



# HOW TO GUARDIAN AD LITEM

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December 8, 2023

# Types of Guardians ad Litem

-The New Mexico Rules of Civil Procedure, Rule 1-017D, NMRA

-Trials, §38-4-10, NMSA 1978

-The Children's Code, §32A-4-10 C, NMSA 1978

-The Probate Code, Articles 5 and 5A

-Custody GALs, §40-4-8, NMSA 1978

-Rule 1-053.3, NMRA



# KNOW THE LAW CREATING, DEFINING AND CLARIFYING THE ROLE

December 8, 2023

*Bonds v. Joplin's Heirs,*  
1958-NMSC-095

“It might not be amiss to suggest to the practicing attorneys of this state that appointment as guardian ad litem of a minor is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved.”

*Hunnicuttt v. Sewell,*  
2009-NMCA-121

“If the appointment of the guardian “does not contemplate actions on behalf of the court but instead representation of the minor as an advocate, or if the guardian departs from the scope of appointment as a functionary of the court and instead assumes the role of a private advocate for the child’s position, then the guardian is not immune.”

*Collins on Behalf of Collins v. Tabet,*  
1991-NMSC-013

“. . . if the guardian’s appointment does not contemplate actions on behalf of the court but instead representation of the minor as an advocate, or if the guardian departs from the scope of appointment as a functionary of the court and instead assumes the role of a private advocate for the child’s position, then the guardian is not immune **and may be held liable under ordinary principles of malpractice.**”

“Where the guardian ad litem is acting as an advocate for his client’s position—representing the pecuniary interests of the *child* instead of looking into the fairness of the settlement (for the child) on behalf of the *court*—the basic reason for conferring quasi-judicial immunity on the guardian does not exist. In that situation, he or she functions in the same way as does any other attorney for a client—advancing the interests of the client, not discharging (or assisting in the discharge of) the duties of the court.”

*Collins on Behalf of Collins v. Tabet,*  
1991-NMSC-013, continued

- A functional analysis is necessary to determine whether the guardian ad litem is acting as an arm of the court or as an advocate.
- In a functional analysis a limited factual inquiry is necessary to determine the nature of the guardian ad litem's appointment and the extent to which he or she functioned within the scope of that appointment.
- A guardian ad litem appointed to approve a pecuniary settlement is not a public employee under the Tort Claims Act.

# Which role do you serve?



December 8, 2023



*Kimbrell v. Kimbrell,*  
2014-NMSC-027

“... a Rule 1-053.3 guardian ad litem is protected by absolute quasi-judicial immunity from suit arising from the performance of his or her duties unless the guardian ad litem’s alleged tortious conduct is clearly and completely outside the scope of his or her appointment.”

“The function of Rule 1-053.3 guardians ad litem is without question to act as an arm of the court, and they are therefore entitled to absolute quasi-judicial immunity from liability for the performance of their duties.”

*Kimbrell v. Kimbrell,*  
2014-NMSC-027, continued

“The custody court that appointed the guardian ad litem is the appropriate court to determine whether the guardian ad litem’s alleged misconduct arose from acts clearly and completely outside the scope of the appointment and, if so, the custody court should appoint a guardian ad litem, other than a parent, pursuant to Rule 1-017(C) NMRA to represent the child in any necessary litigation.”

“A parent does not have standing to sue a guardian ad litem appointed in a custody proceeding on behalf of the child because (1) the parent has been found to be unable to act in the best interests of the child, and (2) such a lawsuit would create a conflict of interest in the custody case.”

# *Dunn v. Brandt,* 2019-NMCA-061

- A protective order that prohibits disclosure of records prohibits production of those records under the Inspection of Public Records Act, §14-2-1, et seq. NMSA 1978. Statutes governing public access to records do not negate court orders.
- To view IPRA as superseding a protective order would be contrary to constitutional separation of powers principles.
- A judge's communications with a guardian ad litem fall within the judicial deliberation privilege because a guardian ad litem acts as an extension of the court by performing quasi-judicial functions of investigating the facts and reports to the court what placement is in the child's best interests.



But should a guardian ad litem have communication with the court outside of the presence of the parties and counsel?


Work only within the scope of your appointment.

◦ Rule 1-053.3, NMRA

◦ Appointing Order  
(Form 4-402)

If you act outside of the scope of your appointment, bad things can happen!





UNDERSTAND  
AND REMEMBER  
WHERE YOUR  
DUTY LAYS

December 8, 2023

15

What kind of animal is a  
guardian ad litem?

- Party?
- Lay witness?
- Expert witness?

