
2-1-2008

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Recommended Citation

Suzanne J. Schmitz, *Guardians Ad Litem Do Not Belong in Family Mediations*, 8 Pepp. Disp. Resol. L.J. Iss. 2 (2008)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol8/iss2/1>

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GUARDIANS AD LITEM DO NOT BELONG IN FAMILY MEDIATIONS

by Suzanne J. Schmitz*

I. INTRODUCTION

Imagine two divorcing parents in mediation to resolve disputes involving the custody of their children after the divorce. At some time during the mediation, the parents may raise various concerns. The mother may express a fear that the father tends to drink a lot on weekends and he may endanger the children by driving while impaired. The father may question the mother's parenting skills because she has sometimes forgotten the children's wellness visits. The parents may engage in a sincere discussion about a child's need for counseling during the divorce, a child's need for a special education program, or a child's need for an elective medical procedure.

In fact, mediators encourage parents to raise their fears and hopes about such issues, discuss their differences of opinion, seek more information if needed, clarify the values and interests behind their positions, narrow their differences, and attempt to reach a resolution. In the typical mediation, the parents are free to discuss any disputed matters without fear that their expressions of concerns will be used against either of them in a legal proceeding. Their confidence in confidentiality is due to the mediation privilege granted by the Uniform Mediation Act¹ and other similar statutes or rules.²

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1 UNIF. MEDIATION ACT § 8 (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

2. See generally SARAH R. COLE, NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, AND PRACTICE* (2d ed. 2001).

Now enter the Guardian ad litem (GAL). Assume the same mediation, but now assume the court has appointed a GAL who attends the mediation. As the GAL hears about a parent's use of alcohol or forgetfulness about medical appointments, the GAL may decide to include these matters in the GAL's report to the court or to further investigate them. Certainly, investigating the family to determine the best interests of the children is within the GAL's role of being the eyes and ears of the court.³

Nevertheless, involvement of the GAL in the mediation process may well destroy the promise of confidentiality that is key to open discussions during family mediation. Even more seriously, the presence of the GAL has the potential to undermine the purpose of mediation, which is to permit the parents to reach decisions regarding their children.⁴

A GAL is valuable to the resolution of custody disputes because the GAL evaluates the facts concerning the dispute and recommends to the court what are the best interests of the child.⁵ Mediation is valuable because parents can determine their own decisions regarding their children. However, where appointing a GAL threatens the value of mediation, there is a risk to mediation. A simple solution to avoid this threat is to refrain from appointing a GAL until after mediation has been attempted or, if one is appointed prior to mediation, to excuse the GAL from mediation.

This article explores whether that solution is consistent with the purpose for which GALs are appointed and the purposes of family mediation. This article begins with a discussion of the role of the GAL and a discussion of the purpose of family mediation in Part II. Part III analyzes the benefits and harms if the GAL attends mediation. Part IV discusses the mediation evidentiary privilege of the Uniform Mediation Act (UMA) and its effect on the GAL. Next, Part V discusses the harms to family mediation if mediation confidentiality is compromised by the presence of the GAL. Finally, the article concludes with several recommendations to courts, mediators, lawyers and GALs in Part VI.

3. 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, 257 (Winter 1998).

4. Andrew Schepard, *Divorce, Custody and Mediation*, in ADR HANDBOOK FOR JUDGES 95, 97 (Donna Stienstra & Susan M. Yates, eds., 2004).

5. Lidman, *supra* note 3, at 256-57.

II. BACKGROUND

A. *What is a Guardian ad Litem?*

In child custody disputes, whether arising out of dissolution, legal separation or paternity proceedings, courts must consider the “best interests” of the child.⁶ Where the parents cannot agree on post-divorce parenting of the child and the court must make the decision for the parents, courts often appoint a Guardian ad litem (GAL) to assist them.⁷

The meaning of the term Guardian ad litem, or guardian for a time, varies among the 50 states and other jurisdictions.⁸ For the purpose of this article, the term means someone appointed by the court to assist the court in determining what custody decision will be in the best interests of the child.⁹ The GAL might be an attorney, a social worker or a mental health professional with a background in families and children, or someone else.¹⁰ The GAL is charged with investigating the family, reporting to the court as to the best interests of the child, and, often, making a recommendation as to

6. UNIF. MARRIAGE AND DIVORCE ACT § 402 (Supp. 2007).

7. *Id.* § 310.

8. There is no national agreement on the role of the GAL. In some jurisdictions, by rule or custom, GALs became advocates for the children, primarily fact finders, or even informal third party negotiators who try to settle the dispute. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1140-41 (1978). The precise role of Guardians ad litem is not usually defined clearly in family law statutes. Courts and others have assigned a wide variety of often conflicting tasks to be performed by Guardians ad litem. Roy T. Stuckey, *Guardians Ad Litem As Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1787 (1996).

9. The traditional Guardian ad litem conducts an independent investigation to uncover all facts and circumstances relevant to deciding a custody dispute, but does not represent the child. Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 59 (1992).

