

## CHAPTER 10

# GUARDIAN AD LITEM

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<b>What Is a Guardian ad Litem? .....</b>	<b>305</b>
<b>Deciding Whether to Seek a GAL .....</b>	<b>307</b>
<b>Getting a GAL Appointed, and Payment of the GAL .....</b>	<b>307</b>
<b>How to Participate Effectively in the GAL Investigation or Evaluation of Your Case .....</b>	<b>309</b>
General Requirements .....	309
At the Beginning .....	309
Meeting with the GAL .....	310
Throughout the Investigation/Evaluation .....	311
Reading and Challenging the Report .....	311
<b>Your Rights During the GAL Investigation or Evaluation.....</b>	<b>312</b>
Confidentiality .....	312
Safety .....	313
Impermissible Dual Roles.....	313
<b>Other Requirements of the GAL Investigation.....</b>	<b>314</b>
<b>GAL Complaint Process.....</b>	<b>315</b>
<b>EXHIBIT 10A—Standards for “Category F” Guardian ad Litem / Investigators .....</b>	<b>316</b>
<b>EXHIBIT 10B—Standards for “Category E” Guardian ad Litem / Evaluators .....</b>	<b>330</b>
<b>EXHIBIT 10C—Motion to Appoint Guardian ad Litem Under G.L. c. 215, § 56A.....</b>	<b>351</b>

## WHAT IS A GUARDIAN AD LITEM?

If you are involved in a Probate and Family Court child custody and visitation case, you may hear the phrase “guardian ad litem” (GAL). A GAL is a person who can be assigned by the court to investigate and/or evaluate the child, the child’s family, and the child’s home life; and to share findings with the judge. A GAL either can be appointed by the judge, or the parties might agree that a GAL should be appointed to the case. Typically, a GAL is appointed where the parents cannot work out a custody and visitation plan on their own; or if one or both parents have raised serious issues about the parenting capacity of the other (usually these issues involve allegations of child abuse or neglect, addiction, or mental illness so severe that the parent cannot care for the child).

There are several different types of GALs. Most of the time, the court will appoint a GAL/investigator or a GAL/evaluator.

The GAL/investigator often is an attorney with experience in representing parties in custody and visitation cases, although sometimes mental health professionals are appointed as GAL/investigators. The GAL/investigator gathers

and analyzes the facts of the case and makes a report, but does not conduct mental health assessments (such as clinical interviews, mental health testing, or analysis that draws on expertise from the mental health field). The GAL/investigator is also referred to as a “Category F” guardian ad litem. The Standards for “Category F” Guardian ad Litem/Investigators are included as **Exhibit 10A**.

The GAL/evaluator is always a mental health professional who both investigates the facts of the case and evaluates those facts using his or her mental health expertise. The GAL/evaluator is also referred to as a “Category E” guardian ad litem. The Standards for “Category E” Guardian ad Litem/Evaluators are included as **Exhibit 10B**.

GAL/investigators and GAL/evaluators—or any other kind of GAL that might be assigned to your case—should be independent (neutral) investigators who examine several aspects of the child’s life. The GAL talks to the child’s parents, usually to the child himself or herself, and often to other adults living in the home. The GAL typically visits the homes of each of the parents and observes the child interacting with each parent. The GAL also talks to other people, particularly professionals, who know the child and/or the parents well or work with the child. These professionals include teachers, doctors, therapists or other counselors, and sometimes people such as coaches, Scout leaders, or others involved in the child’s life. The GAL also reviews documents relevant to the custody and visitation issues the court must decide. After the GAL finishes gathering this information, he or she writes a report that presents the facts, analyzes the facts, and, in some cases—where the judge has made the request—makes recommendations about custody and visitation. The GAL files the report with the court. The judge then reviews the report at a hearing and/or considers it as evidence at a trial along with the GAL’s testimony.

This chapter focuses on the GAL/investigator or evaluator. However, there are many other types of GALs, and it is possible that the judge in your case could appoint another type of GAL either instead of or in addition to the GAL/investigator or evaluator. These other types are as follows:

- **Probate and Family Court Probation Department or Court Clinic Investigation.** In some cases, particularly if neither party can afford to pay for a private GAL/investigator or evaluator, the court may appoint the Probate and Family Court Probation Office to conduct a brief investigation. Some courts also have court clinics that perform a similar function. Note that Probate and Family Court probation officers do not play the same role that probation officers play in criminal courts, but instead deal with family court cases only. See chapter 2 of this book on the role of the Probate and Family Court Probation Office. Many of these probation officers are experienced in custody and visitation matters and conduct effective investigations.
- **Guardian ad Litem/Next Friend.** In some cases, a judge might appoint a GAL/next friend for a child. The role of the GAL/next friend is different from that of the GAL/investigator or evaluator because the GAL/next friend represents the best interest of the child. This means that the GAL/next friend acts as an attorney who advocates for what he or she has determined is in the child’s best interest. GAL/investigators and GAL/evaluators do not advocate for the child; instead they are neutral parties who provide information to the court about what they observed during their investigations or evaluations. A GAL/next friend also plays a different role than an attorney for the child. An attorney for the child advocates for what the child wants (or, when the child is too young to state a preference, for what the attorney believes the child would want), but the GAL/next friend advocates only for what they have determined to be in the child’s best interest, regardless of what the child might say they want. The role of the attorney for the child is a highly controversial and hotly debated issue. Note that some counties also have a program known as Attorneys Representing Children (ARC). An attorney appointed under this program represents what the child wants, or would have wanted if he or she were not too young to state a preference.
- **Guardian ad Litem to Waive the Child’s Privilege.** A GAL may be appointed specifically to determine whether to waive the child’s privilege with a therapist or counselor. Parents, the parents’ attorneys, and GAL/investigators and GAL/evaluators do not have automatic access to a child’s privileged communications with therapists and counselors. The communication remains confidential unless and until it is waived. This privilege can be waived only if a different GAL—an attorney specially appointed for the limited task of determining whether privilege should be waived—determines that waiver is appropriate. The role of the GAL to waive the child’s privilege is discussed in more detail in “Confidentiality,” below.
- **Parenting Coordinator.** A parenting coordinator is not technically a GAL, but it is described here because there is some overlap with the GAL role. The parenting coordinator’s role is set out in Probate and Family Court Standing Order 1-17. While a case is open, or even after it has been closed, parents may agree to engage a parenting coordinator, or some judges may appoint a parenting coordinator as long as both parties have consented to pay the coordinator’s fees. Parenting coordinators help parents resolve disputes about

how to implement or comply with a custody order or judgment. They typically focus on mediating disputes over issues that are not specifically covered by the custody order or judgment. While parenting coordinators may sometimes help parents come to an agreement about issues that require modification of an order or judgment, these agreements must be brought to court and formally added to the order or judgment. Importantly, parenting coordinators cannot help parties reach agreements that would change legal custody or physical custody in a way that affects child support. There are a few things to bear in mind before asking for, or agreeing to, a parenting coordinator. A parenting coordinator is likely not appropriate if you have a history of domestic violence (see chapter 3, Safety and Protection Issues, and chapter 19, Mediation), and the court cannot require you to use a parenting coordinator if you or the opposing partner has been victim of, or accused of, domestic violence. Also, be wary of any agreement for a parenting coordinator that would give the parenting coordinator the final decision-making authority over disputes. Courts always retain final decision-making authority over the primary issues of custody, parenting time, and child support, but you may still want to be able to go to court if the parenting coordinator's recommendation about nonprimary issues are unworkable, unsafe, or not in your child's best interest. Keep in mind that what you tell a parenting coordinator can be shared with either party, attorneys for either party or the child, and in court. Finally, while you can voluntarily share your own records with the parenting coordinator, the parenting coordinator cannot require you to release confidential or privileged information that is not included in the nonimpounded case records; and will not be given access to the child's privileged records unless privilege has been waived in court.

## DECIDING WHETHER TO SEEK A GAL

Consider carefully whether a GAL is right for your case. In many cases, GALs identify important facts that aid the judge and the parents in figuring out what custody and visitation plan might work best for the child. With these facts in hand, parents might be better able to reach an agreement about custody and visitation schedules. The GAL also can provide the judge with facts the judge needs so that he or she can separate baseless claims from real concerns about one or both parents. Although GAL appointment does not necessarily mean the case will not go to trial, the GAL can often be extremely helpful in focusing both parents on what is best for the child, and enable them to resolve differences about custody and visitation without a trial. Often the GAL process provides flexibility to enable both parents to become involved in working out a thoughtful plan that will meet their child's needs. But there are some factors that may weigh against a GAL for some custody cases. While GALs are often helpful, they can be costly. You may be eligible to have the GAL's costs paid by the Commonwealth if you are indigent as defined by Massachusetts law. If not, you may have to carry some of the costs of a GAL yourself. There is no fixed rate for GALs and total costs for GAL investigations and evaluations vary widely. In general, total charges may range anywhere from \$3,000 to \$20,000 and beyond for more complicated cases. In addition, the GAL investigation and evaluation process can be long, emotionally draining on you, your children, and other people in your life, and at times intrusive on your privacy. For example, you can be required in some GAL investigations to undergo psychological testing or substance abuse testing, or to share details about your life that you had expected to keep private, which may include giving the GAL access to your medical records. In addition, it has been the experience of many litigants that appointed GALs do not always understand certain issues such as the dynamics of a relationship involving domestic abuse or substance abuse (even though they may hold themselves out as experts in such an area). Because judges often give a GAL report and recommendations substantial weight, it can be harmful having a GAL who disbelieves you, who does not understand critical issues in your case, or who makes problematic recommendations.

It is worthwhile to consider these and any other costs and benefits when you are deciding whether to request the appointment of a GAL. If your child's other parent requests a GAL, the choice may not be yours. You can still object to the appointment of a GAL on the grounds that you cannot afford the costs or that the costs are not warranted because a GAL is not really needed.

## GETTING A GAL APPOINTED, AND PAYMENT OF THE GAL

If you decide you want to ask that a GAL be appointed, you can do so by filing a motion to appoint a guardian ad litem. See **Exhibit 10C** for a sample motion. In this motion, you would state the reasons that a GAL is needed and what issues you would want the GAL to address.

For example, if you had well-founded concerns that your child's other parent was abusing alcohol while caring for the child, you would write in your motion that a GAL is needed because you are concerned that the other parent drinks frequently in the children's presence and that therefore the children would not be safe having unsupervised visits with that parent. You would then state why you believe this to be true, and what evidence you have of this substance abuse problem. Then you would state specifically what issues a GAL should investigate and/or evaluate. For example, you might state that the issues are

- whether and to what extent the other parent has a substance abuse problem,
- to what extent and in what way any such substance abuse problem affects that parent's parenting of the child, and
- what visitation schedule would be most appropriate.

If either you or the child do not speak English as a first language and are not comfortable speaking English, ask the court to appoint an interpreter. (See Category F Standard 4.4.2 and Category E Standard 4.4.2.) You can make that request in your motion.

If both parties are represented by counsel, your attorneys, in consultation with each of you, may be able to agree to one or more possible GALs and submit those names to the judge, who may agree to appoint one of the agreed-upon GALs. Even if you are not represented by counsel, you and/or the other party can get information about who might make an appropriate GAL for your case, agree to one or more possible GALs, and submit those names to the court; the judge may appoint the GAL that the two of you propose. To increase the likelihood of the judge agreeing to appoint the proposed GAL, make sure that the GALs you propose are on the GAL appointment list and/or satisfy all the requirements for being placed on the appointment list. If you do not propose a GAL, and/or if the judge does not agree to order the appointment, the rules state that a judge should appoint the next GAL on a list of GALs who meet the court's training, licensure, and experience requirements. If the court does not follow the order of the list, the rule requires that the judge state in writing the reason he or she has not followed the order of the list. A judge may choose not to follow the order of the list, for example, if he or she believes the case requires special expertise in areas such as domestic violence, child abuse, substance abuse, or mental illness. Note that practice about following the order of the list varies from court to court. Usually, the issue of payment will come up, and have to be decided, at the time of the decision to make a GAL appointment. This is because GALs are costly, so the parties should know how the cost will be allocated between them; and because GALs often require some or a substantial portion of their payment up front in the form of a retainer. Generally the costs of the GAL are split between the parties. However, sometimes a judge will allocate the costs unevenly or order one party to pay the whole cost if the court finds that one party has substantially greater financial resources than the other. If you believe you have good reasons as to why the costs should not be split evenly, state these in your motion. Keep in mind that judges have leeway to reallocate costs at the end of the investigation. Judges will sometimes do this if they find that one party is more responsible than the other for the problems that required the appointment of a GAL; that a party has not been cooperative with a GAL; or that a party has forced the GAL to do work that has proved to be unnecessary or frivolous.

If you cannot afford to pay the costs of a GAL and you qualify as indigent under Massachusetts law, you would include in your motion seeking appointment of the GAL a request that the Commonwealth pay the GAL fees. To qualify as indigent in Massachusetts, you must be receiving public assistance; your income must be 125 percent or less of the current Federal Poverty Guidelines; or you must be able to show that you are unable to pay the GAL's costs without hardship. G.L. c. 261, § 27A. The Federal Poverty Guidelines are available at the U.S. Department of Health and Human Services website at <http://www.aspe.hhs.gov/poverty/index.shtml>. Note that these guidelines are updated every year. You can also find out what they are by checking with the court.

If you are not the one seeking the appointment of a GAL but you believe the costs should not be split evenly or that you would qualify to have your portion of the GAL's costs paid by the Commonwealth, you can file a separate motion stating how you believe costs should be paid, and why. If you are filing an objection to the appointment of the GAL, you can include in that objection a request that if a GAL is nonetheless appointed, the GAL's costs be allocated unevenly (in that case, specify how the costs should be apportioned between the two parties); or be paid by the Commonwealth.

## HOW TO PARTICIPATE EFFECTIVELY IN THE GAL INVESTIGATION OR EVALUATION OF YOUR CASE

If you do not already have a lawyer and a guardian ad litem has been appointed in your case, you should seriously consider retaining a lawyer if at all possible. See “Do You Need a Lawyer” in chapter 1 of this book. The stakes of the GAL investigation or evaluation are high, because the judge will often place a lot of weight on what the GAL reports and recommends about custody and visitation for your child. If there are pending or potential criminal claims against you, and/or if the other parent has accused you of breaking the law, the stakes are potentially increased. If you have a criminal attorney but not a Probate and Family Court attorney, talk with your criminal attorney about handling criminal claims that might be explored in the GAL investigation or evaluation.

There is a wide variation in the experience and skill of GALs. Be prepared to participate effectively with any GAL appointed to your case regardless of the GAL’s skill level or methodology. Below are some basic guidelines to working effectively with a GAL investigator or evaluator.

### General Requirements

In general, it is important that you be able to

- provide the GAL with all the information supportive to your position that he or she will need, protect your rights to confidentiality so that the GAL does not obtain information about you or your child without either your consent or the child’s consent through a specially appointed guardian ad litem to waive the child’s privilege (see “Confidentiality,” below), or a court order;
- ensure that the GAL follows the mandatory standards of practice that set out what a GAL must do and may not do in a GAL investigation or evaluation; these standards are included as **Exhibits 10A** and **10B**; and
- read the GAL’s report in advance of any hearing or trial in which the report will be used and to be able to effectively challenge that report.

Many of these things are hard to do without an attorney who is experienced in working with GALs in custody and visitation cases.

### At the Beginning

- As soon as you learn that a particular GAL has been appointed, whether you have been told the GAL’s name by the judge or court personnel or have received a written appointment order in the mail, contact the GAL to set up an initial appointment. This shows the GAL from the outset that you are making an effort to cooperate and that you are on top of things. If you have an attorney, your attorney may make this call. Also, calling right away may help head off unnecessary delays if the judge has told you a particular person has been appointed and that person does not receive an appointment order from the court. Although the GAL cannot be expected to begin his or her work until he or she receives an appointment order, if there is a delay in the court’s sending the appointment out to the GAL, your early phone call to the GAL would enable him or her to contact the court to find out the status of the appointment order.
- In your initial call, ask the GAL if there is anything he or she would like you to bring to the first meeting.
- Make sure you are clear about how payment is going to work, so that you can be sure to make arrangements to pay the GAL, and to make these payments on time. Ask the GAL if he or she has a written statement that you can read in advance and/or show to your attorney describing how the GAL bills for services (including the investigation and/or evaluation, report writing, attending court hearing(s) or trial, and depositions). Some GALs use retainer agreements setting out the costs and terms of their services. It is important to read any retainer agreement carefully, and consult with your attorney if you have one, before signing this agreement. You should also ask about payment for other services, such as a deposition or time in court for hearings or trial.
- You have a right to have your attorney present during your meetings with the GAL. You and your attorney would discuss the pros and cons of this option. Sometimes an attorney may attend the initial meeting between you and the GAL, generally as an observer only, and not attend subsequent meetings. In other cases, particularly complicated cases, your attorney may want to sit in on all meetings.