## Case law hints that a guardian ad litem is an expert witness, but that hint is not definitive.

*Thomas v Thomas*, 1999-NMCA-135. “The court decided to adopt the GaL’s recommendation. This is not an uncommon practice, as the GaL has direct experience with the children and is mandated to act in their best interests. *See generally* §40-4-8(A); NMSA 1978, §40-4-9 (1977). There is no requirement that the trial court hear direct testimony from individuals, be they counselors, teachers, medical professionals, or others, to whom the GaL has spoken in coming to her recommendations. *Cf.* Rule 11-703 NMRA 1999 (bases of expert opinion need not be admissible in evidence).”

The ruling in *Thomas* seems to have been expanded in a subsequent unreported case.

*Bourgoyne v. Bourgoyne*, 2015 WL 1683547. “Appellant continues to argue that the GAL’s report was inadmissible hearsay, and the district court’s reliance on it for its judgment cannot be said to be harmless. To the extent Appellant argues it was predicated on inadmissible hearsay statements, we disagree. ***See Thomas v. Thomas*, 1999-NMCA-135, paragraph 25, 128 N.M. 177, 991 P.2d 7** (recognizing that bases of GAL’s expert opinion on whether child was abused need not be admissible in evidence under Rule 11-703 NMRA and “[t]here is no requirement that the trial court hear direct testimony from individuals, be they counselors, teachers, medical professionals, or others, to whom the GAL has spoken in coming to her recommendations”).

# Rule 11-703, NMRA

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

# Rule 1-053.3 J

**Presentation of report and recommendations; authority to call witnesses.** The guardian *ad litem* may call and examine witnesses at any hearing at the guardian *ad litem*'s discretion. The guardian *ad litem* may provide a verbal report and recommendations at any hearing or trial in the matter.

# To call witnesses or not to call witnesses?

## **Things to think about:**

- Is the witness's testimony helpful in explaining the matter to the court?
- Will the witness's testimony educate the parties and help them understand the issue?
- Will the witness's testimony harm important relationships between the child and the witness?
- Will the witness's testimony harm important relationships between either parent and the witness?

# Keep an open mind.



- Do not form hypotheses before you complete your investigation.
- Be mindful of and quell your own biases.

# The case of the flying squirrel.



December 8, 2023



December 8, 2023

# Types of Biases.

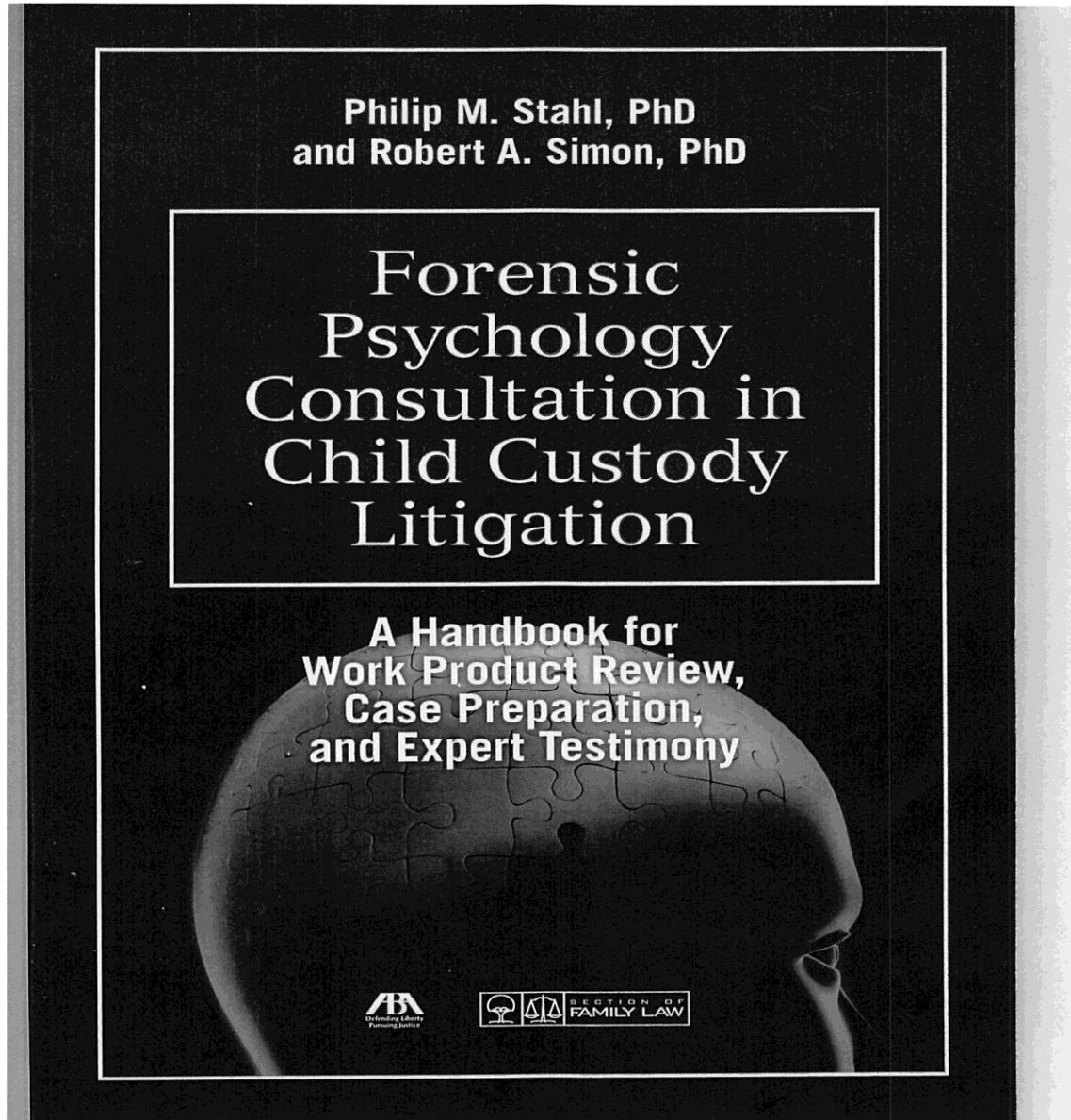
- **Heuristics Bias**—problem solving algorithms that simplify decision making in complex situations.
- **Anchoring Heuristic bias**—over reliance on certain information at the expense of other information.
- **Availability Heuristic**—tendency to focus on what is most available in memory because it is more vivid, unusual or more emotionally charged.
- **Confirmatory Bias**—tendency to form an opinion before completing all data gathering to start looking for data that supports the opinion.
- **Hindsight Bias**—“I knew it all along.”