10. See, e.g., Elrod, *supra* note 9, at 59; Lidman, *supra* note 3, at 256; *Information Packet: Overview of Guardians ad Litem for Children in Family Court* (Univ. of S.C. Children’s Law Office, Columbia, S.C.), Apr. 2003, at 2-5, available at http://childlaw.sc.edu/frmPublications/overviewofguardiansinfopak_114200442235.pdf. Local court rules will govern who may serve as a Guardian ad litem. For example, in Missouri, only an attorney licensed in Missouri or a court appointed special advocate volunteer sworn in as an officer of the court may act as a Guardian ad litem for a child. STANDARDS FOR GUARDIAN AD LITEM IN MISSOURI JUVENILE & FAMILY COURT MATTERS § 1.0 (Mo. Sup. Ct. 1996) [hereinafter MISSOURI STANDARDS], available at <http://www.rollanet.org/~childlaw/galstd/mogalstd.htm>.

custody.¹¹ The GAL is expected to interview or observe the child, usually while the child relates to each parent, interview each parent, visit the home of each parent, and interview whomever else or investigate whatever else might bear on the best interests of the child.¹² The GAL may be required to testify and be subject to cross-examination with regard to the recommendation.¹³ Many states grant judicial immunity to the GAL, thus emphasizing that the GAL functions as an “arm” of the court.¹⁴ The GAL has also been described as “the eyes and ears of the court” because GALs gather information about the parents and the children and report back to the court.¹⁵ While the GAL’s duty is to make recommendations that are in the best interests of the child, the GAL’s loyalty and responsibility is to the court, not to the child, and certainly not to the parents.¹⁶

Because of the lack of clarity long associated with the role of the GAL, some professional organizations have recommended elimination of the GAL in favor of attorneys appointed for the child, with loyalty to the child.¹⁷ Nevertheless, the role of the GAL continues in many courts.¹⁸

11. MINN. SUP. CT. ADVISORY TASK FORCE ON THE GUARDIAN AD LITEM SYS., CO-95-01475, FINAL REPORT AND PROPOSED RULES 49-50 (Feb. 16, 1996), available at http://www.mncourts.gov/gal/documents/GAL_REPORT_1996.pdf.

12. *Id.* See also Elrod, *supra* note 9, at 61.

13. *Information Packet: Overview of Guardians Ad Litem for Children in Family Court*, *supra* note 10, at 7-8; see also Stuckey, *supra* note 8, at 1787. But see STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIAN AD LITEM FOR CHILDREN (Va. Judicial Sys. 2003) [hereinafter VIRGINIA STANDARDS], available at http://www.courts.state.va.us/gal/gal_standards_children_080403.html (the GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined or testify).

14. *Information Packet: Overview of Guardians Ad Litem for Children in Family Court*, *supra* note 10, at 7-8; see also Stuckey, *supra* note 8, at 1787; see also Elrod, *supra* note 9, at 62. But see VIRGINIA STANDARDS, *supra* note 13.

15. Lidman, *supra* note 3, at 256-57.

16. But see Elrod, *supra* note 9, at 59 (hinting that the GAL’s duty is to the court as an adjunct of the court).

17. Because of the confusion in the roles of the GAL, the American Bar Association Section on Family Law, in drafting its 2003 Standards for Lawyers Representing Children in Custody Cases, recommended elimination of the role of the GAL. STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § II (Am. Bar Ass’n Section of Family Law 2003), available at http://www.abanet.org/family/reports/standards_childcustody.pdf. By adopting the Standards, the American Bar Association encourages clear standards and consistency in appointment and performance of lawyers for children in custody cases.

18. There have been recent GAL guidelines created in Virginia, Minnesota, and Missouri. See MINN. SUP. CT. ADVISORY TASK FORCE ON THE GUARDIAN AD LITEM SYS., CO-95-01475, FINAL REPORT AND PROPOSED RULES 49-50 (Feb. 16, 1996), available at http://www.mncourts.gov/gal/documents/GAL_REPORT_1996.pdf; MISSOURI STANDARDS, *supra* note 10; VIRGINIA STANDARDS, *supra* note 13. Illinois recently created the roles of child’s representative and attorney for the child, while retaining the role of GAL. Many other states continue to have effective GAL guidelines, which were created during the 1980s or 1990s. See generally Andrew Shepard, *The*

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While some courts suggest that the GAL should help negotiate or mediate an agreement between the parties,¹⁹ that role is not the focus of this article. Rather, this article addresses the role of the GAL when the parents are mediating custody issues with someone formally trained and designated as a mediator.

B. What is Family Mediation?

The use of mediation to help parents²⁰ resolve custody disputes has become widespread, either because of statute, court rule, court order, or the desire of parents or their attorneys.²¹ Mediation is a process of resolving disputes through communication and negotiation.²² The mediator helps the parents identify the issues to be discussed, assists them during discussion, and aids them in identifying and evaluating possible options for resolution.²³ Even though parents may be required to attend mediation, they are not required to reach an agreement.²⁴ The mediator may or may not be a lawyer, but the mediator does not act as a lawyer or as an arbiter.²⁵ Nor

Model Standards of Practice for Family and Divorce Mediation, in *DIVORCE AND FAMILY MEDIATION* (Jay Folberg et al. eds., 2004).

19. See Lidman, *supra* note 3, at 281; MINN. SUP. CT. ADVISORY TASK FORCE ON THE GUARDIAN AD LITEM SYS., CO-95-01475, (Feb. 16, 1996), available at http://www.mncourts.gov/gal/documents/GAL_REPORT_1996.pdf.

20. In some cases, parents choose, or are required, to use mediation for all aspects of the divorce. Mediation of issues related to the children is the more common requirement. See Schepard, *supra* note 4, at 109.

21. See COLE, ROGERS & MCEWEN, *supra* note 2; Jay Folberg, Ann L. Milne & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 3, 6 (Jay Folberg et al. eds., 2004).

22. UNIF. MEDIATION ACT § 2(1) (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

23. See generally Schepard, *The Model Standards of Practice for Family and Divorce Mediation*, *supra* note 18; Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in *ADR HANDBOOK FOR JUDGES*, *supra* note 4, at 5.

