

GUARDIANS AD LITEM IN CRIMINAL COURT

*PROTECTING A CHILD'S RIGHT TO
PRIVACY*

Why Should a Court Appoint a GAL or Counsel for a Child in a CR Case?

- “Colorado courts have recognized that the patient holds the privilege. When the patient is a child who is too young or otherwise incompetent to hold the privilege, the child's parent typically assumes the role of privilege holder.”

L.A.N. v. L.M.B., 292 P.3d 942, ¶19 (Colo. 2013).

- However, a parent cannot hold the child's privilege when the parent's interests as a party to an action conflict with the child's interest in maintaining the confidentiality of the relationship. *Id.* at ¶20; *People v. Marsh*, __ P.3d __, 2011 WL 6425492, ¶10 (Colo.App. 2011).
- “[T]he GAL [rather than the juvenile court or the department of human services] should hold the child's privilege when neither the child nor the child's parent(s) have authority to do so.” *L.A.N.* at ¶ 27.

Does L.A.N.'s rationale extend to CR cases ?

- A parent may be charged with committing a crime in which the child is a witness or victim;
- A parent's interests may be aligned with the accused and in conflict with the interests of the child witness or victim;
- A child may be charged with a delinquent act in one case and be a witness or victim in another case and the parent(s) may have conflicting interests arising out of either or both cases;

- A parents' ability or willingness to assert a privilege on behalf of the child may be impeded by a variety of circumstances (*e.g.*, mental or physical health, addiction, out-of-home placement or commitment, estrangement, lack of parental control, geographical separation);
- Though sufficiently mature to hold a privilege, the child may be poorly equipped to exercise the privilege without legal assistance; and,
- It may be contrary to the child's best interests to rely on others (*e.g.*, DA, law enforcement agencies, health care providers, DHS, the court) to assist the child in asserting the privilege.

Authority to Appoint a GAL or Counsel

CJD 04-04 provides express authority to appoint a GAL or counsel in a CR case in only three circumstances:

- Direct filing, C.R.S. 19-2-517;
- Transfer proceedings, C.R.S. 19-2-518; and
- To assist a witness in exercising the privilege against self-incrimination, CJD 04-04(IV)(C)(1)(d).

Other Sources of Authority

- Constitutional grounds. CJD 04-05(III)(A)(9) (Amended July 1, 2014).
- Inherent authority. CJD 04-06(I)(B) (Revised March 15, 2013).

The 4th Amendment: Unreasonable Searches and Seizures

The 4th Amendment applies if the affected person has a legitimate expectation of privacy in the area searched or the items seized. *Rakas v. Illinois*, 439 U.S. 128 (1978); *People v. Suttles*, 685 P.2d 183, 190 (Colo. 1984).

Art. II, § 7 & 25, Colo. Const.

The protection afforded by the Colorado Constitution may be broader than that of the 4th Amendment. See, *People v. Lamb*, 732 P.2d 1216, 1219-1221 (Colo. 1987), holding that a bank customer has a reasonable expectation of privacy in bank records pertaining to his/her accounts, despite contrary U.S. Supreme Court precedent.

14th Amendment: Privacy & Due Process

The right to privacy or confidentiality protects the individual interest in avoiding disclosure of personal matters and “includes the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.” *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980) (personnel files); *People v. Gutierrez*, 222 P.3d 925 (Colo. 2009) (tax returns); *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150, 155 (Colo. 2008) (tax returns); *In re District Court*, 256 P.3d 687, 690 (Colo. 2011) (financial records); *Gateway Logistics, Inc. v. Smay*, 302 P.2d 235 (Colo. 2013) (electronic computer records).

***The Victims' Rights Amendment--Art. II, § 16a,
Colo. Const.***

- A “victim” of an enumerated crime has the right to notice and the right to be heard at any court proceeding “[i]nvolving a subpoena for records concerning the victim’s medical history, mental health, education, or victim compensation, or any other records that are privileged pursuant to section 13-90-107, C.R.S.”

