Who Am I and What Is My Role?

GAL ROLE, RESPONSIBILITIES, AND CONSIDERATIONS

July 2015 New Attorney Orientation

WHO WE ARE

Introductions/Goals

- Name, jurisdiction, type of practice?
- Why did you want to be a GAL?
- What do you anticipate will be your biggest challenge in this role?
- Top 3 things you are hoping to get out of the two-day program.

WHEN WE GET APPOINTED

Dependency and Neglect--GAL

- § 19-3-203(1)
  - Upon the filing of a petition, the court shall appoint a guardian ad litem.
  - Nothing in this section shall limit the power of the court to appoint a GAL prior to the filing of the petition for good cause.

Dependency and Neglect—Counsel for Child

- § 19-1-105(2)
  - If the court finds that it is in the best interest and welfare of the child, the court may appoint both counsel and a guardian ad litem.
  - Nothing in this title shall prevent the court from appointing counsel if it deems representation by counsel necessary to protect the interests of the child or other parties.

Delinquency

- § 19-1-111(2)(a) sets forth provisions under which GAL may be appointed:
  - Parent does not appear.
  - Conflict of interest.
  - Specific findings that appointment is necessary to serve best interests.

Domestic Relations

- § 14-10-116
  - The court may, upon the motion of either party or upon its own motion, appoint an attorney to serve as CLR.

Truancy

- § 19-1-111(b)
  - In order for court to appoint GAL in a truancy proceeding, court must make findings that appointment is necessary due to exceptional and extraordinary circumstances.

Probate

- § 15-14-115
  - Allows court at any stage of proceeding to appoint a GAL.
  - Court must find that "representation of the interest otherwise would be inadequate."
  - Court shall state on the record the duties of the GAL and the reasons for the appointment.

Criminal

- For defendant
  - Court has discretion to appoint GAL for juvenile charged in adult criminal proceeding. § 19-2-517(8).
- For child victim
  - Victims Rights Amendment, § 24-4.1-302(5), deems any person under the age of 18 to be incapacitated unless legally emancipated. Incapacitated victim's parent, grandparent, sibling, etc., "or other lawful representative" may exercise rights under act. Other lawful representative is defined as "any person who is designated by the victim or appointed by the court to act in the best interests of the victim." § 24-4.1-302(3).

Other

- Court **must** appoint GAL for:
  - Child facing a **mental health commitment** who is a ward of the state or who is under the age of fifteen and objects to the petition filed by their parents, *see* §§ 27-65-103(3), (7)(c), C.R.S. (2014).
  - Child postured as a **parent facing termination of parental rights in a D&N proceeding**. *See* § 19-3-602(3). *See also* § 19-1-111(2)(c), *People in Interest of M.M.*, 726 P.1108 (Colo. 1986).

Other

- Court **may** appoint GAL for:
  - Child in **adoption proceedings** upon a finding of conflict of interest between a parent and the child or a best interests finding. § 19-5-103(9)(a).
  - The court in a **paternity action** has the discretion to make the child a party to the case and to appoint a GAL. If child is made a party, "the child's mother or father may not represent the child as guardian or otherwise." § 19-4-110.

Pop Quiz

- Which of the following appointment statutes require findings of indigency for OCR to pay?
  A. Delinquency.
  B. Probate.
  C. Domestic.
  D. Dependency and Neglect.
  E. B&C.
  F. None of the above.

Pop Quiz

- Indigency findings are required for:
  - CLR.
  - Paternity.
  - Adoption and relinquishment.
  - Probate.

CJD 04-06(IV)(A).

OUR CLIENT

Who is my client?

- You are have been appointed as GAL for Dahlia in a dependency and neglect proceeding. Dahlia is sixteen years old and is placed in a foster home. Who is your client, as defined by the Colorado Rules of Professional Conduct?
  A. Dahlia.
  B. Dahlia's parents.
  C. Dahlia's foster parents.
  D. None of the above.

Best Interests of The Child

- CJD 04-06(V)(B)
  - "All attorneys appointed as GALs or Child's Representatives shall be subject to all of the rules and standards of the legal profession."
  - CLRs and GALs do not have traditional attorney-client relationship with child.
  - Client of GAL/CLR is best interests of child.