24. The general rule of court ordered mediation is that an agreement is not required to result from the mediation session. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000) [hereinafter MODEL STANDARDS], available at <http://www.afccnet.org/pdfs/modelstandards.pdf>. "A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation." *Id.* § I(D).

25. Schepard, *The Model Standards of Practice for Family and Divorce Mediation*, *supra* note 18, at 516, 530.

does the mediator make a recommendation to the court.²⁶ While a high percentage of family disputes are resolved through mediation, not all of them are.²⁷

A primary purpose of family mediation is to empower the parents to act as parents. Mediation can increase the parents' ability to make decisions about their children, improve their ability to communicate, and reduce the economic and emotional costs associated with litigating family disputes.²⁸ One scholar suggests that mediation permits parents to be more effective care-givers because they can devote more time and energy to those obligations rather than to litigation.²⁹ Mediation also reduces the interference of the state in the life of the family and permits the parents to devise a post-divorce parenting plan that reflects the family's values.³⁰

C. Juxtaposition of These Two Developments in Family Law

The use of GALs pre-dates the growth of mediation in family court.³¹ As often happens in the law, these two developments grew independently and without serious consideration of their effect on each other. Some state courts have drafted guidelines for GALs that direct them to participate in mediation.³² While the guidelines do not identify the responsibilities of the GAL in mediation, Virginia's guidelines state that when in mediation, the GAL is bound by the state's mediation confidentiality rules.³³

26. UNIF. MEDIATION ACT § 8 (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

27. *Id.* § 2(1).

28. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 59 (2004).

29. UNIF. MEDIATION ACT § 2(1) (amended 2003); see also Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271 (2007).

30. SCHEPARD, *supra* note 28; see also Hinshaw, *supra* note 29; UNIF. MEDIATION ACT, prefatory note 2 (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

31. Family Mediation developed in the United States in the 1980s. See Schepard, *supra* note 4, at 89. On the other hand, the concept of GAL dates from around the Fourteenth Century. Lidman, *supra* note 3, at 291-92.

32. See, e.g., Maine and Virginia. VIRGINIA STANDARDS, *supra* note 13; THE VOLUNTEER LAWYERS PROJECT, BEST PRACTICES MANUAL FOR GUARDIANS AD LITEM, <http://www.ptla.org/vlp/gal.htm>.

33. VIRGINIA STANDARDS, *supra* note 13.

The Model Standards of Practice for Family and Divorce Mediation,³⁴ a widely respected set of norms for family mediators, do not address the role of the GAL but do address the “court-appointed representative for the children.”³⁵ The Standards direct the mediator to “inform any court-appointed representative for the children of the mediation.”³⁶ If the representative participates, the mediator “should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of the mediation.”³⁷ The mediator is to provide the representative with any agreements reached concerning the children.³⁸

The Standards do not address whether the GAL is a court-appointed representative for the child and, if the GAL is, the Standards do not address what role the representative or the GAL plays in mediation.³⁹ Because of the variety in state confidentiality statutes, the Standards do not explain the effect of the presence of the GAL on mediation confidentiality. Nor do the Standards suggest what is meant by the effect of the GAL on the mediation process. This article will explore those issues.

III. SHOULD THE GAL ATTEND FAMILY MEDIATION?

There are several benefits to the GAL who attends family mediation, but those benefits can be gained outside mediation. There are harms to the mediation process if the GAL attends mediation and those harms to mediation outweigh the benefits to the GAL.

34. Although widely accepted and respected, this set of Standards is not binding on any mediator unless a local court adopts the Standards as its norms of practice. See *Reporter's Foreword to MODEL STANDARDS*, *supra* note 24, available at <http://www.afcnet.org/pdfs/modelstandards.pdf>.

35. MODEL STANDARDS, *supra* note 24, at § VIII(C).

36. *Id.*

37. *Id.*

38. *Id.*

39. Professor Andrew Schepard, Reporter for the Symposium that developed the Standards, explains that defining the relationship between the mediation process and the representative for the child was one of the most difficult questions the drafters faced. Schepard, *supra* note 18, at 530. States vary in whether they appoint a representative and what the representative's role is. *Id.* Thus, the drafters chose not to take a position on whether the representative must be included in the mediation process. *Id.*

A. Benefits to the GAL in Family Mediation

There are several reasons GALs should attend mediation. First, by attending mediation and listening to the parents speak, the GAL might learn a great deal of information helpful to determining the best interests of the child. Second, where there are concerns about the safety of a child, the GAL might learn about these concerns and be able to protect the child by reporting them to the court. Through mediation, the GAL may learn of these issues more quickly than if the GAL had not been present.

The third reason GALs should attend mediation is to serve as an agent of reality and, thus, assist the parents in reaching an agreement. It is likely that GALs will be familiar with the local court and thus can help the parents understand what the court might do if they do not reach an agreement. Consideration of what might result if the parents do not resolve their differences may motivate the parties to re-consider their positions.⁴⁰ Often in mediation, each parent is convinced that their position is the better one, unless their certainty in that position is pierced.⁴¹ A GAL who is able to say that a court is likely to reject the parent's position might create the condition in which the parent re-considers his or her position or becomes open to listening to new proposals.⁴²

Likewise, GALs can help parents understand what a court will not approve by way of an agreement. Even when parents agree on a parenting plan, the court must determine that the plan is in the best interest of the child.⁴³ Parents are not well served if, through mediation, they design a plan that is rejected by the court. Thus, the GAL can assist early in the discussions to help the parents appreciate what the court might accept or reject.

