (1) the child's age, intelligence, and maturity; (2) the intensity with which the child advances his preference; and (3) whether the preference is based upon undesirable or improper influences." *In re Berg*, 152 N.H. 658, 886 A.2d 980, 988 (2005).

<sup>124</sup> *See, e.g., S.C. v. Guardian Ad Litem*, 845 So. 2d 953, 960 (Fla. App. 4th Dist. 2003) (holding that competent or mature minors are entitled to notice and an opportunity to be heard, at least in camera, on the issue); *E.C. v. Guardian Ad Litem*, 867 So. 2d 1193, 1194 (Fla. App. 4th Dist. 2004) (holding that competent or mature minors are entitled to notice and an opportunity to be heard, at least in camera, on the issue). *See also* David Wolowitz & Jeanmarie Papelian, *Minor Secrets, Major Headaches: Psychotherapeutic Confidentiality After Berg*, 48 N.H.B.J. 24, 25 (2007).

<sup>125</sup> *See, e.g., Berg*, 886 A.2d at 988. *See also* Adoption of Diane, 400 Mass. 196, 201–02 (1987) (providing that the patient or the patient's guardian may assert the privilege); *Nagle*, 460 A.2d at 51 (holding that the trial court should appoint a GAL to determine if waiving the privilege is in the child's best interest); *In re Zappa*, 631 P.2d 1245, 1251 (1981) (holding that child's GAL had right to assert or waive child's privilege in termination of parental rights proceeding).

<sup>126</sup> *See Berg*, 886 A.2d at 988.

conflicting interest and an independent GAL is required. This appears to be the more common practice.<sup>127</sup>

In sharp contrast to the procedure discussed above, still other states provide statutory authority to the GAL to inspect and copy a child's medical and mental health records simply by virtue of the GAL appointment.<sup>128</sup> While such a statutory scheme offers convenience and fiscal economy, there are also significant costs associated with statutory abrogation of the child's privilege.<sup>129</sup> In particular, automatic waiver of the therapeutic privilege may damage the ongoing therapeutic relationships or discourage high-conflict parents from seeking therapy.<sup>130</sup> As one scholar noted, "[a]s asepsis is to surgery, so is confidentiality to psychiatry."<sup>131</sup> Yielding to expediency, these courts simply presume that a child's best interest is served by waiving the therapeutic privilege,<sup>132</sup> and thus bypass an independent "privilege GAL."

### C. The GAL Report

#### 1. Hearsay in the GAL Report

In addition to information provided by the parties, GAL reports commonly contain important information gathered from collateral sources—family members, teachers, and treatment providers who provide valuable insight to the court.<sup>133</sup> This information is typically considered "hearsay" since it consists of out-of-court statements that are offered as evidence of the truth of the matter asserted.<sup>134</sup> Despite its hearsay status, many states permit GALs to include this information in their reports,<sup>135</sup> although this situation is not uniform.<sup>136</sup> In fact, rules can even

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<sup>127</sup> See JOANNA BUNKER ROHRBAUGH, A COMPREHENSIVE GUIDE TO CHILD CUSTODY EVALUATIONS: MENTAL HEALTH AND LEGAL PERSPECTIVES 74 (2008); Wolowitz, *supra* note 124, at 27.

<sup>128</sup> See, e.g., 31 DEL. CODE ANN § 3610 (2010).

<sup>129</sup> Deardurff, *supra* note 107, at 667–68.

<sup>130</sup> Paruch, *supra* note 110, at 500.

<sup>131</sup> Jerome S. Beigler, *Tarasoff v. Confidentiality*, 2 BEHAV. SCI. & L. 273 (1984).

<sup>132</sup> Paruch, *supra* note 110, at 500.

<sup>133</sup> Resa M. Gilats, *Family Law: Out-of-Court Statements in Guardian ad Litem Written Reports and Testimony*, 33 WM. MITCHELL L. REV. 911, 922–23 (2007).

<sup>134</sup> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c).

<sup>135</sup> See, e.g., *In re Chelsea C.*, 884 A.2d 97 (Me. 2005) (finding that hearsay in GAL report does not preclude the report's admission into evidence); *In re Sean*, 630 N.E.2d 604 (Mass. App. 1994) (GAL report containing hearsay admissible if the GAL is available to testify and report identifies source of information).

<sup>136</sup> Jurisdictions have attempted to strike a balance between allowing hearsay in the GAL report and excluding it entirely by allowing the court (and parties) to review the GAL report, but not allowing it in evidence. See *Toms v. Toms*, 98 S.W.3d 140, 144 (2003) (holding that although a GAL report is not admissible, it may be reviewed.").

vary dramatically among different courts within a state. For example, in Minnesota, hearsay is permitted in its juvenile court but not in its family court.<sup>137</sup>

The hearsay rules serve to exclude unreliable evidence,<sup>138</sup> primarily because hearsay statements cannot be tested through cross-examination.<sup>139</sup> In the case of GAL investigations, however, the expedience of bringing to the court important information from a number of collateral sources, all of whom are available to testify, is generally thought to outweigh usual hearsay objections.<sup>140</sup> Indeed, in this context, hearsay statements may be at least as reliable as in-court testimony. For example, Goodmark<sup>141</sup> argues that since a child's out-of-court statement is spontaneous, not the product of extended questions, and free of the stress of the courtroom, the statement's reliability is enhanced. While few have examined the subject, the same argument concerning spontaneity could be extended to collaterals such as pediatricians and school teachers, especially since those collaterals rarely have an interest in the ultimate outcome of the case. Further, it is impractical for large numbers of collateral sources to appear in court before the matter is even tried. But for the GAL, much of this information simply would not be available to the court. The Federal Rules of Evidence go a step further, providing that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."<sup>142</sup> Under some circumstances, the out-of-court statements may independently enter into evidence via an exception to the hearsay rule.<sup>143</sup>

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<sup>137</sup> See MINN. R. JUV. PROT. P. 3.02, subdiv. 2; MINN. STAT. §260C.165 (2009); cf. MINN. STAT. ch. 518 (2009). Both family court and juvenile court GALs in Minnesota are charged with the same roles and responsibilities, including collecting out-of-court statements as part of interviewing sources; MINN. R. OF GUARDIAN AD LITEM P., R. 901-907. See also Gilats, *supra* note 133, at 912. Nonetheless, GALs in juvenile court can include out-of-court statements in their report and in their oral testimony while GALs in family court cannot. *Id.* at 921. Little is written justifying the distinction except that "[t]he admissibility of these statements [in the juvenile court] is linked directly to the central purpose of the public policy and corresponding law that are designed to protect children," though protecting children is also a mission of the family court. *Id.* at 922. Protecting children, however, is also a mission of the family court. *Id.* This conflict regarding hearsay within one state is demonstrative of the larger divide nationwide.

<sup>138</sup> See Gilats, *supra* note 133, at 929.

<sup>139</sup> Cal v. Green, 399 U.S. 149, 158; (1970) ("cross-examination . . . [is] the greatest legal engine ever invented for the discovery of truth") (original quotation omitted).

<sup>140</sup> See Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 297-98 (1999).

<sup>141</sup> *Id.*

<sup>142</sup> FED. R. EVID. 803 advisory committee notes.

