Hey, you’re a lawyer first!

*How to give the Bench the tools to rule*

Elevating the practice of Guardians ad litem for the 23rd Annual Robert E. Shepherd Jr. Juvenile Law and Education Conference

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Introduction

This focus of this year’s seminar is to strengthen representation of our community’s most vulnerable members. As Guardians ad litem, our role is sometimes complicated and messy, but the way to be the strongest advocate for our wards is to remember that we are lawyers first. The court appoints a Guardian ad litem for the child so that the child has a legal representative. Our charge to follow the GAL Standards is not in lieu of the rules of court, the rules of evidence, and our ethical responsibility, but instead it is an added framework. Just as we would advocate for an adult or advocate as retained counsel, our job as GAL is to use the rules of evidence and the law of the case to advocate for the best interest of our ward. Our goal in this presentation is to elevate the GAL practice by providing resources that will assist GALs in the collection of information during your investigation and refresh the skills you will need to put the information before the bench.

As Guardians ad litem, we are appointed by the Court to represent the best interests of a client, in this case, a juvenile. As attorneys and Guardians ad litem, we are guided by the Standards of Performance as well as the Rules of Professional Conduct. We are required to apply the standards in EVERY case, but how to apply them varies depending on the type of case, your role in the case, the applicable law in your case, and the challenges in your specific case.


http://www.vsb.org/pro-guidelines/index.php/main/print_view

The guardian ad litem serves a vital role in our judicial system. The task of the guardian ad litem is to rise above the fray of the contending parties to ensure that the interests of persons under a legal disability are "represented and protected." Code § 8.01-9(A). See also Rule 8:6 (the role of the guardian ad litem for a child is to "vigorously represent the child, fully protecting the child’s interest and welfare"). Wiencko v. Takayama, 62 Va. App. 217, 233, 745 S.E.2d 168 (2013). First, guardians ad litem must adapt the depth of their investigation to the unique facts of each case. Wiencko v. Takayama, 62 Va. App. at 235, 745 S.E.2d 168 (2013).

A good place to start is to first look at the type of case you have been appointed to (i.e. is this delinquency, custody, abuse & neglect, chins, protective order, ... some combination thereof) and then ask the following questions:

a) what kind of case are you dealing with?

b) what is the law of the case?

c) what is your role in the case (who are you GAL for and what is their role in the case)?
d) are you equipped to handle this case?

As the case develops, you should be thinking about the evidence you will need to present. You should review the rules of evidence as applied to your case and prepare to present evidence and argument as it relates to your role. And you should follow the protocol you have developed in GAL cases.

**Standards Governing Performance of GALs**

INTRODUCTORY COMMENT: Many of the competencies required to represent children are the same as those required for many other types of litigation. *There are skills, abilities and actions expected of attorneys in all cases such as conducting interviews, framing and evaluating pleadings, engaging in discovery techniques, thoroughly preparing for trial, and negotiating on behalf of a client.* These skills are of equal importance to other types of civil cases such as labor, tort, contract or family law. The need for practices such as comprehensive client interviews is present in every case. Likewise attorneys involved in any form of litigation must make choices and determine strategic options. For example, the need to interview non-parties depends on the nature of the case and the litigator’s goal. Hence, qualifying phrases like “as appropriate” or “in so far as possible” are found in several standards and commentaries.

Representing children, however, is also different from other forms of litigation. The importance of the dispositional process and the potential for court proceedings to affect the very nature of a family provide the basis for these distinctions. The long-term consequences to the child client make the role of a Guardian ad litem (GAL) as crucial at the dispositional stage as at any other phase of the case. *These consequences demand full attention to the formulation and articulation of well-supported arguments and appropriate recommendations, as well as critical evaluation of plans proposed by others.*

The GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify. The GAL should rely primarily on opening statements, presentation of evidence and closing arguments to present the salient information the GAL feels the court needs to make its decisions.

The implicit set of checks and balances operative in non-juvenile cases is generally not likely to work for children. In a civil action involving adults, the successful party knows when a judgment is paid or a court order is implemented. In proceedings involving children this may not be so; the child may be too young to understand or monitor orders, or the legal proceedings may be too complex for the child to understand. Thus, these standards incorporate provisions regarding communication with the child, the implementation of orders and appeals.

Attorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules. For example, an attorney would follow the general conflict rule (1.7) to determine if there would be a possible conflict of interest if the attorney served as GAL. But unlike the Rules for Professional Conduct as they apply to confidentiality, there may be times when attorneys serving as a GAL must, in furtherance of their role as GAL, disclose information provided by the child to the court. A GAL appointed to represent siblings should be alert to potential conflicts
and, when appropriate, request that the court appoint a separate GAL for each child. The role and responsibility of the GAL is to represent, as an attorney, the child’s best interests before the court. The GAL is a full and active participant in the proceedings who independently investigates, assesses and advocates for the child’s best interests. Decision-making power resides with the court. *Emphasis added

a. Meet Face to Face and Interview the Child
b. Conduct an independent investigation in order to ascertain the facts of the case.
c. Advise the child, in terms the child can understand, of the nature of all proceedings, the child’s rights, the role and responsibilities of the GAL, the court process and the possible consequences of the legal action.
d. Participate, as appropriate, in pre-trial conferences, mediation and negotiations.
e. Ensure the child’s attendance at all proceedings where the child’s attendance would be appropriate and/or mandated.
f. Appear in Court on the dates and times scheduled for hearings prepared to fully and vigorously represent the child’s interests.
g. Prepare the child to testify, when necessary and appropriate, in accord with the child’s interest and welfare.
h. Provide the court sufficient information including specific recommendations for court action based on the findings of the interviews and independent investigation.
i. Communicate, coordinate and maintain a professional working relationship in so far as possible with all parties without sacrificing Independence.
j. File appropriate petitions, motions, pleadings, briefs, and appeals on behalf of the child and ensure the child is represented by a GAL in any appeal involving the case.
k. Advise the child, in terms the child can understand, of the court’s decision and its consequences for the child and others in the child’s life.

I. Applying Standards in DELINQUENCY and CHINS

Each of the below “official comments” can also be found at the website cited below. The page of the standards where that comment can be found is also cited after the comment. Each of the “unofficial comments” are those that we have added to try to help clarify some specific scenarios that we run into frequently.

A. Meet face to face and interview the child:

Official Comment: “In juvenile delinquency, child in need of supervision, child in need of services, and status offense cases, the GAL should exercise caution when talking to the child about the circumstances of the offense and advise the child about the limitations on confidentiality that may apply.” (S-3 and 4)

Unofficial Comment: Early on, it can be important to identify potential needs for the child including whether that child is competent or if there are other communication or comprehension limitations that the child may have. Very few of us are experts in psychology or child development, but we do deal with a lot of children. If you have a concern, raise it with the court, or initially, with the child’s defense attorney -- see if they have the same concerns. Because you have the advantage of acting
for the child’s best interests, you will likely be in a better position to advocate for testing than the defense attorney is.

**Unofficial Comment #2:** In a CHINS, the Court will often identify an issue of concern in the Court order that corresponds with your appointment Order. That is a great place to start. Be sure to check the Court file early on in your appointment so that you can be aware of any of those issues. The older matters in the child’s file can also be a great source of historical data or services that have been attempted.

**Official Comment:** “If the child is uncooperative or appears to have been influenced by a parent or custodian, the GAL should inform the court of these circumstances.” (S-4)

**Unofficial Comment:** You can support the child by making sure that they understand how important it can be to be candid with their defense attorney. Especially when the parent or another household member is the victim of the charge, the child must understand that it is his or her decision to determine his or her plea and whether to testify. For instance, most of the current sitting judges in Chesterfield will ask the child if he or she knows what it means when that child enters a “no contest” plea. You, as Guardian, can help make sure they actually understand.

**B. Conduct an independent investigation in order to ascertain the facts of the case:**

**Official Comment:** “In juvenile delinquency, child in need of supervision, child in need of services, and status offense cases, the GAL should contact the child’s defense attorney.” (S-5)

**Unofficial Comment:** Regarding delinquency cases, you are not the detective investigating the case. Often times, you will not have a vocal role in the adjudication of the case. It is important that you let the commonwealth’s attorney AND the defense attorney do his or her job during this portion. That dang US Constitution requires that you do so.

**Unofficial Comment #2:** In a CHINS matter, you are a little bit more detective-y, collateral interviews are often very helpful - i.e. how is this child doing in school, what services does the counselor think are needed, does the same behavior occur at the grandmas house?

**Official Comment:** “If the home environment is at issue, the GAL should visit the child’s home and any proposed alternative placement.” (S-5)

**Unofficial Comment:** Rarely is detention a good place for a child just because he or she can’t go home. Make sure to make appropriate motions to get the child connected with another housing option or, if necessary, DSS. Sometimes that may require filing a CHINS, but often you can accomplish what you need to through the delinquency matter. Don’t forget that funding can also be an issue for placements -- if your child has a probation officer, that officer can help coordinate funding streams.

**C. Advise the child, in terms the child can understand, of the nature of all proceedings, the child’s rights, the role and responsibilities of the GAL, the court process and the possible consequences of the legal action.**

**Official Comment:** “In juvenile delinquency, child in need of supervision, child in need of services, and status offense cases, the GAL should explain how the GAL’s role and responsibilities differ from that of the child’s defense attorney and advise the child about the limitations on confidentiality that may apply.” (S-6)

**Unofficial Comment:** It is important to have a strong understanding of the criminal proceeding because the child needs to know that, unlike the defense attorney, there may be occasions where you are not advocating for what the child wants.