Historical context

- Pre-*Gabriesheski*
  - Client of GAL not defined in CJD.
  - § 19-1-103(59) defines GAL as "a person appointed by a court to act in the best interests of a person whom the person appointed is representing in proceedings under this article."
  - § 19-3-203(1) the GAL "shall be charged in general with the representation of the child's interests."
  - Case law.
  - CJD reference to Colo. Rule Prof. Cond. 1.14.

Historical Context

- Colo. Rule Prof. Cond. 1.14 at time of COA decision
  - When client's capacity to make adequately informed decisions is impaired, lawyer must maintain, as far as is reasonably possible, normal client-lawyer relationship.
  - Impairment may impose additional responsibilities.
  - Lawyer is not relieved of obligation to obtain information from client to extent possible.
  - Protective action only when lawyer reasonably believes client cannot act in client's own interests.

- Current version of Colo. Rule Prof. Cond. 1.14
  - Seeking appointment of GAL listed as protective action.

Historical context

- *People v. Gabriesheski* question:
  - "Whether the Court of Appeals erred in concluding that conversations between a child and her GAL in a dependency and neglect case are confidential communications protected by the attorney-client privilege."

Historical context

- *Gabriesheski* holding
  - Because a child who is the subject of a D&N proceeding is not the client of a court-appointed GAL, neither the attorney-client privilege nor the ethical rules governing attorney confidentiality obligations to a client strictly apply.

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011).

Historical context

- *Gabriesheski* “fall out” and revisions to CJD 04-06.

Determining Best Interests

- GAL/CLR determination of child's best interests must be based on independent investigation and include:
  - Consultation with the child in a developmentally appropriate manner.
  - Consideration of the child's position regarding the disposition of the matter before the court.

CJD 04-06(V)(B). *See also §14-10-124 for best interests determination in DR proceedings.*

Implications: Scenario #1

- You are GAL for Liz. Liz is seven years old and is placed in foster care. She desperately wants to return home to her mother before school starts in the fall. Her mother, who has been diagnosed with a bipolar disorder, is not taking her medications, has been inconsistent in her compliance with her treatment plan, and lacks stable and adequate housing.

Implications: Scenario #1

- What do you do?
  A. File an emergency motion for return home.
  B. After consulting with Liz and making sure she understands the risks of returning home, advocate for her return home.
  C. File a motion to further restrict Liz's visits with her mother.
  D. Engage in further communication, investigation, and advocacy.

Implications: Scenario #1

- Colo. Rule Prof. Cond. 1.2
  - Client sets objective; lawyer sets strategy in consultation with client.
- CJDC 04-06 provisions regarding youth consultation

Implications: Scenario #1

- Incorporating child's wishes into BI analysis.
- Creativity and compromise.
- Pursue all legal means to address objectives consistent with child's best interests.
- Thinking outside of the box the department has attempted to define.

Implications: Scenario #2

- You are GAL for three children, Sammie (15), Lucy (8), and Ruth (4). All three children are placed jointly through a D&N case with their grandparents. Ruth has made allegations that Sammie has engaged in sexual contact with her.

Implications: Scenario #2

- You must:

A. Continue to represent the best interests of all three children.
B. Seek substitution of counsel for Sammie only.
C. Seek substitution of counsel for Lucy and Ruth only.
D. Seek substitution of counsel for all three children.

Implications: Scenario #2

- Colo. Rule Prof. Cond. 1.7
  - Defines concurrent conflict of interests to include:
    - Representation of one client will be directly adverse to another client
    - Significant risk of material limitation on representation by lawyer's responsibilities to another client, former client, third person or personal interest of lawyer
  - OK to continue with representation if:
    - Reasonable belief re competent and diligent representation
    - Representation is not prohibited by law;
    - Representation does not involve assertion of claim by one client against another; and
    - Each client gives informed consent, confirmed in writing.

Implications: Scenario #2

- The realities:
  - Rural jurisdiction
  - Judicial pressure
  - No one else is getting off

What do you do???!!!?!?!?!

Implications: Scenario #3

- You are GAL for Kylie, a seventeen-year-old girl. Kylie has stated to you that another child is bullying her at her placement, and that this bullying includes acts of physical aggression. Kylie has shown you bruises. Kylie does not want you to report this information to anyone. Her current placement is the best placement she has had for a while. She doesn't want to move and she is afraid of retaliation by her bully.

Implications: Scenario #3

- What do you do?
  A. It depends.
  B. File an emergency motion to the court.
  C. Make a hotline call.
  D. Discuss the situation with the treatment team.
  E. Do not share the information with anyone, as Kylie requested.

