


# Effectively Navigating Attorney/Guardian ad Litem Interviews and Subpoenaed ▶ Records and Testimony

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## Family Law/Mental Health Intersection

- ▶ Family Law
  - ▶ Divorce
  - ▶ Paternity
  - ▶ Modifications
  - ▶ Guardians and Third Parties
- ▶ Therapy and Assessment
  - ▶ Individual Therapy
  - ▶ Group Therapy
  - ▶ Family system work
    - ▶ Reunification Therapy (RT)
    - ▶ Co-parent Coaching
    - ▶ Parenting Coordination (PC)
  - ▶ Child Custody Evaluations (CCEs) or Parenting Plan Evaluations (PPE)
  - ▶ Brief Focused Assessments (BFAs)
  - ▶ Individual Assessments (parental fitness, mental health, substance use)

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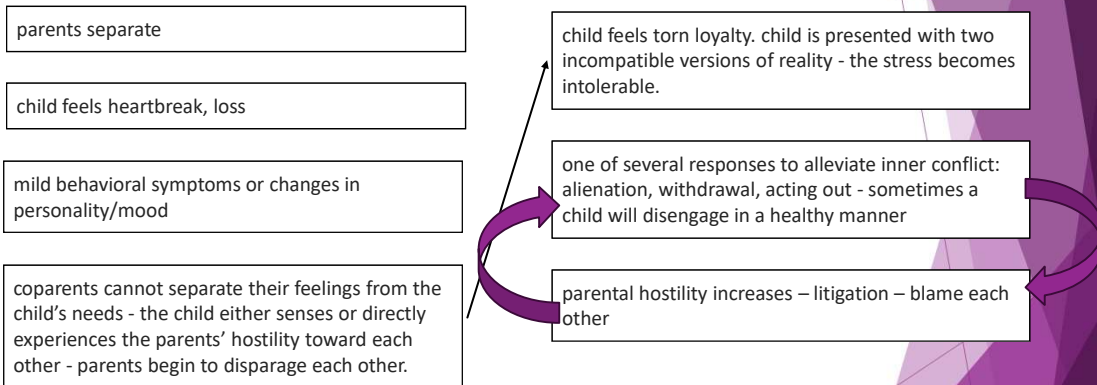
# Learning Objectives



- ▶ Appropriately respond to subpoenas for testimony and records
- ▶ Effectively, ethically and professionally providing courtroom or deposition testimony
- ▶ Understand rights and obligations in giving interviews to attorneys and Court appointed professionals (custody evaluators, reunification therapists, parenting coordinators, Guardian ad Litem, etc.)

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## Hostile divorce/separation can lead to high conflict parenting and parent-child contact issues



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## What is it like to be a child of a hostile divorce?



- ▶ Coparental conflict is damaging to children in manifold respects: interpersonally, emotionally, academically, and behaviorally (Amato & Keith, 1991; Ayoub, 1999; Brock & Kochanska, 2016; Clements, et al. 2014; Coleman & Glenn, 2010; Deutsch & Pruett, 2009; Graham et al., 2015; Harold, et al., 2004; Johnson, et al., 2009; Katz & Gottman, 1993; Kelly, 2012; Kelly & Emery, 2003; McIntosh, 2003; Reynolds, et al., 2014; Rowan & Emery, 2018; Sandler, et al., 2008; Whiteside & Becker, 2000).
- ▶ Karberg and Cabrera (2020) studied 3,387 divorced families and found that *the relationship between the coparents is more important than the parent-child relationships for children's social adjustment.*
- ▶ “Substantial research demonstrates that if conflict is minimized or is handled effectively and rapidly when it occurs, the children of divorce demonstrate no greater prevalence of adjustment problems the children from intact, ‘traditional’ families on a variety of psychosocial measures.” (Simon and Shienvold, 2023).

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## Individual Therapy for Parties/Children

**Court-Involved Therapist (CIT):** Any mental health professional providing psychotherapeutic treatment of a parent, child, couple or family who is, at any time during the treatment, involved with the legal system.

**Court-Appointed Therapist:** Any mental health professional providing psychotherapeutic treatment of a parent, child, couple or family undertaken because the particular psychotherapist was ordered by a judge to provide treatment. The Court order designates the specific psychotherapist and may describe the expected treatment.