**Official Comment:** “The GAL must inform the child that there may be circumstances when confidentiality will apply to communication between the child and GAL, and circumstances when it may not. The GAL may use information received from the child to further the child’s best interest. For example, the GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian.” (S-6)
D. Participate, as appropriate, in pre-trial conferences, mediation and negotiations

**Official Comment:** “In exceptional cases where the GAL reasonably believes that a proposed settlement would be contrary to the welfare of the child, the GAL should first discuss these concerns with the parties and their counsel. If these concerns are not addressed, the GAL should bring the facts that led to the concerns about the settlement to the court’s attention by filing a motion to vacate the agreement in accordance with § 8.01-576.12 of the Code of Virginia. Any proposed settlement which is deleterious to the child should be opposed despite the agreement of the other parties.” (S-6 and 7)

**Unofficial Comment:** A plea agreement is a negotiated settlement, if you disagree, be prepared with evidence at disposition to tell the court why and what the appropriate disposition should be. **Unofficial Comment #2:** Often times, funding can be a major component in the determination as to what services are actually possible for a child. In a CHINS, you may have a social worker who can refer a client to FAPT, but don’t forget that a probation officer can also do so in a criminal matter. The Court service unit is an excellent resource for addressing funding issues and can often advise if it is ven necessary to approach FAPT.

**Unofficial Comment #3:** Just because you have attended a meeting where a plan has been formulated, does not eliminate the need to be prepared to fully inform the bench as to what the proposed plan entails. Be prepared to educate the judge about what the program entails.

E. Ensure the child’s attendance at all proceedings where the child’s attendance would be appropriate and/or mandated.

**Official Comment:** “In so far as possible, the GAL should assure the meaningful participation of the child in all phases of the proceedings which would include attendance at appropriate court hearings.” (S-7)

**Unofficial Comment:** There may be occasions where your ward’s continued participation in a program may not allow them to attend court. It is helpful for the court to have this information at the time the child is entered into the program so that return hearing can be scheduled appropriately or so that the child’s attendance can be waived so long as he or she is enrolled in the program.

F. Appear in Court on the dates and times scheduled for hearings prepared to fully and vigorously represent the child’s interests.

**Official Comment:** “The GAL should prepare, present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary. Although the child’s position may overlap positions of other parties such as the parents, the GAL should be prepared to participate fully in every hearing and not merely defer to or endorse the positions of other parties. The GAL acts as an advocate and uses every attorney skill appropriate to further a result favorable to the child’s best interest.” (S-8)

**Unofficial Comment:** As Guardian, you are not forced to simply pick which position you like better between the Commonwealth and the Defense. If you see a need for the child and find a program or
service that might fit -- be an advocate for that program, just don’t forget to work out the logistics. Consider what the requirements and/or limitations are for what you’re asking, i.e. can the child remain on probation during participation in that program or does the child’s charge preclude participation in the program? It’s also important to work out how it would be funded - sometimes there are limitations on getting a particular program funded because the county doesn’t have a contract with that program. Again, work with the Court Service Unit to figure out whether this is a surmountable problem or if it just means that option has to be taken off the table.

G. Prepare the child to testify, when necessary and appropriate, in accord with the child’s interest and welfare.

Official Comment: “In juvenile delinquency, child in need of supervision, child in need of services, and status offense cases, the child’s defense attorney will take responsibility for preparing the child to testify when necessary.” (S-9)

Unofficial Comment: Again, that dang US Constitution. Now a child will not always have a defense attorney on a CHINS, so be aware of whether they do or not and prepare them accordingly.

H. Provide the court sufficient information including specific recommendations for court action based on the findings of the interviews and independent investigation.

Official Comment: “The GAL is obligated to assure that all facts relevant to the case, available dispositional remedies and possible court orders are presented to the court. The GAL’s arguments to the court should address every appropriate aspect of the litigation including: ... placement of the child; services to be made available to the child and family; dispositional alternatives for the child or parents in juvenile delinquency, child in need of supervision, child in need of services, status offense cases and custody and visitation arrangements; and any other orders the GAL deems to be in the child’s interest. Recommendations for placements outside the home should take into consideration the availability and appropriateness of placement with relatives or friends, parental visitation and keeping a sibling group together.” (S-9)

Unofficial Comment: As stated above, you are an advocate independent from the prosecutor and the defense. Advocate for the child’s best interests. If you do advocate for a dispositional alternative that requires family participations, make sure that the family is up to the task as well.

I. Communicate, coordinate and maintain a professional working relationship in so far as possible with all parties without sacrificing independence.

Official Comment: “The GAL should contact the attorneys for the other parties to the case as soon as possible and at least seventy-two hours prior to any hearing. Counsel for other parties to the case may have information not included in any of the available records and can provide their respective clients’ perspectives.” (S-10)

Unofficial Comment: This means the defense attorney and the prosecutor in a delinquency case. It can also mean the Department of Social Services through either counsel or the worker if they are on the case. It could also mean the Probation officer, depending on whether you’re in the adjudication, disposition or review stage.

J. File appropriate petitions, motions, pleadings, briefs, and appeals on behalf of the child and ensure the child is represented by a GAL in any appeal involving the case.

Official Comment: “The GAL should also ensure that the child has representation in any appeal related to the case regardless of who files the appeal. During an appeal process initiated by another party, the GAL for a child may file a brief and participate fully at oral argument.” (S-11)

Unofficial Comment: Make sure that your ward understands his or her right to appeal, as well as the risk.
K. Advise the child, in terms the child can understand, of the court's decision and its consequences for the child and others in the child's life

Official Comment: “The GAL should review all orders to ensure they conform to the court’s verbal orders and statutorily required findings and notices. The GAL should discuss all such orders and their consequences with the child. The child is entitled to understand what the court has done and what that means to the child.” (S-11)

Unofficial Comment: We have found that it is often helpful to make sure that the parents or guardians also understand what actually happened in the courtroom. Too often children get incomplete or incorrect information from their support group, even those with the best intentions. It's important to give the child the opportunity to ask you questions about what happened in court on their own too, not just with the whole family, as the voiced concerns might be considerably different depending on who all in in the room.


II. Applying Standards in Custody & Visitation Matters

A. Pertinent Statutes

1. § 20-124.2. Court-ordered custody and visitation arrangements.

A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. The court may enter an order pending the suit as provided in § 20-103. The procedures for determining custody and visitation arrangements shall insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members. Mediation shall be used as an alternative to litigation where appropriate. When mediation is used in custody and visitation matters, the goals may include development of a proposal addressing the child’s residential schedule and care arrangements, and how disputes between the parents will be handled in the future.
B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

BI. In any case or proceeding involving the custody or visitation of a child, as to a parent, the court may, in its discretion, use the phrase "parenting time" to be synonymous with the term "visitation."

C. The court may order that support be paid for any child of the parties. Upon request of either party, the court may order that such support payments be made to a special needs trust or an ABLE savings trust account as defined in § 23.1-700. The court shall also order that support will continue to be paid for any child over the age of 18 who is (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the party seeking or receiving child support until such child reaches the age of 19 or graduates from high school, whichever first occurs. The court may also order that support be paid or continue to be paid for any child over the age of 18 who is (a) severely and permanently mentally or physically disabled, and such disability existed prior to the child reaching the age of 18 or the age of 19 if the child met the requirements of clauses (i), (ii), and (iii); (b) unable to live independently and support himself; and (c) residing in the home of the parent seeking or receiving child support. In addition, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law. The court shall have no authority to decree support of children payable by the estate of a deceased party. The court may make such further decree as it shall deem expedient concerning support of the minor children, including an order that either party or both parties provide health care coverage or cash medical support, or both.

D. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court may order an independent mental health or psychological evaluation to assist the court in its determination of the best interests of the child. The court may enter such order as it deems appropriate for the payment of the costs of the evaluation by the parties.

E. The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section or § 20-103 including the authority to punish as contempt of court any willful failure of a party to comply with the provisions of the order. A parent or other person having legal custody of a child may petition the court to enjoin and the court may enter an order to enjoin a parent of the child from filing a petition relating to custody and visitation of that child for any period of time up to 10 years if doing so is in the best interests of the child and such parent has been convicted of an offense under the laws of the Commonwealth or a substantially similar law of another state, the United States, or any foreign jurisdiction which constitutes (i) murder or voluntary manslaughter, or a felony attempt, conspiracy or solicitation to commit any such offense, if the victim of the offense was a child of the parent, a child with whom the parent resided at the time the offense occurred, or the other parent of the child, or (ii) felony assault resulting in serious bodily injury, felony bodily wounding resulting in serious bodily injury, or felony sexual assault, if the victim of the offense was a child of the parent.
or a child with whom the parent resided at the time of the offense. When such a petition to enjoin the filing of a petition for custody and visitation is filed, the court shall appoint a guardian ad litem for the child pursuant to § 16.1-266.

F. In any custody or visitation case or proceeding wherein an order prohibiting a party from picking the child up from school is entered pursuant to this section or § 20-103, the court shall order a party to such case or proceeding to provide a copy of such custody or visitation order to the school at which the child is enrolled within three business days of such party's receipt of such custody or visitation order.

If a custody determination affects the school enrollment of the child subject to such custody order and prohibits a party from picking the child up from school, the court shall order a party to provide a copy of such custody order to the school at which the child will be enrolled within three business days of such party's receipt of such order. Such order directing a party to provide a copy of such custody or visitation order shall further require such party, upon any subsequent change in the child’s school enrollment, to provide a copy of such custody or visitation order to the new school at which the child is subsequently enrolled within three business days of such enrollment.

If the court determines that a party is unable to deliver the custody or visitation order to the school, such party shall provide the court with the name of the principal and address of the school, and the court shall cause the order to be mailed by first class mail to such school principal.

Nothing in this section shall be construed to require any school staff to interpret or enforce the terms of such custody or visitation order.

2. § 20-124.3 Best interests of the child; visitation. In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

2. The age and physical and mental condition of each parent;

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;

5. The role that each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing. Except in cases of consent orders for custody and visitation, this communication shall set forth the judge’s findings regarding the relevant factors set forth in this section.

**B. Pertinent Cases**

**Keel v. Keel, 225 Va. 606 (1983)**
The two prong test for custody modification is: “first, has there been a change in circumstances since the most recent custody award; second, would a change in custody be in the best interests of the children.”

The burden of proof is on the moving party to prove a material change by a preponderance of the evidence.

“Changed circumstances” is a broad concept and incorporates a broad range of positive and negative developments in the lives of children.