However, it is not critical that GALs attend mediation in order to achieve these benefits. The first benefit, that GALs learn about the family, can be achieved without the GAL attending mediation. GALs have investigated custody disputes for years, long before mediation became widely used in family cases. While GALs should not be handicapped by being denied access to helpful information, there are means other than mediation available to them. Indeed, many states provide that GALs are to

40. Robert D. Benjamin, *Strategies for Managing Impasses*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 248, 266 (2004).

41. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 243 (3rd ed. 2004).

42. Many mediators believe that, given at the right time in the mediation, outside evaluations, or even evaluations by the mediator, can assist the parties in resolving their dispute. MODEL STANDARDS, *supra* note 24, at § I(C); *see also* Benjamin, *supra* note 40, at 268.

43. UNIF. MARRIAGE AND DIVORCE ACT § 402 (2007); *see also* MODEL STANDARDS, *supra* note 24, at § VIII(A).

have access to the parents and the child, to educational, medical and other records of the children, and to expert and other reports filed with the courts.⁴⁴ Further, mediation is not a substitute for unannounced home visits where the GAL will observe the parents in their more natural setting. In fact, the same state guidelines that provide that the GAL attend mediation, also prescribe the GAL's duties to include: meeting face-to-face and interviewing the child; interviewing parents and others with knowledge of the child such as clergy, school, medical and mental health personnel, and babysitters; and reviewing relevant records.⁴⁵ Thus, the guidelines do not suggest that attending mediation is a substitute for a thorough interview.

Second, issues regarding safety of children are likely to be raised through several means other than mediation. It is quite likely that a parent concerned about safety will have advised his or her attorney or the GAL outside mediation and that issue will be investigated without the GAL attending mediation. Even if there is no parental report, a GAL conducting a thorough investigation should be alerted to safety issues without attending mediation. Further, even if mediation is the only place where the issue of safety is raised, it is likely that the mediator will encourage the parent to act on those concerns,⁴⁶ or will report the allegations of abuse or neglect to the appropriate agency.⁴⁷

The third and fourth benefits involve the GAL acting as a reality agent in mediation. However, by doing so, the GAL may well duplicate, or even undermine, the role of the mediator. It is standard practice for the mediator to encourage the parties to seek legal advice or other information that will assist them during the mediation process.⁴⁸ In this way, the mediator helps the parties identify what information may help them reach resolution and, in some cases, that may be the opinion of the GAL. To be effective, the GAL must be perceived as unbiased.⁴⁹ The opinion must be provided at a time

44. See MISSOURI STANDARDS, *supra* note 10, at §§ 5.0 – 6.0; MINN. SUP. CT. ADVISORY TASK FORCE ON THE GUARDIAN AD LITEM SYS., at 31-54; VIRGINIA STANDARDS, *supra* note 13, at §§ A – B, D.

45. VIRGINIA STANDARDS, *supra* note 13, at §§ A – B; see also MISSOURI STANDARDS, *supra* note 10, at §§ 5 – 6; THE VOLUNTEER LAWYERS PROJECT, *supra* note 32.

46. MODEL STANDARDS, *supra* note 24, at § IX(C).

47. UNIF. MEDIATION ACT § 7(b)(3) (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>. In fact, some states may mandate mediators to make these reports. See Hinshaw, *supra* note 29.

48. MODEL STANDARDS, *supra* note 24, §§ I(C), III, VI(C).

49. Lidman, *supra* note 3, at 257, 286.

and under the conditions that will be most hospitable to an outside report.⁵⁰ The value of the outside report could be lost if the GAL is perceived as being an advocate for one parent or the other because of the GAL's participation in mediation. It could also be lost if rendered before the mediator has prepared the parties to consider such a report.⁵¹

Thus, while there are some benefits to the GAL to attend mediation, none of these benefits require the GAL to attend mediation. Each benefit can be obtained without the GAL's presence at mediation. Thus, the next question must be whether there is harm if the GAL attends mediation.

B. Harms if the GAL Attends Mediation

There are several potential harms if the GAL attends mediation. The first is that the GAL may obtain a distorted view of the family from the mediation sessions. Even though mediators do not evaluate the parties or make decisions for them, frequently in mediation, the parties "compete with each other as to who is the 'better' parent."⁵² They exaggerate or misstate facts to favor themselves and disfavor the other. The GAL will gain a more realistic view of the family by observing the family in a more natural setting and through interviews with those who daily interact with the family.

The second harm is that the GAL's purpose may well conflict with that of the mediator. The purpose of the GAL is to assist the court in making a decision about the children.⁵³ The very appointment of the GAL assumes the parties will not reach agreement and the court must impose a decision on the parents. In contrast, the purpose of family mediation is to assist the parents in reaching a resolution of family disputes through promoting parents' voluntary agreement.⁵⁴ The key to family mediation is the principle of self-determination—the parents, not the court, will determine the way in which the children will be cared for.⁵⁵ Of the purposes for appointing GALs and mediating conflict—one aims at the court making the decision for the parents and the other aims at parents reaching an agreement. The difference in purposes becomes clearer when one examines the roles each plays and the skills needed to perform those roles.

50. Although the author will argue later that GALs should not be appointed while mediation is on-going, one exception would be the situation where the parties decide to seek the recommendation of the GAL. In that situation, they would ask the court to appoint a GAL.

51. See generally KOVACH, *supra* note 41, at ch. 10.

52. Hinshaw, *supra* note 29.

53. Lidman, *supra* note 3, at 256-57.

54. MODEL STANDARDS, *supra* note 24, at § III.

55. *Id.* § IV(B).