<sup>143</sup> For example, statements made to medical providers for the purpose of treatment, diagnosis, describing medical history, symptoms, pain, sensations, or the general cause or external source of those symptoms are independently admissible. See FED. R. EVID. 803(4). Some states have extended this exception to encompass mental health professionals as

In the usual case, the identified declarant<sup>144</sup> can be called as a witness at trial and subject to cross-examination. Providing the GAL report to the parties in advance of trial increases the likelihood of settlement and also assists in cross-examination of the GAL. The court's discretion to strike portions of the report that are more prejudicial than probative<sup>145</sup> also safeguards the potential unreliability of hearsay included in the report.<sup>146</sup> Finally, courts have also found the GAL's role as "a disinterested party and an agent of the court" a persuasive safeguard in reducing the risk of untrustworthy information influencing a court's decision.<sup>147</sup>

Even in jurisdictions where hearsay is permitted in a GAL report, it is important for GALs to honor the principle behind the hearsay rule: to exclude unreliable evidence.<sup>148</sup> Specific evidentiary rules allow for the admissibility of hearsay within the GAL report to overcome the formality of articulating hearsay exceptions for each statement included in the report.<sup>149</sup> Nevertheless, GALs should independently corroborate critical data and carefully consider the rules of evidence in deciding which statements to include,<sup>150</sup> weigh the prejudicial and probative value of statements, and justify their reliance on such statements since any information may be later impeached during testimony at trial, jeopardizing the credibility of the GAL.

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well. *See, e.g.*, *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993) (statements alleging abuse made to a psychologist admissible under the medical treatment exception). Even statements made to a social worker were admissible under this exception in one state. *See also In re Rachel T.*, 549 A.2d 27 (Md. Ct. Spec. App. 1988). Another hearsay exception exists for statements that describe the declarant's then-existing state of mind, emotion, sensation, or physical condition. *See* FED. R. EVID. 803(3). Such an exception could be used to admit a child's description of their parent's behavior to show the child's fear of that parent. *See* Goodmark, *supra* note 140, at 301. While theoretically the excited utterance exception could also be used in custody litigation, courts vary in determining whether the declarant is still under the stress of excitement caused by the event. *Id.* at 299–300; Krista MacNevin Jee, *Hearsay Exception in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?* 19 WHITTIER L. REV. 559, 573 (1998). *See also* FED. R. EVID. 803(2). Finally, there is the residual exception for statements that have equivalent guarantees of trustworthiness but are not covered by another rule. FED. R. EVID. 807. While courts have admitted statements of a sexually abused child against his or her parent under this exception, it is typically not liberally construed. *See, e.g.*, *Truman v. Watts*, 598 A.2d 713, 722 (Del. Fam. Ct. 1991); *United States v. St. John*, 851 F.2d 1096 (8th Cir. 1988); *United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986).

<sup>144</sup> *See, e.g., In re Sean*, N.E.2d 604, 606 (Mass. App. Ct. 1994).

<sup>145</sup> FED. R. EVID. 403.

<sup>146</sup> Karen E. Elliot, *The Guardian ad Litem in Ohio's Domestic Relations Courts: The Square Peg Fits*, 27 OHIO N.U. L. REV. 267, 279 (2001).

<sup>147</sup> *In re Chelsea C.*, 884 A.2d 97, 101 (Me. 2005).

<sup>148</sup> Gilats, *supra* note 133, at 929.

<sup>149</sup> *Id.* at 930.

<sup>150</sup> Marcia M. Boumil, *Ethical Issues in Guardian ad Litem Practice*, 86 MASS. L. REV. 8, 18 (2001).

## 2. *What to Include in the GAL Report*

The issue of hearsay aside, there are other ethical issues concerning what information goes into a GAL report. Inclusion of all important data, including that which disaffirms the GAL's conclusions, is crucial to an objective report, though it is often impractical and unhelpful to include all the data gathered.<sup>151</sup> GALs may also conduct home visits,<sup>152</sup> observe the child's interaction with the parents,<sup>153</sup> and bring the family's concerns to the court's attention.<sup>154</sup>

Selecting from the plethora of available data is a daunting task. Practitioners have taken various approaches in deciding what to include in the report. In *DesLauriers v. DesLauriers*, the GAL focused her report around the jurisdiction's thirteen statutory factors<sup>155</sup> that the court was obligated to consider in determining the best interests of the child. This approach, while logical since it addresses the factors a judge must ultimately consider, exposed the trial court (and impliedly, the GAL) to criticism at the appellate level after the petitioner argued the court improperly relied too heavily on the GAL report.<sup>156</sup> Indeed, the Supreme Court of North Dakota held that "the trial court, not the guardian ad litem, has the authority to make a child custody award" and that although "the weight assigned to a guardian ad litem's report or other independent recommendation is within the trial court's discretion . . . [the trial court] should not regard a guardian ad litem's testimony and recommendation as conclusive."<sup>157</sup> In the absence of other statutory guidelines, but acknowledging the benefit of utilizing a uniform format, state bar associations, continuing legal education providers<sup>158</sup> and professional organizations<sup>159</sup> have suggested report formats.<sup>160</sup> Nevertheless, no agreement

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<sup>151</sup> See, e.g., *McCullough v. McCullough*, 2009 Miss. App. LEXIS 671, at \*14 (Miss. Ct. App. Oct. 6, 2009) (holding that even though the GAL report was not submitted until the final day of trial, the party's failure to object to the report's admission into evidence or to request additional time to review the report procedurally barred appellate review of the issue).

<sup>152</sup> See, e.g., *In re S.C.H.*, 682 S.E.2d 469, 470 (N.C. Ct. App. 2009) (GAL noted safety issues, that had not been previously addressed).

<sup>153</sup> See, e.g., *id.* at 475 (describing the GAL's observation of an unsupervised visit between the child and the foster family's household).

<sup>154</sup> See, e.g., *DesLauriers v. DesLauriers*, 642 N.W.2d 892, 897 (N.D. 2002) (describing the GAL's report to the court that mother was concerned that the father was verbally abusive to her and the children).

<sup>155</sup> *Id.* at 896 (citing N.D.C.C. § 14-09-06.2(1) (2009)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (internal quotations and citations omitted).

<sup>158</sup> See, e.g., Children's Law Ctr. at the University of South Carolina, *The Guardian Ad Litem Report-Suggested Format*, Mar. 17, 2006, available at <http://childlaw.sc.edu/GAL%20Forms/GAL%20Report%20Form.doc>.

<sup>159</sup> See, e.g., American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994), available at <http://www.law.ucdavis.edu/faculty/Bruch/files/AppendixB.pdf>.

exists as to how to sift through the copious data collected to create a comprehensive, but succinct, GAL report.

Another difficult situation arises when the scope of the GAL's tasks are clear, but the court limits the GAL's role by approving an inadequate amount of time or number of hours in order to contain costs. For example, Massachusetts has created standards<sup>161</sup> for GAL appointments that include a comprehensive description of the GAL's duties until the case is decided.<sup>162</sup> The scope and content of GAL investigations are also dictated by the standards, encompassing over forty factual, legal, and investigative considerations to be addressed.<sup>163</sup> The result is that GALs are put in an untenable position, forced to choose between declining the assignment, spending hours in excess of that authorized (and compensated) by the court, or conducting a superficial investigation or writing an incomplete report.<sup>164</sup> None of these are good options and may expose the GAL to criticism, impeachment on cross-examination, a complaint to the licensing board, or even a malpractice action. There is no clear resolution to this problem.

### 3. *Ultimate Issue Recommendations*

Inclusion of "ultimate issue" recommendations in the GAL report is equally controversial. Ultimate issue recommendations opine on the issues awaiting resolution by the court,<sup>165</sup> such as custody or visitation arrangements. Many states permit GALs to make ultimate issue recommendations<sup>166</sup> in their report, and a

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<sup>160</sup> See, e.g., The Family Law Section of the Florida Bar, Guardian Ad Litem Manual, ch. 17, available at [http://www.familylawfla.org/committees/adhoc/GAL\\_AAL/pdfs/Ch\\_17\\_How\\_to\\_write\\_a\\_GAL\\_Report\\_2.pdf](http://www.familylawfla.org/committees/adhoc/GAL_AAL/pdfs/Ch_17_How_to_write_a_GAL_Report_2.pdf).

<sup>161</sup> See, e.g., Massachusetts, Probate and Family Court Department, Standing Order 1-08, Standards for Guardians ad Litem/Evaluators, available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/standingorder1-08galevaluationsstandards.pdf>; Massachusetts Probate and Family Court Department, Category E GAL/Evaluator Standards, [hereinafter Category E Standards], available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/categorystandardsfinal.pdf>. See also Category F Standards, *supra* note 85.