- Think carefully and specifically about your goals for the GAL investigation and evaluation. Do you want to retain physical custody and set up a visitation schedule? What are your goals for legal custody: shared or sole legal custody? Do you have in mind a visitation schedule that you believe would be reasonable? Do you have specific concerns about the other parent, such as substance or alcohol abuse, violence or abuse to you or the children, or mental health issues that interfere with the other parent's ability to care for the children? What custody and visitation plan do you think is appropriate and realistic in light of those concerns: no contact with the other parent, restricted and/or supervised contact? Has the other parent accused you of behavior that you want to show is untrue?
- Then list and begin to gather all the information and witnesses that will support your position.
- List all the people who can provide helpful and relevant information to the GAL. For each, write a one- to two-sentence summary of what they can tell the GAL and why this is relevant. Provide a name, address, and contact information for each person. Remember, the GAL will be most interested in talking to professionals who have worked with your children, teachers, therapists or school counselors, doctors, or even teachers, leaders, and coaches of your child's extracurricular activities if that person has specific and relevant information. The GAL may be willing to talk with friends or relatives if these people have had significant involvement in your child's life and can address specific issues that the GAL is investigating. Before you give their names to the GAL, talk to these people and ask them if they would be willing to speak with the GAL. The GAL may need to speak with them even if they are reluctant to speak, but checking with them first is a good idea. Because GALs may indicate that they will only speak to a certain number of people (particularly family and friends) you should be prepared to have a limited list of people with whom you would like the GAL to meet; and be prepared to explain why these people are important, and/or why they are likely to have important documents. This is another reason why you should speak with potential witnesses before you give their names to the GAL; you will want the GAL to prioritize speaking with people who are the most important to your case and who are willing to cooperate with the GAL.
- List and begin to gather all documents that can provide helpful and relevant information to the GAL. These include any professional reports or prior assessments of your family, the child's report cards, and medical records. Try to identify any information about your child's other parent or about yourself that supports your position. Also gather copies of your court papers that are relevant to the issues the GAL will be investigating.
- Meet with your attorney before you meet with the GAL. Your attorney should be able to help you prepare for your meeting and answer questions you may have about the process.

## Meeting with the GAL

- Bring with you to your first appointment whatever the GAL has asked you to bring to the initial meeting, if possible. Bring your list of contact people and whatever documents you have been able to gather.
- Leave plenty of time so you are sure to get to your meeting with the GAL on time. Because the GAL does not know you and is looking for any information to evaluate you, first impressions such as whether you arrive on time and whether you appear well organized at your first meeting may take on greater weight in the evaluation than they would under other circumstances.
- Be prepared to talk about the history of your relationship with your child's other parent and the history of both of your parenting of your child up to the present day. Also, consider what concerns you might have about the other parent's abilities as a parent, or instances that support these concerns. You may also be asked to provide some information about the family you grew up in. Anticipate anything negative that the other party, someone else, or a document might have told the GAL about you and think about how you can best respond. In many cases, a GAL will ask you directly what you think the other party will say about you. Keep in mind that you may have to address difficult subjects; be prepared to talk about them in a calm and succinct manner.
- When possible, submit things in writing or from a computer to the GAL. This shows organization and helps the GAL focus on the things you think are important. By preparing written documents, you also give yourself the opportunity to organize your thoughts and narrow in on the most important matters.
- Remember that the GAL is trying to figure out what is best for your child. If you present your points to the GAL in terms of what is best for your child, your information will be most helpful and relevant to the GAL. Also, a GAL will be more favorably impressed by a parent who is focused on what is best for their child rather than by a parent who appears focused on what that parent wants or needs.

## Throughout the Investigation/Evaluation

- Remember, the GAL may ask you questions based on things your child's other parent or someone else has said. This does not mean that the GAL believes those claims are true, but it is the GAL's job to investigate those claims. Try to respond calmly and factually, providing the information necessary to disprove or explain those claims. You will be asked to share your concerns about your child's other parent. Again, try to remain calm and factual, explaining why those concerns are relevant to the other parent's ability to care for your child or relevant to safety issues for your child or for you. Provide concrete examples wherever possible.
- Do your part to maintain a cordial relationship with the GAL and to remain available and cooperative with the GAL throughout the investigation. If you believe the GAL is doing something he or she should not be doing that is harmful to your case, you should consult with your attorney if possible. If you are not represented, you will need to try to find the GAL standard, or other legal basis for your belief that what the GAL is doing is incorrect. Evaluate how harmful this problem is to your case, whether the GAL is likely to make the changes you seek, and how likely it is that presenting your concerns to the GAL will cause friction with the GAL. Then if you conclude it is necessary to proceed, raise your concern tactfully and with reference to your legal sources.
- Do not expect that the GAL will be able to take action to prevent something that appears to be going wrong for your child. You may need to share information about this problem with the GAL so that the GAL can investigate it as part of his or her overall investigation or evaluation, but the GAL's role is limited to information gathering and report writing, not taking action to resolve problems that arise. If immediate help is required to resolve a problem, you may need to bring this issue to the judge if other professionals in the child's life are unable to help resolve the problem.
- It makes sense to give your child some information so that he or she will have a general idea of what to expect in the meeting with the GAL. The amount of information you provide will vary depending on your child's age, maturity level, exposure to the issues that the GAL will be investigating, and your child's personality. In general, it makes sense to let a child know, in age-appropriate language, that the GAL is someone the court has asked to help the parents and the judge to figure out the best parenting schedule for the child. It is often a good idea to seek input from the GAL about how to explain the GAL's role to the child. While it is important to provide some information to the child, it is also important not to rehearse with the child what he or she will say. The GAL will be paying attention to whether the child's words appear to be his or her own and to reflect his or her own thinking and feelings. It is important that the child be free to discuss his or her own experience of your family and not your perspective or the other parent's.
- Keep copies of any documents that you provide to the GAL, including letters that you write to the GAL. After you meet with the GAL, you may also want to write down what you remember from the meeting. By keeping an organized record, you will be prepared to cross-reference your own facts against those in the GAL's report, and you will have a record already prepared in case you have to ask the GAL to change or supplement his or her report (see "Reading and Challenging the Report," below).

## Reading and Challenging the Report

- The GAL should notify you when his or her report is completed. The GAL should finish his or her report by the deadline in the appointment order unless he or she has requested additional time from the court. If you are represented by counsel, your lawyer will most likely get a copy of the report, which he or she will have you read. They are generally not allowed to give you a copy. If you do not have a lawyer, and the court has not provided specific instructions about how you will be able to see the report, you will likely have to go to the courthouse to read the report there, unless you file a motion, which the court allows, to have a copy of the report released to you. If you need to read the report in the courthouse, set aside plenty of time, because it is unlikely that you will be able to make a copy of the report. Bring along a pad and pen because you will want to take notes, or perhaps copy excerpts of the report.
- When you read the report, check for the following:
  - Is the information in the report accurate? If you see inaccurate information that is harmful to your case, consider writing to the GAL to provide information to correct the report or to refer the GAL to information you have already provided that conflicts with what is in the report. Even if the GAL does not then change his or her report, providing this information in writing creates a written record of your attempts to correct incorrect information in the report that might be helpful to you at a later stage in the case.

- Did the GAL address the questions in his or her appointment order?
- Was the GAL thorough in taking the steps that he or she should take in an investigation and evaluation? Did he or she meet with each of the parents at least once, meet with each of the children, visit each home, observe the child with each parent, review appropriate documents including relevant prior court pleadings, and report the relevant facts in his or her report? Note that the GAL is not always required to take all of these steps, but in general he or she should explain in the report why the GAL omitted one of these steps. The steps a GAL is generally expected to take are set out more fully in GAL Category F Standards Section 6 and Category E Standards Section 6.
- Was the GAL thorough in gathering the types of information judges expect from GAL investigations or evaluations? In general, the GAL is required to provide information on the history of the case (what happened in court), the parenting history (the roles that each of you has played in your child's life), the history of your family (information about you, the child's other parent, and the child(ren), and how all of you have functioned together as a family), and the developmental and parenting needs of your children (school functioning, special needs, sibling relationships, etc.).
- Did the GAL spend approximately equal time with you and your child's other parent? Note that this does not mean exactly equal, and note also that sometimes there are reasons that the GAL needed to spend more time with one parent than the other. Did the GAL interview people that each of you suggested he or she interview? The GAL is not required to interview everyone on your list, only those that he or she believes have significant, unbiased information that is relevant to the case. The GAL is most likely to interview professionals involved in the child's life, and then possibly other people involved in the child's life who are not personal friends or relatives, like coaches and activity leaders, if they have relevant information to provide. While the GAL may interview friends or relatives if they have played a significant role in the child's life or witnessed significant events, the GAL may not need to interview all friends and relatives on your list.
- Are the GAL's conclusions and recommendations based on facts in the report and do they make sense in light of the facts reported in the report? If there is no clear connection between the facts stated in the report and the GAL's conclusions and/or recommendations, this may reflect a problem in the report.
- If the problems that you find in the GAL report resulted in the report's being harmful to your position and the GAL is unwilling to change those aspects of the report after you have brought them to his or her attention, you may need to challenge the GAL's report through depositions, in an oral argument, or at trial through cross-examination. See chapter 2 of this book. Again, strongly consider retaining an attorney at this point if possible, as these challenges are difficult to make without an attorney.

## **YOUR RIGHTS DURING THE GAL INVESTIGATION OR EVALUATION**

It is important to be aware of your rights in the GAL investigation or evaluation process. These rights come from statutes, case law, and the GAL standards. Below are some of the most basic of these rights.

### **Confidentiality**

The GAL should warn you at the beginning of the investigation that anything that you share with the GAL verbally or in writing can be shared with the other people involved in your case. This means that anything you say or any documents you give to the GAL can, and most likely will, be reported to the judge, the opposing party, or that party's attorney. In addition, some limited information can be disclosed to others involved in the investigation as necessary to enable the GAL to conduct the investigation. The GAL is also required to give this same warning to your child in language your child can understand.

You do have a right to the confidentiality of certain of your records. This means that in order to obtain these records, the GAL must have your consent or a court order. Confidential records include your mental health counseling records; medical, health, and hospital records; DSS records; medical, alcohol, and drug abuse counseling records; criminal records (CORI and CARI records); prior reports, such as probation or court clinic records; domestic violence or sexual assault victim-counselor records; locations of battered women's shelters and rape crisis centers; mediation records; and alternative dispute resolution records. (See GAL Category F Standard 4.6.1 and Category E Standard 4.6.1 for a listing of these records and the steps the GAL must take to obtain them.) Often, it makes sense



for you to sign a release form giving your consent to the GAL's seeing those records, but if you have serious concerns about the GAL's seeing a confidential record that you believe is not relevant to the issues the GAL is investigating or evaluating, you may need to withhold your consent and be prepared to explain to the court the reasons that you have not consented.

With respect to your child's confidential records, the GAL may obtain some of these by simply getting the consent of the child's custodial parent. These include school and pediatric records. However, for the other more private types of records such as a child's counseling records, the custodial parent's consent is not enough. The court will need to appoint a second GAL, called a GAL to waive the child's privilege, to investigate and determine whether the importance of the records to the investigation or evaluation outweighs the child's interests in keeping those records private.

Be aware that some GALs are mandated reporters. A mandated reporter is someone who is required by law to report suspected abuse or neglect of a child to the Department of Social Services. Generally, mental health professionals are mandated reporters and attorneys, unless they are also mental health professionals, are not. However, an attorney, like any person, may still file a report with the Department of Social Services, even if he or she is not required to, if he or she has reasonable cause to believe your child is being abused or neglected.

## Safety

The GAL investigation and standards contain some important safety provisions. When there is a history of safety issues between you and the opposing party or between either of you and the child, the GAL must

- inquire about any safety concerns or potential risk to either party or the child at the outset of the investigation (e.g., mental illness, substance abuse, child abuse, domestic violence, other violent or criminal conduct) (Category F Standard, Category E Standard 5.2 and 4.3 commentary);
- conduct the investigation and communicate its findings in a manner to avoid harm to the child, parties, GAL, or others (Category F Standard 4.3 commentary, Category E Standard 4.3 commentary);
- arrange joint parent-child interviews, observations, or home visits only when such processes are safe (Category F Standard 4.3A, Category E Standard 4.3A);
- ensure that interviews are scheduled so that you and the opposing party do not come into contact during the interview process—for example, when safety is an issue, the GAL should not schedule interviews so that the two of you will see each other in the GAL's waiting room or near the building (Category F Standard 4.3B, Category E Standard 4.3C);
- not disclose residential or work telephone numbers, addresses, or other information that one of you has kept confidential for safety reasons (Category F Standard 4.3C, Category E Standard 4.3D);
- if there is an abuse prevention order in effect, or when the GAL has reasonable cause to believe that contact between you and the opposing party may be dangerous to the other party or to the child, the GAL must not recommend visitation or other arrangements that bring you and the other party into contact (Category F Standard 4.3D, Category E Standard 4.3 E); and
- warn the party or that party's attorney and contact the police as appropriate if the GAL believes either of you or the child is in danger of imminent physical harm from the other party (Category F Standard 4.3E, Category E Standard 4.3F).

## Impermissible Dual Roles

The standards clarify that a GAL may not be a guardian ad litem and also play another role in your case. (Category F Standard 1.4, Category E Standard 1.4.) This means:

- The GAL may not also be a mediator in your case. Although the GAL may in rare cases conduct a joint interview between you and the opposing party, or may talk with your attorneys about custody and visitation arrangements that may help resolve the case, the GAL may not conduct mediation between you and the opposing party. One reason is because mediation is by definition confidential, whereas, as discussed above, anything said to a GAL can be disclosed to other people involved in your case. For example, if the GAL tried to meet with the two of you together to try to resolve the case and you were to admit something about yourself in that discussion, as a mediator the GAL would have to keep the information confidential but as a GAL and a potential witness in your case, the GAL may be required to report that information to the court

if it was relevant to the investigation or evaluation. Because there is a conflict between the confidentiality obligations of a mediator and the reporting obligations of a GAL investigator, the GAL may not serve as both a mediator and a GAL on the same case. Other reasons include the fact that the court needs the GAL to focus on the investigation and/or evaluation of the case and not be distracted by other roles, and then make sure no conflict arises because a party does not accept what a GAL might recommend in the course of mediation.

- The GAL may not be a therapist to a party or a child involved in the case. Again, therapy is confidential, but information given to a GAL is not.
- The GAL is not the advocate for either party or for the child. The GAL's role is to investigate and report to the court on what custody and visitation arrangement is in the child's best interest. The GAL should not be advising you or the other party about what legal actions either of you should take, and should not be filing motions or arguing in court on behalf of either parent or the child (Category F Standard 1.3C, Category E Standard 1.3 C).

## **OTHER REQUIREMENTS OF THE GAL INVESTIGATION**

- The GAL's report must be filed on time (Category F Standard 3.3, Category E Standard 3.3). The GAL must file his or her report by the deadline stated in the court order, or obtain an extension of time by the court.
- The GAL must be qualified. The GAL must meet the minimum qualifications required for his or her type of appointment. For Category F attorney investigators, an attorney GAL/investigator must have at least three years of experience representing clients in Probate and Family Court cases.
- Category F investigators may also be
  - a clinician meeting requirements for Category E;
  - a licensed certified social worker;
  - a licensed social worker;
  - a licensed marriage and family therapist;
  - a licensed rehabilitation counselor or a licensed mental health counselor; or
  - a person with at least three years of experience after licensure conducting investigations in care and protection cases (G.L. c. 119, § 24, et seq.) in the Juvenile Court and/or in the Probate and Family Court, conducting investigations on issues of child custody and parenting time in paternity, guardianship of minor, adoption, state intervention, divorce, and postdivorce cases.
- The Category E/evaluator must be
  - licensed to practice medicine or psychology;
  - a licensed independent social worker;
  - a licensed marriage and family therapist;
  - a licensed rehabilitation counselor; or
  - a licensed mental health counselor and have at least five years of experience, since licensure, conducting clinical evaluations or therapy with family members involved in court proceedings that include issues of child custody.
- In addition, in cases involving the specialized areas of domestic violence, substance abuse, mental health issues, or child physical or sexual abuse, the GAL should have the experience and background necessary to thoroughly investigate and assess those issues and their implications for a custody and visitation plan.
- The GAL should interact with family members with respect (Category F Standard 4.1, Category E Standard 4.1). The Standards for GAL Investigators and Evaluators require that they approach all family members with an attitude of respect and openness to hear their accounts of the relevant facts. The investigation process is by its nature an intrusive one, and it is important to distinguish between situations where the GAL is just doing his or her job even though it feels intrusive to you and when the GAL is truly showing disrespect. It is difficult to ask the GAL to show more respect without creating unnecessary friction in your relationship. If you believe the GAL is treating you discourteously, impatiently, or scornfully, and you have considered your own contribution to this problem, you would first want to discuss your options with your attorney. If you do not have an attorney, it is generally helpful to take some time before reacting or to talk

with someone else whose judgment you trust. It is generally most effective to avoid directly criticizing the GAL. Instead you might want to ask the GAL if there is anything that you are doing that bothers the GAL, and/or to tell the GAL how his or her behavior is making you feel rather than what you believe he or she is doing wrong.

## **GAL COMPLAINT PROCESS**

What happens if the GAL does or says something in his or her investigation, report, or testimony to the court that significantly harms your case and is clearly improper under the law or the standards? Or what if the GAL is clearly not qualified from the outset to handle your investigation? If you have already brought the issue to the GAL's attention as tactfully as possible, but the GAL has not responded appropriately, if you have then brought the issue to the court's attention, again, as tactfully as possible, but the court has not required any change, you may wish to consider the formal complaint process. Before filing such a complaint, it is important to think through the likelihood that you will accomplish something positive by doing so and the risks of creating more problems, or delay, by doing so. Be aware that this complaint process is for the purpose of asking the chief justice of the court your case is in to consider removing the GAL from the GAL appointment list so that he or she will not be eligible for any further appointments. Although the court may determine that some lesser response is more appropriate, such as temporary suspension or further training, these are all serious consequences and the chief justice is not likely to order them except in the most serious situations.

If you believe the circumstances of your case justify such a complaint, you would follow the process set out in Supreme Judicial Court Rule 1:07, Uniform Practice I. Your complaint must be in writing, must specify the reasons that you are requesting the GAL be removed from the list, and must be addressed to the chief justice of the Probate and Family Court. The chief justice will send a copy of your complaint to the GAL, who will have an opportunity to respond. The chief justice will then decide whether an investigation is needed, and if so, will appoint someone to conduct the investigation. If the chief justice determines no action is required, the chief justice will inform both you and the GAL of this decision. If the chief justice determines that the GAL should be removed or that some lesser action should be taken, the chief justice submits this recommendation to the chief justice of the Trial Court (CJTC), who will make a decision within sixty days of receiving the chief justice's recommendation. You will receive a copy of the decision.