Implications: Scenario #3

- CJD 04-06(V)(B)
  - Because of unique relationship, obligation to not reveal confidential information revealed by the child does not apply if the information must be revealed to ensure the child's best interests.
  - GAL/CLR must explain limitations on confidentiality to the child.
- Colorado Rule of Prof. Cond. 1.6
  - Requires informed consent or implied authorization.
  - Applicability to best interests client?
- Statutory Provisions
  - § 19-3-304: GAL is not mandatory reporter.

Implication: Scenario #3

- What if?
  - Sex with boyfriend
  - Foster parent engaging in inappropriate sexual contact
  - Theft of other resident's backpack

Implications: Scenario #4

- You have an adjudicatory jury trial in a D&N proceeding set for Friday. It is Monday evening. You have docket days Tuesday and Thursday. You have a contested hearing Wednesday. You are aligned with the county department in that you believe the children in the case should be adjudicated dependent or neglected.

Implications: Scenario #4

- What do you do?

A. Nothing.
B. Continue to work on your trial notebook, voir dire questions, witness preparation, cross examination questions, and opening and closing arguments.
C. Call the OCR and tell your staff liaison this job is much more than you bargained for and that you'd like SOC immediately.
D. Check in with county attorney and make sure s/he has everything covered.

Implications: Scenario #4

- Colo. Rule Prof. Cond. 1.3:
  - "A lawyer shall act with reasonable diligence and promptness in representing a client."
- CJD 04-06(V)(C) requirement of diligence.
- Statutory provisions:
  - § 19-1-111(3): GAL shall have right to participate in all proceedings as a party except in delinquency cases

OUR RESPONSIBILITIES

Sources of Responsibilities

- Statutes
- Chief Justice Directives
- Contracts
- Case law

Relevant Statutes

- D&N
- JD
- CLR

Statutory Responsibilities of D&N GAL

- § 19-3-203
  - Must be provided with all reports relevant to case; must be kept apprised of significant developments in the case.
  - Examine and cross examine witnesses; introduce own witnesses.
  - Make recommendations.
  - Appeals.
  - Seek to assure reasonable efforts are being made (if in best interests of the child, health and safety of child paramount concern).

Statutory Responsibilities of D&N GAL

- § 19-3-606
  - At post-termination review hearing, GAL must submit written report with recommendations to the court for best disposition of the child
    - Must be based on best interests of the child

Statutory Responsibilities of JD GAL

- § 19-1-111(3): GAL shall have the right to participate as a party in all proceedings, except in delinquency cases.

Statutory Responsibilities of CLR

- § 14-10-116 requires CLR to
  - Comply with disclosure provisions within 7 days of appointment.
  - Actively participate in all aspects of the case involving the child, within the bounds of the law.
  - Ascertain and consider wishes of child, but CLR is not required to adopt the child's wishes in recommendation or advocacy, unless such wishes serve child's best interests as set forth in § 14-10-124.

CJD 04-06

- Reason for CJD
- Requirements of CJD
  - General provisions of CJD.
  - CJD provisions for specific case types.

CJD 04-06

- Findings of General Assembly in creating OCR:
  - Children lack resources to retain attorney.
  - Children are unable to efficiently provide or communicate necessary information to an attorney.
  - Children lack ability and understanding to effectively evaluate and complain about quality of representation.

§ 13-91-102(1)(a).

CJD 04-06

- Duties of the OCR include:
  - Making recommendations re minimum training requirements to Chief Justice.
  - Making recommendations to Chief Justice concerning establishment of standards to which GALs, CFIs, CLRs shall be held.

§ 13-91-105 .

Responsibilities—All Case Types

- Diligently take steps necessary to represent and protect best interests of the child.
  - Under terms and conditions/within scope of order of appointment.
- GAL/CLR may request expansion of terms of appointment/scope of duties when necessary and in best interests of child.

CJD 04-06(V)(C).

D&N

- Attend all court hearings and provide accurate information to the court.
- Present statement of child's position when ascertainable based on child's developmental level, regarding disposition of matters addressed at the hearing.
  - Unless child informs GAL s/he does not want position reported.

CJD 04-06(V)(D)(1).

D&N

- At the court's discretion and in compliance with § 19-3-606(1), file written or oral reports.
- Take actions within the scope of her authority and ethical obligations necessary to represent the child's best interest, i.e., fully participate in all aspects of litigation.

CJD 04-06(V)(D)(2) -(3).