<sup>162</sup> See, e.g., Category E Standards, *supra* note 162; Category F Standards, *supra* note 85.

<sup>163</sup> Category F Standards, *supra* note 85, at 18–19.

<sup>164</sup> See, e.g., *Zakhary v. Bifano*, No. 02-P-380, 2003 WL 22439684, at \*2 (Mass. App. Ct. Oct. 28, 2003) (illustrating that GAL's appointment was limited to fifteen hours of work, which ultimately was insufficient to investigate the issue of visitation with grandmother).

<sup>165</sup> See FED. R. EVID. 704(b).

<sup>166</sup> *Rodvik v. Rodvik*, 151 P.3d 338, 343 (Alaska 2006); *Delmolino v. Nance*, 437 N.E.2d 578 (Mass. App. Ct. 1982) (indicating that a GAL may make ultimate issue recommendations regarding custody); *Richmond v. Tecklenberg*, 396 S.E.2d 111, 113 (S.C. Ct. App. 1990) (illustrating that a GAL may express an opinion as to the ultimate issue involved, provided cross-examination is permitted). Even the Federal Rules of Evidence permit ultimate issue recommendations provided it leaves to the court the issue of

majority of GALs do include such recommendations.<sup>167</sup> Indeed, judges often request them.<sup>168</sup> Judges are not required to adopt the recommendations.<sup>169</sup> Yet, the GAL's report and, in particular, the ultimate issue recommendations, frequently influence the judge's decision and subsequently all remaining aspects of the case.<sup>170</sup> Indeed, the Court in *Gilbert v. Gilbert*, was concerned with this very issue:

[a] careful review of the record demonstrates that the guardian's report significantly influenced the presentation of evidence . . . defined the factual issues to be examined . . . placed one party in the position of using the hearing to corroborate the facts and conclusions given in the report, while the other party was left to refute them.<sup>171</sup>

Likewise, GAL recommendations create "undue pressure" on the parties to settle as they "sense the weight that the judge will give to the guardian's recommendations."<sup>172</sup> Thus, the practice remains contentious, especially for mental health professionals who serve as evaluator GALs.<sup>173</sup>

Further, ultimate issue recommendations inherently include "moral and value judgments"<sup>174</sup> and may reflect personal biases.<sup>175</sup> Judges are also human beings, of course, and possess their own conscious or subconscious moral values.<sup>176</sup> While

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"whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." FED. R. EVID. 704(a)-(b).

<sup>167</sup> See James N. Bow & Francella A. Quinnell, *A Focus on Child Custody Evaluations: A Critical Review of Child Custody Evaluations Reports*, 40 FAM. CT. REV. 164, 170 (2002) (indicating that a study of fifty-two custody reports drafted by doctoral-level psychologists across the nation found that almost all participants included ultimate issue recommendations).

<sup>168</sup> See Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 295 (2002); Boumil, *supra* note 150, at 19–20; JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS 21 (2d ed. 2006).

<sup>169</sup> See, e.g., *Mason v. Coleman*, 850 N.E.2d 513, 521 (Mass. 2006) ("The judge was not required to adopt the opinions of a guardian ad litem, therapist, psychologist, school official, and other evaluator.").

<sup>170</sup> See, e.g., *Gilbert v. Gilbert*, 664 A.2d 239 (Vt. 1995) (reversing a court's award of parental rights after finding that the court erred in relying on a GAL report improperly admitted into evidence).

<sup>171</sup> *Gilbert*, 664 A.2d at 242–43.

<sup>172</sup> Goodmark, *supra* note 140, at 328.

<sup>173</sup> Boumil, *supra* note 150, at 20.

<sup>174</sup> Bowermaster, *supra* note 168, at 296. Indeed, "the 'best interest of the child' standard is . . . amorphous - a vacuum to be filled by the decision-maker's personal values." Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 707 (2003).

<sup>175</sup> Boumil, *supra* note 150, at 19–20 ("life experiences, upbringing and other factors, conscious and not" may generate evaluator bias).

<sup>176</sup> See *id.* at 20.

injecting another layer of these subjective judgments may distort the issues more than clarify them,<sup>177</sup> frank analysis of the data and legal expertise to apply the legal presumptions<sup>178</sup> or statutory factors places GALs in an appropriate position to offer ultimate issue recommendations that may aid the judge in making a determination.<sup>179</sup> However, “[i]f the facts are substantially disputed, the clinical data is unclear, or the application of the law is in doubt,” an ultimate issue recommendation is inappropriate.<sup>180</sup>

Ultimate issue recommendations are equally contentious in proceedings where GALs are appointed to preserve or waive a child’s therapeutic privilege. Privilege GALs not only determine whether waiver of the child’s privilege would be in the child’s best interest, but must navigate the procedures of doing so.<sup>181</sup> A GAL must be concerned with whether she should even make a recommendation to the court regarding privilege waiver or should stand in the child’s shoes as the holder of the privilege and waive or preserve the privilege without court input. Different states vary in which approach they take,<sup>182</sup> and in many states there is no consensus. For example, the Massachusetts Supreme Judicial Court has declined to address the procedure, writing only that “[w]e note, without deciding the question, that waiver by the guardian ad litem was probably an appropriate procedure.”<sup>183</sup> The result is a legal quagmire where “[s]ome Probate and Family Court judges accept the guardian ad litem’s decision as final, whereas other judges may treat it more like a recommendation.”<sup>184</sup> While the data collection process that a GAL uses remains the same regardless of the procedure, the results may vary greatly. Where the GAL’s decision is treated as final, often no appeal is possible,<sup>185</sup> but where the GAL proposes only a recommendation and the court makes the waiver decision, appeal is a matter of right.<sup>186</sup>

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<sup>177</sup> Rosen, *supra* note 6 *passim*.

<sup>178</sup> Delmolino v. Nance, 437 N.E.2d 578, 581 (Mass. App. Ct. 1982) (“In making that recommendation, it is plain that the guardian ad litem did not take into consideration the law that is applicable to a change of custody matter”).

<sup>179</sup> Boumil, *supra* note 150, at 20.

<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., Karp, *supra* note 120, § 9.4.5(a).

<sup>182</sup> Most states have decided that assertion or waiver of a child’s privilege is the GAL’s decision, not merely a recommendation for the court’s consideration. See *Nagle v. Hooks*, 296 Md. 123, 128 (1983) (holding that the court must appoint a GAL to act in the child’s best interest); *Devlin v. Devlin*, 598 N.Y.S.2d 1015, 1017 (N.Y. App. Div. 4th Dep’t 1993) (indicating that the child’s GAL waives or asserts the physician-patient privilege). Other states have reserved the ultimate issue to the court. *In re Berg*, 886 A.2d 980, 987 (N.H. 2005) (holding that the court is not bound by the GAL’s attempt to assert or waive the child’s privilege). Some states have declined to articulate the appropriate procedure. See *In re Adoption of Diane*, 508 N.E.2d 837, 840 (Mass. 1987).

<sup>183</sup> *Diane*, 508 N.E.2d at 840.

<sup>184</sup> Karp, *supra* note 120, § 9.13.4.

<sup>185</sup> *Id.*

<sup>186</sup> See, e.g., *In re Berg*, 886 A.2d 980, *passim*.

Making ultimate issue recommendations remains contentious in GAL practice, particularly because of the complex cases in which GALs are appointed. Importantly, as one former Massachusetts Probate and Family Court judge wrote, GALs and their recommendations are “only one cog in the wheel.”<sup>187</sup> Judges and lawyers must be fluent in the concepts of psychological testing, parenting ability, and children’s developmental needs so that they can critically parse and assess the merits of the GAL’s recommendations. In the end, it is the judge alone who decides a case.

