

To: GALs in D&N Proceedings, Other OCR attorneys

From: Office of the Child's Representative

RE: L.A.N. v. L.M.B., 2013 CO 6 (January 22, 2013)

Date: February 8, 2013

On January 22, 2013, the Colorado Supreme Court issued its decision in *L.A.N. v. L.M.B.* The Court held:

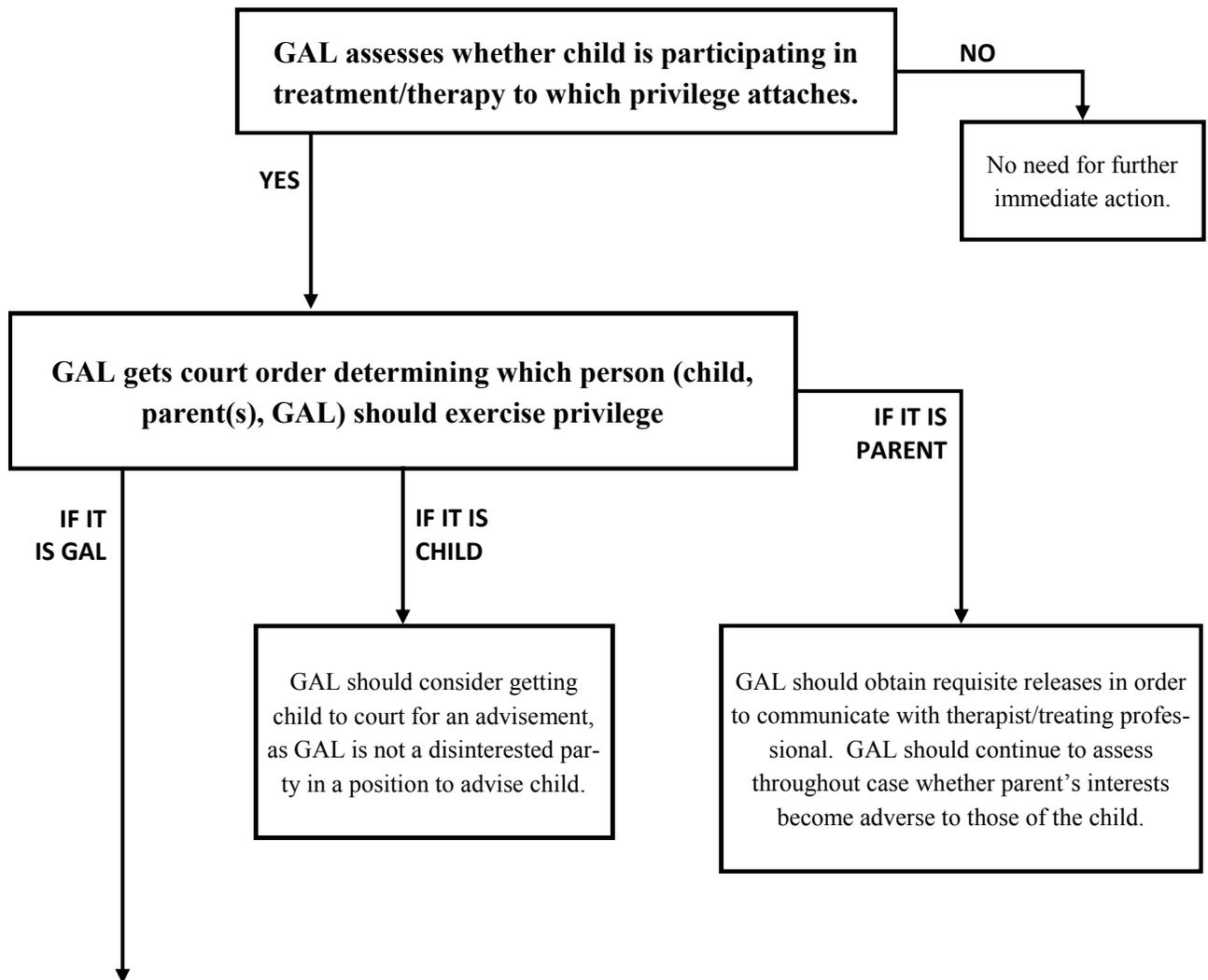
The GAL is in the best position to waive the child's psychotherapist-patient privilege in a dependency and neglect proceeding when: (1) the child is too young or otherwise incompetent to hold the privilege; (2) the child's interests are adverse to those of his or her parents; and (3) section 19-3-311 does not abrogate the privilege.