C.R.S. 24-4.1-302.5(1)(c)(VII) and -303(14.5)(b).

The Victims' Rights Amendment (Cont'd)

- Unless emancipated, a victim who is under 18 years of age is deemed “incapacitated” and must exercise VRA rights through the assistance of a parent, relative, legal guardian, or other lawful representative. C.R.S. 24-4.1-302(5).
- An incapacitated adult “victim” is entitled to exercise VRA rights through a spouse, relative, or other lawful representative. *Id.*

The Victims' Rights Amendment (Cont'd)

- “Lawful representative” means “any person who is designated by the victim or appointed by the court to act in the best interests of the victim.” C.R.S. 24-4.1-302(3).
- “[J]udges are encouraged to designate one or more persons to provide [various] services on behalf of a child who is involved in criminal proceedings as a victim or a witness” C.R.S. 24-4.1-304(1).

When to Appoint a GAL or Counsel

A party to a criminal case seeks disclosure of privileged or confidential information concerning the child and

- The GAL holds the child's privilege, pursuant to an *L.A.N.* order entered in another case;
- The child holds the privilege to the exclusion of his/her parents, pursuant to an *L.A.N.* order entered in another case and the child does not have a legal representative (*e.g.*, guardian or legal custodian) who can assist him/her in exercising the privilege;

When to Appoint a GAL or Counsel (Cont'd)

- The child is a victim or witness of a crime covered by the VRA, a subpoena has been issued for production of privileged or confidential records concerning the child, and the child cannot be represented effectively in the matter by a parent, relative, or other lawful representative; or,
- Disclosure of privileged or confidential information concerning a child might violate the child's privilege against self-incrimination.

How Appointment Might Occur

- *Sua sponte* motion of the trial judge in the CR case;
- Motion of the prosecution or the defense in the CR case;
- Motion or request of a victim or witness in the CR case;
- Special appearance and motion of the custodian of the information; or,
- Special appearance and motion of a GAL who was appointed in another case

Does a GAL May Have a Duty to Seek Appointment?

“If the appointee finds it necessary and in the best interests of the child, the appointee may request that the court expand the terms of the appointment and scope of the duties.”

CJD 04-06(V)(C) (Revised March 15, 2013).

How Counsel and GAL Differ

GAL: No attorney-client privilege

Counsel: Attorney-client privilege applies

GAL: Discretion to waive confidentiality after consultation

Counsel: No waiver without client consent

Best Practice: Appoint a GAL if the GAL holds the privilege. Appoint counsel if the child holds the privilege.

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

Discovery in CR Cases: Crim.P. 16

Crim.P. 16 divides all discoverable material into two broad categories: (1) Material subject to mandatory disclosure and (2) material subject to discretionary disclosure.

To obtain discretionary disclosure the defense must file a motion. Crim.P. 16(l)(d)(1). The motion must demonstrate that the request is “reasonable”—*i.e.*, “(1) relevant to the conduct of the defense, and (2) unavailable from any source other than the prosecution.”

People v. Vlassis, 247 P.3d 196 (Colo. 2011).

Crim.P. 16 (Cont'd)

Discretionary discovery may be denied if “there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment . . . which outweighs any usefulness of the disclosure to the defense.”

Crim.P. 16(l)(d)(2).

Crim.P. 16 (Cont'd)

Privileged or Confidential Material: Except for attorney work product and police informants, Crim.P. 16 does not address rules of privilege or confidentiality. Such matters may be addressed through motions for protective orders, excision, and *in camera* proceedings.

See, Crim.P.16(III)(c), (d), (e), and (f).

