Who Am I and What Is My Role?

GAL Role, responsibilities, and considerations

July 2017 New Attorney Orientation

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Goals of this session

- Understand the unique role and the ethical obligations that flow from this role;
- Identify practice standards and sources;
- Get to know one another and have fun!

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Youth Feedback:

"She understood where I was coming from and stuff, just everything that was happening in my life. She understood how to find the people who were my true friends and family. "

"Well every time something went on, he was the one there. He would be the one I would talk to. I would tell him everything."

"He got me where I am now, did what he said he was going to do, and always kept his word."

"(My GAL) knew me better than my best friend."

"I felt more supported by (my GAL) than anyone else on my team. (My GAL) wanted to make sure I knew what I was going to do when I emancipated. She wanted me to have my ducks in a line."

"I trust her because she really knew what she was doing. She got the chance to get to know me. "

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Getting to Know Your Team

- Two minutes with partner:
  - What are you most excited about?
  - What do you think your greatest challenge will be?
- Four minutes with team members
  - Same question

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Competition Time!

- Game:
  - Two Teams – Blue Team & Orange Team
  - The more people on your team that answer the questions correctly, the more points your team earns!
- Rules
  - Turn to your neighbor and consult before answering each question.
  - If you know the right answer, find a way to share it with other members of your team to earn more points!

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Sign-Up for Teams

A. Blue Team
B. Orange Team

APPOINTMENT

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Which of the following case types provide for mandatory appointment of a GAL?

A. Delinquency.
B. Probate.
C. Domestic.
D. Dependency and Neglect.
E. A&D.
F. None of the above.

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Dependency and Neglect--GAL

- § 19-3-203(1)
  - Upon the filing of a petition, the court shall appoint a GAL.
  - 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.

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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 GAL.
  - 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.

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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.

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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.

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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.

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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.

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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).

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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).

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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.

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Counsel for Child

- CJD 04-06 (1)(B)(3)
- §19-1-105
- *In re Marriage of Hartley,* 886 P.2d 665 (Colo. 1994)

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Which of the following appointment statutes require findings of indigency for OCR to pay?

A. Delinquency
B. Probate
C. Domestic & Paternity
D. Dependency&Neglect
E. B&C ✓
F. None of the Above

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Indigence Findings and Procedures

- Indigence findings required prior to billed activity; no nunc pro tunc orders. ***§ IV.B.1.***
  - Applies to all case types requiring indigency, not just DR

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The Client

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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.

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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.

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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).

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Historical context

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

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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.*

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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.

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What do you do?

A. File an emergency motion to 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.

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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

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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.

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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.

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You Should:

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. ✓

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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.

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Implications: Scenario #2

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

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

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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.

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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.

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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.

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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.

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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

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GAL/CLR responsibilities

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Sources of Responsibilities

- Statutes
- Chief Justice Directives
- Contracts
- Case law

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Relevant Statutes

- D&N
- JD
- CLR

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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).

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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

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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.

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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.

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CJD 04-06

- Reason for CJD
- Requirements of CJD

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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).

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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 .

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DEPENDENCY AND NEGLECT

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Under what circumstances can D&N GAL obtain coverage

A. When court approves.
B. When exceptional circumstances require coverage.
C. When an OCR-qualified GAL is available to cover.
D. Whenever GAL determines coverage is consistent with best interests of child.
E. Only if a and b are met.
F. Only if a, b, and c are met.

Court Coverage

A GAL in a D&N case shall attend all court hearings.

In exceptional circumstances, another OCR-qualified attorney who has sufficient knowledge of the issues and status of the case may substitute for some hearings, with permission of the court.

§ V.D.1. commentary

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When must the D&N GAL inform the court of the child's position (if ascertainable)?