The role of the GAL is to investigate the family, interview those with knowledge of the family, review records, find facts, reach conclusions, and report to the court.⁵⁶ In some cases, the GAL files motions with the court, prepares recommendations to the court, or testifies in court.⁵⁷ Some GALs try to assist the parents in reaching a voluntary agreement, but their primary role is to assist the court in making a decision when the parents do not or cannot reach agreement.⁵⁸ While GALs begin by being impartial, eventually they may make a report in which they do recommend one parent over the other, or are perceived as doing so.⁵⁹

In contrast, the role of the mediator is to help the parents communicate, understand each other, share information with each other, find common interests, talk out differences, explore options, and reach their own agreement about their children.⁶⁰ The mediator does not find facts or interview witnesses.⁶¹ Often the mediator does not meet with the children at all.⁶² The mediator reports to the court only very limited information such as whether the parties attended mediation and whether an agreement was reached.⁶³ The mediator does not make a recommendation or assessment or evaluation to the court⁶⁴ concerning the parents, the very thing the GAL does do. The mediator is expected to remain impartial throughout the mediation.⁶⁵

GALs must have a different set of skills than mediators and vice versa. Both need knowledge of family law and child development.⁶⁶ However, GALs must have the skills of interviewing and investigating, testifying, and report writing.⁶⁷ When a GAL faces an impasse between the parents, the

56. VIRGINIA STANDARDS, *supra* note 13, §§ A – B, D; THE VOLUNTEER LAWYERS PROJECT, *supra* note 32.

57. MODEL STANDARDS, *supra* note 24, at § IV(B).

58. Lidman, *supra* note 3, at 257.

59. Lidman, *supra* note 3, at 299.

60. MODEL STANDARDS, *supra* note 24, at § VIII.

61. *See generally* MODEL STANDARDS, *supra* note 24.

62. *Id.*

63. UNIF. MEDIATION ACT § 7(b)(1) (amended 2003), *available at* <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

64. *Id.* § 7(a). In some states that have not adopted the UMA, mediators are expected or reported to make recommendations to the court. *See, e.g.*, CAL. FAM. CODE § 3183 (Deering 2007). This is not the common practice among family mediators.

65. MODEL STANDARDS, *supra* note 24, § IV.

66. MODEL STANDARDS, *supra* note 24, at § II(A).

67. *See* Elrod, *supra* note 9, at 61.

GAL makes a report to the court.⁶⁸ In contrast, mediators work with the parents to try to overcome that impasse through further communication and consideration of the alternatives to reaching an agreement.⁶⁹ Further, the mediator must have the skills of trust-building, facilitating communications, exploring underlying interests and options, and orchestrating negotiations.⁷⁰

In short, while mediators and GALs share the goal of protecting the best interests of the children in the midst of a family dispute, how they meet that goal and the skills they need are quite different. Both roles are needed, but these two roles should not be blended or confused.

Third, while it is unclear what role the GAL would play in mediation if the GAL attended mediation, it is possible that the presence of the GAL might well undermine the work of the mediator. Each mediator builds trust and rapport with the parents at different rates and in different manners.⁷¹ Further, the mediator gauges when to address which issues,⁷² whether and when to caucus with the parties,⁷³ when to explore the alternatives to reaching an agreement,⁷⁴ and when and how to be an agent of reality,⁷⁵ to name a few tasks. If the GAL does not appreciate the tasks the mediator is performing or the subtle decisions the mediator is making concerning these tasks, the GAL may interfere in ways that are not helpful. For example, a GAL seeking information about the family may inquire about the family life well before the mediator has built sufficient trust to encourage open and honest dialogue.⁷⁶ A GAL might ask the parties their desires for their children, but if asked too early, this inquiry might actually harden the parties in their positions and make the negotiations even more difficult, or even impossible.⁷⁷

Fourth, the presence of the GAL in mediation may undermine the confidence of the parties in the GAL report, if one is later needed.⁷⁸ If the GAL takes an active role in mediation, especially in acting as an agent of reality or in advocating for the children, either or both parents may perceive

68. See MINN. SUP. CT. ADVISORY TASK FORCE ON THE GUARDIAN AD LITEM SYS., CO-95-01475, FINAL REPORT AND PROPOSED RULES (Feb. 16, 1996), available at http://www.mncourts.gov/gal/documents/GAL_REPORT_1996.pdf.

69. MODEL STANDARDS, *supra* note 24, at § 1; see also KOVACH, *supra* note 41, at 236-55.

70. See generally KOVACH, *supra* note 41, chs. 6 - 7, 10.

71. KOVACH, *supra* note 41, at 173.

72. *Id.* at 242 - 44.

73. *Id.* at 239.

74. *Id.* at 241.

75. *Id.* at 239.

76. See *id.* at 173.

77. See *id.* at 242.

78. See KOVACH, *supra* note 41.

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the GAL as favoring one side or another.⁷⁹ If the parents do not reach an agreement, the GAL who attended mediation will make a report to the court. In addition to helping the court, often it is the GAL report that enables the parties to make one last effort at resolution or prepares them for the fairness of the court's decision.⁸⁰ If the parents have already determined that the GAL is one-sided, the value of the GAL report is decreased and devalued.

Fifth, in the occasional case, the parents may determine that they could benefit from the evaluation or report of the GAL to help them overcome their certainty in their positions.⁸¹ In such a case, the parties may ask the court to appoint a GAL. The mediator might recess the mediation until the GAL report was completed. At that time, the parties would resume mediation, with the benefit of the report. The value of the report in helping the parents depends on the parents viewing the GAL as unbiased and helpful, rather than as an interloper in the mediation.

Sixth, the presence of the GAL may destroy the confidentiality of mediation.⁸² If that is done, mediation may become meaningless. This last harm requires further analysis.