Third Party Material—Subpoenas to Produce

- Information not in the possession or control of the district attorney may be obtained by means of a subpoena *duces tecum*. Crim.P. 16(l)(c)(2); Crim.P. 17(c).
- A copy of the subpoena must be served on opposing counsel. Crim.P. 17(c).
- The district attorney has standing to challenge a subpoena. *People v. Spykstra*, 234 P.3d 662 (Colo. 2010).
- The court may quash or modify a subpoena if compliance would be unreasonable or oppressive. Crim.P. 17(c).

Crim.P. 17 (Cont'd)

If a third-party subpoena is challenged, a defendant must show:

(1) A reasonable likelihood that the materials exist; (2) The materials are “evidentiary and relevant”; (3) The materials are not otherwise procurable by due diligence; (4) The party cannot properly prepare for trial without pretrial production and inspection of the materials; and (5) The application is made in “good faith” and is not “a general fishing expedition.”

People v. Spykstra, 234 P.3d 662, 669 (Colo. 2010).

Crim.P. 17 (Cont'd)

- *Protected Information:* If the information sought is privileged, private, or confidential a defendant must make a “proportionately greater showing of need” and the trial court must balance the competing interests before requiring disclosure. *Spykstra* at 669.
- *In camera review* is not required in all cases but may be necessary “in the interest of due process.” *Spykstra* at 670.
- *Note:* Privileges defined by §13-90-107, C.R.S., are **not** subject to a balancing test.

Court Orders for Production of Records

Upon request of a criminal investigator or peace officer, a court may issue an order directed to a business entity to produce records in its actual or constructive control that would be material evidence in a subsequent criminal prosecution. CRS 16-3-301.1(2)(e), (5)(a).

The records to be produced “shall not include an item that is privileged pursuant to section 13-90-107, C.R.S., unless the person who possesses the privilege gives consent.” CRS 16-3-301.1(11)(e).

Objections to Discovery—Substantive Grounds: The Right to Privacy

- The right to personal privacy is grounded in the Bill of Rights and the 14th Amendment. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).
- The right to privacy “includes the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.” *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980).

The Right to Privacy—Balancing Test

“When the right to privacy is at issue, the trial court must give the discovery request special consideration and balance an individual's right to keep personal information private with the general policy in favor of broad disclosure.” *In re District Court*, 256 P.3d 687, 690-691 (Colo. 2011).

The Right to Privacy—Balancing Test (Cont'd)

- The requesting party must show that the information sought is relevant to the subject of the action;
- The opposing party must show that he/she has a legitimate expectation of privacy with respect to the information;
- The requesting party must prove that disclosure is required to serve a compelling state interest **or** there is a compelling need for the information; **and**,
- The requesting party must prove that the information is not available for other sources **or** he/she is using the least intrusive means to obtain the information.

In re District Court, 256 P.3d 687, 690 (Colo. 2011).

Objections to Discovery—Substantive Grounds: Statutory Privileges

Statutory privileges share four characteristics:

- (1) The communications must originate in confidence ;.
- (2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship;
- (3) The relationship must be one which in the opinion of the community ought to be fostered.
- (4) The injury to the relationship that would result from disclosure of the communications must outweigh the benefit to be gained from “the correct disposal of litigation.”

Beth Israel Hospital v. District Court, 683 P.2d 343, 345 (Colo. 1984).

Statutory Privileges—Common Examples

- *Attorney-Client Privilege, C.R.S. 13-90-107(1)(b)*
- *Physician/Patient Privilege, C.R.S. 13-90-107(1)(d)*
- *Psychologist/Patient Privilege, C.R.S. 13-90-107(1)(g) and 12-43-218(1)*
- *Victim's Advocate Privilege, C.R.S. 13-90-107(1)(k)*
- *Parent/Child Derivative Privilege, C.R.S. 13-90-107(1)(l)*
- *Statements of a Juvenile in the Course of Court-Ordered Treatment, C.R.S. 19-3-207(2.5)*

