

**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. 104-191 (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.