D&N

- Minimum Requirements of Independent Investigation include:
  - Personally meet with the child in his placement:
    - As soon as reasonable.
    - In no event later than 30 days following the GALs appointment.

CJD 04-06(V)(D)(4) (a).

D&N: Initial Investigation

- Personally meet with and observe the child's interaction with parents, proposed custodians or foster parents including kinship care providers.
  - This requirement is not met by GAL meeting with the care provider and observing the child in a temporary intake placement, respite care or juvenile detention facility unless that is the only opportunity to observe the child.

CJD 04-06(V)(D)(4) (a).

D&N: Initial Investigation

- Review court files and relevant records.
- Interview, with consent of counsel, respondent parents.
- Interview other people involved in the child's life (includes foster parents, caseworkers, CASA volunteers, relatives, school personnel, therapists).

CJD 04-06(V)(D)(4) (c), (d), (e).

D&N: Initial Investigation

- Confirm that the County's investigation has included a search for any prospective kinship placement or potential tribal affiliation.

CJD 04-06(V)(D)(4) (f).

D&N: Initial Investigation

- When appropriate, visit the home from which the child was removed.

CJD 04-06(V)(D)(4) (g).

Question

When does this prescribed independent investigation have to take place (other than child visit)?

A. Within first 30 days.
B. Within first 45 days.
C. Within first 60 days.
D. Within first 90 days

Independent Investigation

- Frontload investigation.
- Placement interview/observation required within 30 days of appointment.
- All other duties within 45 days of appointment.

CJD 04-06(V)(D)(4) (g).

Question

Does GAL need to see the child in placement within 30 days of appointment if GAL has been representing best interests of child on another case ?

A. Yes.
B. No.
C. It depends.

Question

What parts of investigation may GAL assign to staff?

A. Interviewing other important people in child's life.
B. Interviewing parents.
C. Review court files.
D. A & B.
E. All of the above.

GAL May Delegate Limited Tasks

- GAL must personally perform all aspects of the initial investigation except:
  - Confirming search for kin/tribe.
  - Interviewing other parties involved in the child's life.
- The above may be performed by a qualified person under the supervision of the GAL.

Question

Michael, a two-year old in a D&N proceeding, has just been moved to his aunt's home. When must the GAL personally visit him?

A. Within 30 days.
B. Within 45 days.
C. Within a reasonable amount of time.
D. No specific obligation, as aunt is a family placement.

Ongoing Investigation

- If the child's placement changes:

  -GAL shall personally meet with and observe the child in the new placement.

  -Visit within 30 days of that new placement.

  -If not possible, send a trained representative within 30 days with follow up visit by GAL within reasonable time.

CJD 04-06(V)(D)(5) (a).

Visit Exemptions: Initial and Ongoing

- In cases in which the child is placed more than 100 miles outside the jurisdiction of the court, the requirements to personally meet with and interview the child are waived.
- However, to the extent possible, the GAL shall endeavor to see the child in his placement.

CJD 04-06(V)(D)(6).

Ongoing Investigation

- Maintain contact and ongoing communication with the child, foster parents, caseworker, CASA and other professionals.

CJD 04-06(V)(D)(5) (b).

Contract provisions

- Training: 10 hours of OCR sponsored or approved per year
  - More stringent requirement than CJD 04-06, which requires 10 relevant CLEs each reporting period.
- Appeals

TRACKING COMPLIANCE

GAL Reporting Requirements

All D&N GALs must submit standard affidavit of compliance to the OCR by May 30 of each year for appointments made in previous contract year.

CJD 04-06(V)(D)(7).

OCR Activities

- Annual verifications
- Tri-annual evaluation process
- Complaints
- CARES reports

OTHER CONSIDERATIONS

Other Considerations

- *J.E.B.*, 854 P.2d 1372 (Colo. App. 1993); *M.G.*, 128 P.3d 332 (Colo. App. 1986)
  - Limited circumstances in which GAL shall be called as witness.
- *R.E.*, 729 P.2d 1032 (Colo. App. 1986)
  - Court cannot dismiss D&N case over GAL objection without hearing.

Other Considerations

- § 19-1-111(3): GAL shall have the right to participate as a party
- § 19-3-213(1)(a)
  - Duty to notify GAL prior to change of placement; right to seek emergency hearing if disagrees.
- § 19-3-403(3.6)
  - Parent must identify relatives and kin and provide contact information in relative affidavit.
  - Must file with court no later than five days after temporary custody hearing.
  - GAL must receive a copy of the affidavit.

