

**GUARDIANS AD LITEM IN CRIMINAL COURT:  
PROTECTING A CHILD'S RIGHT TO PRIVACY**

## I. APPOINTMENT OF GAL OR COUNSEL FOR A MINOR

### ***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.

*L.A.N.* was limited to the context of a D & N case and concerned only one statutory privilege, but its rationale invites extension to criminal cases because:

- 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.*, district attorney, law enforcement agencies, health care providers, department of human services, the court) to assist the child in asserting the privilege.

## ***Authority to Appoint a GAL or Counsel—CJD 04-04***

CJD 04-04 provides ample authority to appoint a GAL or counsel for a minor in juvenile court cases, probate cases, mental health cases, and some civil cases.

CJD 04-04 also provides authority to appoint a Child's Representative or an Attorney CFI in domestic relations cases.

CJD 04-04 provides express authority to appoint a GAL or counsel in a criminal 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).

## ***Constitutional Grounds to Appoint a GAL or Counsel***

“In an instance where the court finds constitutional authority for the appointment of counsel for an indigent party, a written order of appointment stating the grounds for appointment, citing legal authority, and certifying payment of counsel at the state rate is required.” CJD 04-05(III)(A)(9) (Amended July 1, 2014).

OCR shall be responsible for “Provision of services in any other GAL, Child's Representative or attorney Child and Family Investigator appointments where authorized, by statute or inherent authority, to act in or in representation of the best interests of a minor.” CJD 04-06(I)(B) (Revised March 15, 2013).

Constitutional grounds to appoint a GAL may include:

- *The 4<sup>th</sup> Amendment to the U.S. Constitution: Unreasonable Searches and Seizures*

A person is entitled to claim the protection of the 4<sup>th</sup> Amendment if he/she 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).

- *The Colorado Constitution, Article II, Sec. 7 (Unreasonable Searches and Seizures) and Sec. 25 (Due Process of Law)*

The protection afforded by the Colorado Constitution may be broader than that of the 4<sup>th</sup> 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.

- *The 14<sup>th</sup> Amendment to the U.S. Constitution: The Right to Privacy Under the Due Process Clause*

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 or 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.*:

Under the VRA, 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 C.R.S. 24-4.1-303(14.5)(b).

Unless legally emancipated, a “victim” who is under 18 years of age is considered “incapacitated.” C.R.S. 24-4.1-302(5). Accordingly, a child victim is entitled to exercise the rights defined by the VRA through the assistance of a parent, grandparent, sibling, legal guardian, or other lawful representative. *Id.* Similarly, an incapacitated adult victim is entitled to exercise the rights defined by the VRA through the assistance of a spouse, relative, or other lawful representative. *Id.* The term “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.” C.R.S. 24-4.1-302(3).

“In addition to all rights afforded to a victim or witness under section 24-4.1-302.5, . . . judges 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 Should a Court Appoint a GAL or Counsel for a Child in a CR Case?***

- The GAL holds the child’s privilege, pursuant to an *L.A.N.* order entered in another case, and a party to a criminal case seeks disclosure of privileged or confidential information concerning the child;
- The child holds the privilege to the exclusion of his/her parents, pursuant to an *L.A.N.* order entered in another case, a party to a criminal case seeks disclosure of privileged or confidential information concerning the child, the child does not have a legal representative (e.g., guardian or legal custodian) who can assist him/her in exercising the privilege, and the child lacks the ability to exercise the privilege and protect the information without legal assistance;
- The child is a victim or witness of a crime covered by the VRA, a subpoena has been issued in the criminal case for the production of privileged or confidential records concerning the child, and the child cannot be represented effectively in the matter by a parent, grandparent, sibling, legal guardian, or other lawful representative; or,

- A party to a criminal case seeks disclosure of privileged or confidential information concerning the child and disclosure of such information 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 the 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 in a CR Case?***

“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

Discretion to waive after consultation

#### **Counsel**

Attorney-client privilege applies

No waiver without client consent

***Best Practice:*** Appoint a GAL if the GAL is the privilege holder. Appoint counsel if the child is the privilege holder.