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## EXHIBIT 10A—Standards for “Category F” Guardian ad Litem / Investigators

### STANDARDS FOR CATEGORY F GUARDIAN AD LITEM INVESTIGATORS

Commonwealth of Massachusetts  
The Trial Court  
Probate and Family Court Department  
Hon. Sean M. Dunphy, Chief Justice

Effective: January 24, 2005

#### INTRODUCTION

A Category F Guardian ad Litem investigator (GAL) is appointed by the Probate and Family Court to investigate facts in cases involving the care and custody of minor children and other matters that implicate the interests or rights of children. G.L. c. 215, § 56A; G.L. 208, § 16. A GAL is often appointed in cases that raise questions about:

- a child’s best interests as related to custody and visitation;
- advantages or disadvantages of removing a child from the Commonwealth;
- changes in circumstances that might warrant modification of a judgment;
- existence of a de facto parent-child relationship;
- parental fitness as related to termination of parental rights or guardianship;
- paternity of a minor child; or
- other matters implicating the rights and interests of a minor child.

The purpose of these standards is to:

- provide accountability related to GAL investigations;
- improve custody, visitation, and other outcomes for children;
- promote uniformity and consistency in GAL investigations; and
- promote respect for the rights of parties and their children, including their safety.

These standards apply to all Category F guardian ad litem investigators.

#### 1. THE ROLE OF THE GAL INVESTIGATOR

The GAL performs duties that are within the scope of the court order of appointment.

##### 1.1 The GAL Shall Gather and Report Factual Data to the Court.

The role of the Category F GAL investigator is to gather and report factual information that will assist the court in making custody, visitation, or other decisions related to the welfare of a child. Unless the appointing judge specifies otherwise, the GAL investigator’s role is limited to gathering and reporting information to the court. The GAL may include recommendations in the report if the order of the court authorizes inclusion of such recommendations.

**Commentary.** The court, not the GAL, decides legal issues and ultimately makes credibility determinations and factual findings when facts are in dispute. The GAL reports on facts and avoids providing legal conclusions or legal analysis.

Inappropriate analysis: “This case presents a legal question of first impression as to whether the mother is entitled to relief from judgment. The national trend is to deny relief in this situation and in a recent case, the SJC hinted that it also would reject a claim based on weak facts such as those in this case.”

### **A. The GAL Investigator is Not a Clinical Evaluator and Shall Not Perform Clinical Assessments or other Clinical Functions.**

The GAL should provide descriptive information without clinical interpretations, even if the GAL is a mental health professional.

Example of a descriptive statement: “Mr. Jones said that he has felt very sad since his separation with his wife; he said he has trouble sleeping, has no appetite, and has missed numerous days of work because he is too depressed to get up.”

Example of improper clinical interpretation: “Mr. Jones appears to be clinically depressed.”

### **B. The GAL Shall Investigate Only those Areas Specified by the Court.**

If the GAL sees a need to broaden the scope of the investigation, the GAL shall seek authority from the court before broadening the investigation. For example, a GAL appointed to investigate the issue of visitation discovers that the major conflict between the parties involves a parent’s plan to remove the child out of state. The GAL must file a motion with the court before expanding the investigation to encompass fact gathering relating to the removal issue. Copies of any and all motions filed by a GAL must be sent to counsel of record and any pro se parties.

**Commentary.** This standard does not preclude a GAL from investigating factual issues that were not identified at the time of the appointment if they are relevant to the legal issues identified in the appointment.

#### **1.2 The GAL’s Role Requires Participation in the Trial and Discovery.**

After conducting the investigation and writing a report, the GAL shall be available for trial and for possible deposition. If the parties do not reach an agreement about their case, the GAL may be subpoenaed by a party or the court may request that the GAL be present for trial.

**Commentary.** Absent a protective order of the court, the GAL shall appear for deposition as required under the applicable rules and statutes as part of his or her responsibilities as the GAL.

#### **1.3 The GAL Shall Serve as an Impartial Investigator and Reporter.**

The GAL is an impartial investigator and reporter in all cases.

### **A. The GAL Shall Decline or Withdraw from the Appointment if a Conflict of Interest Exists, or the GAL has Information or Personal Relationships that Will Bias the Process or Outcome of the Investigation.**

If the GAL has any prior or existing direct or indirect relationships with parties, their families, their attorneys, material witnesses, or someone else connected with the family, the GAL must consider whether the GAL’s impartiality is compromised as a result of these relationships. The GAL shall decline the appointment if:

- The GAL or the GAL’s law firm previously advised or acted as counsel for a party, child, or other person closely aligned to a party, including but not limited to a party’s spouse, non-marital partner, or a material witness;
- The GAL has or had a dating or intimate relationship with any counsel of record, or a close personal relationship with any counsel of record that will impact the GAL’s ability to be unbiased;
- The GAL provided counseling or other services to a party or members of the family, or a material witness;
- The GAL was married to or had a personal relationship with a party, a member of the party’s family, a material witness, or another person closely aligned to a party;
- The GAL has or had pecuniary interests or financial involvement with a party, the party’s spouse or non-marital partner, a material witness, counsel for a party or other person closely aligned to a party;
- The GAL’s concerns about reprisal or adverse personal consequences if the report is unfavorable to a party will impede the GAL’s candor or ability to be impartial and render an unbiased report;
- The GAL is aware of other circumstances that will impede the GAL’s candor or ability to be impartial and render an unbiased report.

**Commentary.** If a GAL is aware of circumstances that indicate that the GAL may have a conflict of interest or other circumstances that may make it inappropriate for the GAL to serve as the investigator, the GAL shall disclose the information to counsel of record and any pro se parties. The GAL also shall immediately file a motion for instructions from the appointing judge as appropriate with notice to counsel and any pro se parties.

**B. The GAL Engages in Nondiscriminatory Practices.**

The GAL shall not engage in conduct manifesting bias or prejudice based on race, gender, religion, ethnicity, disability, age, socioeconomic status, marital status or sexual orientation against a party, witness, counsel, or other persons involved in the case.

**Commentary.** The GAL must be aware of how societal and personal biases may interfere with an objective investigation and recommendations. The GAL recognizes and strives to overcome any such biases. If the GAL is not able to do so, he or she must promptly decline or withdraw from the appointment. If the GAL considers factors related to race, gender, religion, ethnicity, disability, age, sexual orientation, marital status or socioeconomic status concerning a party in the investigation or report, the GAL must explain the relevance of these factors to the issues before the court.

**C. The GAL Investigator Shall Not Act as an Attorney or Legal Advocate for the Child.**

The GAL is an objective and even-handed reporter. The GAL shall not give legal advice or act as advocate or attorney for the child. In some cases, the child's wishes may be contrary to the child's best interests.

**Commentary.** A GAL is not a party to the case. A GAL is a witness to the case. A GAL shall not engage in direct or cross examinations of witnesses or conduct depositions. The GAL shall not file motions except as related to performance of the GAL's responsibilities and as provided in these standards.

**D. The GAL Does Not Represent Parties or Give Them Legal Advice.**

The GAL refrains from giving legal advice to parties, including but not limited to advice about how the law applies to the facts of their case, how to obtain or modify court orders, or how to draft legal documents. The GAL refers parties to their attorneys for legal advice. If a party is pro se, the GAL suggests that the party seek legal advice from an attorney.

**Commentary.** Many courts have "Lawyer of the Day" programs for indigent parties and many bar associations have lawyer-referral panels. Non-profit "legal aid" (a/k/a "legal services") programs may be able to provide free legal advice and representation to low income or indigent parties.

The GAL shall refrain from giving a party legal advice that he or she should drop a restraining order so that the parties may meet together with the GAL or engage in mediation pertaining to the restraining order. See G.L. c. 209A, § 3.

**1.4 The GAL Avoids Dual or Multiple Roles.**

The GAL shall not provide legal, mental health, mediation or other professional services to any party or the child during the investigation or pendency of the case.

**Commentary.** To provide such services during the investigation or pendency of the case is inconsistent with the GAL's role as an impartial investigator and reporter. The GAL, however, may provide information to the parties, the court, and counsel about community resources available to the parties, such as but not limited to substance abuse treatment programs or other professional services that may be helpful to the parties and their children.

**1.5 The GAL Adheres to Applicable Ethical and Professional Standards.**

The GAL shall adhere to the ethical guidelines and standards for his or her profession to the extent that these guidelines apply. An attorney must remain in good standing as a member of the bar and adhere to the Rules of Professional Conduct that apply to lawyers. See Mass. R. S. Ct. Rule 3:07. Likewise, mental health professionals must adhere to ethical and professional standards that govern their respective professions.

**Commentary.** There is no attorney-client confidentiality when an attorney serves as a GAL investigator because the investigator does not represent any party. If an attorney or mental health professional serving as a GAL is unable to perform his or her investigatory responsibilities because of a conflict with applicable professional standards, the GAL shall promptly file a motion to withdraw as the GAL with notice to counsel and any pro se parties.

## 2. COMPENSATION

GAL investigator's fees paid by the Commonwealth are set by the Administrative Office of the Trial Court. If the court order lacks clarity about who will pay for GAL services, the GAL shall file a motion for clarification by the appointing judge with notice to counsel and any pro se party. If the order specifies that compensation will be paid by the Commonwealth, the GAL is prohibited from charging additional fees to the parties. The GAL files the report in a timely fashion whether or not compensation has been paid.

**Commentary.** At present, Category F Guardian ad litem investigators paid by the Commonwealth are compensated in accordance with Memo No. 14 (February 28, 1997, Fiscal Year 1997) issued by the Administrative Office of the Trial Court. The GAL also may file a motion with notice to counsel and any pro se party for an extension of hours beyond the number of hours set forth in the order of appointment for approval by the judge who appointed the GAL.

## 3. UPON RECEIVING THE APPOINTMENT

The GAL carefully reviews the order of appointment to determine the scope of the investigation and the duties to be performed.

### 3.1 The GAL Clarifies the Scope of the Appointment and Duties as Necessary.

If the GAL is uncertain about the areas to be investigated or the GAL's responsibilities, the GAL shall file a motion for clarification for hearing before the appointing judge with notice to counsel and pro se parties.

**Commentary:** A Category F investigative appointment should indicate that the GAL shall "investigate" certain issues, rather than "evaluate" the issues. If the order includes both mandates, the GAL should file a motion for clarification for hearing before the appointing judge with notice to counsel and any pro se party.

### 3.2. The GAL Determines Whether he or she has the Requisite Expertise and Competence in the Areas to be Investigated.

If the GAL lacks the necessary experience, expertise or competence to conduct an investigation of the issues, the GAL shall decline the appointment.

### 3.3 The GAL Determines Whether the GAL's Personal and Professional Schedule Permit a Timely Report.

The GAL reviews the areas to be investigated and the tasks to be performed. If the GAL will not be able to complete a report by the designated deadline, the GAL shall promptly decline the appointment.

**Commentary.** If the GAL determines after commencement of the investigation that additional time will be needed to complete the investigation, the GAL may file a motion to extend the deadline with notice to counsel and any pro se party. The motion shall include a new proposed due date for the report so that the judge may determine whether the deadline should be extended or the appointment should be vacated.

### 3.4 The GAL Promptly Accepts or Rejects any Appointment.

The GAL shall promptly accept or reject the appointment no later than twenty days after the GAL receives it, or earlier if requested by the court. The GAL accepts or rejects the appointment by returning the completed form to the court.

## 4. THROUGHOUT THE CASE

### 4.1 The GAL Maintains an Attitude of Respect.

The GAL shall approach all family members and parties with an attitude of respect and openness to hear their account of the relevant facts regardless of any allegations that have been made. The GAL shall be patient, courteous,

and dignified in his or her interactions with litigants, witnesses, attorneys, and others with whom the GAL deals in this official capacity.

**Commentary.** The GAL may limit the number of telephone calls and contacts made by a party or attorney as is reasonable given the particular circumstances. The GAL may seek assistance from the court on issues related to the GAL's safety or to address inappropriate conduct by a party related to the investigation. In such instances, a motion must be filed with the court with a copy sent to counsel of record and any pro se parties.

#### **4.2 The GAL is Diligent and Adheres to Time Deadlines.**

The GAL shall adhere to all time frames set forth in the order of appointment as applicable.

**Commentary.** If the report is not filed on time, the Probation Office notifies the judge and seeks further instruction from the court. Probate and Family Court Standing Order 2-98. If the GAL needs more time to complete the report, the GAL shall file a motion with notice to counsel and pro se parties to extend the deadline prior to the date when it is due. The motion shall indicate the proposed due date for the report. The GAL shall complete the report even if a party declines to participate or an attorney indicates that the case may settle.

#### **4.3 The GAL Maintains Safety.**

The GAL shall make every reasonable effort to ensure the safety of all parties and their children. To implement this requirement, the GAL shall:

- A. Arrange joint parent-child interviews, home visits, or observations of a party with the children only when such processes are safe.
- B. Arrange interview schedules so that parties do not come into contact during the interview process when domestic violence is alleged or identified as a possible issue.
- C. Inquires about and refrains from disclosing, directly or indirectly, residential, telephone, work, or other location information that a party has kept confidential for safety reasons.
- D. Refrain from recommending visitation or other arrangements that bring the parties into contact when an abuse prevention order is in effect, or when the investigator has reasonable cause to believe that such contact may be dangerous or harmful for either party or the child.
- E. Warn the party, the party's attorney and contact police as appropriate if the GAL believes that a party or child is in danger of imminent physical harm from the other party in the case.

**Commentary.** To ensure the safety of the parties and their children, the GAL should screen for previously undisclosed safety issues in separate interviews with the parties early in the investigation. Depending on the circumstances, the other party, the child, the GAL, or others may be at risk if there are issues of mental illness, domestic violence, child abuse, or substance abuse. The GAL should attempt to gather and communicate information in ways that avoid harm to parties, the child or children, or others involved in the case. The GAL shall consider the safety of the parties and other family members when he or she makes recommendations and determines how the information he or she has collected will be reported to the court.

##### **4.3.1 The GAL Files Mandatory "51A" Reports When Required and as Appropriate.**

In cases of suspected child maltreatment, many mental health professionals are required to file a "51A" report. G.L. c. 119, § 51A. However, a lawyer or mental health professional, who is not a mandated reporter, may still report suspected abuse or neglect as necessary if a child is at risk. If the GAL has reasonable cause to believe a child is in imminent danger, the GAL should report this information to the police department and should also report the information to the Court through an emergency motion for instructions with the required notice to counsel and pro se parties.

#### **4.4 The GAL Shall Use a Process for Communication and Collection of Information that is Conducive to Disclosure of Information and Fair to the Parties.**

The GAL shall provide each party with a separate interview so that each party may speak with candor. The GAL encourages parties and their attorneys to provide additional relevant information and documents. The process for



communications must be even-handed and provide each party with the opportunity to present relevant information and respond to relevant allegations by the opposing party. The GAL also affords a pro se party the same procedural protections that the GAL affords a party with an attorney.

#### **4.4.1 The GAL Shall Conduct All Oral and Written Communications with Attorneys and Pro Se Parties in a Manner that Avoids the Question of Bias.**

The GAL shall send counsel of record and pro se parties copies of any motions and other documents filed by the GAL in court, except for the GAL report. If the GAL sends a substantive written communication to one counsel or a pro se party, the GAL shall send a copy of the communication to the opposing counsel or pro se party.

**Commentary.** A GAL's written communications to one party or attorney about administrative or scheduling matters, such as arranging a time for an interview or signing releases, are not substantive matters. While it is not required by any statute or rule, attorneys may agree to send copies of all written correspondence addressed to the guardian ad litem to the opposing counsel.

#### **4.4.2 The GAL Arranges for a Qualified Interpreter if a Party or Child is Unable to Understand or Use the English language.**

The need for an interpreter goes beyond the courtroom if a party is not completely fluent or comfortable in using the English language. The party, child or child's guardian should be interviewed to determine the communication system to be used and the party's or child's comfort with it. In the case of a deaf or hard-of-hearing person, this communication system could be oral, cued-speech, finger spelling, sign language, or a combination of all of them. People may prefer to use their native language. Using a child as an interpreter is not appropriate, and using relatives or friends may have a chilling effect on what is disclosed. If the child or a party has limited or no English language skills and the GAL does not speak the language, every effort should be made to ensure that only qualified interpreters are used. Any authorizations for release of information and other forms should be translated for such parties. Likewise, a party or child may have a need for a sign language interpreter.

**Commentary.** If a party does not supply a qualified interpreter, the GAL may file a motion in court for appointment of a qualified interpreter that includes a request that the Commonwealth pay for the interpreter's services if a party is indigent, or that a party or parties who are not indigent pay for the interpreter. Counsel and pro se parties shall be given notice of the motion. If the GAL desires payment from or reimbursement from the Commonwealth for the cost of using an interpreter, the GAL must receive approval from the court before incurring the expense. Bias or incompetence of an interpreter can lead to omitted and inaccurate communications with the GAL. The interpreter should not have a conflict of interest or a relationship with a party or other person that will bias the interpretation. The Supreme Judicial Court has promulgated standards for court interpreter services and qualifications which are available on the internet at: <http://www.state.ma.us/courts/formsandguidelines/index.html>.

Certain cases may require that the GAL possess or utilize cross-cultural competence and expertise. For example, if the parents dispute whether a certain religious ritual was integral to a certain faith and whether the ritual should be performed on the child. The role of the interpreter, however, is to facilitate communication rather than serve as a substitute for an expert on a particular culture.

#### **4.5 The GAL Answers Appropriate Questions about the GAL's Credentials or Role.**

The GAL answers appropriate questions about the GAL's education, training, experience, practice areas, professional affiliations, and the process of the GAL investigation.

**Commentary.** If requested by counsel or a pro se party, the GAL shall provide a copy of his or her curriculum vitae to said counsel or party. However, questions pertaining to the GAL's personal life need not be answered.