Other Considerations

- Confessions
  - *People in the Interest of S.M.D.* , 864 P.2d 1103 (Colo. 1994): GAL can act in place of parent for purposes of § 19-2-511; GAL's presence at interrogation of interview of child satisfies statutory requirements re parent, guardian, legal custodian presence during interview.

Privilege: L.A.N. v. L.M.B.

The psychotherapist-patient privilege:

- Applies to "licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor."
- Prevents examination "as to any communication made . . . or advice given in the course of professional employment" without consent by the client.

13-90-107(1)(g).

Privilege: L.A.N. v. L.M.B.

The psychotherapist-patient privilege:

- Applies to group therapy sessions.
- Applies not only to testimonial disclosure but also to pretrial discovery of communications, files, and records made during the course of treatment. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *Clark v. District Court*, 668 P.2d 3 (Colo. 1983).

Privilege: L.A.N. v. L.M.B.

- *L.A.N. v. L.M.B.* , 292 P.3d 942 (Colo. 2013), the CO Supreme Court held the GAL holds the child's privilege in a D&N case when:
  - The child is too young or otherwise incompetent to hold the privilege;
  - The child's interests are adverse to those of his or her parents; and
  - Section 19-3-311 does not abrogate the privilege.

Privilege: L.A.N. v. L.M.B.

- Guidance re child: "too young or otherwise incompetent."
  - In FN 1, court declines to provide additional guidance.
- Guidance re parent:
  - When child is too young or otherwise incompetent, it is the parent that "typically assumes the role of the privilege holder."
  - Parent cannot hold the privilege "when the parent's interests as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship."

Privilege: L.A.N. v. L.M.B.

- Why the GAL?
  - GAL's client is best interests of child; ethical obligations as an attorney (including fiduciary duties of loyalty and confidentiality) flow from this unique definition of client.
  - Professional duties of GAL serve the privacy interest of the psychotherapist-patient privilege because GAL cannot reveal information if contrary to best interests of the child.
  - GAL's statutory duties put the GAL in an "optimal position" to understand when to assert or waive the privilege in the child's best interests.
-

Privilege: L.A.N. v. L.M.B.

- Guidance regarding waiver/disputes over scope of waiver
  - Waiver with readily apparent limited scope.
  - If other parties contend that privilege should not apply to any information in the privilege log, juvenile court may perform an *in camera* review of the documents.
  - After receipt of privilege log and performing any necessary *in camera* review, court determines scope of waiver by balancing competing interests surrounding disclosure.
    - Decision sets forth competing interests and other discretionary factors court may consider.

Privilege: L.A.N. v. L.M.B.

- Key points
  - The privilege is important.
  - As GAL, make sure that there has been a determination of privilege holder prior to any sharing of information.
    - Beware of implied waiver.
  - If you as GAL are privilege holder, seek rulings on limited scope and strategize about other sources of information.

Question

- You are GAL for Stacie, who is sixteen years old. She has been determined by the court to be the holder of her own patient-therapist privilege. You should:

A. Provide her a general overview of the privilege to her but not offer her legal advice.
B. Advise her on whether to waive the privilege.
C. File motions on her behalf objecting to the disclosure of any information from the therapist.
D. Ask the court to advise.

Counsel for Child

- Colo. Rule Prof. Cond. 1.7
  - Best interests of child versus child's wishes/objectives.
- Colo. Rule Prof. Cond. 4.3
  - In dealing with person who is not represented by counsel, lawyer shall not state or imply disinterest.
  - Lawyer shall not give legal advice to unrepresented person, other than the advice to secure counsel, if lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

WHEN DO MY OBLIGATIONS END?

Statutory Requirements

- § 19-1-111(4)(b) provides that a GAL appointment shall terminate:
  - Imposition of sentence unless out of home placement as condition of probation.
  - Child reaches 18 years of age.
- § 19-1-111(4)(c) provides when JD GAL appointment may terminate because appointment is no longer necessary

Other considerations

- In order to continue CLR appointment/Paternity GAL appointment after entry of permanent orders, court must make extraordinary/ special circumstances findings. *Marriage of Finer*, 920 P.2d 325 (Colo. App. 1996), *In the Interest of A.R.W.*, 903 P.2d 10 (Colo. App. 1995).

Questions/ Comments?

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