As a result of this decision, it is clear that the psychotherapist-patient privilege set forth in § 13-90-107(1)(g) applies to children in D&N proceedings. Other than information for which the privilege is abrogated in § 19-3-311, a waiver is required for pretrial discovery or testimonial disclosure of communications made by a child to his or her treating therapist. While this decision sets forth guidance regarding considerations a juvenile court should make in determining the scope of the waiver, it leaves unresolved a number of issues regarding the identification of which person in any given case should exercise the privilege on behalf of the child and calls into question the implications of existing forms of information sharing in dependency and neglect proceedings. This memo sets forth possible resolution of unresolved issues for GALs and identifies relevant legal authority.

Overriding themes:

- The privilege is that of the child. The question is who should exercise it on the child's behalf.
- Distinguish:
 - who may legitimately be entitled to information under HIPAA and state privacy statutes **not through discovery in the juvenile proceeding** but because of their responsibilities for the custody and care of the child (e.g., parent, legal custodian, day-to-day caretaker)
 - who gets to **inject information into the legal proceeding** (privilege holder)
- The psychotherapist-patient privilege serves to promote trust in the therapist and the therapeutic process. This interest is "particularly pronounced in cases involving children due to the sensitive nature of treating children's mental health" and "strong policy reasons support keeping records derived from a child's ongoing therapy sessions confidential." *L.A.N.* slip op. at 18. See also *People v. Sisneros*, 44 P.3d 797 (Colo. 2002)(explaining privilege's purpose of "enhance[ing] effective diagnosis and treatment" and "protecting patients from any embarrassment and humiliation" potentially caused by disclosure); *People v. District Court*, 719 P.2d 722 (Colo. 1986)(discussing paramount importance of privilege for victims of sexual assault).
- GALs who are in the position to exercise the privilege have a **heightened responsibility** to be in contact with the therapist to gather information relevant to the child's best interests. *Note that given the privacy interests/ importance of trust in the therapeutic process, this need not necessarily include all information obtained during therapy unless GAL must compile privilege log/ cannot get ruling regarding readily apparent limited scope of waiver.*
- **A GAL determined to be in a position to exercise the privilege should NOT waive the privilege without an advance court ruling re limited scope of waiver or informed determination (based on review of therapist's entire records) that complete waiver of privilege is in child's best interests.**
- A GAL waiving the privilege should always:
 - Strategize to determine whether waiver of the privilege is really necessary. Explore other ways to introduce relevant and persuasive evidence.
 - Seek protective orders regarding limited scope of waiver.¹

General Approach/Procedure



- GAL who is determined to be privilege holder should consider seeking order from court
 - Prohibiting others from signing releases of information, sharing information, or injecting it into the proceeding.
 - Consider whether others, including therapists, need to be brought into court and/or made a special respondent.
 - Finding that release of limited/circumscribed information for those who need to know for successful treatment of child (e.g., caregivers, personal representatives under HIPAA) does not effectuate broadsweeping waiver of privilege, either because the sharing of such information does not require/constitute a waiver of the privilege or because the court can find a readily apparent limited scope of the waiver. GAL may wish to address staffings/other meetings in the order.
- Any time GAL is privilege holder, GAL should vigilantly protect privacy interests of child and carefully consider prior to waiving the privilege whether waiver is necessary and, if so, whether it is possible to get a ruling on readily apparent limited scope of waiver. If GAL determines evidence from therapy must be introduced and cannot get a "readily apparent limited scope" ruling, GAL should review therapists's entire file as part of the assessment of whether waiver serves the best interests of the child.
- GALs who are in a position to exercise privilege should continue to assess when and whether child becomes of sufficient age and maturity to exercise on his/her own behalf.

