inexpensive determination' of civil cases.'" *Trattler v. Citron*, 182 P.3d 674, 683 (Colo. 2008) (citing *Todd v. Bear Valley Village Apartments*, 980 P.2d 973, 979 (Colo. 1999).[2] Given the need to move quickly to adjudication in D&N cases, for that is in best interest of children, the court allowed, at Father's own request, for counsel to voir dire the caseworker in order to not further delay the proceeding. *See* TR 3/11/21, p 4-12. The court must make a good cause finding to delay an adjudicatory trial, C.R.S. § 19-3-5-505(3), and this was a case that was already six months past service of the petition on Father. *See* TR 8/17/20, p 4:21-23. Any prejudice to Father would be outweighed by the harm to the best interest of the children, the standard which is paramount in D&N matters.

II. The Trial Court correctly ruled that the GAL was not required to respond to Father's requests for admission, and correctly ordered that the jury be instructed as to the GAL's position on disputed jury instructions.

A. Standard of Review

Petitioners-Appellees do not agree with the standard of review set forth by Father in regard to Issue II. A trial court's discovery rulings will not be disturbed on review absent an abuse of discretion. *See In re Marriage of Gromicko*, 387 P.3d 58, 61 (Colo. 2017); *Edwards v. Bank of America, N.A.*, 382 P.3d 1272, 1275 (Colo.

[2] *Trattler* also stated that when considering a sanction for nondisclosure, or late disclosure, the court should include alternatives, to include "any other sanction directly commensurate with the prejudice caused. *Trattler*, 182 P.3d at 683.

App. 2016). A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable or unfair. *Gateway Logistics, Inc. v. Smay*, 302 P.3d 235, 239 (Colo. 2013).

Regarding the disputed jury instructions, an appellate court reviews a trial court's decision to give or not to give a particular instruction for an abuse of discretion, and an abuse of discretion results only when the instruction includes a misstatement of the law or is manifestly arbitrary, unreasonable or unfair. *See People in Interest of J.G.*, 370 P.3d 1151, 1161 (Colo. 2016) (citations omitted). (citations omitted).

B. Preservation of Issue for Review

Petitioners-Appellees agree that Father preserved this Issue II for appeal. *See* Opening Brief at p 22.

C. Legal Authority and Analysis

In the Opening Brief at 22-26, Father asserts that the trial court improperly denied his request that the trial court GAL answer requests for admissions pursuant to C.R.C.P. 36. Specifically, Father sought an admission from the trial court GAL that neither child "exhibit[ed] evidence of an identifiable and substantial impairment of [their] intellectual or psychological functioning or development." CF, p 228, ¶¶ 9-10. The trial court sustained the GAL's objection to answering this request for admission. *See id.* at 263. On appeal, Father challenges this decision by the trial court

and argues that this error was compounded when the trial court approved related jury instructions which included a statement that the GAL had not stipulated or agreed to them. *See* Opening Brief at 26-29. However, considering the relevant law regarding the unique role of the GAL in these proceedings, the trial court's ruling on these issues was a well-reasoned and fair resolution to the parties' competing positions.

1. Trial court properly excused GAL from having to respond to Father's request for admissions.

A GAL is appointed in D&N cases, as well as other actions involving children in the court system, to act as an independent attorney representing and advocating for the child's best interests. C.R.S. §§ 19-1-111(1), 19-1-103(59), 19-3-203(3). Ultimately, the GAL is "tasked with acting on behalf of the [individual] child's health, safety, and welfare." *People in Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011).

The Colorado Rules of Civil Procedure apply in D&N proceedings only to the extent that different procedures are not addressed in the Colorado Rules of Juvenile Procedure. *See* Colo. R. Juv. P. 1. Additionally, the El Paso County District Court CMO governs the process and procedures in D&N cases. *See* CF, p 329-336. The CMO authorizes requests for admissions and written interrogatories but indicates that the scope and manner of these discovery tools are governed by C.R.C.P. 26 and 36. As discussed below, nothing in these authorities suggests that a GAL is compelled to answer requests for admissions as a traditional party must.