A. At the Permanency Planning Hearing only.

B. At each hearing, provided the GAL believes the child's position furthers his or her best interests.

C. At each hearing, as long as the child's position is well-reasoned and clear.

D. At each hearing, unless the child directs otherwise. ✓

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Stating Child's Position Requirements

A GAL in a D&N case shall specifically:

- Attend all court hearings and advocate for the child's best interests . . . State the child's position when ascertainable.
- If the child informs the GAL that s/he does not want the GAL to report his or her position to the court at a specific hearing, the GAL may proceed without directly stating such position.

§ V.D.1.

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Involvement of Children in Proceedings

When ascertaining child's position GAL shall endeavor to maximize child's involvement in proceedings when consistent with BI of child by:

- Discussing court process
- Ascertaining child's wishes regarding appearing
- Advocating for elimination of barriers to participation

Post hearing follow up regarding hearing outcome and child's experience.

§ V.D.1. Commentary

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Youth Feedback

"She talked to me about what I wanted the judge to know about me. She was basically my speaker when we went to court. She definitely knew what I wanted the judge to know. I just didn't have the guts to say it myself." – Youth

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Which of the following requirements apply to placement visits?

A. GAL must visit within 30 days of appointment.
B. GAL must visit within 30 days of change of placement.
C. GAL must visit within 45 days of change of placement.
D. GAL does not personally need to visit child after change of placement.
✓ E. a&b
F. a&c
G. a&d

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Change of Placement Visit

- Change of placement visit
  - Personally assigned to GAL
    - Unless change of physical address only; then other qualified professional acting as agent of GAL can visit.
    - Exception for rural GALs who can obtain OCR approval to send preapproval from OCR to use qualified professional and follow up with personal visit within reasonable time.
  - As soon as reasonable but no later than 30 days after change
    - *Commentary emphasizes role of court & county in keeping GAL apprised and allows visit to occur within 30 days of notice of placement change when GAL has acted diligently but county has failed to inform GAL of placement change.*

§ V.D.5.a

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Which of the following is now true about the 100 mile exception?

A. It applies to all case types.
B. When child is placed 100 miles outside judicial district boundaries, GAL can rely on caseworker reports alone to assess status of the child and placement.
C. GAL does not need to conduct in-placement visit if child is placed over 100 miles away from GAL's office.
D. GAL does not need to conduct in-placement visit if child is located 100 miles outside the judicial district boundaries.
E. a & d ✓

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100 –MILE EXCEPTION

- 100-mile placement visit exception is:
  - now applicable to all case types
  - clearly defined in light of geographical boundaries of judicial **district**
- When 100-mile exception applies, GAL has ongoing obligation to engage in independent investigation that includes interviews and observations (electronic or other means of communication permissible).

§ V.G

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Colorado Judicial Districts

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Does GAL need to do a placement visit/interview of child if GAL already knows the child through an existing appointment (i.e., JD, truancy)?

✓ A. Yes

B. No

When must the initial investigative tasks set forth in V.D.4 take place

A. All tasks must be completed within 30 days.
B. Visit with child within 30 days; all other tasks within 45 days.
C. Visit with child within 30 days; all other tasks within 60 days.
D. It depends.

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Time frame for Initial Investigation

- In-placement interview with/observation of child must be performed as soon as is reasonable but in no event later than 30 days.
- 45-day timeframe for initial investigation moved from commentary to standard.

§ V.D.4

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Which of the following tasks may be delegated to qualified professionals working for GAL?

A. Meeting with placement providers.
B. Meeting with Respondent Parents.
C. Observing the child with the child's caregiver.
D. Obtaining first hand information from other persons or professionals (CASA volunteers, school personnel).

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Initial Investigation

- Investigative activities personal to GAL include:
  - In-person meeting with child w/in 30 days
  - Observation of child with caregiver in placement
  - First-hand assessment of placement
  - Meeting with placement provider
  - Interviewing respondent parents (with consent of counsel)

§ V.D.4

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Initial Investigation

- Investigative activities that may be performed ***by qualified professional acting as agent of GAL under GAL's supervision***:
  - Meeting with proposed placement providers
  - Observation of the child's interaction with proposed placement providers
  - Observation of the child's interaction with respondent parents
  - Reviewing court files and relevant records, reports, and documents
  - Obtaining first-hand information from other persons or professionals necessary to assess and serve the child's best interests
  - Confirmation of diligent search; independent diligent search
  - Visiting home from which child was removed

§ V.D.4

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First-Hand Information Requirements

- Obtaining first-had information from other persons or professionals necessary to assess and serve the child's best interests. Such persons or professionals shall include caseworkers, CASA volunteers, relatives, school personnel, therapists, treatment providers, and any other persons or professionals necessary to assess and serve the child's best interests.