**Community Therapist:** Any mental health professional providing psychotherapeutic treatment of a parent, child, couple or family who is not involved with the legal system at any time during the treatment.

**Court-Ordered Therapist:** Any mental health professional providing psychotherapeutic treatment of a parent, child, couple or family undertaken because it was ordered by a judge. The Court order does not designate a specific therapist and may describe the expected treatment.

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## Interventions: Individual Therapy for Children

- ▶ Examine the court order pertaining to custody and psychotherapy.
- ▶ Both parents have equal rights to access the child's record unless the judicial officer has ordered otherwise.
- ▶ Make sure both parents are aware you have seen the child, regardless of who has legal or physical custody (unless a court order directs otherwise).
- ▶ Build alliances with both parents.
- ▶ Under most circumstances, involve each parent equally in the child's treatment plan.
- ▶ Understand high conflict parent dynamics and how to avoid a power struggle
- ▶ Know the signs of parent child contact problems
- ▶ Assess for a preferred or rejected parent. Try to stay neutral.

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## Interventions: Individual Therapy for Children

- ▶ Do not enthusiastically validate complaints about a parent.
- ▶ Remember, the child's reality or realities has or have likely been shaped by the parents, who have their own agendas.
- ▶ The child may have repeated their accounts of interactions with the parents to empathic listeners.
- ▶ Stay solution-focused.
- ▶ Work with parents to insulate the child from the hostility and litigation.
- ▶ Resources for kids: *Parents Divorce? A Survival Guide for Kids, Divorce Is Not the End of the World, It's Not Your Fault.*

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## Working with a Guardian Ad Litem (GAL) or Court Appointed Special Advocate (CASA)

### What is the GAL?

- ▶ The GAL is a party to the litigation
  - ▶ “an attorney, volunteer, or an employee of a county program” who is appointed by the court to
    - ▶ (1) represent and protect the best interests of a child; and
    - ▶ (2) provide the child with services requested by the court, including:
      - ▶ (A) researching;
      - ▶ (B) examining;
      - ▶ (C) advocating
      - ▶ (D) facilitating; and
      - ▶ (E) monitoring the child’s situation.
- ▶ The GAL does not have any confidential or privileged relationship with the child or the parties.

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## Working with GALS

### What is the GAL process?

- ▶ I.C. 31-17-2-12(b): In preparing a report concerning a child, the investigator may consult any person who may have information about the child and the child’s potential custodian arrangements. Upon order of the court, the investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child’s custodian. However, the child’s consent must be obtained if the child is of sufficient age and capable of forming rational and independent judgments.

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# Working with GALS

Examples of activities the GAL may do to investigate the child's situation:

- ▶ Review court's legal file, exhibits, orders, and recordings of hearings;
- ▶ Conduct home visits;
- ▶ Interview the parties and the child
- ▶ Interview significant others who live with and/or frequently interact with the child;
- ▶ Interview collateral sources such as teachers, doctors, therapists;
- ▶ Obtain and review records such as DCS records, school records, medical records, criminal records;
- ▶ Observe parent-child interactions; and
- ▶ Prepare and file needed motions.

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STATE OF INDIANA ) IN THE BOONE COUNTY SUPERIOR COURT  
 )  
 ) SS:  
 COUNTY OF BOONE ) CAUSE NO. [REDACTED]

IN RE: THE MATTER OF: )  
 )  
 [REDACTED] )  
 Petitioner, )  
 )  
 v. )  
 )  
 [REDACTED] )  
 Respondent. )

**ORDER APPOINTING GUARDIAN AD LITEM AND FOR  
 GUARDIAN AD LITEM FEE**

This matter having come before the Court, the Court now finds in this case that the appointment of a Guardian ad Litem is desirable to represent and protect the best interest of the child.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That Jennifer Hostetter is appointed as the Guardian ad Litem in the above matter in this matter for the purpose of representing these children's interest.
2. That the Respondent shall be responsible for the costs of all GAL fees subject to potential reallocation of fees at the final hearing.
3. Upon presentation of this Order any medical, psychiatric or other expert person who has served the child, shall permit the Guardian ad Litem access to records, reports, x-rays, photographs or other relevant matters as to the child, without consent by the child's parents, pursuant to IC 31-17-2-12.