#### 4. *Use of Psychological Testing*

GALs routinely seek mental health information when conducting a child or family evaluation.<sup>188</sup> In some matters, a capable mental health evaluator has treated the family members and can be called upon to provide valuable information.<sup>189</sup> In other cases, either no mental health providers are present, or the information is not available to the GAL.<sup>190</sup> If the GAL determines that there are potential mental health issues substantial enough to affect the outcome of the evaluation, she may seek to have a psychological evaluation conducted, and it may or may not include psychological testing.<sup>191</sup> Despite their widespread use in legal matters however, psychological testing in the context of family court proceedings can be quite contentious,<sup>192</sup> particularly where the GAL uses this information to assess a child’s developmental and emotional needs or a parent’s ability to meet those needs.<sup>193</sup> In the course of the evaluation the GAL may seek to administer the testing instruments herself (if she is qualified to do so) as part of the evaluation, or may incorporate test results conducted by a separate tester.<sup>194</sup> These psychological tests provide objective data distinct from the evaluator’s opinion and assist the GAL in determining issues that interviews alone cannot such as “the psychological strengths and weaknesses of the parents and child, the presence of a major mental illness, and personality characteristics that may hinder implementation of certain custody or visitation arrangements.”<sup>195</sup>

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<sup>187</sup> Arline S. Rotman, *Commentary on “Empirical and Ethical Problems with Custody Recommendations”*: A Call for New Family Court Priorities, 43 FAM. CT. REV. 242, 245 (2005).

<sup>188</sup> See Boumil, *supra* note 150, at 11.

<sup>189</sup> See *id.* at 10, 15.

<sup>190</sup> See *id.* at 10.

<sup>191</sup> See *id.* at 11–12.

<sup>192</sup> Steven K. Erickson, Scott O. Lilienfeld & Michael J. Vitacco, *Psychological Testing and Child Custody Evaluations in Family Court: A Dialogue: A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 FAM. CT. REV. 157, 157 (2007).

<sup>193</sup> McCurley, *supra* note 28, at 277.

<sup>194</sup> See Boumil, *supra* note 150, at 11.

<sup>195</sup> Erickson et al., *supra* note 192, at 158.

Because psychological tests contribute objective data to what is otherwise a largely subjective assessment, they often have special importance to the GAL and the court, despite certain limitations on the tests' potential admissibility.<sup>196</sup> Like any other evidence, psychological inventories must meet the "basic standards of scientific rigor," including relevance, reliability and validity.<sup>197</sup> Jurisdictions apply their own standards to assess the reliability and relevance of evidence proffered by experts such as psychologists.<sup>198</sup> There is a large body of literature that debates the virtues of psychological testing, particularly as it applies to custody evaluations, and nearly every jurisdiction has implemented standards that impose substantial scrutiny of the underlying data.<sup>199</sup> Much of the controversy centers on the fact that most standard psychological testing instruments were not specifically created for custody evaluations.<sup>200</sup> In particular, the Minnesota Multiphasic Personality Inventory (MMPI, versions 1 and 2) and the Rorschach Inkblot Technique have been widely criticized.<sup>201</sup>

The MMPI was originally developed to assess the presence of severe psychopathology, leading critics to argue that its applicability in the custody arena is heavily dependent on the evaluator drawing inferences beyond the MMPI's intended design.<sup>202</sup> Specifically, use of this instrument requires the evaluator to correlate a parent's personality profile with group MMPI profiles to predict the

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<sup>196</sup> See *id.* at 157–58.

<sup>197</sup> See Steven K. Erickson, Scott I. Lilienfeld & Michael J. Vitacco, *Failing the Burden of Proof: The Science and Ethics of Projective Tests in Custody Evaluations*, 45 FAM. CT. REV. 185, 185 (2007). Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests and Clinical Judgment*, 36 FAM. L.Q. 135, 162 (2002).

<sup>198</sup> Two key cases have provided guidelines for the admissibility of expert opinions. The most well known is *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). In *Daubert*, the U.S. Supreme Court acknowledged that trial judges serve as gatekeepers of expert testimony and outlined factors that should be weighed in assessing the admissibility of expert testimony. *Id.* at 596–97. These factors include whether the methodology has been tested, whether the methodology has been subject to peer review, whether the rate of error is appropriate, and whether the methodology is generally accepted by the scientific community. *Id.* at 593–94. See also Steven K. Erickson, *Psychological Testimony on Trial: Questions Arise About the Validity of Popular Testing Methods*, 75 N.Y. ST. B.J. 19, 19 (2003). Several jurisdictions continue to rely on the standard set forth in *Frye*, 293 F. 1013, 1014 (D.C. Cir. 1923), which articulated that expert testimony and evidence could be admitted in court if the methodology was generally accepted by the relevant field.

<sup>199</sup> Shuman, *supra* note 197, at 138–39.

<sup>200</sup> *Id.* at 142. Tests which were specifically created for conducting custody evaluations include the Bricklin Perpetual Scales (BPS), Perception of Relationships Test (PORT), Parent Awareness Skills Survey (PASS), and the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT). *Id.*

<sup>201</sup> See *id.* at 144–48. The revised version of the MMPI is the most utilized objective personality test in custody evaluations. The MMPI consists of 567 true-or-false questions with ten clinical scales and three validity scales which address psychopathology, personality, and the taker's approach to testing. *Id.*

<sup>202</sup> *Id.*

effect of that parent's profile on the child's development.<sup>203</sup> Even more contentious is the use of the Rorschach Inkblot Test in custody litigation. The Rorschach has been regarded as both "the most cherished and the most reviled of all psychological test instruments,"<sup>204</sup> and its use in custody litigation has been hotly debated.<sup>205</sup> Critics of the use of the Rorschach Test in custody evaluations are concerned that it "has the propensity to present psychologically healthy children as severely disturbed,"<sup>206</sup> that "no studies correlate personality attributes identified by the Rorschach with good parenting,"<sup>207</sup> and that many of the studies that established the norms in the TRACS system manual have not been subject to peer review.<sup>208</sup>

Of course, no psychological or other diagnostic test is specifically designed to assess the best interests of a child or which parent is "best."<sup>209</sup> Although GALs are appointed for the purpose of applying their special knowledge to assist the court in making such decisions,<sup>210</sup> "the assessment of human behavior will always be an imprecise science [dependent] on more variables . . . than can be measured."<sup>211</sup> In light of this as well as the added costs, courts often limit psychological testing to those matters in which "there is an identifiable reason to suspect that testing would shed light on an issue that cannot be assessed in any other way."<sup>212</sup> In some cases, objective tests assist GALs in seeing past the deception, hostility, and personality dysfunctions that cause the high-conflict divorces requiring child custody

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<sup>203</sup> *Id.* Other criticisms of the MMPI-2 include code types failing to show adequate temporal stability, low internal consistency of MMP-2 clinical scales, significant overlap between scales, and its dependence on test takers' self-understanding. Robert E. Erard, *Picking Cherries with Blinders On: A Comment on Erickson et al. (2007) Regarding the Use of Tests in Family Courts*, 45 FAM. CT. REV. 175, 175-76 (2007).

<sup>204</sup> Shuman, *supra* note 197, at 148. The Rorshach Inkblot Test continues to be the most utilized projective instrument used in custody evaluations. *Id.* The test involves showing inkblot drawings to test takers and asking them to describe the drawings. *Id.* The test results are a projection of the test taker's personality. *Id.*

<sup>205</sup> See Erickson, *supra* note 198, at 20-21.

<sup>206</sup> *Id.* at 20.

<sup>207</sup> Shuman, *supra* note 197, at 148.

<sup>208</sup> Erickson, *supra* note 198, at 22. Others argue that over ninety percent of the studies in the TRACS system manual were published in peer-reviewed journals. See Erard, *supra* note 203, at 177-78.