## II. DISCOVERY IN CRIMINAL CASES

### *Crim.P. 16*

*Overview:* Crim.P. 16 governs discovery in criminal cases. Rule 16 divides all discoverable material into two broad categories:

- Material subject to mandatory disclosure (grand jury transcripts; expert witness reports; tangible objects, including documents and photographs, held as evidence; criminal history records; electronic surveillance records; the names and addresses of prosecution witnesses; statements of the accused and any co-defendant to the police; and exculpatory information)
- Material subject to discretionary disclosure

*Special Rules for Discretionary Disclosure:* A request for discretionary disclosure must be “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). Discretionary disclosure may be denied if “there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense.” Crim.P. 16, Part I(d)(2).

*Expert Witnesses:* A defendant is entitled to discovery of “Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.” Crim.P. 16, I(a)(1)(III). “Where the interests of justice would be served, the court may order the prosecution to disclose the underlying data supporting the opinion in that particular case of an expert endorsed as a witness.” Crim.P. 16, I(d)(3). Absent a court order, the prosecution is not required to identify endorsed witnesses who are expected to testify as experts at trial. *People v. Greer*, 262 P.3d 920 (Colo. App. 2011).

*Photographs, Tapes, and Other Tangible Objects:* Generally, the prosecution is required to make photographs, tapes, and other tangible objects held as evidence available to the defense and to provide duplicates thereof upon request of the defense. Crim.P. 16(I)(a)(1)(IV), (VI). This rule does not apply to “sexually exploitative material” (*i.e.*, “visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct”). C.R.S. 18-6-403(2)(j). Section 16-9-601, C.R.S., prohibits reproduction and duplication of such materials absent a case-specific showing of need. This statute was enacted in 2008 and effectively abrogates *People v. Arapahoe County Court*, 74 P.3d 429, 431 (Colo. App. 2003).

*Privileged or Confidential Material:* Except for attorney work product and police informants, Crim.P. 16(I) 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).

### ***Subpoenas to Produce, Crim.P. 17***

*Third Party Material—Subpoenas:* If information sought by the defense is not in the possession or control of the district attorney or a law enforcement agency, the defense may seek production of the information by means of a subpoena *duces tecum* issued to other governmental personnel or a third party. Crim.P. 16(I)(c)(2); Crim.P. 17(c). The subpoenaing party must provide a copy of the subpoena to opposing counsel upon issuance. Crim.P. 17(c). The court may quash or modify a subpoena if compliance would be unreasonable or oppressive. Crim.P. 17(c). The district attorney has standing to challenge a defense subpoena issued to a third party. *People v. Spykstra*, 234 P.3d 662, 666 (Colo. 2010).

*Defense Burden:* “[W]hen a criminal pretrial third-party subpoena is challenged, a defendant must demonstrate:

- (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
- (2) That the materials are evidentiary and relevant;
- (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
- (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
- (5) That the application is made in good faith and is not intended as a general fishing expedition.”

*People v. Spykstra*, 234 P.3d 662, 669 (Colo. 2010) (private, electronic communications information subpoenaed from the parents of a child sex assault victim).

*Protected Information:* If the information sought is protected by a privilege or right to privacy or confidentiality a defendant must make a “proportionately greater showing of need” and the trial court must balance the competing interests before requiring disclosure. *Id.* Note: Privileges defined by section 13-90-107, C.R.S., are **not** subject to a balancing test.

*In camera review* is not required in all cases but may be necessary “in the interest of due process.” *Spykstra* at 670.

### ***Court Orders for Production of Records, C.R.S. 16-3-301.1***

Section 16-3-301.1(2)(e), (5)(a), C.R.S., permits a court, upon request of a criminal investigator or peace officer, to 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. However, the records to be produced pursuant to such an order “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.” C.R.S. 16-3-301.1(11)(e).

### III. OBJECTIONS TO DISCOVERY—SUBSTANTIVE GROUNDS

#### *The Right to Privacy/Confidentiality*

An interested person may oppose discovery on grounds that it would violate his/her right to privacy or confidentiality.

This right to personal privacy is grounded in the Bill of Rights and the 14<sup>th</sup> 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) (personnel files); *Stone v. State Farm Mutual Auto Ins. Co.*, 185 P.3d 150 (Colo. 2008) (tax returns); *People In Interest of E.G.*, 2015 COA 18, 2015 WL 795121, ¶ 15 (Colo.App. 2015) (defense access to crime scene).