4. The Guardian ad Litem assigned to this cause shall maintain any information received from any source as confidential and will not disclose the same except in reports to the Court and parties to this cause.
5. The Guardian ad Litem shall appear at all hearings or proceedings concerning custody and/or visitation scheduled in this cause and shall assure proper representation of the children at said hearings.
6. The Guardian ad Litem shall be notified by the attorneys for the parties of any hearings, investigations, depositions or other proceedings concerning the child and shall receive notice prior to any action taken on behalf of the child by any party. The Guardian ad Litem is ordered to send copies of all pleadings or reports to all attorneys of record when said reports or pleadings are filed with the Court.
7. All parties and their attorneys are hereby ordered to cooperate with the Guardian ad Litem regarding interviews with the Guardian ad Litem, planning and executing visitation.

SO ORDERED THIS December 14, 2021 [REDACTED]  
 Judicial Officer, Boone County Superior Court

**DISTRIBUTION:**  
 [REDACTED]

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## Working with GALS

What is the mental health providers obligation to speak with the GAL?

- ▶ I.C. 31-17-2-12(b): In preparing a report concerning a child, the investigator may consult any person who may have information about the child and the child's potential custodian arrangements. Upon order of the court, the investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past **without obtaining the consent of the parent or the child's custodian. However, the child's consent must be obtained if the child is of sufficient age and capable of forming rational and independent judgments.**

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## Working with GALS

Is your conversation with the GAL confidential? Are records you provide to the GAL confidential?

- ▶ I.C. 31-17-2-12(c): The investigator shall make the following available to counsel and to any party not represented by counsel:
  - ▶ (1) the investigator's file of underlying data and reports
  - ▶ (2) complete texts of diagnostic reports made to the investigator under subsection (b)
  - ▶ (3) The names and addresses of all persons whom the investigator has consulted

What is the benefit in speaking with the GAL?

- ▶ You can ask the GAL to keep certain information private
- ▶ You likely avoid testimony

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## Working with Parenting Coordinators

What is a Parenting Coordinator? Indiana Parenting Time Guidelines Section V (A)

### A. GENERAL PROVISIONS

1. Parenting coordination is a court-ordered, child-focused dispute resolution process in which a Parenting Coordinator is appointed to assist high-conflict parties by accessing and managing conflicts, redirecting the focus of the parties to the needs of the child, and educating the parties on how to make decisions that are in the best interest of the child.
2. A Parenting Coordinator is an individual appointed by a Court to conduct parenting coordination.
3. "High conflict parties" are parties who have had ongoing disagreements and conflict. The disagreements and conflict center on the parties' inability to communicate and resolve issues regarding the care of the child, a parenting time schedule, or any other issues that have adversely affected the child.
4. Nothing in this guideline limits, supersedes, or divests the court of its exclusive jurisdiction to determine issues of parenting time, custody, and child support.
5. These guidelines apply to all Parenting Coordinator appointments made after the effective date of the adoption of these guidelines and do not modify an existing parenting coordination order. These guidelines do not limit a party's right to file for modification under existing Indiana law.

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## Working with Parenting Coordinators

Who can be a Parenting Coordinator?

IPTGL Section V (B)

### B. QUALIFICATIONS

The Parenting Coordinator shall be a registered Indiana Domestic Relations Mediator, with additional training or experience in parenting coordination satisfactory to the court making the appointment. A Parenting Coordinator, as a registered Indiana Domestic Relations Mediator under ADR Rule 1.5, has immunity in the same manner and to the same extent as a judge.

Attorneys, mediators and providers can all be trained and qualified as PCs



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## Working with Parenting Coordinators



### Parenting Coordination Process

Varies—each PC develops his/her preferred process

Generally, the process is

- ▶ Appointment
- ▶ Detailed Court Order establishing payment obligations, authority, and immunity
- ▶ Contracts with the parents (informed consent)
- ▶ Individual intakes
- ▶ No other individual communication
- ▶ Joint Sessions
  - ▶ Identify issues
  - ▶ Set Agenda
  - ▶ Benefits of in-person or virtual/phone
  - ▶ Considerations of IPV
- ▶ Negotiation/mediation
- ▶ Arbitration/binding recommendations
- ▶ Objections and Court Approval