Chart outlining issues, possible resolution, legal authority

#	Issue	Possible Resolution/ GAL Responsibility	Legal Authority
1	<p>Determination of privilege holder in a new case</p>	<p>GAL assesses/determines whether s/he should be privilege holder because neither the child nor the parents have such authority.</p> <p>GAL seeks court order confirming determination at the time of appointment.</p> <ul style="list-style-type: none"> GAL can seek order through verbal or written motion or proposed stipulation. GAL must ensure that court enters order (e.g., minute order). <p>If GAL is determined to be privilege holder</p> <ul style="list-style-type: none"> Seek court order holding that release of information to legal custodians and caretakers that is authorized under HIPAA does not require/constitute waiver of privilege (argument is that this is shared not through discovery but through other means). Seek court order prohibiting other parties/ individuals/entities from signing releases of information, injecting information into proceeding, or using in other proceeding. <i>Determine whether such individuals need to be brought into court for advisement/admonition and/or be made special respondents.</i> If GAL believes limited waiver of privilege is in best interests of child either b/c order proposed above is denied or b/c GAL seeks to introduce additional evidence, GAL seeks court order regarding readily apparent limited scope of waiver. If such order is denied, GAL should access therapist’s records and compile privilege log. <p>If GAL is not determined to be privilege holder, GAL should obtain releases from appropriate persons.</p>	<p><u>Identification of privilege holder</u></p> <p>LAN decision re minors “too young or otherwise incompetent.”</p> <p>Per note 1, Court declines to address criteria. Possible criteria:</p> <ul style="list-style-type: none"> Age of 15 for consent to mental health treatment. §27-65-103(2). Age of 12. § 19-5-203(2). Age of 18 for competency to sue/ be sued in civil actions without necessity of GAL. § 13-22-101(1)(c). Developmental/competency considerations. <i>See, e.g.,</i> § 19-2-1301 <i>et seq</i> (competency in JD proceedings). <p>LAN authority re parents: “Child’s interests are adverse to those of his or her parents.” <i>Slip op.</i> at 3. “[W]hen the parent’s interests as a party in a proceeding 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.”</p> <p><i>People v. Marsh</i>, No. 08CA1884 , 2011 WL 6425492 (Colo. App. Dec. 22, 2011) (cited in LAN)(holding that trial court in a criminal case properly concluded, based on the nature of the proceedings, the nature of the child’s interests, and the extent of the conflict between the parent defendant’s interests and the child, the parent defendant lacked the authority to waive the child’s psychotherapist-patient privilege).</p> <p>§13-25-127: burden of proof in civil actions is preponderance of evidence unless otherwise specified</p> <p><u>Distinction between sharing of information for care of child and waiving privilege/injecting into proceeding</u></p> <p>Under HIPAA, personal representative to be treated as individual. 45 C.F.R. § 164.502(g)(1). For unemancipated minors, a parent, guardian, or other person acting in loco parentis who has authority to act on behalf of a minor in making decisions related to health care must be treated as a personal representative. 45 C.F.R. § 164.502(3)(i). Individuals may not be</p>