Evidence considered in a previous custody case may be considered for the purposes of establishing “background” information to understand the change in circumstances. Such evidence, however, cannot be used to retry the issues from the prior proceeding.

The Court may consider a benefit to the parent from relocation only if “the move independently benefits the child.”

The interests of parents in the care, custody, and control of their children is the oldest of fundamental liberty interests. The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

**Williams v. Williams, 256 Va. 19 (1998)**
Before visitation can be ordered over the objection of the children’s parents, a court must find actual harm to the child’s health or welfare without such visitation. The “best interests” standard is considered in determining visitation only after a finding of harm if visitation is not ordered.
The actual harm test does not apply if one parent objects to third party visitation and the other parent affirmatively supports it. Rather, the standard is clear and convincing evidence of what is in the best interests of the child.

The actual harm test does not apply if natural parents do not contest that it’s in the child’s best interests to have visitation with the third party.

To take physical custody of a child from his or her natural parent, a third party must prove by clear and convincing evidence an extraordinary reason for depriving the natural parent of custody. The Bailes case lays out the five scenarios which rebut the legal presumption in favor of natural parents: parental unfitness, a previous order of divestiture; voluntary relinquishment; abandonment; and a finding of special facts and circumstances constituting an extraordinary reason for taking a child from its parent.

If the third party can meet the burden of proof, then both parties stand equally before the court, with no presumption in favor of either.

Once custody has been determined and a visitation order entered giving visitation rights to a third party, if the custodial party then seeks to terminate and/or reduce visitation, he or she must show that denying visitation with the third party who has court ordered visitation would be in the best interest of the child.

When a party has filed a petition to modify an existing visitation order between a parent and third parties, the courts must apply the Supreme Court’s two-pronged test enunciated in Keel v. Keel, 225 Va. 606, 303 S.E.2d 917 (1983), to determine whether modification of that order is proper. That test asks, “first, has there been a change in circumstances since the most recent custody award; second, would a change in custody be in the best interests of the children.”

The following provision in an order: “[t]he child shall continue in counseling with the counselor until he releases her or until he recommends some other course. The parents shall fully cooperate with the child’s counselor and shall follow his or her recommendations” is overly broad language … impinges upon parenting decisions protected by the Due Process of the Fourteenth Amendment.

Reilly v. Reilly, 16 Vap UNP 1369152 (2016).
It was erroneous “for the circuit court to approve such language allowing a third party, even a guardian ad litem, total discretion to decide mother’s visitation without providing judicial review because it is inconsistent with the language and purpose of Code § 20-124.2”

III. Protective Orders
A. Emergency Protective Orders

Va Code §16.1-253.4 applies to emergency protective orders. An emergency protective order can be issued by any judge of any court or a magistrate in order to protect the health or safety of a person.

Per Va Code §16.1-253.4(B) An emergency protective order is often granted in conjunction with a warrant for assault and battery under §18.2-57.2.

The Court can prohibit contact by the respondent with family or household members of the respondent. The Court can grant the family or household member possession of the premises to the respondent’s exclusion. The Court can even grant the petitioner possession of any companion animal.

An EPO is temporary and shall expire three (3) days after issuance at 11:59 p.m. on the third day. If it expires on a date the court is not in session then it continues until 11:59 p.m. of the next date that the JDR court is in session. Va. Code §16.1-253.4(C). This can result in an emergency protective order being extended several weeks in smaller jurisdictions where the juvenile court is only in session two (2) times per month.

There is no time constraint in the emergency protective order regarding past acts of abuse, but rather the emphasis is on the “probable danger of further acts of family abuse.”

Pursuant to §16.1-253.4(A), the Court may issue a written or oral ex parte protective order to protect the health or safety of any person. Generally, the respondent would not be present due to the limited opportunity of the courts to notify an individual against whom a protective order is being sought within hours of a hearing. And consider §16.1-253.4(B), which states that for EPO’s when a law-enforcement officer or an allegedly abused person “asserts under oath,” the judge or magistrate shall issue an ex parte emergency protective order.

B. Preliminary Protective Orders

Va. Code §16.1-253.1 applies to preliminary protective orders. A preliminary protective order may be issued by a judge of any court or a magistrate in order to protect the health or safety of the petitioner or any family or household member of the petitioner. There must be a showing by the petitioner that he or she is or has been subjected to family abuse within a reasonable period of time.

For good cause shown the protective order can be granted ex parte, but to establish good cause, the petitioner must show immediate and present danger of family abuse occurring or evidence of probable cause that the abuse recently happened.

Upon the filing of a preliminary protective order pursuant to §16.1-253.1(A) the Court may order any of the following: 1) the prohibition of further acts of family abuse, 2) prohibition of contact by respondent with petitioner or any of petitioner’s family and household members, 3) exclusive possession of the residence that was occupied by the petitioner and the respondent, 4) requirement that the respondent does not terminate utilities or must restore utilities to the premises now occupied by petitioner, 5) temporary use of an automobile owned by petitioner or jointly by the parties, 6) requirement that the abusing person provide suitable alternative housing for the petitioner and any other household member, and pay deposits to connect or restore necessary utility services, 7) possession of companion animal.
The Court has the authority to grant temporary possession or use of a vehicle owned solely by the petitioner or jointly by the parties, but not solely by the respondent. Va. Code §16.1-253.1(A)(6).

The preliminary order shall specify a date for a full hearing which shall be held within 15 days of the issuance of the preliminary protective order. The petitioner and the respondent may at any time file a motion with the court to dissolve or modify the protective order at any time and that motion and hearing shall be given precedence on the Court's docket. Va. Code §16.1-253.1(B).

The Respondent can request for good cause shown that the protective order be continued to be heard with any underlying criminal charges. Va. Code §16.1-253.1(B).

C. Permanent Protective Orders

Va. Code §16.1-279.1 applies to permanent protective orders in cases of family abuse. The court may issue a protective order to protect the health and safety of the petitioner and family or household members of the petitioner. This is a full hearing, not ex parte.

A protective order issued under this section may: 1) Prohibit acts of family abuse by the Respondent, 2) Prohibit contact by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons, 3) Grant the petitioner possession of the residence occupied by the parties to the exclusion of the respondent, 4) Enjoin the respondent from terminating any necessary utility service to the residence to which the petitioner was granted possession or, where appropriate, order respondent to restore utility services to that residence, 5) Grant the petitioner temporary possession or use of a motor vehicle owned by the petitioner alone or jointly owned by the parties to the exclusion of the respondent, 6) Require that the respondent provide suitable alternative housing for the petitioner and, if appropriate, any other family or household member and where appropriate, require the respondent to pay deposits to connect or restore necessary utility services in the alternative housing provided, 7) Order respondent to participate in treatment, counseling or other programs as the court deems appropriate, 8) Grant possession of a companion animal, 9) Any other relief necessary for the protection of the petitioner and family or household members of the petitioner, including a provision for temporary custody or visitation of a minor child.

Va. Code §16.1-279.1 (A)(9) allows the court to grant temporary custody or visitation of a minor child and Va. Code §16.1-279.1(A)1 states that the court may also issue a temporary child support order for the support of any children of the petitioner whom the respondent has a legal obligation to support.

The protective order may be issued for a specified period of time up to a maximum of two years. Prior to the expiration of the protective order, a petitioner may file a written motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. There is no limit on the number of extensions that may be requested or issued. The court may assess costs and attorneys’ fees against either party regardless of whether an order of protection has been issued as a result of a full hearing. Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Proceedings to dissolve or modify a protective order shall be given precedence on the docket of the court.
D. Child Protective Orders

Va. Code §16.1-253(A) states “Upon the motion of any person or upon the court’s own motion, the court may issue a preliminary protective order, after a hearing, if necessary to protect a child’s life, health, safety or normal development pending the final determination of any matter before the court. The order may require a child’s parents, guardian, legal custodian, other person standing in loco parentis or other family or household member of the child to observe reasonable conditions of behavior for a specified length of time.”

Va. Code §16.1-253(H) provides that "nothing in this section enables the court to remove a child from the custody of his or her parents, guardian, legal custodian or other person standing in loco parentis, except as provided in § 16.1-278.2, and no order hereunder shall be entered against a person over whom the court does not have jurisdiction.

Violation of any order issued pursuant to this section shall constitute contempt of court Va. Code §16.1-253(J).

E. Proving Family Abuse

1. Family Abuse

Va. Code §16.1-228 defines “family abuse” as “any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person’s family or household member. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury.”

2. Family or Household Members

Va Code §16.1-228 defines "family or household member" as “(i) the person’s spouse, whether or not he or she resides in the same home with the person, (ii) the person’s former spouse, whether or not he or she resides in the same home with the person, (iii) the person’s parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home with the person, (iv) the person’s mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v) any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person.”

3. Sworn Testimony

Protective Orders require the testimony of 1) law enforcement, or 2) the allegedly abused person from facts that establish a warrant for assault and battery of a family member plus a finding of probable danger of further acts of abuse, or 3) testimony that establishes reasonable grounds exist to believe that respondent committed family abuse plus probable danger of further acts of abuse.
F. Guardian Ad Litem in Protective Orders

1. Guardian Ad Litem for a child

Va. Code §16.1-266 governs the appointment of guardian ad litem. In some instances the Court shall appoint a guardian ad litem and in some instances the appointment is discretionary. In cases of a child who is alleged to be abused or neglected or in detention proceedings the court shall appoint a guardian ad litem. In all other cases in which in the discretion of the court require a guardian ad litem to represent the child, a guardian ad litem may be appointed.

However, Va. Code §16.1-266(F) states that in case where the custody of a child is the subject of controversy and each parent is represented by counsel, then the court shall not appoint a guardian ad litem unless it finds that the best interests of the child are not adequately represented.

2. Guardian Ad Litem for persons under a disability

Va. Code § 8.01-9(A) provides: “A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian ad litem to such defendant, whether the defendant has been served with process or not. If no such attorney is found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs. Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of the defendant is so represented and protected. . . .”