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## Working with Parenting Coordinators

- ▶ No Confidentiality
- ▶ No Privilege
- ▶ PC is not a fact-finder; could be fact witness or expert
- ▶ The Court must maintain ultimate authority to determine the best interests of the child; Court cannot delegate decision making
- ▶ Most PCs have parties sign contract that allows them to obtain mental health records and speak to providers
- ▶ Like GAL, PC is party to litigation and can ask Court to order assessments and treatment
- ▶ PC reserved for high conflict parents; not particularly effective

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## Working With Attorneys

- ▶ Range of knowledge - some attorneys have conversant familiarity with social science research and best practices; some have very little familiarity. Don't assume either ignorance or expertise.
- ▶ Be wary of the request to express an opinion about which parent should have custody or what parenting time is appropriate for a party; Unless you were court appointed to make recommendations about custody and parenting, you probably aren't qualified to form an opinion. It's okay to say that you aren't qualified and that it violates your code of professional conduct to take on a role for which you have not been specifically trained. Aside from not being qualified to give an opinion on custody and parenting time, the odds are you do not have enough information to form an opinion. Most of the time you are seeing a party or a child for individual therapy and know little to nothing about the other party (aside from what you were told- single source information).
- ▶ Familiarize yourself with legal terminology and the roles of other professionals such as GALs and PCs. If there is a GAL or custody evaluator in the case, there is already someone appointed to make recommendations on custody and parenting time.
- ▶ If providing therapy, clarify confidentiality boundaries.

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## Working with Attorneys

What's the difference between the therapeutic role and the evaluative role?

- ▶ Fact witness (therapeutic role) testifies about what they have firsthand knowledge of:
  - ▶ Patient's history
  - ▶ Clinical diagnosis
  - ▶ Treatment
  - ▶ Progress/Prognosis
  - ▶ Statements made during the course of treatment
- ▶ Ability to give your professional opinion based on professional expertise and experience.
- ▶ Ability to testify as to other specialized knowledge that may assist the court.



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## Working with Attorneys

### Best Practices

- ▶ Don't give your opinion as to a person/party that you're not treating or that you have not assessed.
- ▶ If working with the child, find out what the legal custody arrangements are.
- ▶ Limit unilateral communication with either parent or their counsel.

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## Subpoena Duces Tecum for Records

- ▶ Indiana law protects mental health records to help reduce stigma and reluctance to seek help (IC 16-39-2-3; HIPAA)
- ▶ Indiana Law also makes the mental health of parents and children relevant to custody and parenting time disputes (IC 31-17-2-8(6))
- ▶ In most family law cases, authorizations for the release of mental health records are executed as part of the discovery process. The subpoena received by the provider has an attached release.
- ▶ Where a party refuses to sign a release, the Court may order the release of the records or that the party sign a release. The provider receives a Notice to Appear (IC 16-39-3) or a subpoena with an attached release.
- ▶ A GAL or PC may just forward executed releases.
- ▶ Most records requests that include an executed release require compliance
- ▶ A Motion to Quash may be appropriate under certain circumstances.

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## Subpoena Duces Tecum for Testimony

- ▶ Could be deposition or trial
- ▶ Order to Appear will include date, time and location and whether you are to bring documents
- ▶ Must include check for witness fee and mileage to and from court/deposition
- ▶ You are not entitled to your hourly rate or a special hourly rate unless you have a signed agreement with the party calling you as a witness that you will be paid that hourly rate for testimony- this needs to exist before you receive the subpoena
- ▶ You must appear regardless of whether that hourly rate or special rate is paid up front
- ▶ There are statutory limits on what you can bill for medical records. (\$1) per page for the first ten (10) pages.(2) (\$.50) per page for pages eleven (11) through fifty (50).(3) (\$.25) per page for pages fifty-one (51) and higher.(b) The provider or the medical records company may collect a labor fee not to exceed twenty dollars (\$20). If the provider or medical records company collects a labor fee, the provider or medical records company may not charge for making and providing copies of the first ten (10) pages of a medical record. (760 Ind. Admin. Code 1-71-3)

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## Subpoenas: How to Respond