Statutory Privileges—Common Exceptions

- *Exception for At-Risk Victims:* Privileges listed in C.R.S. 13-90-107(1) do not apply to prosecution of certain crimes listed in C.R.S. 18-6.5-103 when committed against at-risk adult or an at-risk juvenile, as defined by C.R.S. 18-6.5-102(9).
- *Exceptions to Attorney-Client Privilege:* This privilege does not apply to communications about a future crime or a present continuing crime or civil fraud. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

Statutory Privileges—Common Exceptions (Cont'd)

- *Exceptions to the Physician-Patient Privilege:* This privilege does not apply to information conveyed pursuant to a licensee's duty to report a medical examination and diagnosis of an injury believed by the licensee to involve a criminal act (but not including the patient's statements), C.R.S. 13-90-107(3), C.R.S. 12-36-135(1), (3), *People v. Martinez*, 2015 COA 37; a communication which is the basis for a report of child abuse or neglect pursuant to C.R.S. 19-3-304 and -311(1), *Dill v. People*, 927 P.2d 1315, 1319 (Colo. 1996); and a prosecution for first degree murder, C.R.S. 18-3-102(4), or child abuse, C.R.S. 18-6-401(3) and -401.1(5).

Statutory Privileges—Common Exceptions (Cont'd)

- *Exceptions to the Psychologist-Patient Privilege:* This privilege does not apply to threatening statements made by a patient during a therapy session that trigger the mental health professional's "duty to warn," C.R.S. 13-21-117(2), *People v. Kailey*, 2014 CO 50, 333 P.3d 89 (Colo. 2014); involuntary certification proceedings under Title 27, *People v. Hynes*, 917 P.2d 328 (Colo.App. 1996); and a communication which is the basis for a report of child abuse or neglect pursuant to C.R.S. 19-3-304 and -311(1), *Dill v. People*, 927 P.2d 1315, 1319 (Colo. 1996). However, this privilege protects later communications between psychologist and patient concerning the same incident. *Id.*

Statutory Privileges—Common Exceptions (Cont'd)

- *Exceptions to the Parent-Child Derivative Privilege:* This privilege does not apply to a civil action by one parent against the other; a civil action in which parent and child are adverse parties; mental health commitment proceedings against parent or child; a guardianship or conservatorship action brought because of a mental or physical condition of either a parent or the child; an action for termination or relinquishment of parental rights; dependency or neglect actions; support proceedings against a parent; and a criminal action brought against a parent, a parent's spouse, a parent's partner in a civil union, a sibling, or a step-sibling in which the child is alleged to be a victim. C.R.S. 13-90-107(1)(I)(II).

Statutory Privileges—Burdens of Proof

- *Claimant:* Statutory privileges are strictly construed. The party claiming a privilege bears the burden of establishing the applicability of the privilege. *People v. District Court*, 743 P.2d 432, 435 (Colo. 1987). If a statutory privilege applies, the only basis for allowing disclosure of privileged information is waiver or consent of the privilege holder. *People v. Tauer*, 847 P.2d 259, 261 (Colo.App. 1993); *People v. District Court*, 719 P.2d 722, 727 (Colo. 1986).

Statutory Privileges—Burdens of Proof (Cont'd)

- *Party Seeking Disclosure*: The party seeking to overcome a privilege must prove that the privilege was waived. Waiver occurs when “the privilege holder, by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.” *Clark v. District Court*, 668 P.2d 3, 7 (Colo. 1981); see also, *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

Statutory Privileges—Waiver

- *No Balancing Test*: A privilege defined by § 13-90-107 is not subject to judicial balancing of competing interests. *Clark v. District Court*, 668 P.2d 3 (Colo. 1981); *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).
- *Scope of Waiver*: The *L.A.N.* opinion recognizes “limited-scope waivers.” *Garcia v. Patton*, 2014 W.L. 5358449 (Colo. 2005). In the event of a dispute, a court must determine the scope of a waiver. *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013).

Statutory Privileges—Waiver (Cont'd)

When Waiver May Occur: A waiver may occur when a witness testifies to the substance of any treatment sessions or otherwise places his/her physical or mental health in issue. *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002); *Clark v. District Court*, 668 P.2d 3 (Colo. 1981).