Va. Code § 8.01-9(B) provides: “Notwithstanding the provisions of subsection A or the provisions of any other law to the contrary, in any suit wherein a person under a disability is a party and is represented by an attorney-at-law duly licensed to practice in this Commonwealth, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires that the person under a disability be represented by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of guardian ad litem.

Per Va. Code § 8.01-2(6), a “Person under a disability” shall include: a. a person convicted of a felony during the period he is confined; b. an infant; c. an incapacitated person as defined in § 64.2-2000; d. an incapacitated ex-service person under § 64.2-2016; or e. any other person who, upon motion to the court by any party to an action or suit or by any person in interest, is determined to be (i) incapable of taking proper care of his person, or (ii) incapable of properly handling and managing his estate, or (iii) otherwise unable to defend his property or legal rights either because of age or temporary or permanent impairment, whether physical, mental, or both. Such impairment may also include substance abuse as defined in § 37.2-100.

3. Guardian Ad Litem for other situations
Va. Code § 16.1-266(F) states: “In all other cases which in the discretion of the court require counsel or a guardian *ad litem*, or both, to represent the child or children or the parent or guardian, discreet and competent attorneys-at-law may be appointed by the court. A GAL “may” be appointed in all other cases in which the court believes, in its discretion, that the interests of the child are not adequately represented.”

IV. Professional Guidelines: Preamble

A lawyer may perform various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As third party neutral, a lawyer represents neither party, but helps the parties arrive at their own solution. As evaluator, a lawyer examines a client’s legal affairs and reports about them to the client or to others.

**Rule 3.1 of Professional Guidelines**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

**LEO 1729**

The issue raised is whether one attorney may serve as guardian *ad litem* in a matter and also testify as a witness (having been the visitation supervisor) in that same matter. The opinion concludes that as the testimony to be given is part of the statutory duties of a guardian *ad litem*, (i.e., to present a report to the court), the usual witness/advocate rule does not apply. The opinion establishes as a basic principle that, "*where fulfilling a specific duty of a guardian *ad litem* conflicts with traditional duties required of an attorney under the [ethics rules], the specific duty of the guardian *ad litem* should prevail.*" When the duties do not conflict, the guardian *ad litem* should follow traditional course of action required under the Code of Professional Responsibility.

**LEO 1870**

When a lawyer has been appointed to serve as a guardian *ad litem* for a child in a civil proceeding, Rule 4.2 applies and prohibits counsel for another party in that proceeding from communicating ex parte with the child about the subject matter of that proceeding, unless the guardian *ad litem* consents to such communication or unless the law or court order authorizes that lawyer to communicate ex parte with the represented child. Similarly, the lawyer serving as guardian *ad litem* for the child is bound by Rule 4.2 and may not have ex parte communications with another represented party in that proceeding, unless counsel for that party consents, or unless the GAL is authorized by law or court order to have such communication.
V. Evidence Hacks


A. Admission of RECORDS:

1). Court records: If you’re going to ask the court to take judicial notice about something in a file other than the one that is before the court -- give the court notice so that the appropriate file can be pulled by the clerks ie in a custody case, the support items are NOT in the child’s file, they are in the file of the payor parent.

Rule 2:201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Notice. A court may take judicial notice of a factual matter not subject to reasonable dispute in that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(c) Opportunity to be heard. A party is entitled upon timely motion to an opportunity to be heard as to the propriety of taking judicial notice.

2). School Records 8.01-390.1 with affidavit (req. Notice 7 days prior)

§ 8.01-390.1. School records as evidence.

In a proceeding where a minor’s school records are material and otherwise admissible, copies of such school records shall be received as evidence in any matter, provided that such copies are authenticated to be true and accurate copies by the custodian thereof, or by the person to whom the custodian reports if they are different. An affidavit signed by the custodian of such records, or by the person to whom the custodian reports if they are different, stating that such records are true and accurate copies of such records shall be valid authentication for the purposes of this section. Except for copies of report cards and letters previously sent to parents, subjective information, including observations, comments or opinions shall be redacted, by the court, from any records prior to admittance of the records into evidence pursuant to this section. Any party seeking to introduce records authenticated by affidavit under this section shall deliver notice and a copy of such records to the other parties so that they are received not less than seven days prior to the introduction of such records.

3) Social Service Records - Request records via letter for parties to the case. See Attached forms. If requesting records for non-parties such as the boyfriend of Mom, you will need to obtain consent from that person.

a. Practice Tip: To request records from the City of Richmond Department of Social Services, you must provide a certified copy of your order of appointment.

4) Mental Health Records
32.1-127.1:03 (C) Provisions of this section shall not apply to any of the following: 4. To the attorney and/or guardian ad litem of a minor who represents such minor in any judicial or administrative proceeding, if the court or administrative hearing officer has entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the health care entity of such order.

5) Medical Records with affidavit: Attach affidavit. See attached form.

Rule 2:902 SELF-AUTHENTICATION (in part):
(4) Medical records and medical bills in particular actions. Where authorized by statute, medical records and medical bills, offered upon the forms of authentication specified in the Code of Virginia.

B. HEARSAY EXCEPTIONS WHERE AVAILABILITY OF THE DECLARANT NEED NOT BE SHOWN (Rule 2:803, in part):

1. (6) Business records. A memorandum, report, record, or data compilation, in any form, of acts, events, calculations or conditions, made at or near the time by, or from information transmitted by, a person with knowledge in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, organization, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

2. § 16.1-245.1. Medical evidence admissible in juvenile and domestic relations district court.

In any civil case heard in a juvenile and domestic relations district court involving allegations of child abuse or neglect or family abuse, any party may present evidence, by a report from the treating or examining health care provider as defined in § 8.01-581.1 or the records of a hospital, medical facility or laboratory at which the treatment, examination or laboratory analysis was performed, or both, as to the extent, nature, and treatment of any physical condition or injury suffered by a person and the examination of the person or the result of the laboratory analysis.

A medical report shall be admitted if the party intending to present such evidence at trial or hearing gives the opposing party or parties a copy of the evidence and written notice of intention to present it at least ten days, or in the case of a preliminary removal hearing under § 16.1-252 or § 16.1-253.1 at least twenty-four hours, prior to the trial or hearing and if attached to such evidence is a sworn statement of the treating or examining health care provider or laboratory analyst who made the report that (i) the information contained therein is true, accurate, and fully describes the nature and extent of the physical condition or injury and (ii) the patient named therein was the person treated or examined by such health care provider; or, in the case of a laboratory analysis, that the information contained therein is true and accurate.

A hospital or other medical facility record shall be admitted if attached to it is a sworn statement of the custodian thereof that the same is a true and accurate copy of the record of such hospital or other medical facility. If thereafter a party summons the health care provider or custodian making such statement to testify in proper person or by deposition taken de bene esse, the court shall determine which party shall pay the fees and costs for such appearance or
depositions, or may apportion the same among the parties in such proportion as the ends of justice may require. If such health care provider or custodian is not subject to subpoena for cross-examination in court or by a deposition de bene esse, then the court shall allow a reasonable opportunity for the party seeking the subpoena for such health care provider or custodian to obtain his testimony as the ends of justice may require.

3) Calls for service records/police records
   1. Send letter via FOIA requesting records. See Attached forms.
   2. Absence of records - if you request, see Rule 2:803 HEARSAY EXCEPTIONS WHERE AVAILABILITY OF THE DECLARANT NEED NOT BE SHOWN (in part):
      (10) Absence of entries in public records and reports. (a) Civil Cases. An affidavit signed by an officer, or the deputy thereof, deemed to have custody of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk’s office of a court, stating that after a diligent search, no record or entry of such record is found to exist among the records in such office is admissible as evidence that the office has no such record or entry.

4) § 8.01-390. Nonjudicial records as evidence (Subdivision (10)(a) of Supreme Court Rule 2:803 derived from subsection C of this section).
   a. Copies of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk’s office of a court, shall be received as prima facie evidence, provided that such copies are authenticated to be true copies either by the custodian thereof or by the person to whom the custodian reports, if they are different. A digitally certified copy of a record provided pursuant to the provisions of Chapter 38.2 (§ 2.2-3817 et seq.) of Title 2.2, whether in electronic form or in print form with visible assurance of the digital signature, shall be deemed to be authenticated by the custodian of the record unless evidence is presented to the contrary.
   b. Records and recordings of 911 emergency service calls shall be deemed authentic transcriptions or recordings of the original statements if they are accompanied by a certificate that meets the provisions of subsection A and the certificate contains the date and time of the incoming call and the incoming phone number, if available, associated with the call.
   c. An affidavit signed by an officer deemed to have custody of such an official record, or by his deputy, stating that after a diligent search, no record or entry of such record is found to exist among the records in his office is admissible as evidence that his office has no such record or entry.

5) DMV records 46.2-215, Boone v. Commonwealth


6) DSS records
   1. See above exception to hearsay
7) Photographs/ Videos - foundation, authentication

1. § 8.01-420.2. Limitation on use of recorded conversations as evidence.

No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section shall not apply to emergency reporting systems operated by police and fire departments and by emergency medical services agencies, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62.

8) Social media/communications - focus on foundation & authentication. How do you need to use this? Maybe not for truth of the matter, if not, be ready to defend why the information is relevant?

1. Rule 2:613 PRIOR STATEMENTS OF WITNESS (in part):

   (b) Contradiction by prior inconsistent writing.

   (i) General rule. In any civil or criminal case, a witness may be cross examined as to previous statements made by the witness in writing or reduced to writing, relating to the subject matter of the action, without such writing being shown to the witness; but if the intent is to contradict such witness by the writing, his or her attention must, before such contradictory proof can be given, be called to the particular occasion on which the writing is supposed to have been made; the witness may be asked whether he or she made a writing of the purport of the one to be offered, and if the witness denies making it, or does not admit its execution, it shall then be shown to the witness, and if the witness admits its genuineness, the witness shall be allowed to make an explanation of it; but the court may, at any time during the trial, require the production of the writing for its inspection, and the court may then make such use of it for the purpose of the trial as it may think best.