			<p>personal representative and minor must be treated as an individual if the minor has legal ability to consent to health care or parent/guardian/in loco parentis person agrees to confidentiality. 45 C.F.R. § 164.502(3)(a),(c).</p> <ul style="list-style-type: none"> • §27-65-103(2). A minor age 15+ may consent to receive mental health services. The person rendering services “may, with or without the consent of the minor, advise the parent or legal guardian of the minor of the services given or needed.” <p>45 C.F.R. §164.508(a)(2). Standard regarding disclosures about victims of abuse, neglect, or dv.</p> <p><u>Limited Waiver/Scope of Waiver</u> <i>L.A.N . slip op.</i> at 17 states that court must first decide whether scope of waiver is readily apparent by words or conduct constituting waiver of privilege. Only if scope of waiver is not readily apparent, must GAL compile a privilege log and does court consider conducting <i>in camera</i> review.</p> <p>Upon determining waiver has occurred, court must weigh benefits of maintaining privilege against benefits of disclosure. <i>See L.A.N. slip op.</i> at 19. <i>See also Bond v. District Court</i>, 682 P.2d 33 (Colo. 1984)(holding that district court abused its discretion by not applying balancing test after determining waiver had occurred).</p> <p><i>L.A.N . slip op.</i> at 17-20 sets forth competing interests surrounding disclosure and lists discretionary factors court may use in conducting its balancing analysis.</p> <p><i>See also Alcon v. Spicer</i>, 113 P.3d 735 (Colo. 2005)(“Extending the waiver to anything that is relevant would allow the exception to destroy the privilege.”).</p> <p><u>Privilege log</u> <i>Alcon v. Spicer</i>, 113 P.3d 735 (Colo. 2005).</p>
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<p>2 Determination of privilege holder in existing case</p>	<p>On cases filed before L.A.N., GAL assesses/determines whether s/he should be privilege holder because neither the child nor the parents have such authority. On existing cases, GAL continues to assess whether change needs to be made regarding identified privilege holder. When new parties are added to the proceeding, GAL needs to ensure appropriate orders are entered.</p> <p>GAL seeks court order confirming determination at the time of appointment.</p> <ul style="list-style-type: none"> • GAL can seek order through verbal or written motion or proposed stipulation. • GAL must ensure that court enters order (e.g., minute order). <p>If GAL is determined to be privilege holder and information from therapist has already been disclosed to court, GAL should consider asserting that prior presentation of evidence did not constitute a waiver.</p> <p>If GAL is determined to be privilege holder</p> <ul style="list-style-type: none"> • Seek court order holding that release of information to legal custodians and caretakers that is authorized under HIPAA does not require/constitute waiver of privilege (argument is that this is shared not through discovery but through other means). • Seek court order prohibiting other parties/ individuals/entities from signing releases of information, injecting information into proceeding, or using in other proceeding. <i>Determine whether such individuals need to be brought into court for advisement/admonition and/or be made special respondents.</i> • If GAL believes limited waiver of privilege is in best interests of child either b/c order proposed above is denied or b/c GAL seeks to introduce additional evidence, GAL seeks court order regarding readily apparent limited scope 	<p><i>See legal authority for #1 re determination of privilege holder, limited waiver/scope of waiver, privilege log.</i></p> <p><u>Legal guidance as to whether waiver occurred</u></p> <p><i>Following are some cases that may be supportive of an argument that waiver has not occurred depending on the circumstances of the case. Note, however, that any argument that GAL's actions did not constitute a knowing waiver b/c of unsettled nature of the law is undermined by the LAN decision itself. GAL was determined to have waived privilege despite unsettled nature of the law and trial court's determination that it held the privilege</i></p> <p><i>Clark v. District Court</i>, 668 P.2d 3 (Colo. 1983). Burden of establishing waiver is on party seeking to overcome claim of privilege. Mere filing of a pleading in a personal injury case is not determinative; appropriate inquiry is whether privilege holder injected mental condition into the case as basis of claim or affirmative defense.</p> <p><i>People v. Silva</i>, 782 P.2d 846 (Colo. App. 1989). Court applies totality of circumstances analysis to hold that victim's testimony regarding bad dreams, discomfort and fear, and statement that she had sought counseling as a result of the assault "did not reveal any intent . . .to forsake her constitutionality" and did not constitute waiver. Court states that privilege "should not lightly be deemed waived by the holder's unwitting responses to questions posed by persons who have no personal or fiduciary interest in its preservation."</p> <p><i>People v. Sisneros</i>, 55 P.3d 797 (Colo. 2002). Supreme Court applies totality of circumstances analysis to conclude that victim's testimony that therapist helped her recall some details of assault did not constitute a waiver b/c it did not put the substance of the victim's treatment sessions in issue.</p> <p><i>People v. Wittrein</i>, 221 P.3d 1076 (Colo. 1989). Express waiver of Children's Hospital diagnostic records did not constitute a waiver of ongoing therapy sessions with a different provider</p>
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		<p>of waiver. If such order is denied, GAL should access therapist's records and compile privilege log.</p> <p>If GAL is not determined to be privilege holder, GAL may still be able to receive info from therapist.</p>	<p>when victim did not place the substance of her ongoing treatment at issue.</p> <p><i>People v. Pressley</i>, 804 P.2d 226 (Colo. App. 1990). Court of Appeals rejects claim that b/c detectives were present during two therapy sessions, the privilege had been waived. While there was ample support in the record for a finding that the privilege had been violated, there was no evidence that child's mother had been advised of the child's claim to a privilege or agreed to/authorized the presence.</p> <p><i>Dill v. People</i>, 927 P.3d 1315 (Colo. 1996) release of information for which privilege was abrogated under §19-3-311 does not constitute waiver of privilege for ongoing treatment.</p>
3	Therapist is attending staffings, etc. (GAL is the privilege holder)	<p>Unless GAL determines, based on comprehensive review of therapist's file, that complete waiver of privilege is in best interests of child, the GAL must object to such participation unless GAL gets satisfactory rulings from the Court regarding limited scope of waiver/protection from other parties injecting information as evidence in legal proceeding.</p> <p>GAL should make record/seek order regarding objection to therapist's participation in staffings, etc.</p>	<p><i>People v. Sisneros</i>, 44 P.3d 707, 800 (Colo. 2002): privilege not only protects testimonial disclosures but also pretrial disclosure of material derived or created in the course of treatment. See also <i>LAN slip op.</i> at 8.</p> <ul style="list-style-type: none"> Is there any legal authority regarding whether staffings are part of discovery/legal proceedings? Difference between treatment-oriented staffings (e.g., at TRCCFs) and case-oriented staffings such as TDMS, family service plan meetings? <p>Is there a legitimate interpretation of 13-90-107(1)(g) that the privilege attaches/applies to treatment-oriented meetings?</p>
4	CASA volunteer wants information about therapy (GAL is privilege holder).	<p>Unless CASA is within scope of waiver applicable to all parties in the proceeding, the GAL must object to CASA receiving such information and seek protective order preventing CASA from disclosing any previously-acquired information from the therapist.</p> <p>Let CASA know that they have an important role in sharing what they have learned from their independent investigation with the therapist.</p>	<p>§19-1-208(1)(a): duty of CASA is to conduct independent investigation re best interests of the child that will provide factual information to the court . . .</p> <p>§19-1-208(3),(4): CASA must prepare written reports, may be called as a witness.</p> <p>§19-1-210 allows court to issue order authorizing access to info "as the court deems necessary." <i>L.A.N.</i> establishes it is not within the court's authority to waive privilege.</p> <p>§19-1-209(1)(a) does not constitute abrogation of privilege.</p> <p>Local district/CASA MOU. See § 19-1-202(1).</p>