§ V.D.4.e

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Ongoing Investigation

Perform necessary investigation to represent the best interests of the child, and must include:

- Maintaining contact and ongoing communication with child
- Maintaining communication with placement providers, caseworker, CASA, and any other parties, persons, or professionals necessary to ensure ongoing and timely assessment of best interests.

§ V.D.5.b

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Maintaining Contact with Child

- Context provided to maintaining contact requirement:
  - Continue to assess child's best interests
  - Consider child's position
  - State child's position to court

§ V.D.5.b

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When does GAL in a D&N proceeding have to participate in an appeal?

A. Never
B. Always ✓
C. Only when GAL determines participation is necessary to advocate for best interests of child.

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D&N Appeals

- Appellate requirements:
  - Personally file a pleading

  OR
  - Formally joining another party's pleading

§ V.D.6

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JUVENILE DELINQUENCY/DIRECT FILE

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Do GALs have any obligation regarding the juvenile's due process rights?

✓ A. Yes

B. No

C. It depends

JD/Direct File Standards

- Overall responsibility
  - Representation of the juvenile's best interests ***in a manner that promotes and protects the juvenile's rights.***

§ V.E

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When must GAL meet with the juvenile?

✓ A. It depends.

B. The initial court hearing meeting is sufficient.

C. Sometime within the first 45 days of my appointment.

D. Within 30 days.

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Initial Out of Court Meeting with the Juvenile

- In person meeting with juvenile
  - Must be timely
    - As soon as possible for all juveniles.
    - If juvenile is in detention, GAL must make diligent efforts to meet within 7 days.
  - Must be in a location that promotes open communication between the juvenile and GAL.
  - Must include an explanation of distinction between GAL role versus defense counsel role.

Commentary allows flexibility in timing when GAL has already established a meaningful relationship with the juvenile in an existing appointment.

§ V.E.1

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On JD appointments, the GAL does not need to attend court:

A. When the GAL determines that doing so is not necessary to advocate for the juvenile's best interests.

B. Whenever the court schedules a hearing that is in conflict with the GAL's calendar.

C. In exceptional circumstances with advance approval from the court.

✓ D. Only if the conditions set forth in a & c are both met.

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JD/Direct File Court Appearance Requirements

- Attendance at court hearings is required
  - Coverage allowed only in exceptional circumstances and with court permission.
  - In exceptional circumstances when GAL deems attendance is not necessary to representation of best interests, GAL may seek court approval to miss hearing. Approval must be sought prior to hearing.
- Court hearing presentation
  - Independent information relevant to juvenile's best interests.
  - Through recommendations, motions, or other means consistent with appointment orders/statutory and ethical obligations.

§ V.E.2

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CJD 04-06 requires JD GAL independent investigation to include interviews with:

✔ A. Parents

B. School personnel

C. Pretrial services staff

D. Treatment providers

E. None of the above

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JD/Direct File Standards

- Independent investigation components:
  - Contact with juvenile
  - Interviews with
    - Parents
    - Kin
    - Current and potential placement providers
  - Interviews with other professionals or individuals necessary to assess and advocate for juvenile's best interests.
    - Examples include : school personnel, pretrial services staff, probation officers, and treatment providers.