Statutory Privileges—Waiver (Cont'd)

When Waiver Does Not Occur: Generally, waiver does not result from—

- filling out a victim's impact statement, *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004);
- testifying at a preliminary hearing, *People v. Sisneros*, 55 P.3d 797 (Colo. 2002);
- testifying at trial to the emotional effects of an alleged assault, *People v. Silva*, 782 P.2d 846 (Colo. App. 1989);

- unauthorized disclosure of privileged information to a police officer, *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993), *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990).
- An express waiver of a privilege with respect to hospital records does not result in an implied waiver of a privilege with respect to subsequent treatment records. *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990); *People v. Wittrein*, 221 P.3d 1076, 1082-1084 (Colo. 2009).

Statutory Privileges—Voluntary Waiver

A GAL's Discretion: A GAL's client is the best interests of the child. CJD 04-06(V)(B) (Revised 3/15/13). “[A]n attorney’s obligation not to reveal confidential information provided by the child does not apply if the information must be revealed to ensure the child’s best interests.” *Id.* A GAL or Child’s Representative must consult with the child in a developmentally appropriate manner, consider the child’s position regarding disposition of a matter, and explain to the child the limitations on confidentiality. *Id.*

Statutory Privileges—6th Amendment Concerns

A defendant's constitutional right to confront witnesses does not supersede a victim's right to rely upon an evidentiary privilege. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993); *People v. Turner*, 109 P.3d 639 (Colo. 2005).

Statutory Privileges—Privilege Logs

Privilege Log: A court may require a claimant to provide a privilege log in response to a discovery request. The privilege log must (a) explain the privilege being claimed as to each communication and (b) identify the documents withheld with sufficient particularity to permit the requesting party and the court to evaluate the claim.

Traverse: The opposing party may ask the trial court to resolve the dispute and perform an *in camera* inspection, if necessary.

Alcon v. Spicer, 113 P.3d 735, 740-742 (Colo. 2005).

Statutory Privileges—In Camera Review

- *In Camera Inspection*: Generally, a court should not review privileged documents *in camera*. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002); *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009); *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004).
- However, *in camera* review may be required by due process of law—*e.g.*, to determine if an exception applies or a privilege was waived. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987); *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005) (attorney-client privilege); *People v. Trujillo*, 144 P.3d 539 (Colo. 2006); *Spykstra* at 670; *Alcon v. Spicer*, 113 P.3d 735, 740-742 (Colo. 2005).

Confidentiality Statutes—HIPAA

- *Federal Standards:* HIPAA prescribes standards relating to “the privacy of individually identifiable health information.” 45 C.F.R. §§ 160.203(b) and 160.202.
- *Preemption:* HIPAA standards preempt state laws that are less stringent than HIPAA regulations. *Colorado Consumer Health Initiative v. Colorado Bd.*, 240 P.3d 525, 530 (Colo.App. 2010). Colorado law is consistent with HIPAA regulations. *Id.*; see also, 45 C.F.R. § 164.512.
- *Exceptions:* “The HIPAA regulations permit the disclosure of medical information in response to a subpoena, discovery request, or other lawful process so long as the patient first receives sufficient notice in order to have an opportunity to object to the court.” *Reutter v. Weber*, 179 P.3d 977, 984, fn. 4 (Colo. 2007).

Confidentiality Statutes—Child Abuse and Neglect Records

- ***Confidentiality:*** Records and reports of child abuse or neglect, including the identity of any informant, are confidential. C.R.S. 19-1-307(1)(a).
- ***Privileged Information:*** Child abuse and neglect records often include materials that are privileged under §13-90-107, C.R.S.

