

THE “NEW” GAL RULES AND BEST PRACTICES

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IMPORTANT DEVELOPMENTS IN MAINE FAMILY LAW: A VIEW FROM THE BENCH AND THE BAR

THE "NEW" GAL RULES AND BEST PRACTICES FOR LAWYERS

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EXCLUSIVE RESPONSIBILITY AND OPINIONS OF THE PRESENTER
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History: GALs are not a New Invention!



- A court "should appoint a guardian *ad litem* to appear in the cause and protect and safeguard the rights of the infant, and, unless the infant is so protected and the record so show, a judgment or decree against him is erroneous and may be reversed on a writ of error." *Easton v. Easton*, 33 Me. 114, 122 (1851).
- A GAL appointment may occur when the "minor's interests require separate representation." *Cyr v. Cyr*, 432 A.2d 793, 798 (Me. 1981).
- In the 1980s, The Legislature began enacting statutory definitions for the best interests test, which included authority to appoint GALs, and amendments have continued over the decades.

Nor is the Duty or the Role

- *Gerber v. Peters*, 584 A.2d 605, 607 (Me. 1990) (“The duty of a court appointed guardian ad litem of a minor child in a divorce case is to the court, and the scope of that duty lies within the parameters of the order of appointment.”).
- *Coppersmith v. Coppersmith*, 786 A.2d 602, 604 (Me. 2001) (“Given the extensive history of conflict between the parents...the District Court needed an objective and independent investigation into the interests and desires of the Coppersmiths' children, and did not abuse its discretion in appointing a guardian ad litem.”).
- *Richards v. Bruce*, 691 A.2d 1223, 1226 (Me. 1997) (“The guardian serves as the court's agent and prepares a report for the court detailing his or her findings.”).

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And When Parents Litigate: Due Process...No Matter How Small



- *Miller v. Miller*, 677 A.2d 64, 70 (Me. 1996) (The “use of guardians ad litem to protect the best interests of children in divorce proceedings fully satisfies any federal constitutional requirements. Accordingly, the Miller children are not entitled to intervene in the divorce action of their parents and be represented by independent legal counsel.”).
- *S**** S**** v. State*, 299 A.2d 560, 571 (Me. 1973) (The “power of the State to act as *parens patriae* for the benefit of children and adolescents does not override the constitutional privilege of substantive due process to which minor children are entitled equally as much a adults.”) (Dufresne, C.J., dissenting).

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See Wechsler v. Simpson, 2016 ME 21, ¶15

- Pursuant to 19-A M.R.S. § 1507(4) (2015), a “guardian ad litem shall use the standard of the best interest of the child as set forth in section 1653” when reporting findings and recommendations to a court.
- During testimony, GAL stated that “Washington’s guidelines are informative on child development and are relevant in this action only to the extent that they address factors included in Maine’s statute.
- Further, in his report, the GAL explicitly stated that “our state should not and cannot follow the laws or guidelines of another state.”
- The GAL thereby “expressly demonstrated a clear understanding that his analysis was to be governed by the best interest standard established in Maine law.”

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I. The GAL “Paradigm Shift” for Judges and Lawyers



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The New GAL Law and Rules

➤ Who Qualifies as a GAL?

- Only licensed professionals who take GAL training and placed on roster by CJ

➤ Mandatory Duties:

- Interview child and parents/partners in home
- Investigate, write a report, and appear at trial to testify or assist court

➤ Non-Mandatory Duties if in AO:

- Interview third parties like grandparents (if not living in home), teachers, therapists, physicians or day care providers *designated by AO*
- Obtain and review records from other sources
- Attend mediation or other court proceedings before trial
- Recommend therapist, psychological evaluations, or other service providers

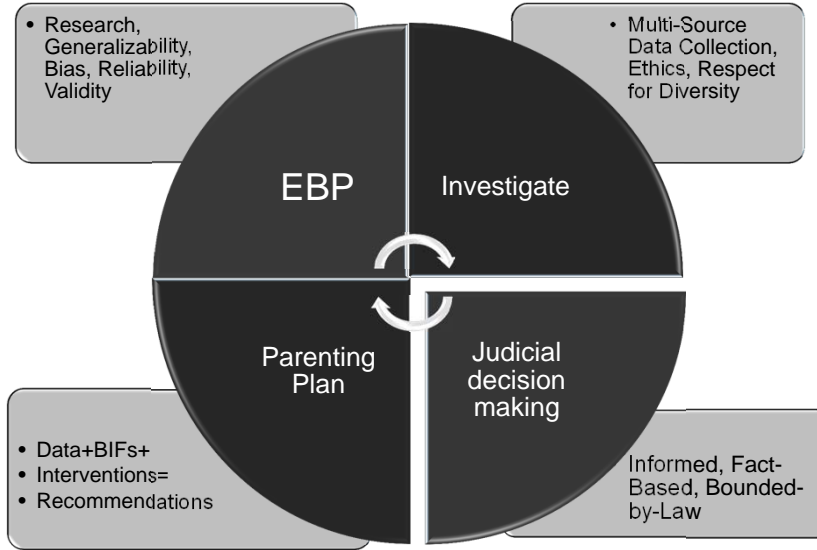
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A Summary: Know the GAL Rules