5	Therapist is asking GAL to sign releases	If GAL is determined to be privilege holder, GAL should ask court for an order prohibiting all others aside from GAL from signing releases. GAL should sign release as “privilege holder” and should not hold self out to be personal representative unless GAL has been determined to be personal representative. GAL should not sign other releases, such as consent to treatment, liability waivers.	<p><u>HIPAA provisions regarding release of information</u></p> <p>See #1.</p> <p><u>State law regarding consent to/release of information</u></p> <p>See #1.</p>
6	GAL is NOT privilege holder and wants to introduce information from therapist/share with other parties in the case.	<p>GAL must be privilege holder or privilege holder must have waived the privilege in order for the GAL to introduce evidence.</p> <p>If parents are privilege holder, GAL believes that parents are exercising privilege in a manner contrary to the best interests of the child, GAL should consider seeking ruling from court that GAL is now the privilege holder.</p>	<p>L.A.N. –see #1.</p> <p>CRPC 3.4 Fairness to Opposing Party and Counsel</p> <p>CRPC 4.3 Dealing with Unrepresented Persons</p> <p>CRCP 4.4 Respect for Rights of Third Persons</p>
7	Family/Group therapy	Privilege holder must determine whether it is in best interests of child to preserve/waive the privilege and seek applicable orders. While privilege still applies to group therapy situations, the privacy interests may not be as strong when the participants in the therapy are the parties to the proceeding.	§13-90-107(1)(g) specifically lists licensed marriage and family therapist among the professionals to which it applies and also states: “. . . nor shall any person who has participated in any psychotherapy . . . including group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.”
8	Medical Records	Different privacy concerns may arise; caselaw regarding psychotherapist-patient privilege recognizes that need for privacy is especially pronounced. However, any waiver of privilege for purpose of D&N proceeding should include a request for court order limiting scope of waiver to D&N proceeding itself.	
9	Court orders GAL to complete privilege log / department requests GAL to compile privilege log even though GAL has not sought to engage in waiver of privilege	<p>GAL should object.</p> <ul style="list-style-type: none"> If GAL has previously injected/allowed to be injected information from therapist, GAL may need to compile privilege log but should first consider asserting that waiver did not occur and/or that any waiver that occurred was limited in scope in a readily apparent manner. See #2. 	L.A.N. guidance regarding when privilege log applies: only after holder has effectuated waiver, and then only if court does not find readily apparent waiver. See slip op at 17-18.