K. Expert Testimony - Is your expert/professional testifying as an expert OR a fact witness?

1. § 8.01-401.1. Opinion testimony by experts; hearsay exception (subsection (a) of Supreme Court Rule 2:703, subsection (a) of Supreme Court Rule 2:705, and subsection (a) of Supreme Court Rule 2:706 derived from this section).

In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation, shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the specific statements shall be designated as literature to be introduced during direct examination and provided to opposing parties 30 days prior to trial unless otherwise ordered by the court.

If a statement has been designated by a party in accordance with and satisfies the requirements of this section, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial.

2. § 8.01-401.3. Opinion testimony and conclusions as to facts critical to civil case resolution (Supreme Court Rule 2:701 derived from subsection B of this section, subdivision (a)(i) of Supreme Court Rule 2:702 derived from subsection A of this section, and subsection (a) of Supreme Court Rule 2:704 derived from subsections B and C of this section).

A. In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

B. No expert or lay witness while testifying in a civil proceeding shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. However, in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law.

C. Except as provided by the provisions of this section, the exceptions to the "ultimate fact in issue" rule recognized in the Commonwealth prior to enactment of this section shall remain in full force.

3. Rule 2:702 TESTIMONY BY EXPERTS (Rule 2:702(a)(i) derived from Code § 8.01-401.3(A))

(a) Use of Expert Testimony.

(i) In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(ii) In a criminal proceeding, expert testimony is admissible if the standards set forth in subdivision (a)(i) of this Rule are met and, in addition, the court finds that the subject matter is
beyond the knowledge and experience of ordinary persons, such that the jury needs expert opinion in order to comprehend the subject matter, form an intelligent opinion, and draw its conclusions.

(b) Form of opinion. Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.

4. § 19.2-175. Compensation of experts.

Each psychiatrist, clinical psychologist or other expert appointed by the court to render professional service pursuant to § 19.2-168.1, 19.2-169.1, 19.2-169.5, 19.2-182.8, 19.2-182.9, 19.2-264.3:1, 19.2-264.3:3 or 19.2-301, who is not regularly employed by the Commonwealth of Virginia except by the University of Virginia School of Medicine and the Medical College of Virginia Commonwealth University, shall receive a reasonable fee for such service.

L. Other Lay Witnesses:

1. Rule 2:701 OPINION TESTIMONY BY LAY WITNESSES

Opinion testimony by a lay witness is admissible if it is reasonably based upon the personal experience or observations of the witness and will aid the trier of fact in understanding the witness' perceptions. Lay opinion may relate to any matter, such as - but not limited to - sanity, capacity, physical condition or disability, speed of a vehicle, the value of property, identity, causation, time, the meaning of words, similarity of objects, handwriting, visibility or the general physical situation at a particular location. However, lay witness testimony that amounts only to an opinion of law is not admissible.

M. Business records. A memorandum, report, record, or data compilation, in any form, of acts, events, calculations or conditions, made at or near the time by, or from information transmitted by, a person with knowledge in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, organization, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

1. § 8.01-390.3. Business records as evidence (Subdivision (6) of Supreme Court Rule 2:902 derived in part from this section).

A. In any proceeding where a business record is material and otherwise admissible, authentication of the record and the foundation required by subdivision (6) of Rule 2:803 of the Rules of Supreme Court of Virginia may be laid by (i) witness testimony, (ii) a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness either by affidavit or by declaration pursuant to § 8.01-4.3, or (iii) a combination of witness testimony and a certification.

B. The proponent of a business record shall (i) give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of such record and (ii) provide a
copy of the record and the certification to all other parties, so that all parties have a fair opportunity to challenge the record and certification. The notice and copy of the record and certification shall be provided no later than 15 days in advance of the trial or hearing, unless an order of the court specifies a different time. Objections shall be made within five days thereafter, unless an order of the court specifies a different time. If any party timely objects to reliance upon the certification, the authentication and foundation required by subdivision (6) of Rule 2:803 of the Rules of Supreme Court of Virginia shall be made by witness testimony unless the objection is withdrawn.

C. A certified business record that satisfies the requirements of this section shall be self-authenticating and requires no extrinsic evidence of authenticity.

D. A copy of a business record may be offered in lieu of an original upon satisfaction of the requirements of subsection D of § 8.01-391 by witness testimony, a certification, or a combination of testimony and a certification.

N. Rule 2:406 HABIT AND ROUTINE PRACTICE IN CIVIL CASES

(a) Admissibility. In a civil case, evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion conformed with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.

(b) Habit and routine practice defined. A "habit" is a person's regular response to repeated specific situations. A "routine practice" is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

O. Rule 2:608 IMPEACHMENT BY EVIDENCE OF REPUTATION FOR TRUTHTELLING AND CONDUCT OF WITNESS (in part)

(c) Cross-examination of character witness. Specific instances of conduct may, if probative of truthfulness or untruthfulness, be inquired into on cross examination of a character witness concerning the character trait for truthfulness or untruthfulness of another witness as to whose character trait the witness being cross-examined has testified.

VI: Professionalism

I. Dealing with prosecutors as GAL - Dealing with the prosecutor is going to vary depending on who is being prosecuted. Sometimes we are called upon as GALs to be a Guardian for a potential child witness, in that instance, the victim witness advocate is the best place to start, as he or she will likely have had contact with your ward already. Remember that you have a responsibility to get permission from the parent’s defense attorney prior to contacting that parent. If you have been appointed as the GAL for a child that is facing delinquency charges, then it can be helpful to your ward to speak with the prosecutor to find out what the real goal of prosecution is -- maybe the prosecutor will be on board with seeking mental health or counseling services if they are just presented with a potential plan.

II. Dealing with defense counsel
   1. LEO 1870
III. Dealing with parties’ counsel

1. LEO 1870

IV. TIPS FOR DEALING WITH THE GUARDIAN AD LITEM FOR CHILDREN

A. Determine early in your representation if your client will interact with the Guardian ad litem directly and promptly respond to the request for consent from the Guardian ad litem.

B. Ensure your client completes the Guardian ad litem’s questionnaire fully and returns it promptly and schedules an appointment with the Guardian ad litem as soon as possible.

C. Communicate your client’s position to the Guardian ad litem shortly after appointment. Please present the position based on facts without relying solely on your client’s feelings and opinions.

D. During the initial conversation with the Guardian ad litem, ask how the Guardian ad litem prefers to be contacted (e-mail, cell, text, etc.) by both counsel and the client. Ensure that either you or your client maintains regular contact with the Guardian ad litem.

E. Provide names and contact information of suggested sources of information and provide a few sentences summarizing the information Counsel believes the source will provide.

F. Prepare your client to meet with the Guardian ad litem. Educate your client on the best interest factors and assist them with preparing information related to those factors. Assist your client in preparing necessary documents to provide to the Guardian ad litem such as visitation logs, text messages, and e-mail communication. Ensure these documents are provided to the Guardian ad litem preferably prior to the initial meeting.
   * Explain that there is no confidentiality regarding the communication between the party and the Guardian ad litem.

G. Educate your client on the Guardian ad litem’s role so that the client has reasonable and realistic expectations. Remember “the Guardian ad litem is a full and active participant in the proceedings who independently investigates, assesses, and advocates for the child’s interests.”
   * In particular, educate the client on the independent nature of the Guardian ad litem so that the client understands that the Guardian ad litem does not work for any party (despite who requested the appointment of a Guardian ad litem) and explain to the client why a financial form is required by the Court and how and when the costs of the Guardian ad litem are assessed to a party.
   * Additionally, advise your client that it is not appropriate to tell the child(ren) what to tell the Guardian ad litem and advise your client not to question the child(ren) about the discussion s/he had with the Guardian ad litem.

H. Be mindful that the attorney client privilege does apply to the Guardian ad litem and the child(ren) and be respectful of the limitations that surround that privilege.

I. Do not speak with the child(ren). If you believe it is necessary to your
representation of your client to speak with the child(ren), you must obtain consent from the Guardian ad litem. Please explain this to your client at the beginning of the representation if it appears it will become an issue or a request by your client.

J. Please contact the Guardian ad litem before issuing a witness subpoena for the child(ren). Be prepared to discuss your opinion and perception on why the child(ren) is a necessary witness and be willing to be open to discussing alternatives. Please be mindful that the Guardian ad litem cannot “testify” by providing information that would be elicited from the child(ren) or any other interviewed party.

K. Communicate professionally and respectfully. If there are concerns raised by the client, call the Guardian ad litem and express the concerns and have an honest and open discussion. Please do not always assume your client has provided you with all of the information or that your client knows all of the information.

L. Ensure your client provides updates to the Guardian ad litem in a manner acceptable to the Guardian ad litem (see paragraph 4). Educate your client so that s/he understands that the Guardian ad litem cannot provide them legal advice (“what do I do about him violating the order) but still needs to be made aware of the issues and concerns so that the Guardian ad litem can investigate.

VII: Hearing

I. As you investigate, continuously analyze the information and documents that you have received and think about how that information or those documents would come into evidence. Think about what is the relevant and necessary information for the judge to make a decision.

A. In advance of trial, consult with other counsel regarding the evidence you intend to present. Consider stipulations in order to streamline the case for presentation.
D. Determine if you need to file motions/ petitions/ show cause. If you file a show cause, be prepared to actually prosecute it. Know your jurisdiction and understand when you have to file with the Court Services Unit versus attorney filings in the clerk’s office.

II. Present Evidence and Call Witnesses as you deem appropriate and necessary

III. Make legal arguments that are appropriate and consistent with your wards best interest.

A. Your recommendation should not include hearsay or introduce evidence or facts that have not been presented to the Court. You may want to take the opportunity to let the court know, in broad statements, what your investigation entailed (i.e. My investigation included interviewing school personnel, counselors, the pediatrician, the parents, several references for the parents, and the child).

VIII: After the hearing
I. Coordinate how you will share the Court order with the child(ren) after the trial.