- Law and practices for GALs are evolving as to role, duties, and funding in title 22, 18-A, and 19-A cases.
- The AO is not “inspirational” but defines immunity and ethical protections for a GAL so “no means no” unless judge orders.
- If you intend to file for a GAL do so early: “Use it or lose it.”
- Magistrates/judges must justify appointment based upon needs of child and financial capacity of parents in non-title 22 cases.
- Understand the differences between investigation and recommendations by GAL and how a judge may view the roles.
- **Bend Don't Break:** Bad tactical strategy and worse outcomes for parents in court.
- Providing data to GAL within the scope of the AO is not the same as lobbying hence the admonition above.....
- C-X is not a chance to disrespect or theatrical for clients: Your audience is a judge not internet ratings or client kudos.

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Conceptualizing GAL "Best Practices" Today



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Legislative Enactments and Law Court Rules Now Define the Role for All GALs

- 4 M.R.S. §1555(1) (In "proceedings to determine parental rights and responsibilities and guardianship of a minor under Title 18-A and in contested proceedings pursuant to Title 19-A, section 904, 1653 or 1803 in which a minor child is involved, the court may appoint a guardian ad litem for the child when the court **has reason for special concern** as to the welfare of the child.").
- 4 M.R.S. §1556(1) ("An order appointing a guardian ad litem pursuant to Title 22, section 4005 must specify the terms and conditions of the appointment as provided in Title 22, this chapter and rules adopted by the Supreme Judicial Court.").

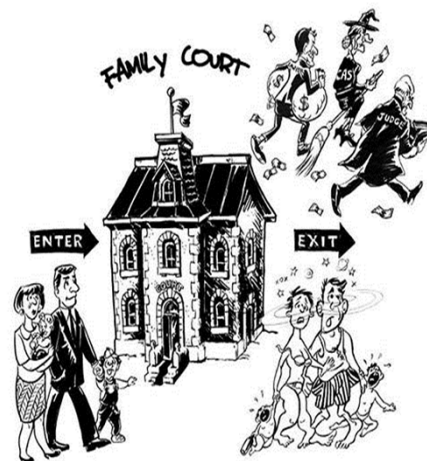
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A Common Core

- M.G.A.L.R. 1 (“These Rules are adopted pursuant to 4 M.R.S. §§1551 to 1557, 18-A M.R.S. §1-112, 19-A M.R.S. §1507, and 22 M.R.S. §4005, to address practice and performance of guardians ad litem for children in the District Court, the Superior Court, and the Probate Court.”).
- These Rules “govern the qualifications for guardians ad litem, standards of conduct for guardians ad litem, appointment of guardians ad litem, and placement of guardians ad litem on, and removal of guardians ad litem from, the guardian ad litem Roster.”
- http://www.courts.maine.gov/rules_adminorders/rules/index.shtml;
http://mebaroverseers.org/regulation/gal_rules.html
- Order: FM-125, Rev. 09/15 - Order Appointing GAL, at http://www.courts.maine.gov/fees_forms/forms/index.shtml#fm

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II. Trips and Traps for the Unwary



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Timing of AOs under Rule 4(b)(2)

- In Title 19-A, any motion for appointment of a GAL shall be filed:
 - no later than the conference with the court following the first scheduled mediation session or,
 - if mediation is waived, 60 days after the first conference with the court.
- A motion or request for appointment of a guardian ad litem may be considered at a later time only if the court finds that:
 - (A) There is good cause for the late motion;
 - (B) The reasons for the late motion could not have been anticipated at a point when a timely motion could have been filed; and
 - (C) The appointment will not unreasonably delay resolution of the matter or harm the best interest of the child in achieving clarity in parental rights and responsibilities for the child.