<sup>209</sup> See Bowermaster, *supra* note 168, at 301. These tests were created to detect psychological pathologies, not to be predictive of future ability to parent. See Shuman, *supra* note 197, at 144 ("those that have reviewed literature conclude that there are not psychological tests that have been validated to assess parenting directly.").

<sup>210</sup> Boumil, *supra* note 150, at 19-20. Boumil argues by analogy to criminal or delinquency competency evaluations, suggesting that psychologists are hired precisely for their expertise and "[a] clinician who is not willing to take a position on the 'ultimate' [] issue does not adequately assist the court." *Id.* at 20.

<sup>211</sup> Erickson, *supra* note 198, at 25.

<sup>212</sup> Boumil, *supra* note 150, at 11.

evaluations.<sup>213</sup> To the extent that the testing is valid, reliable, and relevant, it can contribute some valuable insight.<sup>214</sup>

Some scholars have suggested that GALs seek permission from the court prior to initiating testing so that there are clearly defined questions guiding the evaluation.<sup>215</sup> Not only does this “minimalist approach”<sup>216</sup> limit the testing issues, but it also allows the GAL to address, in advance, any reservations that the court has in admitting a GAL report that includes this type of data.<sup>217</sup> GALs that utilize psychological testing must be satisfied that the methods employed have their foundation in empirical literature and conform to the nature of the evaluation.<sup>218</sup> When approved by the court and administered properly, psychological testing can contribute to the court’s understanding of complex family dynamics and the child’s best interest.<sup>219</sup>

#### *D. After the GAL Report Is Completed*

##### *1. Discovery of the GAL File*

As part of tendering a comprehensive report, GALs commonly access and rely on information held by third parties such as school records, psychological or educational testing, medical records, criminal records, social services records, and court documents.<sup>220</sup> These records, if relied upon by the GAL, may be susceptible to discovery by the parties despite containing sensitive information that would otherwise not be available to those parties.<sup>221</sup>

Whether the parties should have access to third party records in the GAL’s possession is a difficult issue. On the one hand, without the ability to inspect the records on which the GAL relied on in making recommendations, the parties (and their counsel) would be severely disadvantaged in cross-examining or challenging

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<sup>213</sup> See, e.g., Philip M. Stahl, *Deposing the Custody Evaluator: What You Need to Know About Current Child Custody Research and the Use of Psychological Testing*, 2 Ann. ATLA-CLE 1953 (2003) (presenting some objective tests for child custody evaluations).

<sup>214</sup> Erickson et al., *supra* note 197, at 190.

<sup>215</sup> McCurley et al., *supra* note 28, at 290–91. Courts vary greatly in detailing the scope of GAL appointments in court orders. *Id.* Often, court orders merely direct parties to undergo a psychological evaluation without specific direction. *Id.* Consequently, GALs do themselves and the family being evaluated a disservice by not clarifying the issues to be addressed. *Id.*

<sup>216</sup> *Id.* at 291.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See Erickson, *supra* note 198, at 25.

<sup>220</sup> Austin, *supra* note 103, at 180; Deardurff, *supra* note 107, at 657.

<sup>221</sup> Vic Brown Hill, *Obtaining Discovery From the Guardian ad Litem*, Hill MacDonald, LLC, <http://www.hillmac.com/CM/Custom/Obtaining.asp> (last visited Mar. 5, 2010).

the GAL's findings, thus impinging due process rights.<sup>222</sup> On the other hand, a party may be entitled to privacy of those records and even when integral to the GAL investigation, may become a potential source of unfair or inappropriate leverage against a party who seeks to prevent disclosure of the records. Thus, a state's rules governing access to third parties records in the possession of the GAL become a critical inquiry.

Some states, like Colorado and Illinois, statutorily provide that the GAL must make available to counsel and to pro se parties her file containing underlying data, reports, names and addresses of collateral sources, and the complete text of diagnostic reports made to the GAL.<sup>223</sup> Depending on the nature of the GAL appointment, this may include confidential third-party medical and psychiatric records. Other states such as Alaska make access to records in the possession of the GAL contingent upon fulfilling civil discovery rules and allow access to those materials that are relevant and not privileged.<sup>224</sup> Still other states, like Delaware, deem the records acquired or reviewed by the GAL to be confidential and require the parties seeking discovery to obtain a court order.<sup>225</sup> Such an order would be at the court's discretion based upon relevance, privilege and due process considerations in cross-examining the GAL.<sup>226</sup>

Another important discovery consideration is whether the GAL's notes and file constitute "work product." Some states are more protective of the GAL's work product than third-party records in the GAL's possession. For example, Maine presumes that a GAL's notes and work papers are privileged and thus not discoverable, though a party can challenge the GAL's decision to not produce the documents by requesting an in-camera examination of the documents by the court.<sup>227</sup> Many other states, however, such as Massachusetts and New Hampshire, are more liberal as to discovery of the GAL's notes by the parties.<sup>228</sup> This type of

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<sup>222</sup> *Ross v. Gadwah*, 554 A.2d 1284, 1286 (N.H. 1988) (citing the ability to counter evidence that the judge will rely on to reach a decision as part of parents' rights of due process). *See also* Hill, *supra* note 222, at § 7(a).

<sup>223</sup> *See* COLO. REV. STAT. § 14-10-127 (2009); 750 ILL. COMP. STAT. 5/605(c) (2010).

<sup>224</sup> *See* Amendment to Child in Need of Aid (CINA) R. 8, SUPREME COURT OF THE STATE OF ALASKA, ORDER NO. 1561 (2006), p. 4-5, *available at* <http://www.courts.alaska.gov/sco/sco1561leg.pdf>.

<sup>225</sup> DEL. CODE ANN. § 3608 (2010). (Delaware's GALs are called "Court Appointed Special Advocates").

<sup>226</sup> *Id.*

<sup>227</sup> *Standards of Practice for Guardians ad Litem in Maine Courts*, ME. R. GUARDIANS AD LITEM, Appendix A, § 6.2 (2004), *available at* [http://www.courts.state.me.us/rules\\_forms\\_fees/rules/MGalRules%208-04.pdf](http://www.courts.state.me.us/rules_forms_fees/rules/MGalRules%208-04.pdf).

<sup>228</sup> *See* Massachusetts Trial Court Probate and Family Court Department, Standards for Category F Guardian ad Litem Investigators, Jan. 24, 2005, p. 23 ("The GAL shall retain any notes, records, documents, taped recordings, videos, or other material gathered or created during the investigation so that these materials are available for trial, discovery, appeal, and remand of the case"); *Ross v. Gadwah*, 554 A.2d 1284 (N.H. 1988) (declining to shield the GAL's data from the parents because their due process rights required an opportunity to counter evidence before the fact-finder.).

discovery policy requires the GAL to be more vigilant about what is contained in the file, particularly process notes of the GAL's impressions that may change over time as information is gathered.<sup>229</sup>

A recent Massachusetts case highlights the implications of discovery practices on the litigants. In *P.W. v. M.S.*,<sup>230</sup> the husband sought visitation (but not custody) of his children, but refused to produce his mental health records in order to protect his privacy. He offered to produce the records to the GAL, but only if the GAL and the court would protect them from further discovery by his wife.<sup>231</sup> The court offered to review the records *in camera*, but could not guarantee the records would not thereafter be released to the wife as part of the GAL's file if they were relevant to the visitation issue.<sup>232</sup> The Massachusetts Appeals Court upheld the trial court's ruling that the husband had to choose between his desire for privacy of his mental health records and his claim for visitation with his children.<sup>233</sup>

## 2. High Conflict Families, Pro Se Access to the GAL Report, and Due Process

Further complicating discovery issues is the recent trend toward self-representation in the nation's family courts.<sup>234</sup> Where attorneys once stood as an emotional buffer<sup>235</sup> between bitter parents, candid collateral reports, revealing psychological testing, and blunt recommendations, *pro se* litigants are more frequently standing alone. Moreover, despite the general expectation that divorcing spouses equitably divide property and cooperate with each other in resolving

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<sup>229</sup> GALs have attempted to limit parties' access to their files when the requested discovery involves sensitive information about the children. In *Hogan v. Hogan*, Nos. CA2002-09-216, CA2002-09-225, 2003 WL 22073132, at \*4-5 (Ohio Ct. App. Sept. 8, 2003), the court found that the GAL's files were not subject to attorney-client privilege and did not constitute work product, but the trial court nonetheless had "discretion to grant a motion to quash a subpoena for a guardian ad litem's files if the court finds that it would not be within the children's best interests to allow disclosure of the files." *Id.* Thus, GALs may be able to protect their wards by arguing that it is not in the children's best interests to allow disclosure of sensitive information in GAL records. This case also demonstrates that data in the GAL's possession may create an awkward tension between the children's best interests and the parents' right to confront witnesses.