# Types of Biases, continued.

- **Recency Bias**—where observer focuses on most recent data and reaches a conclusion based on that data.
- **Stereotyping**
- **Affiliative/Disaffiliative Bias**—observer influenced by the characteristics of a parent that are similar or dissimilar to the observer.
- **Pathology Bias**—failure to fully explore the relationship between the pathology and the ability to parent.
- **Data-Gathering Bias**—observer believes more in some types of data than others, giving greater weight to that type of data.

# Types of Biases, continued.

- **Research Bias**—using research to support a preconceived opinion.
- **“Truth lies Somewhere in the Middle” Bias**—prevents evaluators and judges from recognizing the unique contributions of each parent to the conflict.
- **“Attila the Hun doesn’t marry Mother Teresa” Bias**—assumes that a psychologically healthy parent is not likely to marry a much less psychologically functional parent.
- **“For the Move” or Against the Move” Bias**—failure to consider individual circumstances and to confuse the preference of shared coparenting with a presumption that relocation will automatically harm the child.
- **Personal Bias**—gender, cultural, and religious biases.



The above list of biases is provided with the permission of Dr. Stahl and Dr. Simon.

The second edition of this best-selling book is now available through the American Bar Association.



# ORDER OF APPOINTMENT

December 8, 2023

29

# Order of Appointment

- Make sure the order cites the rule and clearly outlines your role
- Use the approved form as a baseline and add provisions as needed
- A minute or other order that does not cite the rule and clearly outline your role is not sufficient
- Beware of multiple orders that conflict with each other and/or the rule
- Once you have an acceptable order, file your Acceptance of Appointment, but remember that you can SAY NO! In that case, file a Notice of Non-Acceptance



# LETTER OF INSTRUCTION

December 8, 2023

31

# Letter of Instruction

- Send to all parties and counsel and generally outline your roll and the action you MAY take in the case
- There is no one way to do this, but do make sure it is consistent within a single case
- Identify which form(s) of communication you will use (e-mail, text, telephone, OFW, etc.)
- Include releases allowing the GAL to speak to parties without counsel
- May also include expectations of the parties (timely responses, respectful communication, etc.)
- Will there be home visits? If so, is travel required?



# LIST OF COLLATERALS

December 8, 2023

33

# List of Collaterals

- Ask parties and/or counsel for their wish list of who they would like to interview, which should include names, a brief description of their relevance to the case and contact information
- Remind parties that you may not speak to every single person
- Ask parties to execute releases where necessary (for therapists, court clinic, medical providers, etc.)