#### **4.6 The GAL Maintains Confidentiality.**

The information gathered by the GAL for the court is confidential. The GAL shall not disclose confidential and personally identifiable information about the parties, their children, or the services rendered by the GAL to a person who is not a party or counsel in the case, except as necessary to gather information to complete the investigation and report, or to perform responsibilities related to the order of appointment. This prohibition is permanent and applies to the GAL's writings, lectures, or other media communications.

**Commentary.** If a GAL has questions regarding release of information pertaining to the parties, child, or the investigation and report, the GAL may file a motion for instructions with the court with notice to counsel and any pro se party.

#### **4.6.1 The GAL Obtains Appropriate Release Forms or Court Orders before Obtaining Privileged and Confidential Information about the Parties and their Children.**

Many of the most common and relevant records that are subject to statutory privileges or other restrictions can be obtained with an appropriate authorization for release of the information or a court order.

- Department of Social Services (DSS) records. A party's release form or court order is needed to access records. The GAL can obtain the DSS file with a release from a party but privileged information must be redacted. 10 C.M.R. § 12.09(1)-(3).
- Medical, health and hospital records. A party's release form or court order is needed to access records. G.L. c. 111 § 70, § 70E(b); The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (HIPAA).
- Psychotherapist records. A party's release form or court order is needed to access records pertaining to an adult from a psychotherapist whose communications are privileged. G.L. c. 112, § 8GB; *Commonwealth v. Bernard*, 424 Mass. 32, 673 N.E.2d 1220 (1996). G.L. c. 233, § 20B.
- Social Worker records. A party's release form or court order is needed to access records. G.L. c. 112, §§ 135A, 135B.
- Alcohol and drug abuse programs records. A party's release form and/or court order may be needed to access records. 42 U.S.C. §§ 1175, 290 dd-3.
- School records. If a party has shared or sole legal custody, he or she may authorize release of records, except for a parent or party whose access is restricted by a Chapter 209A or other court order. G.L. c. 71, § 34H; G.L. c. 208, § 31.
- Criminal Offender Record Information (CORI and CARI). The GAL can most easily review these records with a court order through the Probation Department, or request the records through the Criminal History Systems Board.
- Prior GAL reports, Probation Office or Court Clinic reports involving the parties. The GAL must file a motion with the court with notice to the parties to access these records.
- Domestic Violence or Sexual Assault Victim-Counselor records. Confidential communications cannot be disclosed in civil actions by court order and are not discoverable without the victim's prior consent. G. L. c. 233, §§ 20J, 20K.
- Victim program locations. Locations of battered women's shelters, domestic violence, and rape crisis programs may not be disclosed by court order, or otherwise to the GAL. G. L. c. 233, §§ 20J, 20K.
- Mediator Records. Communications made during mediation with a mediator are privileged and the court cannot order disclosure. G.L. c. 233, § 23C.
- Alternative dispute resolution information. The Probation Department of the Probate and Family Court may release the information to the GAL if the court orders release of the information or the parties consent to the release of information.

The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (HIPAA) requires that health providers may only release personal health information if the release signed by a party complies with the provisions of the federal law. Even if no statutory privilege applies to the information sought by the GAL, the provider or keeper of other records (e.g. unlicensed support group leaders, batterer intervention programs) may also request a written release from their client. In some instances, the order for appointment of the GAL will provide that the GAL is permitted to access certain records and information; this obviates the need for a party's authorization for release of the information.

**Commentary.** Some third parties or providers may be unaware of protections that apply to records or confidential information relating to the parties or the children. The GAL, however, shall only review the information after appropriate releases or court orders for access to the information have been provided to the holder of the

information. If a privilege is not properly waived, a judge may allow a motion to strike reference to the information from the GAL report.

#### **4.6.2 The GAL Recognizes that Children’s Rights to Confidentiality are Different than Other Parties’ Rights to Confidentiality.**

The GAL shall obtain authorizations for release of information pertaining to children from the children’s parents or legal guardians. A parent, however, cannot waive a child’s psychotherapy or social worker privilege. If the counseling information is needed but protected by a privilege, the GAL or counsel must return to the appointing judge and present a motion for appointment of another guardian ad litem to investigate whether waiver of the child’s psychotherapy privilege is in the child’s best interest. Adoption of Diane, 400 Mass. 196, 201 (1987); G.L. c. 233, § 20B. The motion should indicate the scope of the information sought and the GAL’s reason for seeking the information. Counsel and pro se parties must have notice of the motion. If the court later waives the privilege, the GAL may access the information.

**Commentary.** A parent or parents with legal custody of the child, or a party granted legal guardianship of the child, may authorize access to most other records of the child. If a parent or parents refuse to authorize release of information that is important to the investigation, the GAL may file a motion for access to the information with notice to counsel and pro se parties.

### **5. COMMENCEMENT OF THE INVESTIGATION**

After the GAL accepts the appointment, he or she promptly schedules initial investigatory contacts with each of the parties and their attorneys if they are represented.

**Commentary.** If a party has an attorney, the GAL should first make contact with the attorney. The GAL may find it helpful to send a letter of introduction to counsel and pro se parties outlining the investigative process. The GAL should use additional means of communication, however, if a party’s primary language is not English, or there are literacy or other barriers impacting written communication. The GAL can determine more easily if a party understands what is communicated in a face-to-face interview.

#### **5.1 The GAL Provides an Explanation of the GAL’s Role and a Lamb-type Warning at the Commencement of the Investigation.**

The GAL must explain the GAL’s role and the purpose of the investigation to the parties. The GAL shall inform the parties how the information gathered by the GAL will be used. The GAL must provide a “Lamb warning” that explains there are no “off the record” discussions and any information collected by the GAL may appear in the GAL report, be disclosed in court or to the other party, *Commonwealth v. Lamb*, 1 Mass. App. Ct. 530 (1973), or otherwise disclosed as required or permitted by law. As appropriate based on the child’s level of maturity, the GAL should provide a similar explanation of the investigative process and a Lamb warning to a child, but modified to reflect the child’s age and level of understanding. If the GAL interviews other witnesses, they also must receive a Lamb warning.

**Commentary.** To ensure a person understands the Lamb warning, the GAL should ask the person to summarize it for the GAL. The parties or witnesses should be informed that while they are encouraged to provide information, they may decline to answer a question and have an attorney present during any interview. Increasingly, parties represent themselves in court. Therefore, the GAL should avoid use of professional jargon or legalese that a party may not understand. The GAL should strive to explain things in simple language and terms as appropriate so that a party with a limited educational background or language ability can better understand what the GAL is communicating.

#### **5.2 The GAL Inquires if the Parties have Relevant Safety Concerns.**

The GAL shall inquire at the outset of the investigation about any safety risks related to the investigation for either party, the child, or others because of any party’s mental illness, substance abuse, domestic violence, child abuse, or history of violence against others. The GAL should attempt to conduct the investigation in such a manner as appropriate to avoid likely harm to the child, a party, the GAL, or others.

### **5.3 The GAL Explains the Limits on Confidentiality and Complies with Legal and Ethical Standards Governing Disclosure of Privileged Communications.**

The GAL shall obtain information or review records after appropriate authorizations for release of information are executed or the court orders release of the information. The GAL shall respect the parties' and their children's right to confidentiality. Before obtaining an authorization for release of records or other information from a party, the GAL should inform the party how the information will be used. The GAL should also disclose that any information obtained by the GAL could appear in the GAL report, be disclosed to the other party, put into evidence during court proceedings or depositions, or disclosed to others as necessary to complete the investigation, discovery, or trial of the case. The authorization for release of information form given to a party by the GAL shall include but is not limited to who the information is sought from and the duration of the authorization of the release. A party should also be informed that he or she has a right to seek legal advice before signing a release and may decline to sign an authorization for release of information. A party may direct that all release forms be sent directly to counsel of record. If a party consents to release of information, the GAL should use forms for release of information that comply with applicable laws and that are acceptable to providers. The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-19 1 (HIPAA) requires that health providers may only release personal health information if the release form complies with the provisions of the federal law.

**Commentary.** The GAL should not seek confidential information unless it is necessary. If a party objects to release of certain information, the GAL may file a motion to obtain this information. G.L. c. 233, § 20B; G.L. c. 112, § 135B; *Commonwealth v. Bernard*, 424 Mass. 32 (1996). A parent cannot consent to release of a child's psychotherapy information. See Section 4.9. 2.

## **6. INVESTIGATION SOURCES AND METHODS**

The GAL shall conduct the investigation in a fair and balanced manner. The GAL should obtain similar types of information about each party. If the case involves more than one child, each child's best interests must be addressed unless the court orders otherwise. If the GAL is unable to report on all of the children, the GAL shall indicate why in the report.

**Commentary.** Depending on the circumstances, the GAL may need to spend more time investigating facts that relate only to one party, especially if such facts are disputed, difficult to investigate, or new information arises about that parent. The GAL may have satisfactory information about one parent, but incomplete data about the other parent. For example, further investigation of alleged drug use might be needed if a party's drug testing results are unreliable because the facility did not monitor how samples from the party were collected, or new sources indicate that the party has used drugs since the time of the last testing.

### **6.1 The GAL Spends Sufficient Time Interviewing Parties and Investigating their Concerns as Necessary to Gather Relevant Information.**

The GAL conducts an initial interview with each party and additional interviews with each party and other witnesses as necessary to gather relevant information. In addition, the GAL may gather information by telephone, email, and or other means.

**Commentary.** A party is permitted to have counsel present during an interview, but the GAL controls the interview and conducts the questioning. If counsel directs a party to refuse to answer a question or plead the Fifth Amendment against self-incrimination, the GAL moves on to other questions, noting the objection. Such objections do not prohibit the GAL from using other sources to obtain the information. If the GAL does not meet with any party, the GAL explains why in the report.

### **6.2 The GAL Asks Each Party about Relevant Witnesses and Documents and Investigates these Sources of Information as Appropriate.**

As a starting point, the GAL invites counsel and parties to provide relevant information, including a fact summary, procedural history, relevant documents, and a list of witnesses and professionals who can provide relevant information. In deciding what records to review or witnesses to interview, the GAL considers the likelihood that relevant information will be obtained, with reasonable convenience, efficiency, cost, and physical safety of a party, child or informant. The order of appointment also may direct the GAL to contact certain witnesses or sources.

**Commentary.** In determining what witnesses to interview, the GAL may also consider: the number of witnesses suggested, whether the witness directly witnessed important events or the aftermath of important events, the potential bias of the witness, the importance of the interview to a party, and other relevant considerations. At the beginning of each collateral witness or party interview, it is important that the GAL explain the GAL's role and the limits of confidentiality. The GAL shall access information after appropriate release forms are provided to professionals. In addition to oral communications, the GAL may provide written questions and accept additional written responses from witnesses or collateral sources.

### **6.3 The GAL Accesses Original Sources When Possible.**

To increase the reliability of reported information, the GAL investigates original sources of information.

For example: John Jones says that Jane Doe saw the parties' son drinking beer at a soccer game. The GAL speaks with Jane Doe to ascertain what she observed. For example: a police report indicates that the child told his soccer coach that the child's parent supplied the beer. The GAL speaks with the coach and the child.

### **6.4 The GAL Uses Multiple Fact Sources When Possible.**

If certain events or facts are disputed, the GAL should investigate more than one source of information relating to the events or allegations when possible. The parties should be encouraged to provide names of witnesses who were present, written reports, or other relevant evidence related to the event or allegation.

**Commentary.** For example, the husband disputes the wife's claim that the husband told her that he was treated at Cambridge Hospital after he attempted suicide by taking an overdose of sleeping pills and cocaine. The GAL contacts the hospital and interviews any other witnesses with direct knowledge about the disputed event or his statements about it. Hospital records in the case lead to other relevant sources of information such as "911" call records, a police report, and an ambulance report, including a copy of a suicide note found in the ambulance. The GAL reports all the relevant facts collected about the disputed allegation.

### **6.5 The GAL Conducts a Home Visit When Appropriate.**

Ordinarily, home visits can yield valuable information, but on occasion a home visit is not indicated. Factors to consider in deciding whether to conduct home visits include: whether issues or problems with either home are alleged, cost and time involved, location, and the likelihood of obtaining relevant information not accessible in other ways. If no home visit is conducted, the GAL shall explain why that decision was made in the report.

**Commentary.** If home visits are conducted, care must be exercised so that inequality in housing conditions or perceived wealth do not lead to bias. A person, who is a fit parent and caretaker for the child, also may experience transitional or temporary housing difficulties as a result of separation from the other party, nonpayment of support, inadequate financial support, or relocation related to domestic violence or loss of income.

### **6.6 The GAL Meets with the Children.**

The GAL meets with the children as part of the investigation. Children can offer useful information and should be offered the opportunity to provide information about themselves and their family. The conditions under which children are interviewed must be carefully considered, including what conditions will put the child most at ease and yield the most useful information. The GAL shall explain the reasons for not meeting with any of the children in the GAL report.

**Commentary.** Some children may be much less candid in the interview if a parent or the parents are present during the child's interview, or are visible or able to hear the interview.

### **6.7. The GAL Observes Children with Each Parent When Appropriate.**

The GAL should observe the child with each parent when appropriate. This often provides valuable information about the parent-child relationship.

**Commentary.** The GAL has a duty to avoid further harm to children when possible. If concerns are raised that a child will be traumatized or at risk by contact with a parent (e.g. due to severe neglect or abuse, exposure to

domestic violence, traumatic or unpredictable absence, or other inappropriate behavior) a parent-child observation may not be indicated. The GAL explains the reasons for not observing children with each parent in the report.

### **6.8 The GAL Considers the Need for any Further Information Necessary to Complete the GAL investigation and Provide a Comprehensive Report.**

The GAL shall collect and review documents as well as conduct additional interviews of the parties, each of the children and other witnesses until the necessary information is fully gathered.

## **7. SCOPE AND CONTENT OF THE INVESTIGATION**

A comprehensive history creates a context for understanding the current issues in dispute. The nature and extent of the family history obtained, through both interviews as well review of documents depends on the particular family's circumstances and the directives contained in the order of appointment. However, it is commonplace to obtain the:

### **A. History of legal proceedings and prior investigations.**

- The nature of the case, including the parties and children involved, relevant procedural history, current orders, and the relief sought by each party;
- History of other cases involving the parties, including prior cases pertaining to parties or the children including, but not limited to Probate and Family Court, Juvenile Court, criminal, abuse prevention, or other relevant cases;
- Prior custody related investigations and evaluations, including GAL, Court Clinic, Probation, Department of Social Services, or other evaluations or assessments;

### **B. Facts designated by court order and the applicable law.**

- The issues that the court specifies for investigation in the order of appointment;
- Facts relevant to the legal standard that applies to the case for:
  1. modification of custody or visitation;
  2. termination of parental rights;
  3. guardianship of a minor;
  4. removal of the child from the Commonwealth;
  5. custody or visitation by a parent.

### **C. Relevant concerns raised in the case by each parent, including facts related to how each parent's proposed outcome serves or conflicts with the child's best interests.**

### **D. Parenting history.**

- With whom have the children lived and for how long;
- What parenting tasks have each parent performed, when, for how long;
- The competence with which each parent carried out parenting tasks;
- History of parents' past joint decision- making regarding children;
- Parent's present ability to communicate or make joint decisions;
- Whether a third party or either party is or was a primary caretaker;
- History and impact of a parent's substance abuse, mental illness, or domestic violence on the children and the parent's parenting ability;
- History of physical, sexual or emotional abuse of the children;
- History of past restraining orders and violence against others;
- Each parent's past and present parenting skills and deficits;
- The strength and quality of the parent-child relationships, emotional closeness, attachment, and perceptions of each other;

- Each parent's or potential caretaker's knowledge of the children, knowledge of parenting techniques, disciplinary practices, ability to distinguish his or her own needs from the needs of the children, and to understand and respond to the children's needs;
- The ability of the parent to promote and support appropriate social, emotional, and educational development in the children, and to provide a stable home environment for the children;
- Each parent's or potential caretaker's ability to support the children's relationship with the other parent as appropriate;
- Each party's ability to communicate and cooperate with the other parent regarding the children as appropriate, including the impact of substance abuse, mental illness or domestic violence on that ability.

E. The family history.

- History of parents' relationship, including if and for how long the parties lived together as a family;
- Parties' accounts of how difficulties began, how they were disclosed, or if they persist;
- Prior Department of Social Services involvement with family members;
- Children's present and past school functioning;
- Criminal history of both parties (CORI (Criminal Offender Record Information) or CARI (Court Activity Record Information));
- Sexual offense history (Sexual Offender Registry Information, or SORI);
- Substance abuse and substance use history of family members;
- Mental health treatment and history of family members;
- Relevant medical history or problems of family members;
- Presence of new relationships, partners or their children;
- Relationships with significant caretakers, grandparents, relatives, child care providers;
- Each parent's relationship with family of origin and partner's family;
- Education and employment history of parents;
- If relevant, ethnic, cultural, lifestyle, and religious factors.

F. Developmental status and parenting needs of the children.

- Each child's developmental history, functioning in school, peer relationships, medical and mental health history, activities, schedules ;
- Special needs of each child: medical, learning or developmental problems;
- Assessment of each child's adjustment to school, friends, community, and extended families;
- Child's temperament and response to transitions;
- Impact of change on child's routines, attachments, familiar environs;
- Child's exposure to, understanding of or concerns about a parent's needs, wishes, concerns, safety, or problems;
- Quality of relationship between siblings;
- Particular challenges for either parent or the child with each other .

## 8. REPORT WRITING

The report should address and relate to the areas of investigation designated by the order of appointment. The report should provide accurate, detailed and balanced information about the parties and their children.

### 8.1 The Report Should Appear Professional in Appearance, Format and Writing Style.

The report should be typed, well-written and neat in appearance. Pages must be numbered. The GAL shall attempt to avoid spelling, grammar or typographical errors in the report. The GAL should write the report in a way that is concise in words, yet able to encompass all the relevant facts and provide detailed information. The language used in the report

should be understandable to the average layperson and avoid jargon that may be confusing. The GAL should prepare a report that is well-organized. Use of headings, bold type, or underlining to separate sections or topics in the report may make a report easier to comprehend. The report shall be dated and signed by the GAL with the GAL's name typed below the signature. The report shall include the GAL's mailing or office address and telephone number.