II. Appeal?

III. Appointment on appeal? See Attached form.

**Ethical Considerations for GALs**

Written by Leslie A.T. Haley, Esquire, Haley Law, PLC

I. General Approach

1. Fulfill all of the duties which apply to a guardian ad litem.

2. Where fulfilling a specific duty of a guardian ad litem conflicts with the traditional duty governing an attorney as expressed in the Rules of Professional Conduct, fulfilling the duty of the guardian ad litem should prevail.

3. Where fulfilling a specific duty of a guardian ad litem does not conflict with the duties governing an attorney as expressed in the Rules of Professional Conduct, the guardian ad litem should follow the traditional course of action in the Rules of Professional Conduct.

4. Attempt to minimize occasions when the apparent duty of a guardian ad litem appears to be in conflict with the apparent duty of an attorney in an attorney-client relationship.

In general terms, the most challenging ethical problem faced by a guardian ad litem occurs when the guardian ad litem faces a conflict between a duty that traditionally governs the conduct of an attorney in an attorney-client relationship, and a duty that governs the conduct of an attorney acting as a guardian ad litem.

II. Duties and Authority of a Guardian ad litem

A. Duties and Authority Arise from Multiple Sources.

The duties and authority of a guardian ad litem are set forth in Rule 8:6 of the Rules of the Supreme Court of Virginia, in the Order appointing the guardian ad litem, in §8.01-9 of the Virginia Code, the Standards to Govern the Performance of Guardians ad Litem for Children and in a variety of judicial opinions.

B. Rule 8:6 of the Rules of the Supreme Court of Virginia.

Rule 8:6 The Roles of Counsel and of Guardian ad litem When Representing Children.

The role of counsel for a child is the representation of the child’s legitimate interests.

When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child’s interest and welfare. The guardian ad litem shall advise the court of the
wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child’s interest and welfare.

See, Stanley v. Fairfax County Department of Social Services, 242 Va. 60, 62, 405 S.E.2d 621 (1991)

In determining the ethical duties of an attorney serving as guardian ad litem, the Legal Ethics Committee has recognized that the relationship of the guardian ad litem and child is different from the relationship of attorney and client. In reconciling the differences between the traditional ethical duties an attorney owes to a client, and the legal obligations that a guardian ad litem must discharge, the committee believes that where fulfilling a specific duty of the guardian ad litem conflicts with the traditional duties required of an attorney under the Rules of Professional Conduct, the specific duty of the guardian ad litem should prevail. When the duties do not conflict, the guardian ad litem should follow traditional course of action required under the Rules of Professional Conduct. LEO 1844

C. The Order of Appointment.

The Order for Appointment of Guardian Ad Litem (DC-514) provides that the guardian ad litem is appointed “to protect and represent the interests of [child] in connection with all proceedings involved in this matter.”

The Order of Appointment provides further that the guardian ad litem “perform the duties . . . specified on the reverse and incorporated by reference into this order.” The duties incorporated by reference include the following:

1. Represent the child in accordance with Rule 8:6 of the Rules of the Supreme Court of Virginia.

2. Advise the court relative to the following:
   a. the results of the guardian ad litem’s investigation of the case;
   b. the guardian ad litem’s recommendation as to any testing necessary to make an effective disposition of the case;
   c. the guardian ad litem’s recommendation as to the placement of the child and disposition of the case;
   d. the results of the guardian ad litem’s monitoring of the child’s welfare and of the parties’ compliance with the courts orders;
   e. the guardian ad litem’s recommendation as to the services to be made available to the child and family or household members.

3. File appropriate petitions, motions and other pleadings and appeals on behalf of the child.

4. The guardian ad litem is authorized to appear at the Family Assessment and Planning Team and at panel review hearings conducted by the local Department of Social Services pursuant to Virginia Code § 63.1-56.2.
D. Judicial Opinions.

The appellate courts of Virginia have addressed the authority of a guardian ad litem in several cases:


In Stanley, the Court held that a guardian ad litem of children has standing to petition for termination of residual parental rights. The Court reasoned that Va. Code § 16.1-241(A) provides that the Juvenile and Domestic Relations District Court consider petitions filed by “any party with a legitimate interest therein.” The Court found that a guardian ad litem “certainly has a legitimate interest in whether his ward is to be subjected to continued abuse and neglect.” Stanley, 242 Va. 60 at 63. Additionally, the Court cited Virginia Code § 8.01-9 as authority supporting its conclusion that a guardian ad litem may file a petition seeking termination of residual parental rights if a guardian ad litem believes that the best interests of his ward compel termination of the parents’ rights.

Where the guardian ad litem authority to act is unclear, consider filing a motion with the appointing court seeking an order specifically authorizing the proposed action on behalf of the child. The proposed action should reflect the guardian ad litem duty under Rule 8:6 to fully protect the child’s interests and welfare. Additionally, review the reasoning of the Supreme Court of Virginia in Stanley, which looked at why the child was before the court (allegations of abuse and neglect), and examine the guardian ad litem’s proposed action to determine whether it would further the child’s interests in that regard. Is your proposed action one which promotes the child’s interests in relation to the reason why the child is within the court’s jurisdiction?

III. Rule 1.2: Scope of Representation

As discussed above, the guardian ad litem is not bound by the child client’s expressed wishes, but the child’s best interests. That fundamental duty of the guardian ad litem conflicts with the traditional role of the lawyer as advocate for the client. It is also inconsistent with the lawyer’s fundamental responsibility under Rule 1.2 to abide by a client’s decisions about the objectives of the case. Guardian ad litems are required by statute to present to the court what they think is in the child’s best interests, as well as the reasoning and facts that support this conclusion, regardless of the client’s expressed wishes.

This is further complicated because a guardian ad litem must consider the child’s position when assessing the child’s best interests. This includes factors such as the child’s age, maturity, mental capacity, competence and environment, which should all be considered by the guardian ad litem when weighing the child’s wishes versus what is in their best interest.

Even though the child’s wishes may be inconsistent with the guardian ad litem’s opinion the guardian ad litem has a duty to make the child’s wishes known to the court.
IV. Rule 1.6: Confidentiality

Applying the confidentiality rules to guardian ad litems can be confusing. A difficult issue for a guardian ad litem is whether and to what degree to keep confidential certain communications between the guardian ad litem and child. The confidentiality normally required in the lawyer/client relationship might prevent a guardian ad litem from carrying out the statutory duty to advocate what she thinks is in the best interest of the child. This is because Rule 1.6 prevents the guardian ad litem from disclosing information provided by the child that arguably should be disclosed to the court for an adjudication of the child’s best interests under the statute. Consequently, a guardian ad litem generally must bend the restrictions of Rule 1.6 to disclose to the court relevant and necessary information provided by the child. There is no satisfactory way to resolve this ethical dilemma. What, then, should the guardian ad litem do if the child informs the guardian ad litem of relevant facts that the child does not want to be divulged?

As legal counsel for the child’s best interests, the guardian ad litem must explain to the child, if possible, that the guardian ad litem is charged with advocating the child’s best interests and that otherwise confidential information may be provided to the court. What should the guardian ad litem do if the child informs the guardian ad litem of relevant facts that the child does not want to be divulged?

The guardian ad litem should advise the child, before soliciting information, that the information will not be confidential. The child then can make informed decisions about what to disclose. This advisement is especially important when representing older children who often have a sophisticated understanding of what characterizes a lawyer/client relationship. Many young people see lawyers in movies, television, and other media. They, or someone they know, often have personal experience with the legal system. They may assume their lawyer will keep information confidential. To make sure the guardian ad litem does not violate the trust of these young people, it is critical to let child clients know that the guardian ad litem’s role is to tell the judge what the guardian ad litem thinks is best for the child and why. The guardian ad litem also should let the child know that she might have to reveal matters they will discuss to the judge, the social worker, or someone else.

Reconciling the Confidentiality Duty.

1. As a general principle, the guardian ad litem should try to maintain the confidentiality of information provided by the child, as well as information provided by others.

2. Where disclosure of otherwise confidential information would be required in order to fully protect the child’s interests and welfare, the guardian ad litem is under a duty to disclose the information. Rule 8:6. The guardian ad litem is charged with the duty of “fully protecting the child’s interests and welfare.” Rule 8:6.

3. Where the information that needs to be disclosed is related to a conflict between the wishes of the child and the opinion of the guardian ad litem, the guardian ad litem has a duty to advise the court of the wishes of the child. Rule 8:6. One can readily imagine a set of facts in which a guardian ad litem would feel compelled to disclose otherwise confidential information in order to serve the child’s interests and welfare.

4. The Standards to Govern the Performance of Guardian ad Litem for Children require the guardian ad litem to advise the child of the limitations on confidentiality and the fact that there
may be circumstances when confidentiality will not apply to their communications and times when it will. There will be occasions when the child’s willingness to disclose information is consistent with the guardian ad litem’s judgment as to what information needs to be disclosed in order to protect the child’s interests and welfare. However, other occasions may arise where the child’s wishes concerning disclosure are inconsistent with the guardian ad litem’s duty to the court.

GAL Standards Introductory Comments: “In juvenile delinquency, child in need of supervision, child in need of services, and status offense cases, the guardian ad litem should exercise caution when talking to the child about the circumstances of the offense and advise the child about the limitations on confidentiality that may apply.”

5. What is important to keep in mind is that the decision to disclose or not disclose the information belongs to the guardian ad litem rather than to the child.

V. Client-Lawyer Relationship

A. Maintaining Normal Client-Lawyer Relationship

The client-lawyer relationship assumes that the client, when properly advised and assisted, can make decisions about important matters. In other words, the presumption is that the client has capacity. The rule’s first instruction is that when a client’s capacity to make decisions is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship. Capacity may be diminished by a client’s age, drug addiction, mental impairment, or for some other reason. A “normal client-lawyer relationship” means the lawyer owes duties of loyalty, confidentiality, diligence, conflict of interest, competence, communication, and advice.