GALs are always attorneys. *See* C.R.S. § 19-1-103(59); CJD 04-06 ¶ V. Yet, C.R.C.P. 33(a) and (b) indicates that interrogatories are answered by parties to the case not attorneys. Only if the party is "a public or private corporation, a partnership, an association, or a governmental agency," then the interrogatories may be answered by an agent or office who has been supplied with the required information by the entity. C.R.C.P. 33(a). As evidenced by the absence of the GAL's name in the case header, a GAL is not a party to the case in the same way the parents, or even the child, is. Rather, a GAL's client consists of a theoretical construct known as "the best interests of the child." *See* C.R.S. §§ 19-1-103(59), 19-3-203(3); Chief Justice Directive 04-06 § V.B., revised May 2019 ("CJD 04-06"). Because the "client" of a GAL is the "best interests of the child," a GAL is unable to consult with his or her client in order to obtain information and/or enter denials or admissions of any factual matters.

Similarly, because the GAL is not a party to the case, no party can force a GAL to testify at trial unless "the guardian ad litem chooses to present his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence." *People in Interest of J.E.B.*, 84 P.2d 1372, 1376 (Colo. App. 1993). In *J.E.B.,* the respondent mother attempted to call a GAL to the witness stand at the termination trial, but the trial court prevented the GAL from being examined as a witness. 854 P.2d at 1374. In

upholding this ruling, the Court of Appeals concluded that the "manner in which the GAL chooses to proceed" at a hearing is dispositive of the question whether the GAL may be examined or cross-examined. *Id*. at 1376. So long as a GAL does not elect to function as a witness in the proceedings, he or she cannot be compelled to do so by others. Since the professional and ethical risks of becoming a fact witness are borne solely by the GAL, it is sound policy to reserve that decision to the GAL.

Requiring the GAL to testify as a fact witness is akin to requiring a GAL to answer requests for admission, and the same policy considerations apply. Furthermore, requiring a GAL to answer requests for admission would likely lead to the GAL becoming a fact witness. Answers to interrogatories are to be made under oath for use as evidence at trial. C.R.C.P. 33(b)(1), (c). Likewise request for admissions are used to discover the parties' positions on "the truth of any matters" within the scope of discovery. C.R.C.P. 36(a). It is probable that, if a GAL is required to answer a request for admission, the opposing side would then seek to call the GAL to the stand and cross-examine the GAL as to the basis of the admission or denial, thereby making the GAL into a fact witness in the case.

This outcome would have unintended consequences, or perhaps intended consequences on some parents' part. The comments to Colorado Rule of Professional Conduct 3.7 note that it is confusing to the trier of fact if an attorney serves as both an advocate and a witness, stating "a witness is required to testify on

the basis of personal knowledge while an advocate is expected to explain and comment on evidence given by others." Not only are the dual roles confusing to the factfinder, but it also creates a conflict of interest. *See Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005).

If a GAL is required to testify, that GAL would have to withdraw from the case and a new GAL would need to be appointed, with this cycle potentially happening several times over the course of a case. Requests for admissions would be the first step in this cycle, and therefore, allowing requests for admissions would be an unduly burdensome and inefficient method for a parent to obtain the same information from another source. It could also be used for nefarious purposes, if a parent submits discovery to the GAL for the sole purpose of having the GAL removed from the case.

Contrary to Father's assertions in the Opening Brief at 23-24, a GAL is not an actual party to this case in the same way that the parents or the child is. Although the Children's Code states that a GAL shall have the "right to participate as a party" in D&N cases, C.R.S. § 19-1-111(3), the purpose of treating the GAL as a party is so that the GAL is not limited in his or her representation of the child's best interests. *See* C.R.S. §§ 19-1-103(59), 19-1-111(1)(III). Even the case law that Father cites in support of his assertion that the GAL is a "party to the case" demonstrates that the term "party" in this context refers to a unique attorney role. *See* Opening Brief at 24;

People in Interest of G.S., 820 P.2d 1178, 1180 (Colo. App. 1993) ("Once a petition in dependency and neglect is filed, the proper party *to represent the interests of the child* is the guardian ad litem, if one is appointed by the court." (emphasis added)); *People in Interest of T.M.S.*, 454 P.3d 375, 378 (Colo. 2019) (GAL for child in D&N participates as counsel in proceedings) (citations omitted). The use of the term "party" in these cases is taken out-of-context by Father because the cases actually acknowledge that a GAL is appointed to act as legal counsel on behalf of the best interests of a child, rather than to participate as a party in the same way a parent does.