<sup>230</sup> *P.W. vs. M.S.*, 857 N.E.2d 38, 40 (Mass. App. Ct. 2006).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 40-41.

<sup>233</sup> *Id.* at 40. Throughout the proceeding, the mother expressed concerns about the father's mental history, which included severe emotional difficulties, attempted suicide, a hospitalization, and counseling. *Id.*

<sup>234</sup> Madelynn Herman, *Self Representation: Pro Se Statistics Memorandum*, NAT'L CTR FOR ST. CTS, Sept. 25, 2006, <http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm>; Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376-78 (2005); Symposium, *Access to Justice: Does it Exist in Civil Cases?*, 17 GEO. J. LEGAL ETHICS 455, 479 (2004).

<sup>235</sup> See Anita R. White, *Family Law Symposium: Mediation in Child Custody Disputes and a Look at Louisiana*, 50 LA. L. REV. 1111, 1128 (1990).

custody, a “good divorce” has become an oxymoron.<sup>236</sup> Divorcing spouses often add intense acrimony to an already difficult process by humiliating, insulting, and punishing each other.<sup>237</sup> High-conflict matters may escalate to the point of creating risk to the spouse, children, providers of collateral information, and even the GAL.<sup>238</sup> What was once a matter of family privacy is no longer private and the GAL report may contain an abundance of intimate information that, while impounded from the public,<sup>239</sup> is nevertheless available to a warring spouse.<sup>240</sup>

GALs are being appointed to an ever-increasing number of family matters burdened with a history of domestic violence.<sup>241</sup> They are charged with investigating the allegations of abuse, reporting the extent to which the children

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<sup>236</sup> Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 567 (2000).

<sup>237</sup> Nat Stern & Karen Oehme, *Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L.J. 373, 373–74 (2003/2004) (High conflict cases often involve intense anger, blame, and refusal to cooperate regarding the needs of their children). *See, e.g.*, *Cooney v. Rossiter*, 583 F.3d 967 (7th Cir. 2009) (dismissing pro se mother’s suit against judge, court-appointed child psychiatrist, her husband’s defense attorney, a therapist, and child’s attorney/GAL alleging that they conspired to deprive her of the custody of her children); *Krempp v. Dobbs*, 775 F.2d 1319 (5th Cir. 1985) (dismissing appeal of pro se father’s suit against his former wife and her present husband, his wife’s attorney during the divorce and custody suit, his wife’s attorney in a subsequent proceeding against him for contempt for failure to pay child support, four state judges, the court clerk, a judge’s secretary, a judge’s wife, the state commission on judicial contact, and the state bar alleging a conspiracy to deprive him of his rights); *Goad v. United States*, 661 F. Supp. 1073, 1081 (S.D. Tex. 1987) (noting “meanness of spirit” with which pro se party attempted to cut-off payments to former spouse under divorce decree), *aff’d in part, vacated in part on other grounds*, 837 F.2d 1096 (Fed. Cir. 1987), *cert. denied*, 485 U.S. 906 (1988).

<sup>238</sup> Schacht, *supra* note 2366, at 567–68.

<sup>239</sup> *See, e.g.*, Massachusetts Probate and Family Court, Standing Order 2-08: Impoundment of Guardian Ad Litem Reports, (Mar. 10, 2008), *available at* <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/standing-order-2-05-impoundment-gal-reports.pdf>.

<sup>240</sup> *See, e.g.*, *In re* Family Law Rules of Procedure, 663 So.2d 1047, 1049 (1996) (amendments to the Florida Rules of Civil Procedure provide that the GAL give counsel or pro se parties a copy of the GAL report at least one week before the final hearing); *Sawyer v. Sawyer*, No. Pen-08-389, 2009 LEXIS 85, at \*1–\*2 (Me. May 14, 2009) (pro se wife’s failure to object to admission of GAL report did not preserve the issue for appeal); *Rawlinson v. Rawlinson*, No. 33127-6-II, 2006 LEXIS 2447, at \*3–\*4 (Wash. App. Nov. 16, 2006) (pro se wife vigorously attacked contents of the GAL report); *Tuning v. Buckle*, No. FA054008688, 2006 LEXIS 2062, at \*1 (Conn. Super. July 7, 2006) (pro se parties had hearing continued for the GAL report).

<sup>241</sup> Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283, 285–86 (2004) (investigators are routinely appointed in domestic violence cases due to the conflicting allegations of batterers and partners about abuse).

have been exposed to it and making recommendations that protect the children.<sup>242</sup> Of course, the risk of domestic violence does not end when the parents separate<sup>243</sup> and custody litigation is a prime opportunity for abusive partners to control, manipulate or abuse a spouse, using finances, property and even the children as “bargaining chips.”<sup>244</sup> The GAL investigation process may inadvertently exacerbate the abuse, contributing psychological testing results, detailed data and candid collateral interviews. This situation is compounded when litigants, particularly those without attorneys, do not understand the nuances of this information and unfettered access to the GAL report may increase the hostility and accusations between the battling parents rather than promoting resolution of the case.<sup>245</sup>

In some cases, the GAL process itself becomes a catalyst for violence.<sup>246</sup> For example, in a 2006 Florida case, a father murdered his wife and two children and thereafter set the family’s home on fire after the mother was granted custody of the children.<sup>247</sup> A court-appointed psychologist who evaluated the family during the custody dispute recommended custody in favor of the mother, in part due to the children’s stated preferences.<sup>248</sup> Eight days after the court’s ruling, the mother and the children were all dead.<sup>249</sup>

Psychological harm can also result from incorporating children’s statements concerning their parents into the GAL report. GALs sometimes disclose not only a child’s stated preference in matters of custody, but may also reveal other family secrets such as a parent’s substance abuse or domestic violence.<sup>250</sup> Even reporting

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<sup>242</sup> *Id.* at 286.

<sup>243</sup> Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 719 n.1 (1999); Goodmark, *supra* note 140, at 244; Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1119 (1996). *See also* Commonwealth v. Bianchi, 757 N.E.2d 1087, 1089 (Mass. 2001) (estranged husband shot wife to death immediately after she dropped off their son for court-ordered visitation).

<sup>244</sup> Hastings, *supra* note 241, at 304 (Partners who abuse their spouses are twice as likely as non-abusers to seek sole custody of the children and the abuser’s primary motive is often to “hurt and frighten their former partners.”) *Id.* *See also* Nina W. Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. L. & WOMEN’S STUD. 35, 35–36 (2003).

<sup>245</sup> MARC J. ACKERMAN, CLINICIAN’S GUIDE TO CHILD CUSTODY EVALUATIONS, 6 (3d ed. 2006) (Pro se parents do not understand legal proceedings, are “blinded by their own obsessions in the case,” and are overly litigious.).

<sup>246</sup> Hastings, *supra* note 241, at 318.

<sup>247</sup> *Dad Blamed in 3 Deaths*, ORLANDO SENTINEL, Dec. 28, 2006, at B5.

<sup>248</sup> Don Jordan, *Doctor Saw Paranoia in Father Before Fire*, PALM BEACH POST, Dec. 29, 2006, at 1A.