### **8.2 The Report Should be Accurate, Objective and Unbiased.**

When writing the report, the GAL provides a balanced view of the parties that includes all of their relevant strengths and weaknesses. The information contained in the report should be accurate. It also should be as factual and detailed as possible. The GAL report should:

#### **A. Use descriptive statements rather than evaluative statements.**

Evaluative statement: "Michael is a cruel and aggressive boy."

Descriptive statements: "In his interview, Michael said he punches his younger brother, Joseph, almost every day. Michael's father reports that he had to interfere three times last week when Michael hit the family dog with a hockey stick."

#### **B. Provide ample details, but avoid inflammatory characterizations if possible.**

Derogatory statement: "Mr. Jones is well-known to the courts as a drunk."

Descriptive statement: "Mr. Jones was convicted in Somerville District Court of driving under the influence of alcohol in 1986, 1996, 2001, and in July, 2003."

#### **C. Provide past and present relevant facts relating to both parties and the children.**

1. Include all relevant facts that address the court's directives.
2. Include all relevant facts collected from all sources, including facts that are consistent and inconsistent with other reported facts.
3. Provide balanced and similar information about both parties;
4. Provide relevant and detailed information about all of the children.
5. Include facts that do not support the GAL's recommendations or conclusions.
6. Disclose what important information may be missing and why it missing.

#### **D. Include specific information and provide dates and pinpoint time frames if at all possible.**

Avoid use of vague phrases or time frames such as "in the past" or "occasionally" or "sometimes" if a more precise time frame is available. The GAL should provide detailed information.

Vague: "John says he used heroin in the past."

Specific: "John says he used heroin in May, 1996 and June, 1998."

Vague: "Mary states that John occasionally uses drugs."

Specific: "Mary states that she saw John use cocaine twice in August, 1998."

Vague: "The child has health problems."

Specific: "The child has diabetes."

### **8.3 The GAL Identifies the Sources of Information.**

Sources should be easily identified in the report. The GAL must list every person interviewed and the records reviewed with any relevant information about the informant or source.

- Date and Name of each person interviewed (e.g. Dr. Tom Jones on 9/5/03),



- Position, profession, place of employment (psychiatrist, General Hospital);
- Description of record reviewed (Dr. Jones' records regarding mother);
- Date the record was made and period it encompasses (July, 2002 to July, 2003);
- How information was obtained (e.g. in person, telephone call, written request);
- Date records were reviewed or obtained by the GAL (9/5/03);
- Informant or record author's relationship to the parties, child or family (Dr. Jones is mother's psychiatrist, but also saw her and the husband for marriage counseling in May, 2001).

If a source is not clearly identified, a party can move to strike the statement from the report.

Example of improper attribution: "Hospital staff said that Drew Smith was hospitalized there for three months last year." (Names of the staff and hospital are missing).

Use of hearsay statements is permitted in the report, but the GAL should always attempt to contact and also quote the original source in the report if possible.

#### **8.4 If a Party Fails or Refuses to Participate, the GAL Includes the Information that the GAL has Obtained in the Report.**

The GAL encourages parties to participate in the investigation. If a party does not participate, the GAL is still permitted to file a report and to disclose whatever information has been collected about that party from other sources. The report should disclose that such a party has not participated or declined to provide information.

**Commentary.** The GAL shall refrain from drawing conclusions about a party without a factual basis.

#### **8.5 Facts Shall be Separated in the Report from Recommendations or Conclusions.**

Only facts should be contained in the body of the investigation. The investigator's inferences, conclusions or recommendations based on the facts shall be confined to separate summary or recommendations sections of the report. Such material is then easier to redact if it is later excluded from evidence at trial and stricken from the report.

**Commentary.** The GAL's conclusions or recommendations should be consistent with the information that is collected; the GAL shall set forth the connection between the facts and the conclusions or recommendations. The trial judge is the ultimate fact finder. Thus, the GAL's conclusions as to whether a party has met his or her burden of proof should be avoided.

#### **8.6 The GAL Files a Timely Report and Informs Counsel and Pro Se Parties.**

The GAL should inform counsel and pro se parties when the report is filed at the court so that the parties can read the report. The GAL should inform parties requesting a copy of the report that the report is property of the court; it cannot be given out or shown to anyone, except the parties or their counsel. A court order may be required for any distribution of the report, even to parties or their counsel. The GAL shall not distribute copies of the report to the parties, counsel of record or anyone else unless the court orders that the GAL may release copies to such individuals.

**Commentary.** If information or recommendations in the GAL report have the potential of exposing a party or the child to danger, the GAL should consider advising the endangered parent or party about the date that he or she expects to file the report in court.

#### **8.7 THE GAL SHALL RETAIN ANY MATERIALS GATHERED OR CREATED DURING THE INVESTIGATION**

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.

**Commentary.** Notes or other materials created or obtained by a GAL may be sought by a party through discovery. The GAL's notes, written observations, or other materials created during interviews or telephone conversations should be descriptive, factual, and respectful in tone. Note taking should be objective and include quotations of witnesses and parties when possible.

## **EXHIBIT 10B—Standards for “Category E” Guardian ad Litem / Evaluators**

### **TABLE OF CONTENTS**

#### **CATEGORY E GAL/EVALUATOR STANDARDS**

##### **INTRODUCTION**

##### **1. THE ROLE OF THE GAL EVALUATOR**

**1.1 The GAL Shall Gather and Report Factual Data to the Court, and, when Competent to do so, Offer Clinical Opinions**

**A. The GAL Shall Investigate and Evaluate Only those Areas Specified by the Court.**

**1.2 The GAL’s Role Requires Participation in the Trial and Discovery.**

**1.3 The GAL Serves as an Impartial Investigator, Evaluator and Reporter.**

**A. The GAL Shall Decline or Withdraw from the Appointment if a Conflict of Interest Exists, or the GAL has Information or Personal Relationships that Will Bias the Process or Outcome of the Evaluation.**

**B. The GAL Engages in Nondiscriminatory Practices**

**C. The GAL Evaluator Shall Not Act as an Attorney or Legal Advocate for the Child.**

**D. The GAL Does Not Give Legal Advice or Act as Either Party’s Legal Advocate.**

**1.4 The GAL Avoids Dual or Multiple Roles.**

**1.5 The GAL Adheres to Applicable Ethical and Professional Standards.**

##### **2. COMPENSATION**

##### **3. UPON RECEIVING THE APPOINTMENT**

**3.1 The GAL Clarifies the Scope of the Appointment and Duties as Necessary.**

**3.2. The GAL Determines Whether he or she has the Requisite Expertise and Competence in the Areas to be Evaluated.**

**3.3 The GAL Determines Whether the GAL’s Personal and Professional Schedule Permit a Timely Report.**

**3.4 The GAL Promptly Accepts or Rejects any Appointment.**

##### **4. THROUGHOUT THE CASE**

**4.1 The GAL Maintains an Attitude of Respect.**

**4.2 The GAL is Diligent and Adheres to Time Deadlines.**

**4.3 The GAL Maintains Safety.**

**4.3.1 The GAL Files Mandatory “51A” Reports When Required.**

**4.4 The GAL Shall Strive to Minimize any Stress or Discomfort to the Child During or as a Result of the Evaluation Process.**

**4.5 The GAL Shall Use a Process for Communication and Collection of Information that is Conducive to Disclosure of Information and Fair to the Parties.**

**4.5.1 The GAL Shall Conduct All Oral and Written Communications with Attorneys and Pro Se Parties in a Manner that Avoids the Question of Bias.**

**4.5.2 The GAL Arranges for a Qualified Interpreter if a Party or Child is Not Fluent in the English language or a Sign Language Interpreter is Needed.**

**4.6 The GAL Answers Appropriate Questions about the GAL’s Credentials or Role.**

**4.7 The GAL Maintains Confidentiality.**

**4.7.1 The GAL Obtains Appropriate Release Forms or Court Orders before Obtaining Privileged and Confidential Information about the Parties and their Children.**

**4.7.2 The GAL Recognizes that Children’s Rights to Confidentiality are Different than Other Parties’ Rights to Confidentiality.**

##### **5. COMMENCEMENT OF THE EVALUATION**

**5. 1 The GAL Provides an Explanation of the GAL’s Role and a Lamb-type Warning at the Commencement of the Evaluation.**

**5.2 The GAL Inquires if the Parties have Relevant Safety Concerns.**

**5.3 The GAL Explains the Limits on Confidentiality and Complies with Legal and Ethical Standards Governing Disclosure of Privileged Communications.**

## **6. EVALUATION SOURCES AND METHODS**

**6.1 The GAL Shall be Familiar with Applicable Legal Standards and Procedures**

**6.2 The GAL Spends Sufficient Time Interviewing Parties and Investigating their Concerns as Necessary to Gather Relevant Information.**

**6.3 The GAL Asks Each Party about Relevant Witnesses and Documents and Investigates these Sources of Information as Appropriate.**

**6.4 The GAL Accesses Original Sources When Possible.**

**6.5 The GAL Uses Multiple Fact Sources When Possible.**

**6.6 The GAL Conducts a Home Visit When Appropriate.**

**6.7 The GAL Meets with the Children**

**6.8 The GAL Shall Interview the Children in a Developmentally Appropriate Manner**

**6.9 The GAL Observes Children with Each Parent When Appropriate.**

**6.10 The GAL Considers the Need for any Further Information Necessary to Complete the GAL Evaluation and Provide a Comprehensive Report.**

## **7. USE OF SPECIALIZED CLINICAL METHODS IN THE FORENSIC CONTEXT**

**7.1 The GAL Shall use Specialized Methods Only when Doing so is Likely to Produce Necessary, Relevant and Useful Information to Evaluate the Forensic Questions in the Case.**

**Psychological Testing**

**Sexual Abuse Evaluations**

**7.2 The GAL shall Only use those Specialized Methods that the GAL is Competent to use in the Forensic Context.**

**Psychological Testing**

**Sexual Abuse Evaluations**

**7.2.1 If the GAL is not Competent to Perform Psychological Testing or a Sexual Abuse Evaluation, the GAL shall make a Referral to, or Obtain a Pre-Referral Consultation with, an Appropriate Clinical Evaluator (henceforth, the “Designee”).**

**7.2.2 If the GAL is Competent to Perform Psychological Testing or a Sexual Abuse Evaluation, the GAL shall Consider Whether it is Nevertheless Useful or Necessary to have Another Professional Conduct the Testing or Sexual Abuse Evaluation.**

**7.3 The GAL Shall Only Interpret the Results of Psychological Testing and Sexual Abuse evaluations in the Context of Multiple Sources of Data.**

**7.4 The GAL Avoids Offering Psychiatric Diagnoses, Except when Special Circumstances Require the GAL to do so.**

## **8.0 SPECIALTY EVALUATION TOPICS**

**8.1 The GAL both Anticipates and Responds to Allegations or Concerns About Specialty Topics, and Determines Whether the GAL is Competent to Conduct Such Evaluations.**

**8.1.1 The GAL Asks the Parties about Key Issues which Might Warrant Specialized Attention.**

**8.1.2 Based upon the GAL’s Initial Review of the Case and the Terms of the Appointment, the GAL Determines Whether the GAL is Competent to Evaluate the Specialized Questions or Allegations Raised, or Whether Another Course of Action is Necessary.**

**8.2 The GAL Shall be Competent to Evaluate Specialized Topics Within a Forensic Context.**

**8.3 The GAL Incorporates the GAL’s Conclusions from the Specialty Areas with all other Data Gathered in the Evaluation to Complete a Functional Assessment of Parenting as it Relates to the Forensic Questions to be Addressed.**

**A. Substance abuse and Mental Illness**

**B. Domestic violence**

**C. Child Abuse**

**8.4 In Cases Involving but not Limited to Domestic Violence, Substance Abuse, Child Abuse and Mental Illness, the GAL Should Identify Supportive Services Believed Necessary to Successfully Implement a Custody and Access Plan**

**8.5 In Cases Where it is Appropriate that a Party’s Access to Children Proceeds in Stages, the GAL may Suggest a Process for Monitoring Such Access.**

## 9. SCOPE AND CONTENT OF THE EVALUATION

### 10. REPORT WRITING AND ANALYSIS

**10.1 The Report Should Appear Professional in Appearance, Format and Writing Style .**

**10.2 The Report Should be Accurate, Objective and Unbiased.**

A. Use descriptive statements and provide ample details, but avoid inflammatory characterizations if possible.

B. Provide past and present relevant facts relating to both parties and the children.

C. Include specific information and provide dates and pinpoint time frames if at all possible.

**10.3 The GAL Identifies the Sources of Information.**

**10.4 If a Party Fails or Refuses to Participate, the GAL Includes the Information that the GAL has Obtained in the Report**

**10.5 Facts Shall be Separated in the Report from Recommendations or Conclusions.**

**10.6 The GAL's conclusions or recommendations should be consistent with the information that is collected**

**10.7 The GAL shall Identify any Limits in the Information they were Unable to Obtain**

**10.8 The GAL Files a Timely Report and Informs Counsel and Pro Se Parties..**

## 11. THE GAL SHALL RETAIN ANY MATERIALS GATHERED OR CREATED DURING THE EVALUATION

### STANDARDS FOR CATEGORY E GUARDIANS AD LITEM/EVALUATORS

#### INTRODUCTION

A Category E Guardian ad Litem/Evaluator (GAL) is appointed by the Probate and Family Court to investigate and evaluate facts in cases involving the care and custody of minor children and other matters that implicate the interests or rights of children. G.L. c. 215, § 56A; G.L. c. 208, § 16. A GAL is often appointed in cases that raise questions about:

- a child's best interests as related to custody and visitation;
- advantages or disadvantages of removing a child from the Commonwealth;
- changes in circumstances that might warrant modification of a judgment;
- existence of a de facto parent-child relationship;
- parental fitness as related to termination of parental rights or guardianship;
- paternity of a minor child; or
- other matters implicating the rights and interests of a minor child.

The purpose of these standards is to:

- provide accountability related to GAL evaluations;
- improve custody, visitation, and other outcomes for children;
- promote uniformity and consistency in GAL evaluations; and
- promote respect for the rights of parties and their children, including their safety.

These standards apply to all Category E Guardians ad Litem/Evaluators.

#### 1. THE ROLE OF THE GAL EVALUATOR

The GAL performs duties that are within the scope of the court order of appointment.

##### **1.1 The GAL Shall Gather and Report Factual Data to the Court, and, when Competent to do so, Offer Clinical Opinions**

The role of the Category E GAL evaluator is to gather and report factual information, use clinical knowledge to interpret that data, and formulate clinical opinions to assist the court in making custody, visitation, or other decisions

related to the welfare of a child. Unless the appointing judge specifies otherwise, the GAL's role is limited to gathering and evaluating information and reporting it to the court. The GAL may include recommendations in the report if the order of the court authorizes inclusion of such recommendations. The GAL shall not offer clinical assessment or conclusions unless the GAL has the requisite expertise to offer such opinions.

**Commentary.** The court, not the GAL, decides legal issues and ultimately makes credibility determinations and factual findings when facts are in dispute. The GAL reports on facts and avoids providing legal conclusions or legal analysis.

#### **A. The GAL Shall Investigate and Evaluate Only those Areas Specified by the Court.**

If the GAL sees a need to broaden the scope of the evaluation, the GAL shall seek authority from the court before broadening the evaluation. Copies of any and all motions filed by a GAL must be sent to counsel of record and any pro se parties.

**Commentary:** This standard does not preclude a GAL from investigating and evaluating factual issues that were not identified at the time of the appointment if they are relevant to the legal issues identified in the appointment.

#### **1.2 The GAL's Role Requires Participation in the Trial and Discovery.**

After conducting the evaluation and writing a report, the GAL shall be available for trial and for possible deposition. If the parties do not reach an agreement about their case, the GAL may be subpoenaed by a party or the court may request that the GAL be present for trial.

**Commentary.** Absent a protective order of the court, the GAL shall appear for deposition as required under the applicable rules and statutes as part of his or her responsibilities as the GAL.

#### **1.3 The GAL Serves as an Impartial Investigator, Evaluator and Reporter.**

The GAL is an impartial investigator, evaluator and reporter in all cases.

#### **A. The GAL Shall Decline or Withdraw from the Appointment if a Conflict of Interest Exists, or the GAL has Information or Personal Relationships that Will Bias the Process or Outcome of the Evaluation.**

If the GAL has any prior or existing direct or indirect relationships with parties, their families, material witnesses, or someone else connected with the family, the GAL must consider whether the GAL's impartiality is compromised as a result of these relationships. The GAL shall decline the appointment if:

- The GAL has or had a dating or intimate relationship with any counsel of record, or a close personal relationship with any counsel of record that will impact the GAL's ability to be unbiased;
- The GAL provided counseling or other services to a party or members of the family, or a material witness;
- The GAL, by virtue of a professional relationship with a colleague (e.g. members of the same practice, members of a peer review/case review/ professional development group, supervisory/consulting relationship), has or has had access to information about the parties, children, material witnesses, that would otherwise not be available to the GAL in the normal course of the evaluation;
- The GAL was married to or had a personal relationship with a party, a member of the party's family, a material witness, or another person closely aligned to a party;
- The GAL has or had pecuniary interests or financial involvement with a party, the party's spouse or nonmarital partner, a material witness, counsel for a party or other person closely aligned to a party;
- The GAL's concerns about reprisal or adverse personal consequences if the report is unfavorable to a party will impede the GAL's candor or ability to be impartial and render an unbiased report;
- The GAL is aware of other circumstances that will impede the GAL's candor or ability to be impartial and render an unbiased report.

**Commentary.** If a GAL is aware of circumstances that indicate that the GAL may have a conflict of interest or other circumstances that may make it inappropriate for the GAL to serve as the evaluator, the GAL shall disclose the information to counsel of record and any pro se parties. The GAL also shall immediately file a motion for instructions from the appointing judge as appropriate with notice to counsel and any pro se parties.