IV. THE GAL AND THE PROMISE OF MEDIATION CONFIDENTIALITY

A. *UMA Protection of Mediation Candor*

Confidentiality in mediation is a pre-requisite to candor during mediation.⁸³ Candor is the condition that permits parties to share their underlying interests and explore options to resolution without fear that their statements will be used against them in a later proceeding.⁸⁴ Confidentiality is so important to mediation that states have adopted over 2,500 mediation confidentiality or privilege statutes, many of which apply to family

79. *Id.*; see also Lidman, *supra* note 3, at 283.

80. KOVACH, *supra* note 41; Lidman, *supra* note 3, at 283.

81. KOVACH, *supra* note 41, at 243.

82. *Id.*

83. See UNIF. MEDIATION ACT, prefatory note (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf> (promoting candor); Hinshaw, *supra* note 29.

84. See generally UNIF. MEDIATION ACT, prefatory note and reporter's notes (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

mediations.⁸⁵ More recently, the UMA offers a consistent national approach to the protection of confidentiality.⁸⁶

The UMA protects confidentiality by creating a privilege to protect against use of statements made during mediation in later legal proceedings. The privilege provides that the parties to the mediation, the mediator, and nonparty mediation participants “may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.”⁸⁷ The Act’s mediation privilege would appear to empower the parents to prevent the GAL from violating mediation confidentiality by preventing disclosures of mediation communications, but does it? If it does not, the presence of the GAL may destroy confidentiality.

B. The GAL and Mediation Confidentiality

At the beginning of the mediation, mediators review the confidentiality provisions with the parties.⁸⁸ Mediators are directed by the Standards to discuss the effect of the presence of the GAL on confidentiality.⁸⁹ Some mediators may be ignorant of, or confused about, the effect of the GAL’s presence on mediation confidentiality. They will be unable to explain the effect. Other mediators may assure the parties of confidentiality despite the presence of the GAL—an assurance that may not be justified.⁹⁰ During these opening moments, the GAL, once informed about the Act, may decide not to participate in the mediation and will leave the mediation. This

85. See COLE, ROGERS & MCEWEN, *supra* note 2, at app.; UNIF. MEDIATION ACT, prefatory note 3 (amended 2003) (importance of uniformity), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

86. UNIF. MEDIATION ACT, prefatory note 4 (amended 2003) (ripeness of a uniform law), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>. The Act has been adopted by nine states. By creating an evidentiary privilege, the Act follows the trend of 21 states and reflects the more recent approach of states. *Id.* This is an even greater reason to rely on the UMA than on the provisions of various states. However, readers will need to consider the confidentiality provisions of their own jurisdiction, for jurisdictions may give greater or lesser protection to mediation confidentiality than does the UMA. To the author’s knowledge, none specifically address the role of the GAL and confidentiality. This article will rely on the UMA and its protection of mediation confidentiality, rather than any of the state statutes, because the UMA is typical, even though not the same as that of many states. Illinois, Iowa, Nebraska, New Jersey, Ohio, Utah, Vermont, Washington, and the District of Columbia have all adopted the UMA. See UNIF. MEDIATION ACT, References and Annotations (2003).

87. *Id.* § 4(b)(1).

88. See MODEL STANDARDS, *supra* note 24.

89. MODEL STANDARDS, *supra* note 24, at § VIII.

90. UNIF. MEDIATION ACT § 4 (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

departure may be upsetting or confusing to the parents, but will have the least effect on the mediation.

If the GAL remains in the mediation, at some time during or after the mediation, the GAL may be convinced of a duty to report to the court something said in mediation. In such a case, the parents, or the mediator, may assert the confidentiality privilege provided by the UMA to prevent the disclosure.⁹¹ Should the confidentiality privilege be asserted, the court must determine whether the Act prevents the disclosure.

Asserting the privilege assumes the parents, or the mediator, know in advance that the GAL will make such a report. Often, the GAL will report to the court without advance notice to the parties. Thus, the parents would first learn that the GAL has disclosed a mediation communication after the disclosure has been made to the court. At this point, the parents can still assert the privilege and move to quash the report but the judge may well have already learned the information being challenged. And often in family cases, the judge is the trier of fact.⁹² Further, these parents will believe that the promise of mediation confidentiality has been broken.

Alternatively, the GAL may decide not to disclose the mediation statements, but to use the information gained in mediation for further study. Having been alerted to certain information during mediation, the GAL may further investigate a situation that the GAL knows about only because of the GAL's presence in mediation. No provision of the UMA prohibits the GAL from acting on information learned during mediation.

C. Does the UMA Prevent Disclosures by GALs?

The UMA creates a mediation privilege that allows the mediation participants to prevent any person from disclosing a mediation communication.⁹³ Based on that privilege, parents will seek to prevent GALs from making such disclosures, or if already made, they will ask the court to strike the disclosure from the report. In response, GALs will argue that the Act cannot prevent them from fulfilling their responsibilities to the court.

91. *Id.*

92. Unif. Marriage and Divorce Act § 302(a)(4); John De Witt Gregory, et al., *Understanding Family Law* 267 (2d ed. 2001).