<sup>249</sup> *Id.*

<sup>250</sup> For instance, a child may tell his GAL that “he does not want to live with his mother because she says nasty things when she is drinking.” *See* Michelle Johnson-Weider, *Guardians Ad Litem: A Solution Without Strength in Helping Protect Dependent Children*, 77 FLA. BAR J. 87, 89 (2003).

on interactions between a parent and a child during an observed visit may have consequences for the child.<sup>251</sup> Upon reading the GAL report, parents may become angry with the child, blame the child for the consequences of the interaction, or act out against the child in other ways—all of which are documented to result in long-term psychological damage to the child.<sup>252</sup>

Attempting to avoid that result is difficult. On the one hand, an individual “charged with zealously advocating for her client’s best interests can hardly be serving that mission by keeping secret information that directly bears on those interests.”<sup>253</sup> Further, it is rarely within the discretion of the GAL to withhold information gathered.<sup>254</sup> Even if a GAL report omits the child’s preferences,<sup>255</sup> a parent may nevertheless call the child to the stand to provide testimony supporting or contradicting the GAL’s recommendations.<sup>256</sup>

Restricting parents’ access to the GAL report might be a viable solution,<sup>257</sup> but due process usually requires that all information gathered by the GAL be shared with the parties.<sup>258</sup> Indeed in 1988, the Supreme Court of New Hampshire addressed these issues in an interlocutory appeal taken by a GAL.<sup>259</sup> In *Ross v. Gadwah*, the GAL raised the issue of “whether a parent’s right of due process requires access to and the opportunity to challenge any information forming the basis for the guardian’s recommendation, even if such information was obtained from the minor child.”<sup>260</sup> The Court ruled unanimously in the affirmative:

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<sup>251</sup> Nat Stern & Karen Oehme, *The Troubling Admission of Supervised Visitation Records in Custody Proceedings*, 75 TEMP. L. REV. 271, 271 (2002) (Although supervised visitation was created to protect children and domestic violence victims, the rampant misuse of visitation reports threatens to compromise those individuals.).

<sup>252</sup> Emily Richardson, *Lawyers Were Children Once: An Ethical Approach to Strengthening Child Abuse and Neglect Legislation*, 31 J. LEGAL PROF. 357, 360–61 (2007); Stern & Oehme, *supra* note 251, at 287.

<sup>253</sup> Emily Buss, “You’re My What”? *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 FORDHAM L. REV. 1699, 1743 (1996).

<sup>254</sup> *Id.* at 1744.

<sup>255</sup> Most courts are required to consider the child’s preference in a custody proceeding and thus need to learn of the child’s preference in some way. *See, e.g.*, MINN. STAT. § 257C.04(a)(2) (2009). Often no other counsel is appointed for the children so they must rely on the GAL to give them a voice. Gilats, *supra* note 133, at 928.

<sup>256</sup> Buss, *supra* note 253, at 1744.

<sup>257</sup> Since GALs are appointed to assist the court in understanding the issues in the case, such a restriction could theoretically be imposed. *See Peters, supra* note 19, at 1024–25. Thus, GALs have a duty to report to the court but have no parallel duty to inform the parents, particularly if it endangers the child. *See Mary Grams, Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn*, 22 LAW & INEQ. 105, 114 (2004) (GALs don’t need parental consent to examine any record related to the custody proceeding).

<sup>258</sup> *See Buss, supra* note 253, at 1739.

<sup>259</sup> *Ross v. Gadwah*, 554 A.2d 1284 (N.H. 1988).

<sup>260</sup> *Id.* at 1285.

It is apparent to us that since due process requires that either parent have the opportunity to challenge any evidence presented for consideration by the trier of fact, it must also preclude invocation of the attorney-client privilege. Accordingly, we now hold that the attorney-client privilege is incompatible with the guardian's role as a party to and expert witness in custody proceedings. Communications between a guardian ad litem and a minor child are not privileged.<sup>261</sup>

The Court based its decision on the recognition of a parental interest regarding care and custody of children that is specifically recognized in many states' constitutions.<sup>262</sup>

Parental rights, however, are not without limit. In *In re Kalil*,<sup>263</sup> the Supreme Court of New Hampshire retreated, holding that “[a]lthough we recognize that parents have a due process right to be heard, to examine witnesses, to be informed of and to challenge all adverse evidence, such rights are not absolute.” The court upheld a request that a child’s statements to the GAL remain confidential, concluding that “even if we were to *assume* that the father has a due process right to review the sealed report,” the father’s oral agreement that the child’s statements to the GAL would remain confidential (at the child’s request) waived the assumed right.<sup>264</sup> While this case seems to suggest that GALs could request that parents waive their rights to information provided by their children, this raises the same due process issues discussed earlier. At present, there is no good solution for protecting children from their own candid disclosures.

### 3. GAL Safety Concerns and Immunity

In many ways, the circumstances of a GAL investigation or evaluation create a perfect storm for threats and other safety concerns aimed towards a GAL. The storm begins to brew with a high conflict divorce or high-stakes custody determination and an abundance of bilateral allegations that aggravate the parties’

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<sup>261</sup> *Id.* GALs in New Hampshire serve a dual, hybrid role representing the child and assisting the court in making its determination. *Id.*

<sup>262</sup> Numerous courts have decided that the parental interest in care and custody of children is a fundamental right protected by state and federal constitutions. *See, e.g.,* Provencal v. Provencal, 122 N.H. 793, 797 (1982) (explaining that a parent’s interest in decisions regarding the custody of his children is a fundamental right that is protected by the due process clause, N.H. CONST. PT.1, ART. 2., of the New Hampshire Constitution). *See also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (parent’s interest in guiding the rearing of his children is a fundamental right secured by the U.S. Constitution).

<sup>263</sup> *In re Kalil*, 931 A.2d 1255, 1258 (N.H. 2007).

<sup>264</sup> *Id.* (emphasis added). Leonardo v. Leonardo, 665 N.E.2d 1034, 1038 (Mass. App. Ct. 1996), similarly found that where a party had the opportunity to review the GAL report with his attorney prior to becoming pro se, the party was not entitled to an actual copy of the report.

already existing mental health, stress, and anger issues.<sup>265</sup> When these circumstances arise, which one court described as “worthy of a Puccini opera, or at least a midafternoon soap opera,”<sup>266</sup> and are coupled with blunt questioning and brutally honest GAL recommendations, the perfect storm for anger and physical threats is created.<sup>267</sup> As a result, GALs are frequently the target of abusive and threatening telephone messages,<sup>268</sup> threatening and harassing letters,<sup>269</sup> physical threats,<sup>270</sup> vulgar name-calling in public places,<sup>271</sup> and even stalking.<sup>272</sup> Even more common than physical intimidation, however, are threats of professional ruin,<sup>273</sup> discharge from the case,<sup>274</sup> lawsuits,<sup>275</sup> and professional discipline.<sup>276</sup>

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<sup>265</sup> See *Johnson v. Johnson*, No. M2002-00354-COA-R3-CV, 2003 WL 61249, at \*2 (Tenn. Ct. App. Jan. 9, 2003) (when GAL brought to the court’s attention mother’s alleged drinking problem and father’s alleged abuse problem, father left the GAL threatening phone calls). See also *Thibodeau v. Thibodeau*, 869 A.2d 142, 143 (Vt. 2005) (father had a difficult time controlling his anger and became very angry with the children’s GAL); *State v. Antoni*, No. 19158-3-III, 2000 WL 1300357, at \*2 (Wash. Ct. App. Sept. 14, 2000) (father threatened GAL after she testified in a non-favorable way).

<sup>266</sup> *Bergquist v. Cesario*, 844 A.2d 100, 103 (R.I. 2004) (describing the background of the complex custody case).

<sup>267</sup> See *In re L.M.S.*, No. M2008-01336-COA-R3-PT, 2009 WL 2030430, at \*3 (Tenn. Ct. App. July 13, 2009) (mother exhibited threatening behavior when GAL opposed mother’s male companion having unsupervised contact with the child).