### **B. The GAL Engages in Nondiscriminatory Practices**

The GAL shall not engage in conduct manifesting bias or prejudice based on race, gender, religion, ethnicity, disability, age, socioeconomic status, marital status or sexual orientation against a party, witness, counsel, or other persons involved in the case.

**Commentary.** The GAL must be aware of how societal and personal biases may interfere with an objective evaluation and recommendations. The GAL recognizes and strives to overcome any such biases. If the GAL is not able to do so, he or she must promptly decline or withdraw from the appointment. If the GAL considers factors related to race, gender, religion, ethnicity, disability, age, sexual orientation, marital status or socioeconomic status concerning a party in the evaluation or report, the GAL must explain the relevance of these factors to the issues before the court.

### **C. The GAL Evaluator Shall Not Act as an Attorney or Legal Advocate for the Child.**

The GAL is an objective and evenhanded reporter. The GAL shall not give legal advice or act as advocate or attorney for the child. In some cases, the child's wishes may be contrary to the child's best interests.

**Commentary.** A GAL is not a party to the case. A GAL is a witness to the case. The GAL shall not file motions except as related to performance of the GAL's responsibilities and as provided in these standards.

### **D. The GAL Does Not Give Legal Advice or Act as Either Party's Legal Advocate.**

The GAL refrains from giving legal advice to parties including but not limited to advice about how the law applies to the facts of their case, how to obtain or modify court orders, or how to draft legal documents. The GAL refers parties to their attorneys for legal advice. If a party is pro se, the GAL suggests that the party seek legal advice from an attorney.

**Commentary.** Many courts have "Lawyer of the Day" programs for indigent parties as well as family law facilitators and many bar associations have lawyer referral panels. Nonprofit "legal aid" (a/k/a "legal services") programs may be able to provide free legal advice and representation to low income or indigent parties.

The GAL shall refrain from giving a party legal advice that he or she should drop a restraining order so that the parties may meet together with the GAL or engage in mediation pertaining to the restraining order. See G.L. c. 209A, § 3.

#### **1.4 The GAL Avoids Dual or Multiple Roles.**

The GAL shall not provide legal, mental health, parent coordination, mediation or other professional services to any party or the child during the evaluation or pendency of the case.

**Commentary.** To provide such services during the Evaluation or pendency of the case is inconsistent with the GAL's role as an impartial evaluator and reporter. The GAL, however, may provide information to the parties, the court, and counsel about community resources available to the parties, such as but not limited to substance abuse treatment programs or other professional services that may be helpful to the parties and their children.

#### **1.5 The GAL Adheres to Applicable Ethical and Professional Standards.**

The GAL shall adhere to the ethical guidelines and standards for his or her profession to the extent that these guidelines apply.

**Commentary.** If the mental health professional serving as a GAL is unable to perform his or her evaluative responsibilities because of a conflict with applicable professional standards, the GAL shall file a motion to withdraw as the GAL with notice to counsel and any pro se parties.

## **2. COMPENSATION**

GAL evaluator's fees paid by the Commonwealth are set by the Administrative Office of the Trial Court. If the court order lacks clarity about who will pay for GAL services, the GAL shall file a motion for clarification by the

appointing judge with notice to counsel and any pro se party. If the order specifies that compensation will be paid by the Commonwealth, the GAL is prohibited from charging additional fees to the parties. The GAL files the report in a timely fashion whether or not compensation has been paid.

**Commentary.** At present, Category E Guardians ad Litem/Evaluators paid by the Commonwealth are compensated in accordance with Memo No. 14 (February 28, 1997, Fiscal Year 1997) issued by the Administrative Office of the Trial Court. The GAL also may file a motion with notice to counsel and any pro se party for an extension of hours beyond the number of hours set forth in the order of appointment for approval by the judge who appointed the GAL.

### 3. UPON RECEIVING THE APPOINTMENT

The GAL carefully reviews the order of appointment to determine the scope of the evaluation and the duties to be performed.

#### 3.1 The GAL Clarifies the Scope of the Appointment and Duties as Necessary.

If the GAL is uncertain about the areas to be evaluated, or the GAL's responsibilities, the GAL shall file a motion for clarification for hearing before the appointing judge with notice to counsel and pro se parties.

#### 3.2. The GAL Determines Whether he or she has the Requisite Expertise and Competence in the Areas to be Evaluated.

If the GAL lacks the necessary experience, expertise or competence to conduct an evaluation of the issues, the GAL shall decline the appointment.

#### 3.3 The GAL Determines Whether the GAL's Personal and Professional Schedule Permit a Timely Report.

The GAL reviews the areas to be evaluated and the tasks to be performed. If the GAL will not be able to complete a report by the designated deadline, the GAL shall decline the appointment.

**Commentary.** If the GAL determines after commencement of the evaluation that additional time will be needed to complete the evaluation, the GAL may file a motion to extend the deadline with notice to counsel and any pro se party. The motion shall include the reasons for the proposed extension and a new proposed due date for the report so that the judge may determine whether the deadline should be extended or the appointment should be vacated.

#### 3.4 The GAL Promptly Accepts or Rejects any Appointment.

The GAL shall promptly accept or reject the appointment no later than twenty days after the GAL receives it, or earlier if requested by the court. The GAL accepts or rejects the appointment by returning the completed form to the court.

### 4. THROUGHOUT THE CASE

#### 4.1 The GAL Maintains an Attitude of Respect.

The GAL shall approach all family members and parties with an attitude of respect and openness to hear their account of the relevant facts regardless of any allegations that have been made. The GAL shall be patient, courteous, and dignified in his or her interactions with litigants, witnesses, attorneys, and others with whom the GAL deals in this official capacity.

**Commentary.** The GAL may limit the number of telephone calls and contacts made by a party or attorney as is reasonable given the particular circumstances. The GAL may seek assistance from the court on issues related to the GAL's safety or to address inappropriate conduct by a party related to the evaluation. In such instances, a motion must be filed with the court with a copy sent to counsel of record and any pro se parties.

#### 4.2 The GAL is Diligent and Adheres to Time Deadlines.

The GAL shall adhere to all time frames set forth in the order of appointment as applicable.

**Commentary.** If the report is not filed on time, the Probation Office notifies the judge and seeks further instruction from the court in accordance with Probate and Family Court Standing Order 298. If the GAL needs more time to

complete the report, the GAL shall file a motion with notice to counsel and pro se parties to extend the deadline prior to the date when it is due. The motion shall indicate the proposed due date for the report. The GAL shall complete the report even if a party declines to participate or an attorney indicates that the case may settle. A party or GAL may file a motion to terminate the GAL appointment with notice to the parties or GAL as applicable if a case settles and the GAL's services are no longer necessary.

### **4.3 The GAL Maintains Safety.**

The GAL shall make every reasonable effort to ensure the safety of all parties and their children. To implement this requirement, the GAL shall:

- A. Arrange joint parent and child interviews, home visits, or observations of a party with the children
- B. Avoid interview strategies which put the child(ren) at risk of physical or psychological harm from one or both parents after the interview.
- C. Arrange interview schedules so that parties do not come into contact during the interview process when domestic violence is alleged or identified as a possible issue.
- D. Inquire about and refrains from disclosing, directly or indirectly, residential, telephone, work, or other location information that a party has kept confidential for safety reasons.
- E. Refrain from recommending visitation or other arrangements that bring the parties into contact when an abuse prevention order is in effect, or when the evaluator has reasonable cause to believe that such contact may be dangerous or harmful for either party or the child.
- F. Warn the party, the party's attorney and contact police as appropriate if the GAL believes that a party or child is in danger of imminent physical harm from the other party in the case.

**Commentary.** To ensure the safety of the parties and their children, the GAL should screen for previously undisclosed safety issues in separate interviews with the parties early in the evaluation. Depending on the circumstances, the other party, the child, the GAL, or others may be at risk if there are issues of mental illness, domestic violence, child abuse, or substance abuse. The GAL should attempt to gather and communicate information in ways that avoid harm to parties, the child or children, or others involved in the case. The GAL shall consider the safety of the parties and other family members when he or she makes recommendations and determines how the information he or she has collected will be reported to the court.

#### **4.3.1 The GAL Files Mandatory "51A" Reports When Required.**

In cases of suspected child maltreatment, many mental health professionals are required to file a "51A" report. G.L. c. 119, § 51A. However, a mental health professional who is not a mandated reporter may still report suspected abuse or neglect as necessary if a child is at risk. If the GAL has reasonable cause to believe a child is in imminent danger, the GAL should also report the information to the police department and should also report the information to the Court through an emergency motion for instructions with the required notice to counsel and pro se parties.

**Commentary.** If a GAL files a 51A report, the GAL should assess whether he or she can remain neutral and complete his or her duties free of bias.

### **4.4 The GAL Shall Use a Process for Communication and Collection of Information that is Conducive to Disclosure of Information and Fair to the Parties.**

The GAL provides each party with a separate interview so that each party may speak with candor. The GAL encourages parties and their attorneys to provide additional relevant information and documents. The process for communications must be evenhanded and provide each party with the opportunity to present relevant information and respond to relevant allegations by the opposing party. The GAL also affords a pro se party the same procedural protections that the GAL affords a party with an attorney.

#### **4.4.1 The GAL Shall Conduct All Oral and Written Communications with Attorneys and Pro Se Parties in a Manner that Avoids the Question of Bias.**



The GAL shall send counsel of record and pro se parties copies of any motions and other documents filed by the GAL in court, except for the GAL report. If the GAL sends a substantive written communication to one counsel or a pro se party, the GAL shall send a copy of the communication to the opposing counsel or pro se party.

**Commentary.** A GAL's written communications to one party or attorney about administrative or scheduling matters, such as arranging a time for an interview or signing releases, are not substantive matters. While it is not required by any statute or rule, attorneys may agree to send copies of all written correspondence addressed to the guardian ad litem to the opposing counsel.

#### **4.4.2 The GAL Arranges for a Qualified Interpreter if a Party or Child is Not Fluent in the English language or a Sign Language Interpreter is Needed.**

The need for an interpreter goes beyond the courtroom if a party is not completely fluent or comfortable in using the English language or needs an American Sign Language interpreter. Using a child as the interpreter is not appropriate, and using relatives or friends may have a chilling effect on what is disclosed. If the child or a party has limited or no English language skills and the GAL does not speak the language, a qualified interpreter should be used. Any authorizations for release of information and other forms should be translated for such parties. Likewise, a party or child may have a need for a sign language interpreter.

**Commentary.** If a party does not supply a qualified interpreter, the GAL may file a motion in court for appointment of a qualified interpreter that includes a request that the Commonwealth pay for the interpreter's services if a party is indigent, or that a party or parties who are not indigent pay for the interpreter. Counsel and pro se parties shall be given notice of the motion. If the GAL desires payment from or reimbursement from the Commonwealth for the cost of using an interpreter, the GAL must receive approval from the court before incurring the expense. Bias or incompetence of an interpreter can lead to omitted and inaccurate communications with the GAL. The interpreter should not have a conflict of interest or a relationship with a party or other person that will bias the interpretation. The Supreme Judicial Court has promulgated standards for court interpreter services and qualifications which are available on the internet at: <http://www.state.ma.us/courts/formsandguidelines/index.html>. Certain cases may require that the GAL possess or utilize cross-cultural competence and expertise. For example, if the parents dispute whether a certain religious ritual was integral to a certain faith and whether the ritual should be performed on the child. The role of the interpreter, however, is to facilitate communication rather than serve as a substitute for an expert on a particular culture.

#### **4.5 The GAL Answers Appropriate Questions about the GAL's Credentials or Role.**

The GAL answers appropriate questions about the GAL's education, training, experience, practice areas, professional affiliations, and the process of the GAL evaluation.

**Commentary.** If requested by counsel or a pro se party, the GAL shall provide a copy of his or her curriculum vitae to said counsel or party. However, questions pertaining to the GAL's personal life need not be answered.

#### **4.6 The GAL Maintains Confidentiality.**

The information gathered by the GAL for the court is confidential. The GAL shall not disclose confidential and personally identifiable information about the parties, their children, or the services rendered by the GAL to a person who is not a party or counsel in the case, except as necessary to gather information to complete the evaluation and report, or to perform responsibilities related to the order of appointment. This prohibition is permanent and applies to the GAL's writings, lectures, or other media communications.

**Commentary.** If a GAL has questions regarding release of information pertaining to the parties, child, or the evaluation and report, the GAL may file a motion for instructions with the court with notice to counsel and any pro se party.

##### **4.6.1 The GAL Obtains Appropriate Release Forms or Court Orders before Obtaining Privileged and Confidential Information about the Parties and their Children.**

Many of the most common and relevant records that are subject to statutory privileges or other restrictions can be obtained with an appropriate authorization for release of the information or a court order.

- Department of Social Services (DSS) records. A party's release form or court order is needed to access records. The GAL can obtain the DSS file with a release from a party but privileged information must be redacted. 10 C.M.R. § 12.09(1)(3).
- Medical, health and hospital records. A party's release form or court order is needed to access records. G.L. c. 111 § 70, § 70E(b); The Health Insurance Portability and Accountability Act of 1996, Pub. L. 10419 1 (HIPAA).
- Psychotherapist records. A party's release form or court order is needed to access records pertaining to an adult from a psychotherapist whose communications are privileged. G.L. c. 112, § 8GB; Commonwealth v. Bernard, 424 Mass. 32, 673 N.E.2d 1220 (1996). G.L. c. 233, § 20B.
- Social Worker records. A party's release form or court order is needed to access records. G.L. c. 112, §§ 135A, 135B.
- Alcohol and drug abuse programs records. A party's release form and/or court order may be needed to access records. 42 U.S.C. §§ 1175, 290 dd3.
- School records. If a party has shared or sole legal custody, he or she may authorize release of records, except for a parent or party whose access is restricted by a Chapter 209A or other court order. G.L. c. 71, § 34H; G.L. c. 208, § 31.
- Criminal Offender Record Information (CORI and CARI). The GAL can most easily review these records with a court order through the Probation Department, or request the records through the Criminal History Systems Board.
- Prior GAL reports, Probation Office or Court Clinic reports involving the parties. The GAL must file a motion with the court with notice to the parties to access these records.
- Domestic Violence or Sexual Assault Victim-Counselor records. Confidential communications cannot be disclosed in civil actions by court order and are not discoverable without the victim's prior consent. G. L. c. 233, §§ 20J, 20K.
- Victim program locations. Locations of battered women's shelters, domestic violence, and rape crisis programs may not be disclosed by court order, or otherwise to the GAL. G. L. c. 233, §§ 20J, 20K.
- Mediator Records. Communications made during mediation with a mediator are privileged and the court cannot order disclosure. G.L. c. 233, § 23C.
- Alternative dispute intervention information. The Probation Department of the Probate and Family Court may release the information to the GAL if the court orders release of the information or the parties consent to the release of information.

The Health Insurance Portability and Accountability Act of 1996, Pub. L. 10419 1 (HIPAA) requires that health providers may only release personal health information if the release signed by a party complies with the provisions of the federal law. Even if no statutory privilege applies to the information sought by the GAL, the provider or keeper of other records (e.g. unlicensed support group leaders, batterer intervention programs) may also request a written release from their client. In some instances, the order for appointment of the GAL will provide that the GAL is permitted to access certain records and information; this obviates the need for a party's authorization for release of the information.

**Commentary.** Some third parties or providers may be unaware of protections that apply to records or confidential information relating to the parties or the children. The GAL, however, shall review the information only after appropriate releases or court orders for access to the information have been provided to the holder of the information. If a privilege is not properly waived, a judge may allow a motion to strike reference to the information from the GAL report.

#### **4.6.2 The GAL Recognizes that Children's Rights to Confidentiality are Different than Other Parties' Rights to Confidentiality.**

The GAL shall obtain authorizations for release of information pertaining to children from the children's parents or legal guardians. A parent, however, cannot waive a child's psychotherapy or social worker privilege. If the counseling information is needed but protected by a privilege, the GAL or counsel must return to the appointing judge and present a motion for appointment of another guardian ad litem to evaluate whether waiver of the child's psychotherapy privilege is in the child's best interest. Adoption of Diane, 400 Mass. 196, 201 (1987); G.L. c. 233,

§ 20B. The motion should indicate the scope of the information sought and the GAL's reason for seeking the information. Counsel and pro se parties must have notice of the motion. If the privilege is waived, the GAL may access the information.

**Commentary.** A parent or parents with legal custody of the child, or a party granted legal guardianship of the child, may authorize access to most other records of the child. If a parent or parents refuse to authorize release of information that is important to the evaluation, the GAL may file a motion for access to the information with notice to counsel and pro se parties.

## 5. COMMENCEMENT OF THE EVALUATION

After the GAL accepts the appointment, he or she promptly schedules initial contacts with each of the parties and their attorneys if they are represented.

**Commentary.** If a party has an attorney, the GAL should first make contact with the attorney. The GAL may find it helpful to send a letter of introduction to counsel and pro se parties outlining the evaluation process. The GAL should use additional means of communication, however, if a party's primary language is not English, or there are literacy or other barriers impacting written communication. The GAL can determine more easily if a party understands what is communicated in a face-to-face interview.

### 5.1 The GAL Provides an Explanation of the GAL's Role and a Lamb-type Warning at the Commencement of the Evaluation.

The GAL must explain the GAL's role and the purpose of the evaluation to the parties. The GAL shall inform the parties how the information gathered by the GAL will be used. The GAL must provide a "Lamb warning" that explains there are no "off the record" discussions and any information collected by the GAL may appear in the GAL report, be disclosed in court or to the other party, *Commonwealth v. Lamb*, 1 Mass. App. Ct. 530 (1973), or otherwise disclosed as required or permitted by law. As appropriate based on the child's level of maturity, the GAL should provide a similar explanation of the evaluative process and a Lamb warning to a child, but modified to reflect the child's age and level of understanding. If the GAL interviews other witnesses, they also must receive a Lamb warning.