10	Child is determined to be privilege holder	<p>As child is not the client of the GAL, the GAL cannot advise child on waiver issues.</p> <ul style="list-style-type: none"> • The GAL can explain to the child/youth/young adult the scope of the GAL responsibilities and what is not in the scope of the GAL responsibilities. • GAL should ask the court to advise the child/youth/young adult re privilege, waiver, implications of the waiver. • If child is willing to sign release allowing GAL to access information states that s/he does not object to introduction of evidence, GAL should probably have child brought into court and have court make findings regarding the waiver/ scope of the waiver. 	<p>C.R.P.C. 1.7, 1.8 (conflict of interest rules)</p> <p>C.R.P.C. 4.3 In dealing with unrepresented person, a lawyer shall not state or imply that lawyer is disinterested. When lawyer knows/reasonably should know that person misunderstand the lawyer’s role, the lawyer shall make reasonable efforts to correct misunderstanding. Lawyer shall not give legal advice to third person other than to secure counsel.</p> <p>C.R.C.P. 4.4 Lawyer shall not use methods of obtaining evidence that violate the rights of a third person.</p>
11	Evaluations of child	<p>Determine whether evaluation implicates purpose of patient-therapist privilege. Court-ordered evaluations are likely not privileged. Question as to whether evaluations conducted for diagnosis/treatment are.</p> <p>If GAL is privilege holder, GAL must be careful not to waive the privilege by providing evaluator with information from therapist. If sharing of such information is necessary, seek ruling regarding limited scope of waiver. Be careful about any expert examination that would open the door to discovery of therapist’s records.</p>	<p><i>B.B. v. People</i>, 785 P.2d 132 (Colo. 1990). Purpose of psychotherapist-patient privilege (to enhance effective diagnosis and treatment) is not served by evaluation by court appointed/ retained expert, whose purpose is to assist in pending litigation.</p> <ul style="list-style-type: none"> • Info obtained during evaluation might be protected by attorney-client privilege. <i>See id.</i>
12	Whether GALs in other cases and CLR in DR cases are also the privilege holder?		
13	Drug courts/ family treatment courts		