Maintaining a normal client-lawyer relationship requires communicating regularly. Even though we have explained that a guardian ad litem does not have a traditional lawyer/client relationship with the child, as per the Standards, the guardian ad litem should:
- Meet face to face and interview the child. Standard A.
- Advise the child, in terms the child can understand, of the nature of all proceedings, the child’s rights, the role and responsibilities of the guardian ad litem, the court process and the possible consequences of the legal action. Standard C.
- Communicate, coordinate and maintain a professional working relationship in so far as possible with all parties without sacrificing independence. Standard I.
- Advise the child, in terms the child can understand, of the court’s decision and its consequences for the child and others in the child’s life. Standard K.

The commentary to the rules is clear that a client with diminished capacity often can understand, deliberate upon, and reach conclusions about matters affecting the client’s well-being. It further explains that “children as young as five or six years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

B. Assessing Client Capacity

In determining whether a client has capacity to make certain decisions, lawyers should know that they can have a strong influence on a client’s decisions. Paternalistic tendencies can be problematic for even the most well-intentioned parents’ and children’s lawyers. Lawyers need to be aware of the power dynamics and other factors that influence the relationship and
representation.

Just because a lawyer disagrees with a client's decision, or thinks what the client wants is not best for the client, does not mean the client lacks capacity to make decisions. A client's decision may result from many things—fear, lack of understanding, subjective interests—not necessarily diminished capacity. The lawyer should focus on the decision-making process, not whether she approves of the decision.

C. Factors to consider when assessing client capacity:

a. Cognitive ability -
   In some cases a lawyer may need to talk to the child's therapist and psychiatrist to understand their cognitive ability if they've been diagnosed with a psychotic disorder.

b. Emotional and mental development & stability -
   This often changes from one interview to the next, and can change dramatically in certain cases. For example, consider the impact of a child's drug use on her emotional and mental stability.

c. Ability to communicate -
   A child may at first be unable to communicate her feelings, however, through time, medication, counseling, and other interventions she may be able to later engage in meaningful communication.

d. Ability to understand consequences -
   Has the lawyer explained the case, including consequences of certain decisions to help the client understand?

e. Consistency of decisions -
   There is nothing wrong with saying to the court “Mary has mixed feelings, your Honor …” The lawyer should discuss in advance with Mary exactly what will be said to the judge.

f. Strength of wishes -
   If Mary had been adamant about wanting to return to her mother's, and the foster mother had reported that she cried constantly for her mother, and her behavior improved after visits with her mother, this would affect the advocacy efforts.

g. Opinions of other –
   When consulting family members or professionals involved with the case, lawyer must keep the client's interests foremost in her mind. The guardian ad litem should also be aware of any biases and misunderstanding that family members or others may have, and attempt to weigh these factors in determining the client's best interests.

Thus, under the Rules of Professional Conduct, the lawyer should speak to others who have an interest in the case to get their input on what the child wants. But the lawyer should be aware of any bias or misunderstanding that may impact the child's return home.

For children (in addition to above factors):
child's age (age alone is not dispositive)
child's developmental sta
D. Viewing Capacity as a Continuum

Just because a client has diminished capacity, a client may be able to understand, weigh, and reach conclusions about matters affecting her well-being. For example, a child may not understand permanency issues, and may not be able to answer how he or she would actually feel about returning home if a parent’s current paramour lived there full time. But that child may understand and give her reasons on issues such as visitation, including how often and under what conditions (unsupervised, supervised by grandmother, supervised by her caseworker) she would like to visit her mother.

Increasingly, the law recognizes degrees of capacity. Even when a client is impaired, she can participate in some decisions. In other words, a client may have capacity for some issues, but not others. A recent Wisconsin case held that there are different levels of capacity, and that a juvenile who has been declared incompetent to participate in the delinquency proceedings does not necessarily lack capacity to understand the sanctions in a “juvenile in need of protection and services” case.

E. The Difference Between Capacity and Competence

Capacity refers to a client’s ability to understand information relevant to the case and the ability to appreciate the consequences of decision.

Does the client really know what the case is about, what is happening, and what consequences might result from certain actions or inactions? Capacity refers to ability and comes in various degrees.

Competence is a legal standard, and denotes a specific level of skill, knowledge, or ability. The most critical distinction between the two concepts is that competence is a characteristic that someone either possesses or doesn’t. It is an all or nothing principle. Usually competence is associated with a legal standard, used to answer a legal question. For example, in asking whether an individual is “competent to stand trial,” the court considers evidence and issues a ruling that the individual either is or is not competent.

VII. Rule 1.7 & 1.9: Conflicts of Interest

There are several ethical issues that routinely confront the lawyer-guardian ad litem appointed in dependency cases. Because the guardian ad litem’s role differs from that in the traditional lawyer/client relationship, the guardian ad litem’s unique role complicates resolving traditional ethics conflicts.

A. Guardian ad litem Potential Conflicts When Representing Multiple Children

A guardian ad litem may face a different conflict analysis when representing multiple children of the same family. These conflicts, however, are viewed differently than traditional conflicts by the guardian ad litem whose duty is to protect the interests of the children, even if contrary to the children’s wishes. Because the guardian ad litem’s role differs from that in the traditional attorney-client relationship, the guardian ad litem’s unique role complicates resolving traditional ethics conflicts.

From the guardian ad litem’s perspective, when representing multiple children, there may be no
conflict of interest because the arguments for placing the children, although seemingly contradictory, ultimately serve their best interests. Thus, the guardian ad litem would have no need to withdraw from representing one, or all, of the children. Nevertheless, representing the best interests of multiple clients by a guardian ad litem is not without potential conflicts.

Suppose that the guardian ad litem represents three children ranging in age from 10 months to 17 years old in a situation where mom is accused of drug abuse. While the 17 year old can confirm that he is bonded to his mother and educational stability is key to his finishing high school. Because of his age mother’s occasional drug use does not impact his safety or well-being like that of the younger children. In this type of situation the guardian ad litem may advocate for the older child to remain at home and the younger children to be placed in foster care. From the guardian ad litem's perspective, there may not be a conflict of interest because the arguments for placing the children, although seemingly contradictory, ultimately serve their best interests. Thus, the guardian ad litem would not need to withdraw from representing one, or all, of the children.

Nevertheless, when a guardian ad litem represents the best interests of multiple clients there may be a conflict. Slightly changing the facts changes the analysis and the outcome of the ethical dilemma. If the 17 year old’s therapist recommends that he remain with his younger siblings because those are his strongest familial ties, but the younger children’s treatment providers believe the 17 year old to be a negative influence on the younger children then the guardian ad litem faces a quandary. Advocating for the best interest of one sibling may compromise the best interests of another sibling. In this case, the guardian ad litem should ask the court to appoint a different guardian ad litem for the younger children.

Can the guardian ad litem Withdraw from One, But Not the Other Case?

Contrary to traditional ethics conflict analysis, where a lawyer should withdraw from both cases when a conflict arises, in the case of a guardian ad litem that analysis may differ. In the above fact pattern, the lawyer could continue as guardian ad litem for the 17 year old and ask the court to appoint a different guardian ad litem for the other children in the case.

However, with a slightly different twist of the facts, the conflicts analysis would be different. Where a guardian ad litem was appointed to rep two children, one age 7 who is severely emotionally disturbed with behavioral problems and one age 1. Both have been removed from the home and are in separate foster homes because of their distinct needs. The infant's foster parents and DSS believe he should have no contact with the 7 year old because of his severe problems. The guardian ad litem, however, has concluded that it's in the best interests of the 7 year old to maintain a relationship with his infant brother because he views himself as his protector and is his only emotional bond.

Here, the interests of the children are in conflict. In order to vigorously advocate on behalf of the children’s differing interests, the guardian ad litem would need to prove and argue two antagonistic positions. This would be much more difficult; perhaps impossible. The better approach would be for the court to appoint two separate guardian ad litems for these two children.

B. Former Guardian ad litem Relationship: Subsequent Representation.

An attorney served as guardian ad litem for an individual who was subsequently declared incompetent. Subsequently, the incompetent’s son was accused of murdering his sister and requested the former guardian ad litem to represent him. It is not improper for the attorney to
accept the representation. [DR 5-101; DR 5-105]. LEO # 857 (10/31/86).

DR 5-105(D) states that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

The Committee declines to give an opinion as to the existence of an attorney-client relationship between the child and the attorney serving as guardian ad litem.

However, whether or not an attorney-client relationship arises, and assuming that the attorney/guardian ad litem determines that there is an identity of interest between the child and DSS, the Committee concludes that the attorney would not be prohibited from representing DSS in the appeal. This is so whether or not a new guardian ad litem is appointed for the child. Further, assuming no apparent conflict between the child and DSS, the attorney would not be required to receive consent of a new guardian ad litem before undertaking representation of DSS in the appeal. LEO # 1626 (2/17/95).

VIII. Rule 4.2 & 4.3 Communication with Represented and Unrepresented Persons or Parties

A guardian ad litem has a duty to investigate the facts of the case vigorously and thoroughly. In addition, a guardian ad litem is required to monitor the child’s welfare and the parties’ compliance with the orders of the court. Fulfilling these duties usually requires the guardian ad litem to talk with the other parties. It might be argued that the effectiveness of a guardian ad litem’s investigation or monitoring efforts may be compromised by seeking the consent of counsel to interview counsel’s client. However, counsel for the other parties may give consent and allow the guardian ad litem to interview the mother, father or DSS caseworker without the presence of counsel. If counsel refuses to give consent, the guardian ad litem should consider filing a motion with the court to compel access to a represented party, in order to fulfill the duties that a guardian ad litem must fulfill.

The VSB Standing Committee on Legal Ethics issued LEO 1870 in October of 2013 to address exactly these issues. This opinion addresses the following issues:

A. Communicating with Represented Parties

Rule 4.2 states that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer ...” There are two exceptions: (1) the lawyer has the consent of the other lawyer, or (2) the lawyer is authorized by law or a court order to communicate with the unrepresented party.

The rule protects parties against overreaching by opposing counsel, safeguards the lawyer-client relationship from interference, and reduces the likelihood that clients will disclose confidential information that will harm their interests.