<sup>268</sup> *Thibodeau*, 869 A.2d at 143 (father in child custody dispute left GAL abusive and threatening telephone messages); *Johnson*, 2003 WL 61249, at \*2 (father in custody dispute left the GAL threatening telephone message telling her to “watch her back”).

<sup>269</sup> *Bergquist*, 844 A.2d at 109 (ex-boyfriend sent GAL handwritten note saying “You will pay dearly next year.”); *In re Nathan*, 671 N.W.2d 578, 580-81 (Minn. 2003) (attorney for mother in a custody case sent GAL harassing letters, called her “worse than worthless,” threatened to “deal with her accordingly” and to tell others that she was not truthful or impartial.).

<sup>270</sup> *In re L.M.S.*, 2009 WL 2030430, at \*3 (mother in custody dispute threatened GAL when she advocated for child’s protection); *Wallace v. Masten*, No. 02CA13, 2003 WL 927600, at \*1 (Ohio Ct. App. 2003) (father in custody dispute tried to run down the GAL after he lost custody of his children); *State v. Klimek*, 398 N.W.2d 41, 42 (Minn. Ct. App. 1986) (father was verbally abusive during GAL visit and then followed GAL to her car while shaking his fist.).

<sup>271</sup> *Wallace*, 2003 WL 927600, at \*1 (father in custody dispute called GAL obscene names, and shouted out questions in public such as “Are you still protecting child molesters?”).

<sup>272</sup> *Id.* (father in custody dispute devised forty encounters with the GAL); *Antoni*, 2000 WL 1300357, at \*2 (six months after custody dispute, father blocked GAL’s access to her car, yelling, “Leslie, will you dike my ex-wife for me?”).

<sup>273</sup> See *In re Nathan*, 671 N.W.2d at 580-81 (mother’s attorney wrote letters to the judge complaining that GAL was biased, and threatened to publish GAL letters to him on his website “as examples of outrageous actions by a court-appointed quasi-expert.”).

<sup>274</sup> See *Antoni*, 2000 WL 1300357, at \*1 (father filed motion to remove GAL when GAL requested he undergo mental health evaluation).

Many states provide GALs with quasi-judicial immunity in the pursuit of their duties.<sup>277</sup> The rationale behind providing GALs quasi-judicial immunity is directly linked to the leverage that parties seek by intimidating GALs,<sup>278</sup> whether physically or professionally. As one court noted:

To safeguard the best interests of the children, however, the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents.<sup>279</sup>

Quasi-judicial immunity has resulted in unsuccessful lawsuits waged by disgruntled parties against GALs for causes of action such as professional malpractice<sup>280</sup> and defamation.<sup>281</sup>

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<sup>275</sup> *Id.* Father served GAL with complaint alleging abuse of process totaling \$100,000 in damages after GAL requested father in a custody dispute undergo a mental health evaluation. Father later wrote GAL a letter, stating:

You are FIRED as an incompetent GAL for my daughter. . . . Legal action will commence upon you in the near future. Contrary to GAL immunity law, you have overstepped your authority. I will exhaust ALL my financial resources to bring the full force of [the] law against you.

*See also In re Rockwell*, 673 S.W.2d 512, 513–14 (Tenn. Ct. App. 1983) (man was accused of unduly influencing the ward threatened the GAL with suit if he did not resign).

<sup>276</sup> *Antoni*, 2000 WL 1300357, at \*1 (father informed GAL's secretary he was filing a bar complaint against GAL after GAL testified unfavorably for father).

<sup>277</sup> A thorough multi-jurisdictional review of quasi-judicial GAL immunity is undertaken in *Fleming v. Asbill*, 483 S.E.2d 751, 754–56 (S.C. 1997). Generally, most jurisdictions provide GALs immunity for damages claims based on the duties of the GAL, including testifying, written reports, and recommendations. Importantly, not all states provide GALs with immunity. For example, in South Carolina, volunteer GALs in abuse and neglect cases may be held liable for grossly negligent acts. *See id.* at 756; S.C. CODE ANN. § 63-11-560 (West 2009).

<sup>278</sup> *See Short v. Short*, 730 F.Supp. 1037, 1039 (D. Colo. 1990) (articulating the need for GAL immunity).

<sup>279</sup> *Id.* While scholars have argued that GAL immunity will lead to decreased protection of the ward since the GAL knows she won't be liable for her actions, courts disagree. In *Fleming*, 483 S.E. 2d at 755, the court noted safeguards such as GALs not being immune for actions beyond the scope of their duties, and preserved accountability to the parents via cross-examination.

<sup>280</sup> *See State ex rel. Bird*, 864 S.W. 2d 376, 379–80 (Mo. Ct. App. 1993) (issuing a permanent writ to dismiss father's suit against the GAL for actual and punitive damages alleging GAL's malpractice).

<sup>281</sup> *See Lau v. Berman*, 792 N.Y.S.2d 292, 295 (N.Y. Civ. Ct. 2004) (dismissing defamation suit against GAL for statements made in the GAL report); *see also*, *Janicki v.*

In recent years, GALs have also found themselves in the position of seeking judicial protection for their personal safety due to these threats. Indeed, GALs have obtained “no contact” orders (and contempt orders for their violation),<sup>282</sup> disciplinary action against parties’ attorneys,<sup>283</sup> civil protection orders,<sup>284</sup> witness intimidation charges,<sup>285</sup> and disorderly conduct charges<sup>286</sup> against disgruntled parents and attorneys. Despite these recent attempts at protecting GALs from physical and professional harm, the high-conflict environment coupled with parents’ underlying mental health or anger issues and unfavorable recommendations for parents have caused the “best interest of the child” to be overshadowed by concerns of safety. Despite the judicial system’s intervention, GALs continue to be a target of anger in high-conflict cases.

#### CONCLUSION

While there are important differences among jurisdictions with respect to GAL appointments and practice, GALs serve an important function in the nation’s courts. There continues to be a plethora of unresolved ethical issues and unanswered questions, often because there are no good answers. GALs represent the interests of the courts’ most vulnerable populations, often working long hours and receiving minimal compensation. At times, they risk their own physical and emotional well-being. The continued existence of ethical issues speaks as much to the importance and complexity of GAL work as it does to the law’s ability to resolve matters for which there is often no good solution.

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Subbloie, No. CV010277848S, 2002 WL 819100 (Conn. Super. Ct. Apr. 3, 2002) (dismissing father’s defamation claim against the GAL).

<sup>282</sup> See *Bergquist v. Cesario*, 844 A.2d 100, 109 (R.I. 2004) (ex-boyfriend given an opportunity by the court to avoid a contempt finding by making a sworn statement that he would refrain from all contact with the GAL.).

<sup>283</sup> See *In re Nathan*, 671 N.W. 2d 578, 580–81 (Minn. 2003) (mother’s attorney in custody dispute indefinitely suspended from the practice of law for sending harassing letters and initiating frivolous litigation against GAL.).

<sup>284</sup> See *Wallace, v. Masten*, No. 02CA13, 2003 WL 927600 (Ohio Ct. App. Feb. 11, 2003) (GAL successfully sought five-year civil protection order against father in a custody dispute after he arranged between forty and forty-five encounters with the GAL, called the GAL vulgar names, attempted to run down the GAL.).

<sup>285</sup> See *Antoni*, 2000 WL 1300357, at \*\*2–3 (maintaining an intimidation of a former witness charge against father in a custody dispute after he threatened the GAL with a lawsuit, disciplinary action, and yelled vulgar names at the GAL.).

<sup>286</sup> See *State v. Klimek*, 398 N.W.2d 41, 42 (Minn. Ct. App. 1986) (upholding conviction of father in a custody dispute who showed up unannounced and intoxicated to the children’s GAL visit and threatened the GAL).