§ V.E.3

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CJD 04-06 requires JD GAL independent investigation to cover the following topics:

A. Competency
B. Placement
C. Services
D. Understanding of proceeding and consequences
E. Appointment and availability of counsel
F. a-c only
✓ G. All of the above

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Independent Investigation

- Independent investigation ***must*** assess:
  - Juvenile's functioning, needs, and circumstances
  - Appointment and availability of defense counsel
  - Current/proposed placement
    - Due process rights
    - Applicable statutory considerations
    - Reasonable efforts to prevent out of home placement
    - Less restrictive placement options
    - Conditions of confinement/placement for out of home placements in light of juvenile's unique needs
  - Services and treatment
  - Competency issues
  - Juvenile's understanding of proceeding and immediate and long term consequences of proceeding
  - Immediate and long consequences of proposed orders/resolution of charges
  - Necessity of court orders to address family issues (including D&N investigation)
  - Other pending cases

§ V.E.3

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Independent Investigation

- Timing of independent investigation
  - As soon as possible!
  - Often sooner than 45-day time frame applicable to D&N proceedings.

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JD/Direct File Standards

- Who can do the investigation/advocacy
  - GAL must personally interview juvenile and attend court
  - Other activities may be performed by qualified professional acting as agent of GAL under GAL's supervision.
- Necessary to repeat investigation if appointed on another case?
  - When GAL has already obtained relevant information ***through an existing appointment*** the GAL may tailor investigation to ensure currency of information.

§ V.E.3

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JD/Direct File Standards

- Ongoing investigation/advocacy
  - Maintaining contact and ongoing communication
    - Not just in court
  - Other applicable duties listed in ***§V.E.3.***

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OTHER CASE TYPES

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Other Case Types

- General duties
  - Directed by court
  - Set forth by statute
  - As required by Rules of Professional Conduct
- May require:
  - attending court hearings relevant to child; presenting relevant info
  - Personally meeting with and observing the child
  - Meeting with current and proposed placements, guardians, or custodians
  - Reviewing court files and relevant records, reports, and documents

§ V.F

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COURT'S ROLE

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Does court have a role in ensuring CJD compliance by GALs:

✓ A. Yes

B. No

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CJD Provisions Regarding Role of Court

- Judges and magistrates shall ensure GALs/CLRs are representing the best interests of children by:
  - Routinely monitor compliance with directive and promptly notify OCR of compliance issues.
  - Provide guidance and clarify the expectations of the court.
  - Hold periodic meetings.

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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

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Tracking compliance

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What is my relationship with the OCR?

A. OCR supervises my work on cases.
B. OCR reviews my work for compliance with practice standards.
C. OCR monitors my billing.
D. OCR provides litigation support.
E. B, C, and D ✓
F. All of the above

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OCR Activities

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

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Annual Compliance Certification

- All attorneys (not just D&N) will now need to complete compliance certification.
  - Affidavit of compliance is no longer necessary—OCR will provide form through OCR's verification/application process.
  - Courts no longer need to receive compliance certification.

§ V.H

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Other considerations

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Can the GAL be called as a witness?

A. Yes
B. No
C. It depends ✓

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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.

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Can the court close a D&N case if GAL objects?

A. Yes
B. No
C. Not without a hearing ✓
D. It depends

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Other Considerations

- *R.E.*, 729 P.2d 1032 (Colo. App. 1986)
  - Court cannot dismiss D&N case over GAL objection without hearing.

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Other Considerations

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

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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.

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Is the child in a D&N proceeding entitled to therapist-patient privilege

✓ A. Yes
B. No
C. Only if age 12 or older
D. Only if age 15 or older

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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 child in a D&N case is entitled to therapist-patient privilege and that 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.

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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).

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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).

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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."

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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.

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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.

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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.

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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.
E. Request the appointment of counsel for Stacie.
F. D or E. ✓

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.

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When do my obligations end?

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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

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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).

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Youth Feedback:

"(My GAL) is a positive person in the community, and is always willing to help. Those kind of people make a huge difference in the world. Even though (my GAL) might not be able to move mountains she is able to move people's hearts. She is an angel walking among men… In all my years of being in court and DHS, I've never had someone that vouches for me like (my GAL) does."

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