Child Abuse and Neglect Records—Exceptions to Confidentiality

Statutory Exceptions: Access is allowed to the district attorney, law enforcement agency, and social services department conducting an investigation of child abuse or neglect (see, C.R.S. 19-3-308(5.5) and -307(3)); the child, through a guardian ad litem; and a parent, guardian, legal custodian, or other person or agency responsible for the health or welfare of the child. C.R.S. 19-1-307(2)(a), (c), (d), and (e).

Child Abuse and Neglect Records—Exceptions to Confidentiality

Judicially Determined Exceptions: Discovery of child abuse and neglect records is governed by C.R.S. 19-1-307, not Crim.P. 16. *People v. Jowell*, 199 P.3d 38, 42 (Colo. App. 2008). A court may allow access to child abuse and neglect records “for good cause,” C.R.S. 19-1-307(2)(i), or “upon its finding that access to such records may be necessary for determination of an issue before such court, but such access shall be limited to in camera inspection unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it,” C.R.S. 19-1-307(2)(f).

Child Abuse and Neglect Records—Discovery

- *Discovery at Defendant's Request:* To justify *in camera* review, a defendant must identify the type of information sought and explain why disclosure of that information “is necessary,” i.e., relevant and material. *Jowell* at 42.
- *Discovery at Prosecutor's Request:* “[I]f the prosecutor believes that a social services record contains material exculpatory information, he or she must ask the court to review the record *in camera* and to find that public disclosure ‘is necessary for the resolution of an issue,’ under subsection (2)(f).” *Id.*

Child Abuse and Neglect Records—Discovery (Cont'd)

- *In Camera Review*: A court should permit discovery of information that is materially favorable (*i.e.*, exculpatory or impeaching) to the defendant and inculpatory information that would materially assist in preparing a defense. *Id.* at 43. If the records contain information that would otherwise be subject to automatic disclosure, that fact weighs in favor of disclosure. *Id.*
- *Protection of Reporting Parties*: A reporting party is immune from liability unless a court determines that his/her report was willful, wanton, and malicious. C.R.S. 19-3-309.

Confidentiality Statutes—Educational Records

Discoverability: The discoverability of educational records depends on the combined effect of C.R.S. § 22-1-123(3) and 20 U.S.C. 1232g(b)(2)(B), the Family Education Rights and Privacy Act (“FERPA”). Neither statute creates an absolute privilege against disclosure.

Discovery of Educational Records

Discovery Protocol:

- The trial judge must determine whether the defendant articulated a good faith, specific need for information.
- If the threshold showing of need is met, a trial judge must issue an order or authorize issuance of a subpoena requiring notice to the student or his/her parents and a hearing at which the student or his/her parents will have an opportunity to respond.

Discovery of Educational Records (Cont'd)

- At hearing a judge must balance the defendant's need for the information against the privacy interests of the student and his/her parents after considering “(1) the nature of the information sought, (2) the relationship between this information and the issue in dispute, and (3) the harm that may result from disclosure.”
- If the judge determines that the defendant's need outweighs any privacy interests, then it should review the records *in camera*.

Discovery of Educational Records (Cont'd)

- After conducting an *in camera* review the trial court may order disclosure of records that contain exculpatory information materially favorable to the defendant and inculpatory information that will be of material assistance in preparing a defense.

People v. Bachofer, 192 P.3d 454, 460 (Colo.App. 2008); *People v. Wittrein*, 221 P.3d 1076, 1085 (Colo. 2009).

Confidentiality Statutes—Victims' Compensation Records

- Materials of a crime victim compensation board or a district attorney received, made, or kept to process a claim on behalf of a crime victim are confidential.

C.R.S. 24-4.1-107.5(2) (as amended by HB 15-1035).

Victims' Compensation Records (Cont'd)

- VCB records may not be provided through discovery except upon court order after a showing that such records exist and that releasing the documents “will not pose any threat to the safety or welfare of the victim or any other person whose identity may appear in board’s records, or violate any other privilege or confidentiality right.” *Id.*
- The court may conduct an in camera review, without either party present, to determine these issues. *Id.*