This interpretation of the GAL role is further supported by the process by which GALs become involved in D&N cases. GALs are appointed by specific court order in each D&N case. *See* C.R.S. § 19-1-111(1); CF, p 29-31. The GAL does not have a personal interest in the case. In fact, the GAL is charged with maintaining extraordinary objectivity in order to represent the best interests of the child. *See* C.J.D. 04-06 § V.D.4(e) (the GAL must "[c]onduct an independent investigation in a timely manner . . ."). This unique role requires such independence that the GAL has quasi-judicial immunity as a by-product: "The importance of impartial decision making, the potential for unfounded suits and the need for freedom from fear of litigation support providing the protection of absolute quasi-judicial immunity to . . . guardian ad litem[s]." *Short by Oosterhous v. Short*, 730 F.Supp. 1037, 1039 (D. Colo. 1990). The GAL serves as an adjunct of the court. *See Miller v. Clark*, 356

P.2d 965, 966 (Colo. 1960). Done well, a GAL for a child performs the duties "in a careful, profession, and unbiased manner." *See In re Marriage of Barnthouse*, 765 P.3d 610, 612 (Colo. App. 1988).[3]

Because a GAL is charged with exercising objectivity, the evidence presented at trial could persuade a GAL to take a different position than anticipated at the start of a hearing. While this flexibility necessarily carries with it some element of potential surprise to other parties, it is necessary to allow the GAL to be fully independent and effective in his or her representation of the child's best interests. Requiring a GAL to respond to requests for admissions is an attempt to improperly hamstring a GAL's objectivity and flexibility to the detriment of the representation.

In this case, Father has not demonstrated that the trial court GAL advocated for a position at the adjudication hearing based upon her own independent investigation or facts not otherwise in the record. *See J.E.B.*, 84 P.2d at 1376.

[3] In the Opening Brief at p 25, Father argues that the GAL should be required to answer requests for admissions precisely because the GAL must conduct an independent investigation. However, the current state of the law allows for a proper balance between protecting the GAL's important role and the other parties' right to challenge the basis for the GAL's recommendations. As previously noted, a GAL cannot be required to testify, or otherwise participate as a fact witness might, unless "the guardian ad litem chooses to present his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence." *J.E.B.*, 84 P.2d at 1376. Assuming the GAL has not presented an opinion based on facts not otherwise in evidence, the GAL should not be forced to participate in the proceedings as a fact witness might, thereby jeopardizing the GAL's continued representation.

Additionally, Father fails to demonstrate that he had no other way to obtain the same information asked of the GAL. In fact, Father included the same question he asked of the GAL in his requests for admissions to the Department, and he used the Department's response to propose a favorable jury instruction, a request which was granted in part. *See* CF, p 277; TR 3/11/21, p 139:19-23. Additionally, Father could have retained an expert witness who was qualified to examine the children and opine as to their developmental and mental health needs. Instead, Father sought to present this information by treating the GAL as if she were his own expert witness rather than an attorney for the child's best interest. This use of discovery as an end-run around typical case preparation serves no legitimate purpose and threatens to disrupt the GAL's representation of the child's best interests. The trial court agreed:

> I do have concerns . . . foreseeing the guardian ad litem to go out and investigate to fully respond to pretrial request for admission is placing. . . that GAL in a position in which they are essentially being forced, not doing it on their own, forced to go out and perform independent investigation which would then force them into the role of a fact witness which would then force them to withdraw. . . . I do think there is a certain danger that occurs to me and a certain concern about allowing them to be, to be made into a fact witness if the county or the respondent parent doesn't like a particular GAL's stance, then I am concerned about the possibility of . . . this being abused.

TR 3/11/21, p 139:24-140:24.