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AOs, Scope of Duty/Investigations under Rule 4(a)

- (1) A limited purpose appointment order issued pursuant to Rule 4(b)(4)(D)(i), 4 M.R.S. § 1555, and either 19-A M.R.S. § 1507 or 18-A M.R.S. § 1-112;
- (2) A standard appointment order issued pursuant to Rule 4(b)(4)(D)(ii), 4 M.R.S. § 1555, and either 19-A M.R.S. § 1507 or 18-A M.R.S. § 1-112;
- (3) An expanded appointment order issued pursuant to Rule 4(b)(4)(D)(iii), 4 M.R.S. § 1555, and either 19-A M.R.S. § 1507 or 18-A M.R.S. § 1-112; or
- (4) An appointment order issued pursuant to Rule 4(c), 4 M.R.S. § 1556, and 22 M.R.S. § 4005.

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4 M.R.S. §1554(3)

- A person appointed by the court to serve as a GAL acts as the court's agent and is entitled to quasi-judicial immunity for acts performed within the scope of the duties of the GAL.

- As a quasi-judicial officer, GAL shall perform the assigned duties independently and impartially in all relevant matters within the scope of the order of appointment, respecting the court's obligation to dispose of all judicial matters promptly, efficiently and fairly as provided in the Maine Code of Judicial Conduct.

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Ethical Duties and Scope of Protection

- M.R.G.A.L. 4(b)(4)(A) (“The GAL may not perform and shall not be expected to perform any duties beyond those specified in the appointment order, unless subsequently ordered to do so by the court.”).

- *See also* 4 M.R.S. §1556(2)(A) (“The appointment order must be written on a court-approved form and must specify the guardian ad litem's length of appointment and specific duties, including the filing of a written report.”).

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Immunity and the AO

- M.R.G.A.L. III (A GAL “is entitled to quasi-judicial immunity from liability for actions undertaken pursuant to their appointments, these Rules or the Standards of Practice for Guardians ad Litem in Maine Courts.”).
- *Dalton v. Dalton*, 2014 ME 108, ¶9, 99 A.3d 723 (“Judicial immunity protects a GAL from civil liability for acts performed within the scope of a GAL's official duties in the event that he or she is personally sued.”).
- 19-A M.R.S. §1507(6) (“A person serving as a guardian ad litem under this section acts as the court's agent and is entitled to quasi-judicial immunity for acts performed within the scope of the duties of the guardian ad litem.”).

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But What about *Implied* Authority (or Not)?

EX1: The AO directs the GAL to interview both parents but makes no mention of third persons. The pleadings suggest that a third person is engaging in corporal punishment and the mother wants the GAL to interview witnesses and her parents during the home visit but they do not reside with her. Yes or no?

EX2: The AO directs the GAL to *interview* the children's therapist who communicates regularly with the parents' therapists. Father's lawyer wants the GAL to review the therapeutic records of both parents. Mother's lawyer agrees and the lawyers agree in emails to these interviews and records. Yes or no? [Confidentiality of records?].

EX3: The AO directs the GAL write an interim report for mediation but does not order the GAL to attend mediation (or a judicial settlement conference). May the GAL attend mediation as demanded by the attorneys? Yes or No?

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III. Child Wishes or Meaningful Preferences?

- 4 M.R.S. §§1555(5), 1556(4); M.G.A.L.R. 4(b)(6): The GAL shall make the wishes of the child known to the court if the child has expressed them, regardless of the recommendation of the GAL.
- 19-A M.R.S. §1653(3)(C): “The preference of the child, if old enough to express a meaningful preference.”
- Query: Where is “meaningful preferences”? What if disclosure of a wish increases risk of harm? And what if the child does not want the GAL to tell? Can “wishes” mean anything?
- Caveat: If you intend for a child to testify, give the court and GAL advance notice. Do not bring the child to court without disclosure.
- Caveat: If you decide to interview a child after appointment of a GAL, think about who is the client and how you may then be a witness.

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Unique to title 22 GALs (though it should not be....)

M.G.A.L.R 4(c)(5). *Protection of Child as Witness.*

- GAL shall advocate for the interests of the child when the child is called to testify as a witness in any judicial proceeding relating to the case in which the guardian ad litem has been appointed.
- GAL may advocate for special procedures, including, but not limited to, special procedures to protect the child witness from unnecessary psychological harm resulting from the child’s testimony.

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IV. Reports and Filing

- 4 M.R.S. §1555(6) in 18-A and 19-A and M.GAL.R 4(b)(7)
- GAL shall provide a copy of each report to the parties and the court at least 14 days before each report is due.
- GAL shall provide a copy of the final report to the parties and the court at least 14 days in advance of final hearing.
- Reports are admissible and subject to cross-examination and rebuttal, whether or not objected to by a party.
- Any objections to a report must be filed at least 7 days before the applicable hearing. [What objections are objections? *See* Rule 43(e)?]

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But look again, 19-A M.R.S. §1507

- GAL shall make a written report of investigations, findings and recommendations as ordered by the court, with copies of the report to each party and the court (§1507(3)(A)(3)).
- GAL shall make a final written report to the parties and the court reasonably in advance of the hearing. The report is admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party (§1507(5)).

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But then see, 18-A M.R.S. §1-112(e)

- If required by the court, GAL shall make a final written report to the parties and the court reasonably in advance of hearing.
- The report is admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party.

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22 M.R.S. §4005(1)(D) and M.G.A.L.R 4(c)(6)

- GAL shall make a written report of the investigation, findings and recommendations and shall provide a copy of the report to each of the parties reasonably in advance of the hearing and to the court,
- except that the GAL need not provide a written report prior to a hearing on a preliminary protection order.
- The court may admit the written report into evidence as provided by statute.

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RULE 5: STANDARDS OF CONDUCT

- (a) Performance of Duties
- (b) Agent of the Court
- (c) Develop Understanding of Litigation*
- (d) Explanation of Court Process
- (e) Advocate for Clear Court Orders
- (f) Mandated Reporting
- (g) Confidentiality**
- (h) Ex Parte Communications
- (i) Conflicts of Interest and Mandatory Disclosures
- (j) Withdrawal

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Rule 5(g): A Sticky Web for All Professionals



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“Bending” means Knowing these Limits

- GAL shall observe all statutes, rules, and regulations concerning confidentiality.
- GAL shall not disclose information or participate in the disclosure of information relating to a case to any person who is not a party to the case, except as necessary to perform the GAL duties, or as may be specifically provided by law or by these Rules.
- GAL shall exercise reasonable discretion about whether to disclose communications made by the child to the court, or to professionals providing services to the child or the family based on the GAL’s evaluation of the best interest of the child.
- Any decision by the GAL not to disclose such information, however, shall be subject to review by the court following an in camera review.

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No Privilege but Work Product Counts

- Communications made to a GAL, including those made to a GAL by a child, are not privileged.
- A GAL’s notes and work papers are privileged and shall not be disclosed to any person (reserving to the court authority to order disclosure if the court determines disclosure).
- If the GAL is an attorney, she or he shall be deemed to act as a GAL rather than as an attorney, and information he or she receives is not subject to the attorney-client privilege.

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FYI

In re Adoption of T.D., 2014 ME 36, ¶18, 87 A.3d 726:

- Often the most effective challenge to the quality, completeness, or competence of a GAL's work will be accomplished through cross-examination of the GAL at trial.
- If a parent or other interested party has filed a motion to remove the GAL or otherwise challenging the GAL's investigations, the court can, and should, hear the motion during the trial and allow examination of the GAL on the pertinent issues.
- If the court concludes that the investigation has been insufficient or that the GAL has demonstrated a bias that has made the GAL's testimony unreliable, the court may disregard that testimony in whole or in part.
- But be careful as a trial lawyer because if you are overreaching.....

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Nevers for GALs....For All of Us Please

- Never say or write anything to a parent or third person unless you are prepared to have it recorded and replayed to you.
- Never use denigrating language like "poor" or "personality disordered."
- Never use a diagnosis or label unless you are quoting from an authenticated and current report that is evidence-based and not just notes of a therapist or thought experiment.
- Never tell one lawyer something "off the record" unless you would say the same thing to the other lawyer.
- Never assume that what you are told will be testified to in court because the presence of a judge and parents may change "how can I help" role to "I do not remember saying it that way?"
- Never use irrelevant "he/said she said" statements. This is not a sandbox.
- Remember to "stay in your professional lane." You are not a magic wand.....

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And always but always respect and account for diversity and vulnerability



- MARCIA BOUMIL ET AL., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J. LAW & FAM. STUDIES 43 (2011).
- RICHARD DUCOTE, *Guardians ad litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2001).
- LINDA D. ELROD, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L. Q. 105 (2003).
- MARY KAY KISTHARDT, *Working in the Best Interests of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1, 76 (2006) .
- RAVEN C LIDMAN & BETSY R. HOLLINGSWORTH, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched beyond Recognition*, 6 GEO. MASON L. REV. 255 (1997).
- Dana E. Prescott, *The New Phoenix: Maine's Innovative Standards for Guardians Ad Litem*, 69 Me. L. Rev. 67 (2016).
- Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians Ad Litem for Children*, 67 ME. L. REV. 43 (2014).
- MARGARET E. SJOSTROM, *What's a GAL to do?: The Proper Role of Guardians Ad Litem in Disputed Custody and Visitation Proceedings*, 24 CHILD. LEG. RIGHTS J. 2 (2004) .

NOTES