**Commentary.** To ensure a person understands the Lamb warning, the GAL should ask the person to summarize it for the GAL. The parties or witnesses should be informed that while they are encouraged to provide information, they may decline to answer a question and have an attorney present during any interview. Increasingly, parties represent themselves in court. The GAL should avoid use of professional jargon or legalese that a party may not understand. The GAL should strive to explain things in simple language and terms as appropriate so that a party with a limited educational background or language ability can better understand what the GAL is communicating.

### 5.2 The GAL Inquires if the Parties have Relevant Safety Concerns.

The GAL shall inquire at the outset of the evaluation about any safety risks related to the evaluation for either party, the child, or others because of any party's mental illness, substance abuse, domestic violence, child abuse, or history of violence against others. The GAL should attempt to conduct the investigation and evaluation in such a manner as appropriate to avoid likely harm to the child, a party, the GAL, or others.

### 5.3 The GAL Explains the Limits on Confidentiality and Complies with Legal and Ethical Standards Governing Disclosure of Privileged Communications.

The GAL shall obtain information or review records after appropriate authorizations for release of information are executed or the court orders release of the information. The GAL shall respect the parties' and their children's right to confidentiality. Before obtaining an authorization for release of records or other information from a party, the GAL should inform the party how the information will be used. The GAL should also disclose that any information obtained by the GAL could appear in the GAL report, be disclosed to the other party, put into evidence during court proceedings or depositions, or disclosed to others as necessary to complete the evaluation, discovery, or trial of the case. The authorization for release of information form given to a party by the GAL should include who the information is sought from and the duration of the authorization of the release. A party should also be informed that he or she has a right to seek legal advice before signing a release and may decline to sign an authorization for release of information. A party may direct that all release forms be sent directly to counsel of record.

If a party consents to release of information, the GAL should use forms for release of information that comply with applicable laws and that are acceptable to providers. The Health Insurance Portability and Accountability Act of 1996, Pub. L. 10419 1 (HIPAA) requires that health providers may only release personal health information if the release form complies with the provisions of the federal law.

**Commentary.** The GAL should not seek confidential information unless it is necessary. If a party objects to release of certain information, the GAL may file a motion to obtain this information. G.L. c. 233, § 20B; G.L. c. 112, § 135B; *Commonwealth v. Bernard*, 424 Mass. 32 (1996). A parent cannot consent to release of a child's psychotherapy information. See Section 4.6. 2.

## 6. EVALUATION SOURCES AND METHODS

The GAL shall conduct the evaluation in a fair and balanced manner. The GAL should obtain similar types of information about each party. If the case involves more than one child, each child's best interests must be addressed unless the court orders otherwise. If the GAL is unable to report on all of the children, the GAL shall indicate why in the report.

**Commentary.** Depending on the circumstances, the GAL may need to spend more time investigating facts or evaluating issues that relate only to one party, especially if such facts are disputed, difficult to investigate, or new information arises about that parent. The GAL may have satisfactory information about one parent, but incomplete data about the other parent. For example, further investigation of alleged drug use might be needed if a party's drug testing results are unreliable because the facility did not monitor how samples from the party were collected, or new sources indicate that the party has used drugs since the time of the last testing.

### 6.1 The GAL Shall be Familiar with Applicable Legal Standards and Procedures

The GAL shall be familiar with the law and the legal standards applicable to the questions the GAL has been appointed to evaluate.

**Commentary.** A GAL who is not an attorney, shall nonetheless have a sufficient understanding of the law to provide the judge with the facts that the judge will need to apply the applicable legal standard.

### 6.2 The GAL Spends Sufficient Time Interviewing Parties and Investigating their Concerns as Necessary to Gather Relevant Information.

The GAL conducts an initial interview with each party and additional interviews with each party and other witnesses as necessary to gather relevant information. In addition, the GAL may gather information by telephone, email, and or other means.

**Commentary.** A party is permitted to have counsel present during an interview, but the GAL controls the interview and conducts the questioning. If counsel directs a party to refuse to answer a question or plead the Fifth Amendment against self-incrimination, the GAL moves on to other questions, noting the objection. Such objections do not prohibit the GAL from using other sources to obtain the information. If the GAL does not meet with any party, the GAL explains why in the report.

### 6.3 The GAL Asks Each Party about Relevant Witnesses and Documents and Investigates these Sources of Information as Appropriate.

As a starting point, the GAL invites counsel and parties to provide relevant information, including a fact summary, procedural history, relevant documents, and a list of witnesses and professionals who can provide relevant information. In deciding what records to review or witnesses to interview, the GAL considers the likelihood that relevant information will be obtained, with reasonable convenience, efficiency, cost, and physical safety of a party, child or informant.

The order of appointment also may direct the GAL to contact certain witnesses or sources.

**Commentary.** In determining what witnesses to interview, the GAL may also consider: the number of witnesses suggested, whether the witness directly witnessed important events or the aftermath of important events, the potential bias of the witness, the importance of the interview to a party, and other relevant considerations. At the

beginning of each collateral witness or party interview, it is important that the GAL explain the GAL's role and the limits of confidentiality. The GAL shall access information after appropriate release forms are provided to professionals. In addition to oral communications, the GAL may provide written questions and accept additional written responses from witnesses or collateral sources. If a GAL declines to interview some or all of suggested witnesses, the GAL shall provide an explanation why the witnesses were not interviewed.

#### **6.4 The GAL Shall Use Methods Designed to Assess the Accuracy of Information Gathered**

The GAL uses interview and fact gathering techniques designed to test the factual accuracy and reliability (i.e. objective truth) of the information gathered. The GAL compares sources of information, looks for consistencies and inconsistencies in reports, and appraises the value of the information gathered.

##### **6.4.1 The GAL Uses Multiple Fact Sources When Possible.**

If certain events or facts are disputed, the GAL should investigate more than one source of information relating to the events or allegations when possible. The parties should be encouraged to provide names of witnesses who were present, written reports, or other relevant evidence related to the event or allegation.

**Commentary.** For example, the husband disputes the wife's claim that the husband told her that he was treated at Cambridge Hospital after he attempted suicide by taking an overdose of sleeping pills and cocaine. The GAL contacts the hospital and interviews any other witnesses with direct knowledge about the disputed event or his statements about it. Hospital records in the case lead to other relevant sources of information such as "911" call records, a police report, and an ambulance report, including a copy of a suicide note found in the ambulance. The GAL reports all the relevant facts collected about the disputed allegation.

##### **6.4.2 The GAL Accesses Original Sources When Possible.**

To increase the reliability of reported information, the GAL investigates original sources of information.

For example: John Jones says that Jane Doe saw the parties' son drinking beer at a soccer game. The GAL speaks with Jane Doe to ascertain what she observed.

For example: a police report indicates that the child told his soccer coach that the child's parent supplied the beer. The GAL speaks with the coach and the child.

#### **6.5 The GAL Conducts a Home Visit When Appropriate.**

Ordinarily, home visits can yield valuable information, but on occasion a home visit is not indicated. Factors to consider in deciding whether to conduct home visits include: whether issues or problems with either home are alleged, cost and time involved, location, and the likelihood of obtaining relevant information not accessible in other ways. If no home visit is conducted, the GAL shall explain why that decision was made in the report.

**Commentary.** If home visits are conducted, care must be exercised so that inequality in housing conditions or perceived wealth do not lead to bias. A person, who is a fit parent and caretaker for the child, also may experience transitional or temporary housing difficulties as a result of separation from the other party, nonpayment of support, inadequate financial support, or relocation related to domestic violence or loss of income.

#### **6.6 The GAL Meets with the Children and Interviews them in a Developmentally Appropriate Manner**

The GAL meets with the children as part of the investigation. Children can offer useful information and should be offered the opportunity to provide information about themselves and their family. The GAL uses developmentally appropriate techniques to observe, interview and evaluate each child in the family. The conditions under which children are interviewed must be carefully considered, including what conditions will put the child most at ease and yield the most useful information. The GAL shall explain the reasons for not meeting with any of the children in the GAL report.

**Commentary.** Some children may be much less candid in the interview if a parent or the parents are present during the child's interview, or are visible or able to hear the interview.

### **6.7 The GAL Observes Children with Each Parent When Appropriate.**

The GAL should observe the child with each parent when appropriate. This often provides valuable information about the parent-child relationship.

**Commentary.** The GAL has a duty to avoid further harm to children when possible. If concerns are raised that a child will be traumatized or at risk by contact with a parent (e.g. due to severe neglect or abuse, exposure to domestic violence, traumatic or unpredictable absence, or other inappropriate behavior) a parent-child observation may not be indicated.

The GAL explains the reasons for not observing children with each parent in the report.

### **6.8 The GAL Considers the Need for any Further Information Necessary to Complete the GAL Evaluation and Provide a Comprehensive Report.**

The GAL shall collect and review documents as well as conduct additional interviews of the parties, each of the children and other witnesses until the necessary information is fully gathered.

The GAL may consider the usefulness of specialized evaluation tools such as behavioral information surveys; psychological and neuropsychological testing of mental health, adaptive functioning and/or medication needs; evaluations of substance abuse, sexual offending behavior, domestic violence, educational/learning needs; or clinical determinations of child sexual abuse.

## **7. USE OF SPECIALIZED CLINICAL METHODS IN THE FORENSIC CONTEXT**

Specialized methods include primarily psychological testing and sexual abuse evaluations. Other specialized methods such as educational or medical evaluations are subject to the same general requirements as those set forth here.

### **7.1 The GAL Shall use Specialized Methods Only when Doing so is Likely to Produce Necessary, Relevant and Useful Information to Evaluate the Forensic Questions in the Case.**

The GAL must evaluate the merits of using a specialized method and consider the costs (e.g. financial and time) to the parties or to the Court. If the GAL chooses to use a specialized method, the GAL explains the reasons to the parties and counsel, and documents those reasons in the report.

#### **Psychological Testing**

Psychological testing is not required in most cases. The GAL shall obtain an order of the court before performing psychological testing unless previously authorized to do so by the court. In each case the GAL must balance likelihood of obtaining relevant and reliable information against the financial costs, the time involved and the potential invasiveness of the testing. Testing may be necessary when the psychological health or functioning of a party or child is directly relevant to the issues the GAL has been appointed to evaluate, or when psychological limitations of the parties make it difficult to obtain relevant information without psychological testing. When considering psychological testing, the GAL should first determine whether the information sought by the testing could be obtained in other ways.

When selecting a particular psychological test, the GAL ensures and is prepared to explain how any chosen test measures factors relevant to the issues before the court. The GAL shall consider and be prepared to articulate for the Court the reliability and validity of any chosen test. (See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) and *Commonwealth v. Lanigan*, 413 Mass. 154 (1994). Elements of reliability and validity include: commercial availability of the test or measure including a comprehensive test manual; relevant measures of reliability for the test or measure; relevant measures of validity for the test or measure; appropriateness of use with the examinee (e.g. relevance of race, ethnicity, primary language, reading level); peer reviews of the test or measure; relevant error rates of the test or measure or of components (e.g. index or scale) of the test or measure; method of scoring and interpreting including the published system (e.g. Rorschach Comprehensive System); appropriateness of use in the context for which it is being used.

**Sexual Abuse Evaluations**

In determining the appropriateness of conducting a sexual abuse evaluation, the GAL shall first consider the nature and extent of the alleged sexual abuse, the context in which the sexual abuse allegations were raised (e.g. custody conflict) and the relationship of potential findings from the sexual abuse evaluation to the questions that the GAL has been appointed to evaluate

As with psychological testing, the GAL takes reasonable steps to ensure the relevance, reliability, and validity of the sexual abuse evaluation procedure the GAL uses. The GAL shall consider and be prepared to articulate for the Court the reliability and validity of the sexual abuse evaluation procedure.

**7.2 The GAL shall Only use those Specialized Methods that the GAL is Competent to use in the Forensic Context.**

The GAL adheres to relevant standards of ethics and conduct including those which govern psychological testing and other specialized methods, and does not practice outside his or her areas of competence. The GAL shall also be competent to use these specialized methods in a forensic context.

**Commentary:** The GAL or designee does not succumb to pressure by legal actors to overstate or inaccurately represent tests, test interpretations, or the results of sexual abuse evaluations or other specialized methods.

**Psychological Testing**

The GAL must be qualified to administer and interpret each test instrument used, or ensure that his or her designee is qualified to perform these functions. In addition, the GAL or designee must be familiar with applicable testing standards such as the current American Psychological Association's Standards for Educational and Psychological Testing. The GAL must also be knowledgeable about psychological testing in the forensic context, and must be able to link the data, hypotheses and interpretations generated by testing to the forensic questions the GAL has been appointed to evaluate, and must be able to articulate to the Court the limitations of the each test used and its role in the comprehensive GAL evaluation.

**Sexual Abuse Evaluations**

The GAL or designee must be qualified to perform sexual abuse evaluations. Qualifications include: training in child and adolescent psychology; supervised training and practice in conducting sexual abuse evaluations in the forensic context, knowledge of the literature of sexual abuse as it pertains to the family court context and knowledge of the relevant practice guidelines and standards (an example of one well known set of standards is the American Professional Society on the Abuse of Children [APSAC] Standards). In addition, the GAL must be able to link the evaluation data, hypotheses and interpretations generated by the sexual abuse evaluation to the forensic questions before the evaluator, and to articulate to the Court the limitations of the sexual abuse evaluation and its role in the comprehensive GAL evaluation.

**7.2.1 If the GAL is not Competent to Perform Psychological Testing or a Sexual Abuse Evaluation, the GAL shall make a Referral to, or Obtain a Consultation with, an Appropriate Clinical Evaluator (henceforth, the "Designee.").**

The GAL seeks a Court order to have an additional professional conduct the specialized evaluation. The GAL takes reasonable steps to ensure the designee is competent to perform psychological testing or a sexual abuse evaluation. Before making a referral to a designee for psychological testing or a sexual abuse evaluation, a GAL should consider obtaining a consultation from an appropriate professional. The purpose of this consultation is to determine whether or not psychological testing or a sexual abuse evaluation would provide useful information to the Court.

The GAL shall inform the designee that the designee is subject to the requirements of these standards where applicable.

**7.2.2 If the GAL is Competent to Perform Psychological Testing or a Sexual Abuse Evaluation, the GAL shall Consider Whether it is Nevertheless Useful or Necessary to have Another Professional Conduct the Testing or Sexual Abuse Evaluation.**

If the Court has not already clarified whether the GAL or another professional should conduct the testing or sexual abuse evaluation, factors for the GAL to consider in making that determination include: the clinical appropriateness of having the GAL conduct the evaluation. (e.g. an eight year old female alleged sexual abuse victim might feel frightened or uncomfortable with a male evaluator.); the need for consultation from another professional, whether performing the overall GAL evaluation biases, or appears to bias, the GAL's interpretation of testing/sexual abuse evaluation data.

### **7.3 The GAL Shall Only Interpret the Results of Psychological Testing and Sexual Abuse evaluations in the Context of Multiple Sources of Data.**

The GAL should not use psychological testing data as the sole source of information from which to draw conclusions about a party or child. The GAL should consider psychological tests as a means of supporting, disconfirming or generating hypotheses that are to be further investigated and confirmed or disconfirmed through clinical interviews, collateral interviews, document reviews, observations and other available data. If test data conflicts with other sources of data, the GAL is obliged to explain how the GAL understands the discrepancies.

It is particularly important that the GAL be knowledgeable about the ways in which specialty issues (such as Domestic Violence, Child Abuse and Substance Abuse) may contribute to the interpretation of test data.

The results of a sexual abuse evaluation are not, by themselves, determinative of parenting capacity. The sexual abuse evaluation data must be reviewed in the context of the broader forensic question that the GAL has been appointed to evaluate.

### **7.4 The GAL Avoids Offering Psychiatric Diagnoses, Except when Special Circumstances Require the GAL to do so.**

The role of the GAL in most Probate and Family Court matters does not require or warrant the formulation of psychiatric diagnoses. The GAL does gather information relevant to the psychological functioning and mental health histories (both directly and through collateral sources) of both parties and the child(ren). The GAL recognizes that a diagnostic label is not determinative of parenting capacity. Rather than making diagnoses, the GAL describes the impact of clinical symptoms or known diagnoses on the functional abilities of a parent or child and the relationship between the parent and child.

**Commentary.** In the unusual circumstance where formulating a new diagnosis might be appropriate, the GAL considers the potential risks and benefits of making the diagnosis, and the relevance of such a diagnosis to the referral question. The GAL assures that s/he has all the information necessary to make such a diagnosis and is competent to do so. The GAL is particularly sensitive to the potentially pejorative and prejudicial aspects of a diagnosis in the legal context. The GAL provides the rationale for making the diagnosis in the report.

## **8.0 SPECIALTY EVALUATION TOPICS**

In the context of disputed Probate and Family Court matters, some allegations require specialized investigation and evaluation. Examples of such specialty topics which frequently arise in Category E GAL evaluations include: substance abuse, domestic violence, mental illness, and child abuse. Specialty evaluation topics demand both process and content considerations.

### **8.1 The GAL Asks the Parties about Key Issues which Might Warrant Specialized Attention.**

As part of the comprehensive evaluation, the GAL gathers a background history of each party designed to screen for specialty concerns (see 9.1E). The GAL is also attentive to allegations raised by all parties. The GAL should phrase questions about the specialized topics in nonjudgmental language, and ask them in multiple ways. This affords the parties the greatest opportunity to answer openly and accurately.

### **8.2 The GAL Considers Whether the GAL is Competent to Evaluate Questions that Require Specialized Expertise.**

The GAL assesses his or her competence to address the specialty issues that are present in the case. The GAL makes this assessment at the outset of the case, and throughout the case.