Moreover, in this case, requiring the GAL to answer the disputed requests for admission would have required the GAL to answer questions that she was not qualified to answer. A GAL lacks the requisite qualifications to diagnose anyone or

to proffer any opinion as to whether the child exhibits any "identifiable and substantial impairment of the child's intellectual or psychological functioning or development." *See* CF, p 228. Even if a GAL could proffer an opinion on a child's intellectual or psychological functioning or development, based upon contact with other professionals, this would be done at the direction of the parent under Father's proposal. In order to effectively represent a child's best interests, the GAL needs control over his or her own investigative process. *See* CJD 04-06 § V.D.4. The GAL should not be required to act as an investigatory arm of the parent by means of discovery. Furthermore, as an attorney, the GAL's documents and opinions resulting from contacts with other professionals in the case are protected under the attorney work-product privilege. *See* Colo. R. Civ. P. 26(b)(3) ("In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.")

2. Trial court properly approved jury instructions about Children's mental health and intellectual capacities which included statement the GAL had not stipulated or agreed to it.

In his Opening Brief at 26-29, Father asserts that, because the trial court GAL successfully argued that she should not have to complete the request for admission, she should have been precluded from having a position on Father's proposed jury instructions related to the dispute request for admission. However, as discussed at

length above, the role of the GAL is to act as an attorney, not a fact witness, to the proceedings, and therefore, the GAL had every right to take a position on Father's proposed jury instructions. The trial court properly included in the disputed instruction a statement that the GAL did not stipulate or agree to the jury instruction because the addition was not an incorrect statement of the facts or law and did not mislead the jury in any way.

Father's proposed jury instruction indicated, among other things, that the Children "did not have evidence of an identifiable and substantial impairment of [their] intellectual or psychological functioning." CF, p 277; TR 3/11/21, p 123:23-124:22. The GAL objected to the jury instruction as presented by Father arguing as ":inaccurate and misleading and highly prejudicial." TR 3/11/21, p 129:13-16. After hearing the parties' various positions on the disputed jury instructions (jury instruction 9 and 10), the trial court adopted the disputed instruction but modified the language to state that "[The Children] do[] not exhibit evidence of an identifiable and substantial impairment of [their] intellectual or psychological functioning or development and this is agreed to by the department and father, but not the guardian ad litem." TR 3/11/21, p 139:19-24.

Lacking appellate guidance, the trial court ultimately took a middle-ground position. She allowed Father to present his preferred jury instruction, over the GAL's objection, but included a statement informing the jury that the GAL had not agreed

to it. *See* TR 3/11/21, p 139:19-24.[4] On appeal, the GAL believes that the trial court could have correctly struck jury instructions 9 and 10 entirely as the statement regarding the Children's psychological and intellectual health had not been agreed upon by all parties and was, therefore, a factual issue in dispute. Regardless, the trial court's moderate approach of including the instruction but noting the parties' position on it did not abuse its discretion. "Trial courts must correctly instruct the jury on the law applicable to the case, but as long as they meet this obligation, they have broad discretion over the style and form of the instructions." *People in Interest of J.G.*, 370 P.3d 1151, 1161 (Colo. 2016) (citation omitted). Here, the trial court's language in the revamped Jury Instruction 9 and 10 was truthful, well-reasoned and impartial. While neither side was entirely pleased with the trial court's decision regarding the disputed jury instructions, it cannot be said that the trial court's decision constituted an abuse of discretion.

III. The Trial Court correctly gave a broad "educational instruction" at the outset of the trial proceedings, instructing the jury on the purposes and impact of an adjudication.

[4] At the adjudicatory trial, the Department also objected to the trial court using its answer to the request for admission as a basis for jury instructions 9 and 10. *See* TR 3/11/21, p 124:2-13. The Department asserted that its answer to the request for admission was merely a response by the Department stating that it had no knowledge that either child had been formally diagnosed with psychological or developmental impairment, and not a statement of fact. *See id.* Regardless, the trial court determined that the Department was bound by its answer to the request for admission in the negative. *See id*., p 127:20-25, 128:25-129:12.