- ▶ Is the subpoena objectionable?
  - ▶ Procedural Objections
    - ▶ Proper service; Witness fees and mileage (deposition or in person testimony); Discovery deadlines; Unreasonable response time
  - ▶ Substantive Objections
    - ▶ Relevancy; Undue burden or expense; Lack of possession, custody or control; Privileges
- ▶ If not objectionable, you must comply
- ▶ Failure to comply without adequate excuse may result in finding of contempt and order to pay monetary penalties
- ▶ Consult an attorney

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# Witness Tips for Mental Health Professionals

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## Expert Witness vs. Fact Witness

### Expert Witness

- Qualified as an “expert” by knowledge, skill, experience, training or education
- Testify based on specialized knowledge that will help the trier of fact understand the evidence or determine a fact in issue
- May testify as to his/her opinion based upon facts of the case, and also may provide an opinion based on inadmissible evidence

### Fact Witness

- May only testify if there is sufficient finding that the witness has personal knowledge of the matter in question
- May only provide an opinion if it is rationally based on the witness’s perception and helpful to a clear understanding of the witness’s testimony or determination of a fact in issue

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## Preparing to Testify



Be prepared to summarize your education, training, experience and knowledge that sets you apart as an expert



Completely review the records and information applicable to the matter on which you will be testifying



Be prepared to offer your opinion and recommendations where applicable/if applicable (you may just be a fact witness)



Cooperate and coordinate with counsel to prepare testimony and anticipate what will be asked of you

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## A Professional's Role: What to Say

Do:

- ▶ Tell the truth - you should know the answers to the questions asked or be able to answer reasonably quickly. If you cannot, that is a red flag that you are outside of your area of expertise or don't have enough information to answer
- ▶ Prepare for your testimony in detail. Review all your records
- ▶ If you are being called as a witness, ask for a list of questions they intend to ask or for a general understanding of your role as a witness- they may think you can give an opinion on custody and/or parenting time
- ▶ Give responses that are thought out and prepared - think before you speak!
- ▶ Answer the question asked, nothing more
- ▶ Speak audibly and articulately
- ▶ Use appropriate language, maintain professional demeanor at all times
- ▶ Be courteous
- ▶ Stop talking immediately if counsel objects
- ▶ It's okay to say you don't know the answer

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## A Professional's Role: What Not to Say

### Don't:

- ▶ Volunteer information that was not requested or asked about
- ▶ Explain your thought process or state of mind unless you are specifically asked
- ▶ Use “always” and “never”
- ▶ Guess or attempt to answer questions to which you do not know the answer
- ▶ Express anger or frustration with the examiner
- ▶ Attempt levity or make jokes at your own expense or anyone else's
- ▶ Wing it
- ▶ Confuse the case with another
- ▶ Fail to prepare
- ▶ Fail to have explanations for process decisions
- ▶ Waffle
- ▶ Undertake a case for which you lack experience, expertise or time

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## Attorney Strategies: Effective Examination and Cross- Examination

### Direct Examination

- Occurs when the attorney is questioning a witness that he/she called
- The attorney cannot ask leading questions
- The attorney will not ask any questions to which he/she does not know the answer
- Goal is to pull the story, information, facts out of you

### Cross-Examination

- Attorney will ask leading questions
- Attorney will set you up to answer favorably to his/her position
- Attorney will attempt to show inconsistencies or lack of complete truthfulness
- In general, attorneys may be somewhat combative on cross, and may try to confuse you or make you feel uncertain about your testimony

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## Leading Questions and Other Forms of Pressure

- ▶ Examples:
  - ▶ The mother was your primary source of information in collecting the family history, yes?
  - ▶ Your notes don't reflect the father's three attempts to speak to you about \_\_\_\_'s sessions, correct?
  - ▶ You recommended that \_\_\_\_ not be compelled to engage in parenting time with father, correct?

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## General Tips and Tricks

Understand that if there is family litigation, you will likely be involved in some capacity

Understand concepts (and limitations) of confidentiality and HIPAA

- *Meridian Health Services v. Bell*, 71A04-1511-DR-2005; 2016 Ind.App. Lexis 339
- Parents have the right to their children's mental health records
- Beware your note-taking

Have your own legal advisor-know the law regarding custody and parenting time

Have a mentor or "stupid question network"

Always over prepare

Advocate for your client

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## Questions or Comments?

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