If the GAL is not competent to evaluate the specialized questions, the GAL considers:

- Referring the specialized assessment component of the comprehensive GAL evaluation to a competent mental health professional with specialized expertise,
- Seeking consultation and/or supervision from a professional with specialized expertise,
- Withdrawing from the case because the specialized issue warrants that a person with specialized expertise conduct the comprehensive GAL evaluation.

**Commentary:** The GAL also considers the level of attention required to appropriately address the concerns or allegations. In making decisions about whether to refer or seek consultation with a person with specialized expertise, the GAL takes reasonable steps to ensure that the professional to whom the referral is made is competent as per standard 8.2 and does not have a conflict of interest or role conflict as per 1.3 A or 1.4. Finally, the GAL considers the issues of cost, inefficiency, and delay in assigning such assessments to other professionals.

### 8.3 The GAL Shall be Competent to Evaluate Specialized Topics Within a Forensic Context.

- The GAL or designee must have the education or training, knowledge and experience necessary to evaluate a specialty topic within the forensic context.
- The GAL or designee must be knowledgeable about any relevant laws, legal standards or rules particular to specialty topics.
- The GAL or designee must be aware of any relevant standards of practice relevant to the evaluation of specialty topics. These include the Massachusetts Standards on Substance Abuse by the Justices of the Supreme Judicial Court in collaboration with the Massachusetts Trial Court (1998) at: <http://www.mass.gov/courts/formsandguidelines/substancev.html>, and the Standards on Judicial Practice, Abuse Prevention Guidelines by the Administrative Office of the Trial Court (2000) at: <http://www.mass.gov/courts/formsandguidelines/domestic/dvtoc.html>
- The GAL or designee must be knowledgeable about ways that specialty topics might present in the forensic context.
- The GAL must be able to access and interpret collateral sources relevant to each specialty topic.
- The GAL or designee must maintain a current knowledge of the literature and critical issues in specialty topics in the forensic context.

### 8.4 The GAL Incorporates the GAL's Conclusions from the Specialty Areas with all other Data Gathered in the Evaluation to Complete a Functional Assessment of Parenting as it Relates to the Forensic Questions to be Addressed.

A. Substance abuse and Mental Illness—Conclusions about a party related to his/her substance abuse, mental illness, are not dispositive on the question of parenting capacity. The applicable case law states that a determination that one party has or had an active substance abuse problem or mental illness does not constitute unfitness, in and of itself. (See, for example, *Adoption of Katharine*, 674 N.E. 2d 256 (Mass. App. Ct. (1997)).

B. Domestic violence—Conclusions that a party has been a victim of domestic violence are not dispositive of parenting capacity. Conclusions that a party has been the perpetrator of domestic violence are considered direct indicia of parenting capacity, but do not predetermine the answer to the forensic question (e.g. the specifics of a custody/visitation plan). Some conclusions by the GAL about domestic violence may lead to findings by the Court which trigger the requirements of the custodial presumption in favor of custody to the nonperpetrating parent. (G.L. c.208, § 31a)

C. Child Abuse—Conclusions that a party has perpetrated abuse against a child are direct indicia of parenting capacity. As above, however, such conclusions do not dictate the answer to the forensic question to be addressed.

**Commentary:** The GAL recognizes that an adequate assessment of any of these specialized topics involves consideration of coexisting issues that may complicate the resolution of the problem, or mitigate the importance of the problem. For example, resolving a substance dependence problem does not necessarily resolve the other mental health problems, nor does it automatically improve parenting. On the other side, a mentally ill parent may have a support and resource network which allows adequate caretaking of the children even when flagrantly ill or incapacitated.

### **8.5 In Cases Involving but not Limited to Domestic Violence, Substance Abuse, Child Abuse and Mental Illness, the GAL Should Identify the Types of Supportive Services Believed Necessary to Successfully Implement a Custody and Access Plan**

**Examples.** Such resources may include: substance abuse assessment and treatment, mental health evaluation and treatment, sexual abuse or certified batterers' treatment; supervised visitation; counseling; parenting education; educational assessment for the child(ren); medication assessment; recreational or social services; housing or public benefits advocacy; regular payment of court ordered child support; DSS provided in-home services.

**Commentary.** Standard VII of the Massachusetts Substance Abuse Standards promulgated by the Supreme Judicial Court and the Trial Court requires prompt screening to alert the court to the possible need for an immediate substance abuse assessment or treatment program. The Substance Abuse Standards depend to some extent on resources that are not yet fully available to the Court. This may limit the GAL's ability to perform the tasks set out in the standards. It is nonetheless important that the GAL be aware of the standards and consider which elements the GAL has the resources to perform.

### **8.6 In Cases Where it is Appropriate that a Party's Access to Children Proceeds in Stages, the GAL may Suggest a Process for Monitoring Such Access.**

In some cases involving domestic violence, child abuse, substance abuse or mental illness, it may be appropriate that access to the child on the part of the "visiting" party proceed in stages. When appropriate, the GAL may suggest, a process for monitoring a plan built on access increasing in stages.

**Commentary.** The Massachusetts Substance Abuse Standards require a monitoring plan in cases where a party's substance abuse problem is a factor in behavior related to the case. Specifically, Standard XII requires that the Court monitor compliance and Standard XIII requires the Court to implement strategies to prevent relapse. (But see commentary to 8.5 above).

Planning for shifts in access requires many considerations including the recognition that predicting behavior over lengthy time frames has serious potential for inaccuracy. The following is a noninclusive list of considerations: Whether a parent can comply with the recommendations; How likely is it that compliance with recommended interventions will translate into changes related to parenting?; How important it is that the child have access to the parent even if the parent is noncompliant? ; What conditions need to be required of the parent without the problem (e.g. substance abuse, mental illness, etc.) in order for a child to better benefit from contact with the parent with the problem?

## **9. SCOPE AND CONTENT OF THE EVALUATION**

A comprehensive history creates a context for understanding the current issues in dispute. The nature and extent of the family history obtained, through both interviews as well as review of documents depends on the particular family's circumstances and the directives contained in the order of appointment. However, it is commonplace to obtain the following information unless it is not relevant:

#### **A. History of legal proceedings and prior investigations and evaluations.**

- The nature of the case, including the parties and children involved, relevant procedural history, current orders, and the relief sought by each party;
- History of other cases involving the parties, including prior cases pertaining to parties or the children including, but not limited to Probate and Family Court, Juvenile Court, criminal, abuse prevention, or other relevant cases;
- Prior custody related investigations and evaluations, including GAL, Court Clinic, Probation, Department of Social Services, or other evaluations or assessments;

#### **B. Facts designated by court order and the applicable law.**

- The issues that the court specifies for investigation and evaluation in the order of appointment;
- Facts relevant to the legal standard that applies to the case for:
  1. modification of custody or visitation;

2. termination of parental rights;
3. guardianship of a minor;
4. removal of the child from the Commonwealth;
5. custody or visitation by a parent.

C. Relevant concerns raised in the case by each parent, including facts related to how each parent's proposed outcome serves or conflicts with the child's best interests.

D. Parenting history.

- With whom have the children lived and for how long;
- What parenting tasks have each parent performed, when, for how long;
- Each parent's past and present parenting capacities including both skills and deficits;
- The competence with which each parent carried out parenting tasks; History of parents' past joint decision-making regarding children;
- Parent's present ability to communicate or make joint decisions;
- Whether a third party or either party is or was a primary caretaker;
- History and impact of a parent's substance abuse, mental illness, or domestic violence on the children and the parent's parenting ability;
- History of physical, sexual or emotional abuse of the children;
- History of past restraining orders and violence against others;
- Each parent's past and present parenting skills and deficits;
- The strength and quality of the parent-child relationships, emotional closeness, attachment, and perceptions of each other;
- Each parent's or potential caretaker's knowledge of the children, knowledge of parenting techniques, disciplinary practices, ability to distinguish his or her own needs from the needs of the children, and to understand and respond to the children's needs;
- The ability of the parent to promote and support appropriate social, emotional, and educational development in the children, and to provide a stable home environment for the children;
- Each parent's or potential caretaker's ability to support the children's relationship with the other parent as appropriate;
- Each party's ability to communicate and cooperate with the other parent regarding the children as appropriate, including the impact of substance abuse, mental illness or domestic violence on that ability;
- Each parent's ability to recognize his or her own and the other parents strengths and weaknesses as parent.

E. The family history.

- History of parents' relationship, including if and for how long the parties lived together as a family;
- Parties' accounts of how difficulties began, were disclosed, or persist;
- Prior Department of Social Services involvement with family members;
- Children's present and past school functioning;
- Criminal history of both parties (CORI (Criminal Offender Record Information) or CARI (Court Activity Record Information));
- Sexual offense history (Sexual Offender Registry Information, or SORI);
- Substance abuse and substance use history of family members;
- Mental health treatment and history of family members;
- Relevant medical history or problems of family members;
- Presence of new relationships, partners or their children;
- Relationships with significant caretakers, grandparents, relatives, child care providers;

## ■ CHAPTER 10: GUARDIAN AD LITEM

- Each parent's family history and current relationship with family of origin and partner's family;
- Education and employment history of parents;
- If relevant, ethnic, cultural, lifestyle, and religious factors.

F. Developmental status and parenting needs of the children.

The child's preferences for custody and access.

- Each child's developmental history, functioning in school, peer relationships, medical and mental health history, activities, schedules ;
- Special needs of each child: medical, learning or developmental problems;
- Assessment of each child's adjustment to school, friends, community, and extended families;
- Child's temperament and response to transitions;
- Impact of change on child's routines, attachments, familiar environs;
- Impact of the divorce or separation on the child, if any.
- Child's exposure to, understanding of or concerns about a parent's needs, wishes, concerns, safety, or problems;
- Quality of relationship between siblings;
- Particular challenges for either parent or the child with each other .

### 10. REPORT WRITING AND ANALYSIS

The report should address and relate to the areas of investigation and evaluation designated by the order of appointment. The report should provide accurate, detailed and balanced information about the parties and their children.

#### 10.1 The Report Should Appear Professional in Appearance, Format and Writing Style.

The report should be typed, well written and neat in appearance. Pages must be numbered. The GAL shall attempt to avoid spelling, grammar or typographical errors in the report. The GAL should write the report in a way that is concise in words, yet able to encompass all the relevant facts and provide detailed information. The language used in the report should be understandable to the average layperson and avoid jargon that may be confusing. The GAL should prepare a report that is well-organized. Use of headings, bold type, or underlining to separate different sections or topics in the report may make a report easier to comprehend. The report shall be dated and signed by the GAL with the GAL's name typed below the signature. The report shall include the GAL's mailing or office address and telephone number.

#### 10.2 The Report Should be Accurate, Objective and Unbiased.

When writing the report, the GAL provides a balanced view of the parties that includes all of their relevant strengths and weaknesses. The information contained in the report should be accurate. It also should be as factual and detailed as possible. The GAL report should:

##### A. Use descriptive statements and provide ample details, but avoid inflammatory characterizations if possible.

Inflammatory characterization: "Mr. Jones is well-known to the courts as a drunk." Descriptive statement: "Mr. Jones was convicted in Somerville District Court of driving under the influence of alcohol in 1986, 1996, 2001, and in July, 2003."

##### B. Provide past and present relevant facts relating to both parties and the children.

1. Include all relevant facts that address the court's directives.
2. Include all relevant facts collected from all sources, including facts that are consistent and inconsistent with other reported facts.

3. Provide balanced and similar information about both parties;
4. Provide relevant and detailed information about all of the children.
5. Include facts that do not support the GAL's recommendations or conclusions.
6. Disclose what important information may be missing and why it is missing.

**C. Include specific information and provide dates and pinpoint time frames if at all possible.**

Avoid use of vague phrases or time frames such as “in the past” or “occasionally” or “sometimes” if a more precise time frame is available. The GAL should provide detailed information.

Vague: “John says he used heroin in the past.”

Specific: “John says he used heroin in May, 1996 and June, 1998.”

Vague: “Mary states that John occasionally uses drugs.”

Specific: “Mary states that she saw John use cocaine twice in August, 1998.”

Vague: “The child has health problems.”

Specific: “The child has diabetes.”

**10.3 The GAL Identifies the Sources of Information.**

Sources should be easily identified in the report. The GAL must list every person interviewed and the records reviewed with any relevant information about the informant or source.

- Date and Name of each person interviewed (e.g. Dr. Tom Jones on 9/5/03),
- Position, profession, place of employment (psychiatrist, General Hospital);
- Description of record reviewed (Dr. Jones' records regarding mother);
- Date the record was made and period it encompasses (July, 2002 to July, 2003);
- How information was obtained (e.g. in person, telephone call, written request);
- Date records were reviewed or obtained by the GAL (9/5/03);
- Informant or record author's relationship to the parties, child or family (Dr. Jones is mother's psychiatrist, but also saw her and the husband for marriage counseling in May, 2001).

If a source is not clearly identified, a party can move to strike the statement from the report.

Example of improper attribution: “Hospital staff said that Drew Smith was hospitalized there for three months last year.” (Names of the staff and hospital are missing).

Use of hearsay statements is permitted in the report, but the GAL should always attempt to contact and also quote the original source in the report if possible.

**10.4 If a Party Fails or Refuses to Participate, the GAL Includes the Information that the GAL has Obtained in the Report.**

The GAL encourages parties to participate in the evaluation. If a party does not participate, the GAL is still permitted to file a report and to disclose whatever information has been collected about that party from other sources. The report should disclose that such a party has not participated or declined to provide information.

**Commentary.** The GAL shall refrain from drawing conclusions about a party without a factual basis.

**10.5 Facts Shall be Separated in the Report from Recommendations or Conclusions.**

The investigative and evaluative information shall be separated from the GAL's conclusions and recommendations. The report shall include a section on the facts of the case in the body of the evaluation.

### **10.6 The GAL's Conclusions or Recommendations Shall Follow Clearly from the Data Gathered and the Analysis of that Data**

The GAL shall set forth the connection between the facts, the analysis of the facts, and the GAL's conclusions and recommendations. The GAL shall explain the basis for any opinions or conclusions drawn.

**Commentary.** This includes stating in the report: alternative explanations the GAL considered, how conflicting data was reconciled, and the clinical or theoretical framework, if any, which informed the GAL's opinions.

### **10.7 The GAL shall Identify any Limits of the Completed GAL Evaluation**

The GAL shall list any important sources of information that were not obtained and why. The GAL shall articulate any limits to the usefulness of the report's final conclusions. The GAL shall not draw any conclusions for which s/he does not have the adequate supporting data.

**Example:** The GAL discovers that a party's medical records from a particular hospital have been lost. The records were alleged to be evidence of mother's injuries due to domestic violence. The GAL documents the attempts to acquire these records, and that without them mother's allegations of physical injury cannot be confirmed.

### **10.8 The GAL Files a Timely Report and Informs Counsel and Pro Se Parties.**

The GAL should inform counsel and pro se parties when the report is filed at the court so that the parties can read the report. The GAL should inform parties requesting a copy of the report that the report is property of the court; it cannot be given out or shown to anyone, except the parties or their counsel. A court order is required for any distribution of the report, even to parties or their counsel. The GAL shall not distribute copies of the report to the parties, counsel of record or anyone else unless the court orders that the GAL may release copies to such individuals.

**Commentary.** If information or recommendations in the GAL report have the potential of exposing a party or the child to danger, the GAL should consider advising the endangered parent or party about the date that he or she expects to file the report in court.

## **11. THE GAL SHALL RETAIN ANY MATERIALS GATHERED OR CREATED DURING THE EVALUATION**

The GAL shall retain any notes, records, documents, taped recordings, videos, or other material gathered or created during the evaluation so that these materials are available for trial, discovery, appeal and remand of the case.

**Commentary.** Notes or other materials created or obtained by a GAL may be sought by a party through discovery. The GAL's notes, written observations, or other materials created during interviews or telephone conversations should be descriptive, factual, and respectful in tone. Note taking should be objective and include quotations of witnesses and parties when possible.

## EXHIBIT 10C—Motion to Appoint Guardian ad Litem Under G.L. c. 215, § 56A

COMMONWEALTH OF MASSACHUSETTS

\_\_\_\_ DIVISION

PROBATE AND FAMILY COURT  
DOCKET NO.

_____	)	
[Plaintiff],	)	
Plaintiff	)	MOTION TO APPOINT GUARDIAN AD LITEM
	)	
v.	)	
	)	
[Defendant],	)	
Defendant	)	
_____	)	

NOW COMES the [Plaintiff]/[Defendant] \_\_\_\_\_ in the above-captioned divorce action and requests that this Honorable Court appoint a Guardian *ad litem* pursuant to G.L. c. 215, § 56A to [investigate], [evaluate], report, and make recommendations in writing to the Court with respect to the issues of custody and parenting arrangements.

In support of [his/her] request, the [Moving party] states as follows:

1. The parties were married on \_\_\_\_\_.
2. The parties have \_\_\_\_\_ child/ren: \_\_\_\_\_.
3. The children reside with \_\_\_\_\_ at \_\_\_\_\_, Massachusetts.
4. G.L. c. 215, § 56A provides, in pertinent part, that,
 

“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 . . . . Said guardian ad litem shall, before final judgment or decree in such proceeding, report in writing to the court the results of the investigation, and such report shall be open to inspection to all the parties in such proceeding or their attorneys.”
5. \_\_\_\_\_ seeks [custody]/[visitation] of the minor children.
6. \_\_\_\_\_ has serious concerns about \_\_\_\_\_’s parenting skills and abilities. He/she has serious concerns that the children’s emotional, psychological and physical health and welfare if [custody]/[visitation] is granted to \_\_\_\_\_.
7. In further support, \_\_\_\_\_ submits [his/her] Affidavit filed herewith and incorporated herein.

WHEREFORE, [Client], the [Plaintiff]/[Defendant] in the above-captioned action, respectfully requests that this Honorable Court appoint a Guardian *ad litem* pursuant to G.L. c. 215, § 56A, and enter any other, further relief that this Court deems meet and just.

Respectfully submitted,  
[Plaintiff]/[Defendant]

By [his/her] Attorney,  
[Attorney]

Dated:

