

Tennessee Supreme Rule 13(d)(2)

- (C) Reports of abuse or neglect or investigation reports under Tenn. Code Ann. §§ 37-1-401 through 37-1-411. The court shall appoint a guardian ad litem for every child who is or may be the subject of such report. The appointment of the guardian ad litem shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child;
- (D) Proceedings to terminate parental rights. The court shall appoint a guardian ad litem for the child, unless the termination is uncontested. The child who is or may be the subject of proceedings to terminate parental rights shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child; and

Application of S. Ct Rule 40

- These Guidelines set forth the obligations of lawyers appointed to represent children as guardians ad litem *only in juvenile court neglect, abuse and dependency proceedings* pursuant to T.C.A. § 37-1-149, Rules 37 of the Tennessee Rules of Juvenile Procedure, and Supreme Court Rule 13. By adoption of these guidelines it is intended that they not be applied to proceedings in other courts that involve child custody or related issues.

T.C.A. § 37-1-149

- The court at any stage of a proceeding under this part, *on application of a party or on its own motion*, **shall appoint** a guardian ad litem for a child who is a party to the proceeding if such child has no parent, guardian or custodian appearing on such child's behalf or such parent's, guardian's or custodian's interests conflict with the child's or in any other case in which the interests of the child require a guardian. The court, in any proceeding under this part resulting from a report of harm or an investigation report under §§ 37-1-401 37-1-411, shall appoint a guardian ad litem for the child who was the subject of the report.

Definitions

- 1) "Guardian ad litem" is a lawyer appointed by the court to **advocate for the best interests of a child** and to **ensure that the child's concerns and preferences are effectively advocated.**
- (2) "Child's best interests" refers to a determination of the most appropriate course of action based on **objective consideration of the child's specific needs and preferences.**

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- (1) **The child is the client of the guardian ad litem.** The guardian ad litem is appointed by the court **to represent the child by advocating for the child's best interests and ensuring that the child's concerns and preferences are effectively advocated.** The child, not the court, is the client of the guardian ad litem.

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- **Establishing and maintaining a relationship** with the child is fundamental to representation. The guardian ad litem **shall** have contact with the child prior to court hearings and when apprised of emergencies or significant events affecting the child. The age and developmental level of the child dictate the type of contact by the guardian ad litem. The type of contact will range from observation of a very young or otherwise nonverbal child and the child's caretaker to a more typical client interview with an older child. For all but the very young or severely mentally disabled child, for whom direct consultation and explanation would not be effective, the guardian ad litem **shall provide information and advice directly to the child** in a developmentally appropriate manner.

Tennessee RPC 1.14

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- The obligation of the guardian ad litem to the child is a **continuing one** and does not cease **until the guardian ad litem is formally relieved by court order**. The guardian ad litem **shall represent the child** at preliminary, adjudicatory, dispositional and post-dispositional hearings, including the permanency plan staffings, court reviews, foster care review board hearings and permanency hearings. The guardian ad litem **should maintain contact with the child and be available** for consultation with the child between hearings and reviews. For a child who is very young or severely mentally disabled, the guardian ad litem should regularly monitor the child's situation through contacts with the child's caretakers and others working with the child and through periodic observations of the child.

GAL must conduct an independent investigation of the facts, including:

- (i) Obtaining necessary authorization for release of information, including an appropriate discovery order;
- (ii) Reviewing the court files of the child and siblings and obtaining copies of all pleadings relevant to the case;
- (iii) Reviewing and obtaining copies of Department of Children's Services' records;
- (iv) Reviewing and obtaining copies of the child's psychiatric, psychological, substance abuse, medical, school and other records relevant to the case;
- (v) Contacting the lawyers for other parties for background information and for permission to interview the parties;

- (vi) Interviewing the parent(s) and legal guardian(s) of the child with permission of their lawyer(s) or conducting formal discovery to obtain information from parents and legal guardians if permission to interview is denied;
- (vii) Reviewing records of parent(s) or legal guardian(s), including, when relevant to the case, psychiatric, psychological, substance abuse, medical, criminal, and law enforcement records;
- (viii) Interviewing individuals involved with the child, including school personnel, caseworkers, foster parents or other caretakers, neighbors, relatives, coaches, clergy, mental health professionals, physicians and other potential witnesses;
- (ix) Reviewing relevant photographs, video or audio tapes and other evidence; and
- (x) Engaging and consulting with professionals and others with relevant special expertise.

Communication with the child, including:

- (2) Explaining to the child, in a developmentally appropriate manner:
 - (i) the subject matter of litigation;
 - (ii) the child's rights;
 - (iii) the court process;
 - (iv) the guardian ad litem's role and responsibilities;
 - (v) what to expect before, during and after each hearing or review;
 - (vi) the substance and significance of any orders entered by the court and actions taken by a review board or at a staffing.

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- (3) Consulting with the child prior to court hearings and when apprised of emergencies or significant events affecting the child. If the child is very young or otherwise nonverbal, or is severely mentally disabled, the guardian ad litem should at a minimum observe the child with the caretaker.
 - (4) Assessing the needs of the child and the available resources within the family and community to meet the child's needs.
 - (5) Considering resources available through programs and processes, including special education, health care and health insurance, and victim's compensation.
 - (6) Ensuring that if the child is to testify, the child is prepared and the manner and circumstances of the child's testimony are designed to minimize any harm that might be caused by testifying.

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- (7) Advocating the position that serves the best interest of the child by:
 - (i) Petitioning the court for relief on behalf of the child and filing and responding to appropriate motions and pleadings;
 - (ii) Participating in depositions, discovery and pretrial conferences;
 - (iii) Participating in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child;
 - (iv) Making opening statements and closing arguments;
 - (v) Calling, examining and cross-examining witnesses, offering exhibits and introducing independent evidence in any proceeding;

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- (vi) Filing briefs and legal memoranda;
 - (vii) Preparing and submitting proposed findings of facts and conclusions of law;
 - (viii) Ensuring that written orders are promptly entered that accurately reflect the findings of the court;
 - (ix) Monitoring compliance with the orders of the court and filing motions and other pleadings and taking other actions to ensure services are being provided;
 - (x) Attending all staffings, reviews and hearings, including permanency plan staffings, foster care review board hearings, judicial reviews and the permanency hearing;
 - (xi) Attending treatment, school and placement meetings regarding the child as deemed necessary.

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- (8) Ensuring that the services and responsibilities listed in the permanency plan are in the child's best interests.

 - (9) Ensuring that particular attention is paid to maintaining and maximizing appropriate, non- detrimental contacts with family members and friends.

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- (10) Providing representation with respect to appellate review including:
 - (i) discussing appellate remedies with the child if the order does not serve the best interest of the child, or if the child objects to the court's order;
 - (ii) filing an appeal when appropriate; and
 - (ii) Discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.

- **(e) Responsibilities and duties of a guardian ad litem when the child's best interests and the child's preferences are in conflict.**

(1) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:

- (i) Fully investigate all of the circumstances relevant to the child's position, marshal every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;
- (ii) Discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.

Contrast with Rule 40A

- (3) if, after fully investigating and advising the child, the child continues to urge the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian shall take all reasonable steps to:
 - (i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position; and
 - (ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

Rule 305 of Juvenile Procedure

- **a)** Each court shall ensure that the parties in dependent and neglect proceedings have access to information which would be available in circuit court.
- **(b)** Parties shall attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of cases. Only when such attempts have failed, discovery may be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure without a court order.
- **(c)** Leave to obtain discovery pursuant to the Tennessee Rules of Civil Procedure for reasons other than a failed attempt at informal discovery shall be freely given by the court when justice so requires.
- **(d)** Upon motion of a party or upon the court's own initiative, the court may order that the discovery be completed by a certain date.

- **(e)** Any motion to compel discovery, motion to quash, motion for protective order, or other discovery related motion shall:
 - **(1)** quote verbatim the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena, or excerpt of a deposition which shows the question and objection or response, if applicable;
 - **(2)** state the reason or reasons supporting the motion; and
 - **(3)** be accompanied by a statement certifying that the moving party or counsel has made a good faith effort to resolve by agreement the issues raised and that agreement has not been achieved. Such effort shall be set forth with particularity in the statement.
- **(f)** The court shall decide any motion relating to discovery in accordance with the Tennessee Rules of Civil Procedure.
- **(g)** A child shall be required to respond to discovery requests only if the child is the petitioner or a respondent to the action.
- **(h)** A guardian ad litem shall not testify at a deposition.
- **(i)** Except as provided in subdivision (e) above, discovery materials shall not be filed with the court.

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- (2) If, after fully investigating and advising the child, the guardian ad litem is still in a position in which the child is urging the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian ad litem shall pursue one of the following options:
 - (i) Request that the court appoint another lawyer to serve as guardian ad litem, and then advocate for the child's position while the other lawyer advocates for the child's best interest.
 - (ii) Request that the court appoint another lawyer to represent the child in advocating the child's position, and then advocate the position that the guardian ad litem believes serves the best interests of the child.

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- (3) If, under the circumstance set forth in subsection (b), the guardian ad litem is of the opinion that he or she must advocate a position contrary to the child's wishes and the court has refused to provide a separate lawyer for the child to help the child advocate for the child's own wishes, the guardian ad litem should:
 - (i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position;
 - (ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

- **(f) Guardian ad litem to function as lawyer, not as a witness or special master.**

(1) A guardian ad litem may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, §§ EC 5-9, 5-10 and DR 5-101.

(2) A guardian ad litem is not a special master, and should not submit a "report and recommendations" to the court.

(3) The guardian ad litem must present the results of his or her investigation and the conclusion regarding the child's best interest in the same manner as any other lawyer presents his or her case on behalf of a client: by calling, examining and cross examining witnesses, submitting and responding to other evidence in conformance with the rules of evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.

Rule 306 of Juvenile Procedure

- **(a)** Any examination of a child witness shall be conducted in a manner that takes into account the child's age and developmental level. Such testimony shall be recorded.
- **(b)** When a child testifies, the examination shall be conducted either in chambers or in a courtroom which has been cleared of observers and non-party witnesses.
- **(d)** If the court excludes the parties from chambers or the courtroom while the child is testifying, the court shall ensure the following procedures are followed:
 - (1)** Counsel for the parties and child(ren), including the guardian(s) ad litem, shall be permitted to be present during the child's testimony.
 - (2)** The court shall inform any party who is not represented by counsel of the right to be represented by counsel and shall appoint counsel if requested by an indigent party who is entitled to an attorney.

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- (e) Upon motion of any party or upon its own initiative and upon good cause shown based upon the best interest of the child, the court may order one or more of the following accommodations:
 - (1) Arrangement of the courtroom or chambers so that certain individuals are not within the child's line of vision;
 - (2) Exclusion of the parties from chambers or the courtroom while the child is testifying; any motion for exclusion of the parties shall be made prior to trial, except in extraordinary circumstances;
 - (3) Examination of the child through written questions and written answers;
 - (4) Observation by the parties of the child's testimony by closed circuit television or other contemporaneous audio-visual transmission;
 - (5) Examination of the child by the court rather than directly by the parties or attorneys;
 - (6) Allowing the presence of a properly trained comfort animal;
 - (7) Permitting the child to have a stuffed animal or similar comfort toy while the child is testifying; or
 - (8) Permitting the child to be accompanied by a support person who is not a party or a witness.

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- (e) If the court examines the child rather than permitting the parties or attorney to directly examine the child, the court shall ensure the following procedures are followed:
 - (1) The parties or their counsel if represented, the guardian(s) ad litem, and attorney(s) ad litem shall submit written questions to the court prior to the child's testimony. The court shall ask the questions as written.
 - (2) If a party or attorney has an objection to a question, he or she may make the objection by raising his or her hand and then submitting the objection in writing. The written objection shall be provided to the party or attorney who wrote the question, and he or she shall be provided an opportunity to respond to the objection, before the court may sustain the objection.
 - (3) After all of the submitted questions have been asked by the court, the court shall take a recess. During the recess, the attorneys shall have an opportunity to consult with their clients. If a party or attorney wishes to ask additional questions, he or she shall submit the questions in writing prior to the end of the recess.
 - (4) The court shall continue the above process until there are no further questions for the child from any party or attorney.
 - **Advisory Commission Comments.**

Tennessee Rule of Juvenile Procedure 307

- **(d) Evidence Admissible.** The court shall consider only evidence which has been formally admitted at the adjudicatory hearing. All testimony shall be under oath and may be in narrative form. Evidence shall be admitted as provided by the Tennessee Rules of Evidence.

Tennessee Rule of Juvenile Procedure 308

- **e) Evidence Admissible; Standard of Proof.** In arriving at its dispositional decision, the court shall consider only evidence which has been formally admitted, and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The Rules of Evidence shall apply except that reliable hearsay including, but not limited to, documents such as psychiatric or psychological screenings or evaluations of the child or the child's parents or custodian or reports or assessments prepared by a probation officer, youth services officer or the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Tennessee Constitution. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the dispositional hearing is preponderance of the evidence.

Tennessee Formal Ethics Opinion 2013-F-157

- RPC 1.7 would permit a lawyer representing a child or the child's interest as GAL pursuant to SCR 40 or 40A to represent another interest(s) only if other interest(s) was consistent with and did not compromise or interfere with the GAL's exercise of their independent judgment on behalf of the child or the child's interest and did not require the lawyer to violate RPC 1.6 or 1.8(b) by revealing information relating the representation or using such information to the disadvantage of the child or the child's interest. However, other statutes and/or rules of substantive or procedural law appear to prohibit a lawyer from serving as GAL while representing other interest(s) in the same matter. RPC 1.9(a) would permit a lawyer who formerly represented the child and/or the child's interest as GAL pursuant to SCRs 40 and/or 40A to represent another subsequent interest(s) in the same or substantially related matter only if the interest(s) is consistent with the interest of the former client/child and does not violate RPC 1.9(c) by revealing information relating the former representation or using such information to the disadvantage of the child or the child's interest. A lawyer who formerly represented the child or the child's interest(s) as GAL pursuant to SCRs 40 and or 40A could represent adoptive parents in the subsequent adoption proceeding only if the adoption is consistent interests of the former client/child and they did violate RPC 1.9(c). To insure that the concurrent or subsequent representation of another interest is not inconsistent with the interest(s) of the child, it would be advisable to secure consent or permission from the judge who had appointed the lawyer as GAL to represent the other interest, including representation of the adoptive parents in a subsequent adoption proceeding regarding the child.

Tennessee Rule of Evidence 803(1.2)

- 1.2) Admission by Party-Opponent.** A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.

Tennessee Rule of Evidence 803(3)

- **2) Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Tennessee Rule of Evidence 803(4)

- **4) Statements for Purposes of Medical Diagnosis and Treatment.** Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

Tennessee Rule of Evidence 803(25)

- **25) Children's Statements.** Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

Tennessee Rule of Evidence 803(26)

- **(26) Prior Inconsistent Statements of a Testifying Witness.** A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:
 - (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
 - (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
 - (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

Bad Experiences with GALs (according to juvenile defenders listserv)

- A few years ago I was busting my hump assisting a children's rights organization in developing a class-action lawsuit challenging conditions in a state's foster care system. We were having a really difficult time finding named plaintiffs because this state is so parochial and insular. We were reaching out to the volunteer GAL's (or CASA's) in child protection cases to get leads on potential plaintiffs. Until the director of the state program sent out a directive to her subordinates they were not to cooperate with us. So – do you know who got behind the lawsuit and furnished their clients for the eventual federal litigation? The juvenile public defenders, whose dually-involved clients were getting squeezed by both “systems.”
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- I once had a GAL in a dependency case where dad was in jail in another state. GAL visited him in jail (not inappropriate), but thereafter started sending him money for his prison account and advocating highly that the child be returned to him, even though he'd been in prison for the child's entire life. The reason we found out about it was that in open court while the father was appearing by phone, the GAL asked him if he needed more money, and said he would send him \$100. I (representing the child) was shocked. Made a complaint to the court, new GAL assigned and that ended the GAL career of the first GAL.
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- Not interviewing all relevant parties, especially when the GAL only interviews one parent.

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- I had a GAL, on a case where I represented the mother, who started socializing with the father, including taking his own child to the father's home for playdates with the child who was the subject of the case.
 - This GAL was incredulous when I confronted him with this behavior, asserting that there was nothing inappropriate going on.

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- In my career, I've dealt with a couple lackadaisical GALs that would just parrot what the Deputy Juvenile Officer's Attorney wanted stated -without doing much -if any- independent research. Example, not having any in-depth conversation with juvenile client. Communication with the juvenile is essential to their job. Overall, it seems that GALs do a better job when many players are involved. The most egregious error I've witnessed was in a rural county at the beginning of my career (18 years ago) in an adoption case. (Before I even knew what was required of a GAL). The adoption parties showed up to court, recruited a member of the local bar to be the GAL. That "GAL" met with the child for five-ten minutes and then recommended the adoption. YIKES.

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- I have had a case where there were 2 half-siblings in a case that a GAL was working on. One of the half-siblings got dismissed from the case because there was a guardianship completed. Even though that half-sibling and her guardian were no longer parties to the case, the GAL was still visiting with them regularly (outside the scope of her GAL role at that point) and sharing very specific details about the continuing case of the other sibling with that non-party half-sibling and her guardian.

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- The main gripe I have with most GALs is that they don't seem to care about the kids they allegedly represent. We're still fighting shackling in one jurisdiction, and it is impossible to get the GALs there to join our arguments that shackling is bad. They often chime in when POs are trashing our clients and frequently recommend commitment. They get really affronted when you ask them to look for placement alternatives, and footdrag on that stuff endlessly. A kid I represented got beat up in detention and his glasses were broken. I asked his GAL to arrange to get him new glasses (after getting nowhere with encouraging her to find an alternative placement because she thought he "needed" detention). After three weeks of listening to her excuses, we a motion for a furlough, took my kid to LensCrafters and I paid for the new glasses out of my own pocket. I complained to the person who at the time was running the state office that contracts with GALs and was told that this particular GAL was a "systems" person.

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- I've had a GAL give consent to law enforcement to have my client interviewed on a criminal matter.