93. UNIF. MEDIATION ACT § 4 (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

The Act's privilege appears clear—a mediation party, namely a parent in a family custody mediation, “may prevent any other person from disclosing a mediation communication.”⁹⁴ But privileges are not self-executing.⁹⁵ Parties must assert them and courts must enforce them.⁹⁶ The question is whether a court, faced with the possibility of silencing the very person it appointed as “its eyes and ears,” will enforce the privilege and prevent a GAL from disclosing a mediation communication.⁹⁷

Parents have several strong arguments that the UMA prevents the GAL from making such disclosures. First, the privilege is broad and intentionally so, and thus, should be interpreted to preclude GALs from making disclosures.⁹⁸ Second, the privilege serves important public purposes and should be interpreted broadly to preclude disclosures by GALs.⁹⁹ Specifically, mediation helps parents resolve disputes concerning their children, thus eliminating the need for courts to impose a decision. The hope is that parents make better decisions for their families than the court would and that, by mutual agreement, the parties reduce the acrimony and

94. *Id.* § 4(b)(2). The Act should apply to most family mediations but not to those that are conducted by a judge who might make a ruling on the case. *Id.* § 3(b)(3). The scope of the Act provides that it applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator; (2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or (3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.”

Id. §§ 3(a)(1)-(3). Note that the parties to mediation may agree in a signed record in advance that the mediation is not privileged. The privilege prevents disclosure in discovery and in any proceeding, described as “(A) a judicial, administrative, arbitral or other adjudicative process . . . or (B) a legislative hearing or similar process.” *Id.* § 2(7)(A)-(B).

95. See UNIF. MEDIATION ACT reporter's note 2(a) (amended 2003) (noting the drafters of the UMA chose to use the privilege structure to protect mediation in part, because judges are familiar with other privileges and therefore there is greater certainty in judicial interpretation of the Act), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

96. UNIF. MEDIATION ACT § 4; KOVACH, *supra* note 41, at 270.

97. Mediation communication is defined as “a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” *Id.* § 2(2).

98. UNIF. MEDIATION ACT, prefatory note and reporter's notes (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>; See also Schepard, *supra* note 4, at 110.

99. UNIF. MEDIATION ACT, prefatory note (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

expense of litigation.¹⁰⁰ These important societal goals can be protected only by honoring the confidentiality that is key to mediation.

Third, the mediation privilege creates certain explicitly defined waivers and exceptions, none of which refer to the GAL.¹⁰¹ There was no intent to create an exception for a GAL.

Nevertheless, GALs have strong arguments in favor of disclosure. First, the UMA does not address the presence of the GAL or the effect of the Act's privilege on the GAL.¹⁰² Thus, the Act did not contemplate applying to the GAL. Given the important role GALs play in assisting the court and the absence of explicit application of the Act to them, courts might assume the Act does not prevent them from hearing from their GALs.

Second, there are several exceptions to the protections of the Act.¹⁰³ Courts should either create another one or extend the existing ones to permit GALs to testify under certain limited circumstances.¹⁰⁴ The exceptions include matters required to be public, claims of or defense of claims of mediator misconduct or malpractice, or matters all agree to disclose, in addition to threats of harm or plans to commit a crime or conceal a crime.¹⁰⁵ Further, the Act permits mediators to make reports about child abuse and neglect.¹⁰⁶ Thus, the legislature contemplated limits to the Act's protections. Another limit should permit reports of GALs. Particularly in cases of child abuse, neglect, or abandonment, the need to protect children is so great that the disclosure should be permitted, regardless of the UMA.

100. *Id.*; see also Shepard, *supra* note 4, at 101.

101. The Act does provide for some waivers of the privilege, such as where all agree to waive the privilege. UNIF. MEDIATION ACT § 5 (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>. The Act also creates certain exceptions to the privilege, some of which require a balancing of the need for the evidence against the protections of the privilege. *Id.* § 6. For example, threats to inflict bodily injury or to commit a crime of violence are an exception to the privilege, though discussions of past crimes are not. *Id.* However, there is a rebuttable presumption that the privilege applies to evidence sought to be offered to prove a felony unless the proponent of the evidence can meet certain requirements. *Id.*

102. The Act does contemplate non-party participants which would include the GAL; non-party participants also have a privilege to refuse to disclose mediation communications and to prevent others from disclosing mediation communications made by the nonparty participant. See *id.* § 6(b). But the issue is not whether GALs may refuse to disclose something heard in mediation, but whether they may be permitted to disclose a communication.

103. UNIF. MEDIATION ACT § 6(b) (amended 2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>.

104. *Id.*

105. *Id.* § 6.

106. *Id.* § 7(b)(3).

D. Which is the Stronger Argument?

The purpose of the UMA is to create a mediation privilege, giving broad protection to mediation communications.¹⁰⁷ The drafters carefully balanced the competing social interests and struck the balance in favor of confidentiality with a few carefully defined exceptions. Courts should honor this intent and read the statute to provide the widest possible protections against disclosures of mediation communications. Furthermore, there is no need to create exceptions for GALs because they simply do not need to attend mediation. They can fulfill their duties without attending mediation, and thus, they will not be in a position to learn of mediation communications. Therefore, they cannot disclose them.

While the stronger argument is that the GAL should be prevented from making disclosures, there is some risk of disclosures by GALs. Because of that risk, parents and their attorneys are likely to take preventive steps that will render mediation meaningless.

V. POSSIBLE HARM TO MEDIATION

Given the risk that mediation statements witnessed by the GAL might be disclosed to the court or used for further investigation, some parents may refuse to participate in mediations where the GAL is in attendance. This refusal may subject them to contempt proceedings or other sanctions for refusing to comply with the requirement to mediate.¹⁰⁸

Other parents may attend and rely on the mediator's assurances of confidentiality and later find that those assurances were overstated. Those parents who later learn that their mediation statements are being disclosed will feel betrayed and lose all confidence in the mediation process. As others learn that mediations are not confidential, they too will refuse to attend. Such risks and fears are the very reason that the drafters of the UMA observed that public confidence in the mediation process requires a consistent approach to confidentiality.¹⁰⁹

Attorneys knowing that the GAL will attend the mediation, and might disclose or use information learned there, will face a dilemma. To avoid the risk that mediations are not confidential if GALs attend, attorneys may counsel their clients not to attend mediation. The attorneys too will risk sanctions in counseling a client to refuse to attend mediation. If they advise the client to attend mediation, attorneys will likely warn the client to say as

107. *Id.* at prefatory note.

108. KOVACH, *supra* note 41, at 86-92.

109. *Id.* at prefatory note and reporter's notes.

little as possible. They may advise their clients not to share any issue or concern that might be used in later proceedings. In effect, the attorney would tell the client not to be candid with the mediator, thus undermining one of the conditions key to successful mediation.¹¹⁰ Still other attorneys who recommend that their clients participate in mediation in good faith, risk scrutiny later for failure to warn their client of possible disclosure by the GAL.

Even if GALs attend the mediation and are prevented by the privilege from disclosing what they hear, there is still potential harm. GALs who attend mediation and learn of information worthy of further investigation are not prevented by the Act from further investigating those issues. The Act is clear that “evidence or information that is admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.”¹¹¹ Thus, returning to the hypothetical presented in the Introduction, should the GAL have concerns about the father’s drinking or the mother’s forgetfulness, the GAL is free to seek records concerning these issues, interview the parents outside mediation, and interview anyone else who might have relevant knowledge.

In any of the cases discussed above, where the public loses confidence in the mediation process and parents refuse to participate in custody mediations or where parents fail to be honest during family mediations, parents, children, courts and society lose. Parents lose the chance to resolve their disputes in a way that reflects their own family situation and that minimizes animosity between them. Children lose the opportunity to have the disputes about their custody resolved with minimum disruption to the family. Courts lose because judges will have to make decisions they prefer parents make. Society loses because parents will devote great amounts of time, money, and energy to litigating disputes that might be better resolved through mediation. The taxpayer and the judicial system also lose. The taxpayer must fund courts to resolve cases that could have been resolved through mediation, and the judicial system is burdened with cases that could have been resolved more quickly and privately.

110. *Id.*

111. *Id.* § 4(d).

VI. POSSIBLE SOLUTIONS

Both the GAL and family mediation are valuable assets to the courts and society in resolving family disputes. Courts and parents have long benefited from GALs conducting thorough investigations into the families before courts decide custody issues. Courts and parents are currently benefiting from family mediation as a means of helping parents resolve disputes about their children. The ideal situation preserves both these assets. There are two ways to do so; both are based on sound public policies.

The first solution is to adopt a policy that courts not appoint a GAL if the parents are mediating. This solution respects the priority given to parents to resolve their differences before the court intervenes. It avoids the need to decide the role of the GAL in mediation because the GAL will not yet be appointed.

The second solution is that, where GALs are appointed before mediation, they be directed not to attend mediation. Despite the first recommendation, there will be occasions where courts will appoint GALs even while mediation occurs. For example, the court may believe initially that the case is not appropriate for mediation¹¹² and may appoint a GAL. Later, the parents may be ready for mediation. Alternatively, some courts, because of statute or court rule to appoint a GAL at the earliest time,¹¹³ or because of the desire to move a case along, the court may well order mediation and appoint a GAL at the same time. As noted above, there may be times when the parties who are in mediation request the court to appoint a GAL as an aid to assisting them to reach an agreement. There are likely other situations in which a GAL may be appointed at the same time that the parties are mediating.

In such cases, the court should clarify that the GAL is not to attend mediation or to proceed with any investigation until the mediation is concluded, unless the parties agree otherwise. Only when mediation is completed and no agreement has been reached, is it clear that the parents must rely on the court for a decision. Only then is there a need for the input of the GAL.

To implement those two proposals, a number of additional steps are needed:

1. Those defining the role of the GAL, whether through legislation, court order or rule, or court-sponsored guidelines, should adopt

112. A couple may not be ready to mediate at any given time due, perhaps, to their immaturity, need for anger management or counseling, etc.

113. See MISSOURI STANDARDS, *supra* note 10.

standards that no GAL be appointed if mediation is required or anticipated. If, however, a GAL is appointed before mediation begins, the GAL should be prohibited from attending or participating in the mediation of issues involving custody, visitation, or similar issues involving children in connection with divorce, separation, or parenting proceedings. The GAL should also cease any investigation until mediation has been completed.

2. Mediators should not permit the GAL to attend the mediation. Those drafting standards of practice for family mediators should indicate that the mediator should not proceed with mediation if the GAL wishes to attend. The mediator should be prepared to explain, to the court, the parties, and their attorneys, the potential risks to mediation confidentiality if the GAL attends.
3. Attorneys whose clients are participating in family mediation should ensure that the GAL does not attend the family mediation. Attorneys who serve on bar committees should draft statutes or rules that exclude the GAL from the mediation. If the GAL insists on attending, the attorneys should seek judicial intervention and educate the court about the risks.
4. Those appointed as GALs should not attend or participate in family mediation.

GALs should educate themselves about the mediator's role and understand how their presence may confuse that role. GALs should also educate themselves about the value of mediation confidentiality and the breadth of the UMA in protecting mediation. They should understand the reason that they not attend mediation, rather than fight to attend.

VII. CONCLUSION

Family courts have benefited from the development of family mediation in which parents strive to resolve the issues involving their children without the intervention of the courts. Family courts have also benefited from the work of GALs in serving as their "eyes and ears" when parents cannot agree about the custody of their children. As courts, attorneys, GALs, and parents more fully understand the issues discussed in this article, they should work

together to ensure and protect the contributions of each. The best way to do this is by excluding GALs from family mediation.