# COMMUNICATION WITH PARTIES

December 8, 2023

35

# Communication with Parties

- Try to be clear and consistent in communication
- Remember BIFF (Brief, Informative, Friendly, Firm)
- Report abusive communication to the Court



REMEMBER THAT YOU ARE  
NOT THE FACTFINDER!

# Remember that you are not the Factfinder!

- Do your best to complete a thorough investigation and complete report and recommendations, then let the Court decide
- Don't be afraid to ask the Court for guidance

When all else fails,  
Phone a Friend!





# DRAFTING REPORTS AND RECOMMENDATIONS

Two separate documents.

# Contents of Report.

1. State the Status Quo.
2. List the individuals interviewed.
3. List the scholarly articles you consulted.
4. State the issues clearly.
5. State the histories of each parent and their significant others.
6. State the history of the parties' relationship. If there is a history of domestic violence, give a brief synopsis of the incident and disposition.
7. State the results of psychological testing, if any.

# Contents of Report, continued.

8. Write about the child:
  - a. Issues affecting the child
  - b. Course of therapy
  - c. Triggers, stressors and other events that cause the child difficulty
  - d. Information in supervised visitation reports
  - e. Reports of teachers
  - f. Reports of babysitters
9. Reconcile inconsistencies—Explain why one parent's theory does or does not apply

## Contents of Report, continued.

10. Know the source of each fact contained in your report—you will be expected to testify about them.
11. State your conclusion and explain your conclusion.
12. Do not file your report. Serve it on all parties and counsel at least 11 days before you file your recommendations with the court.



CONDUCT YOURSELF  
PROFESSIONALLY AND ERR  
ON THE SIDE OF CAUTION.

1. Keep an open mind at all times.
2. Do not make children repeat a traumatic story. Get the information from the therapist or other observers.
3. Meet with the child as many times as possible to build rapport and test for consistency.
4. Do not react to a parent's drama. Do not react to counsel's drama.
5. Be skeptical of both parent's stories. Neither believe nor disbelieve.
6. Beware of attempts to manipulate you.
7. Choose your language carefully.
8. If you have the luxury of time, use it.
9. Be nice.

10. Have the parents and children over the age of 14 sign HIPPA authorizations for release of information for all therapists, medical care providers and teachers.
11. Talk to therapists, teachers, babysitters and other third parties. Talk to therapists as many times as they will talk to you.
12. Beware of the therapist/advocate.
13. Be conservative but do not be afraid to make drastic changes if required by the circumstances.
14. Do not diagnose. Rather, describe the behavior.
15. Make notes of each conversation as that conversation occurs and keep those notes.

16. Proceed as though you are making a record for appeal.
17. Respect each parents' right to due process. Do **nothing** to deprive either party of due process.

Due process requires notice and a meaningful opportunity to be heard.

*In re Termination of Parental Rights of Laurie R., 1988-NMCA-055*

# A word about your fees.

- Appointing Order should state:
  - Your hourly rate
  - Retainer amount
  - What to do if one parent does not pay the invoice
    - Joint and several liability
- Your invoices should provide detail but protect confidentiality.

Have a working knowledge of high-conflict personalities and the effect of trauma.

## Resources

Association of Family and Conciliation Courts (AFCC) materials.

“High Conflict People in Legal Disputes,” Bill Eddy, LCSW, Esq.

Understand alignment, estrangement, justified refusal and parental alienation and know how to address it.

### Resources:

- April 2021 Family Law Institute, Jennifer J. Harman, Ph.D.
- Join and attend seminars of AFCC (Association of Family and Conciliation Courts)
- “Overcoming Parent-Child Contact Problems,” Abigail M. Judge and Robin M. Deutsch
- “Children Who Resist Postseparation Parental Contact,” Fidler, Bala and Saini



December 8, 2023

-Understand child development.

-Understand what is appropriate time-sharing for children of different ages.

-Know how to interview children.



BE AWARE OF YOUR  
OWN TRIGGERS AND  
PERSONAL REACTIONS.

December 8, 2023

52

# Maintain your own mental health.

(This work can be emotionally draining.)

- Do not be afraid to reach out to a colleague to talk about it (but protect confidentiality).
- Understand *why* your buttons are pushed.
- Do not react.

# Maintain your mental health, continued.

- One or both parties will eventually dislike you. That comes with the territory.
- Do not let that interfere with exercise of your duties.
- And when you get one of those attack emails, sort it out, write it out, but don't press send!
- Understand vicarious trauma.



December 8, 2023

Maintain balance  
for your own  
mental health.

♦ ♦ ♦ *and pray for wisdom.*