The rule applies even though the represented person initiates or consents to the communication. So even if a parent approaches a guardian ad litem with questions or comments about the case, the guardian ad litem must immediately end communication unless the guardian ad
litem gets consent from the parent's lawyer.

Difficulty arises when applying Rule 4.2 because the parties in dependency cases work closely together outside of court. The caseworker and child's counsel, in particular, have extensive contact with parents and children, almost always outside the presence of the other lawyers. Issues arise not only when a lawyer is preparing for court, but during home visits, educational meetings, case staffings, and other routine activities.

GAL Standard B: Comments provide that the guardian ad litem “should communicate their role and responsibilities clearly to the parents and/or other party's attorneys including the guardian ad litem's legal status in the proceeding and responsibility to participate fully to protect the child's interests and express the child's wishes.

GAL Standard D: Participate, as appropriate, in pre-trial conferences, mediation and negotiations: Comment provides that the guardian ad litem “should take any action necessary to attempt to resolve the case in the least adversarial manner possible; however, a guardian ad litem should clarify, when necessary, that he or she is not acting as a mediator.”

These standards are not inconsistent with the conclusions of this LEO. In the opinion it is stated that the lawyer serving as guardian ad litem for the child is bound by Rule 4.2 and may not have ex parte communications with another represented party in that proceeding, unless counsel for that party consents, or unless the guardian ad litem is authorized by law or court order to have such communication.

B. Communicating with UnRepresented Parties

Rule 4.3: “(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. (b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel....”

A guardian ad litem must clarify her role and responsibilities with the parent and inform them that her duty is to the child, not to the mother or the father. The guardian ad litem must inform them that she cannot give them legal advice other than recommending that they obtain an attorney. In addition, the guardian ad litem must emphasize that she makes recommendations to the court, does not issue rulings or orders and consequently has no authority to order either parent to make changes in the visitation. Finally, the guardian ad litem must inform the parents that she is either not a mediator and/or cannot act as a mediator in this matter.

C. Communicating with Parents by Opposing Counsel

Agency lawyers, like DSS in particular, should be aware of this potential issue when advising caseworkers who are interviewing parents outside the presence of counsel. They can guide investigation, but have to be sensitive to the dividing line between guiding investigations and violating Rule 4.2.

Parents’ lawyers who are concerned about protecting the clients, especially in the pre-adjudication phase where allegations have not been sustained, should make clear to caseworkers, guardian ad
items, children’s and agency lawyers that they are not consenting to any contact with their client without their presence. On the other hand, the success of the reunification efforts depends on a strong working relationship between the caseworker and parent, so parents’ lawyers have to be very sensitive when advising clients. They should encourage as much cooperation as possible, while protecting the client’s rights. In fact, post-disposition, parents’ lawyers need to advise their clients that lack of cooperation with social services may have adverse consequences, including termination of parental rights.

D. Communicating with Caseworkers

May a parent’s lawyer, child’s lawyer, or guardian ad litem communicate with the case worker outside the presence of the agency lawyer?

In most jurisdictions, the caseworker is not the “client” of the agency lawyer, because the agency lawyer represents the child welfare agency, not the individual caseworker.

E. Agency Workers Communicating with Child or Represented Person

LEO 1870 also addresses this issue and concludes that Rule 4.2 applies to all lawyer-directed communications with a represented person by non-lawyers. However, a government lawyer does not violate Rule 4.2 merely by requesting a social worker or investigator to communicate with a represented person, including a child for whom a guardian ad litem has been appointed, if the law entitles or charges the investigator or social worker to have such communication. While the government lawyer may request that the social worker or investigator contact and interview a represented person, and advise generally what information the lawyer seeks, the lawyer may not “master-mind” or “script” the interview or dictate the content of the communication. Such conduct would be viewed as circumventing Rule 4.2 through the actions of another. Rule 8.4(a).

F. After the Conclusion of the Litigation.

A question may arise as to whether this prohibition applies when litigation has concluded. In the Juvenile and Domestic Relations District Court, it is sometimes unclear whether counsel for a mother or father will continue to serve in that capacity. For example, after adjudication and an order of disposition, counsel may conclude his or her representation of a parent, and not appear for the parent at a subsequent review hearing. It is presumed that an attorney continues to represent the client following the conclusion of litigation. Thus, before communicating with the opposing party, an attorney must contact opposing counsel and inquire as to whether the opposing party remains represented by counsel. LEO # 1709.

It was improper for an attorney to communicate with an opposing party about a visitation problem after the conclusion of litigation involving custody, support and visitation, even though a final order had been entered and there was no communication from the opposing party’s counsel that they continued to represent their client. LEO # 1389.

G. What about Parent’s Counsel Communicating with Child?

When parents are engaged in a custody dispute, is it permissible for counsel for either parent to meet with the minor child without first obtaining permission from the guardian ad litem?
LEO 1870 addresses this issue clearly and opines that when a lawyer has been appointed to serve as a guardian ad litem for a child in a civil proceeding, Rule 4.2 applies and prohibits counsel for another party in that proceeding from communicating ex parte with the child about the subject matter of that proceeding, unless the guardian ad litem consents to such communication or unless a court order authorized that lawyer to communicate ex parte with the represented child.

IX. THE GUARDIAN ad litem AS A WITNESS

Rule 3.7 Lawyer As Witness

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where...

   (3) disqualification of the lawyer would work substantial hardship on the client.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

If the goal of the guardian ad litem is to follow the traditional disciplinary rules where possible, then the guardian ad litem would offer facts to the court through the traditional means of producing witnesses and other evidence to prove those facts. The guardian ad litem would minimize his or her personal statements to the court to include only those events that the guardian ad litem personally witnessed, as well as recommendations based upon evidence which has been admitted.

As to the issue of calling the guardian ad litem as a witness; LEO 1729 opines that there is a conflict between the attorney’s ethical obligations under the “witness-advocate” rule and the attorney’s duty as a guardian ad litem to report facts to the court that were learned during the guardian ad litem’s appointment and investigation, and to make recommendations to the court based upon such facts. If the guardian ad litem cannot report to the court what the guardian ad litem has observed or learned during the visitation, for fear of violating the “witness-advocate” rule, then the guardian ad litem cannot discharge the legal obligations of his appointment. The guardian ad litem is charged with the duty of “fully protecting the child’s interest and welfare.” Va. S. Ct. R. 8:6.

The guardian ad litem is required to investigate the case and “advise the court” regarding “the results” of the investigation. This requires the guardian ad litem to provide the court with material facts that may be disputed by some party in the instant proceeding. The guardian ad litem is required to provide the court with his “opinion” as to “what is in the child’s interest and welfare.” Rule 8:6 supra.

Enforcing the “witness-advocate” rule in the context of a guardian ad litem complying with his legal mandate to report to the court the results of his investigation does not serve the purpose for which the rule was intended. One of the purposes of the “witness-advocate” rule is to protect the client’s interests in not having testimony produced on a contested issue from a witness (lawyer) who is obviously interested in the case’s outcome and is thus subject to impeachment for that reason. LEO 1729.

X. When do the Responsibilities of the Guardian ad litem End?
1. The Guardian ad litem “shall represent the child … at any such hearing and at all other stages of the proceeding unless relieved or replaced in the manner provided by law.” Virginia Code § 16.1-268.

2. Some view the guardian ad litem as “a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs.” This restrictive definition was announced in Bowen v. Sonnenburg, 411 N.E.2d 390, 396 (Ind. App. 1980), cited as a note in Black’s Law Dictionary 706 (6th ed. 1990). Chief Justice Carrico and Justice Stephenson, dissenting in Stanley v. Fairfax County Department of Social Services, 242 Va. 60, 405 S.E.2d 621 (1991), stated this view.

3. However, the majority in Stanley rejected this restrictive view of the guardian ad litem’s duties, holding that a guardian ad litem has standing to file a petition seeking termination of residual parental rights, over the objection of the parents and the Department of Social Services.

4. Where the guardian ad litem’s authority to act is unclear, consider filing a motion with the appointing court seeking an order specifically authorizing the proposed action on behalf of the child. The proposed action should reflect the guardian ad litem’s duty under Rule 8:6 to fully protect the child’s interests and welfare. Additionally, review the reasoning of the Supreme Court of Virginia in Stanley, which looked at why the child was before the court (allegations of abuse and neglect), and examined the guardian ad litem’s proposed action to determine whether it would further the child’s interests in that regard. Is your proposed action one which promotes the child’s interests in relation to the reason why the child is within the court’s jurisdiction?

A. And now there’s the question of my file

   First and foremost the duty related to returning the client’s property and copies of all documents belongs to the client. Since Dad is not the client Dad has no right to a copy of the file or any other documents or evidence that the guardian ad litem has gathered in the course of their representation of the child.

   As earlier stated, the guardian ad litem has a traditional attorney/client relationship with the child except to the extent the special duties of the guardian ad litem conflict with the Rules of Professional Conduct. That is the case with the duty to provide a client’s file. In this case, the guardian ad litem is acting as a fact-finder, investigator, and then ultimately an advocate for the best interests of the child. It is not up the child, nor necessarily ever in their best interests for all of the file materials and discovery the guardian ad litem has done to get into any of the parties hands. The guardian ad litem can only turn over a copy of the file with the permission of the Court.

   If the guardian ad litem receives a subpoena for a copy of the file or materials the guardian ad litem should file a formal Motion to Quash the subpoena and let the court decide if anyone gets access to the guardian ad litem’s file.

B. The Challenge

   To determine one’s duties when there is an apparent conflict between the duties of an attorney in an attorney-client relationship, and the duties of an attorney serving as a guardian ad litem.
Suggested Approach.

1. Fulfill all of the duties which apply to a guardian ad litem.

2. Where fulfilling a specific duty of a guardian ad litem conflicts with the traditional duty governing an attorney as expressed in the RPCs, fulfilling the duty of the guardian ad litem should prevail.

3. Where fulfilling a specific duty of a guardian ad litem does not conflict with the duties governing an attorney as expressed in the RPCs, the guardian ad litem should follow the traditional course of action in the Code of Professional Responsibility.