“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).

#### *Applying the Balancing Test—Procedural Steps*

- First, the requesting party must prove that the information sought is relevant to the subject of the action;
- Second, the party opposing discovery must show that he/she has a legitimate expectation of privacy with respect to the information;
- Third, if the party opposing discovery meets this threshold burden, the requesting party must prove either (a) disclosure is required to serve a compelling state interest or (b) there is a compelling need for the information; and,
- Fourth, if the requesting party satisfies the third step, it must also show either (a) the information is not available for other sources or (b) it is using the least intrusive means to obtain the information.

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



## ***Statutory Privileges—General Concepts***

“[S]tatutory privileges must be strictly construed and the claimant of a privilege bears the burden of establishing the applicability of the privilege.” *People v. District Court*, 743 P.2d 432, 435 (Colo. 1987).

Statutory privileges share four characteristics:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

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

## ***Asserting a Statutory Privilege***

*Burden of Proof:* The claimant of a privilege bears the burden of establishing its applicability.

*Privilege Log:* The claimant must 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:* If the discovery dispute cannot be resolved by the parties, the requesting party may ask the trial court to resolve the dispute and perform an *in camera* inspection, if necessary.

*In camera review* will be limited to disputed documents.

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

#### IV. SELECTED STATUTORY PRIVILEGES

##### ***Attorney/Client Privilege, C.R.S. 13-90-107(1)(b):***

***An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.***

*Scope:* This privilege applies to communications between attorney and client as well as communications with support staff.

*Exceptions:* Communications between a child and his/her GAL are not privileged. *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011). Under some circumstances a GAL may be called to testify. *People in Interest of J.E.B.*, 854 P.2d 1372 (Colo.App. 1993). This privilege does not apply to communications made for the purpose of aiding the commission of a future crime or a present continuing crime or perpetrating civil fraud. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

##### ***Physician/Patient Privilege, C.R.S. 13-90-107(1)(d):***

***A physician, surgeon, or registered professional nurse duly authorized to practice his or her profession pursuant to the laws of this state or any other state shall not be examined without the consent of his or her patient as to any information acquired in attending the patient that was necessary to enable him or her to prescribe or act for the patient . . .***

*Scope:* This privilege applies to a physician, surgeon, or registered nurse authorized to practice his or her profession and includes hospital records. *People v. Overton*, 759 P.2d 772, 774 (Colo.App. 1988), *Devenyns v. Hartig*, 983 P.2d 63, 66 (Colo. App. 1998).

*Exceptions:* This privilege does not apply to statements that are not necessary to enable a medical professional to diagnose, prescribe for, or treat a patient, *People v. Garrison*, 109 P.3d 1009 (Colo.App. 2004) (statements made by a defendant to a nurse upon hospital discharge), *People v. Perez*, 129 P.3d 1090 (Colo. App. 2005) (patient identifying information); 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) and C.R.S. 12-36-135(1), (3); 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); or 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).

***Psychologist/Patient Privilege, C.R.S. 13-90-107(1)(g) and 12-43-218(1):***

***A licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor shall not be examined without the consent of the licensee's, certificate holder's, or registrant's client as to any communication made by the client to the licensee, certificate holder, or registrant or the licensee's, certificate holder's, or registrant's advice given in the course of professional employment; nor shall any secretary, stenographer, or clerk employed by a licensed psychologist, professional counselor, marriage and family therapist, social worker, or addiction counselor, a registered psychotherapist, or a certified addiction counselor be examined without the consent of the employer of the secretary, stenographer, or clerk concerning any fact, the knowledge of which the employee has acquired in such capacity; nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, 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.***

*Scope:* This privilege applies to a wide variety of licensed, registered, or certified mental health professionals and their support staff and to statements made in the context of both individual and group therapy. This privilege prohibits both pretrial discovery and testimonial disclosure of privileged information. *Clark v. District Court*, 668 P.2d 3 (Colo. 1981). The privilege applies to a therapist's treatment records including notes and reports from ongoing counseling sessions. *People v. District Court*, 719 P.2d 722 (Colo. 1986) (mental health therapist); *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004) (psychologist); *People v. Dill*, 904 P.3d 1367 (Colo. App. 1995), *affirmed*, 927 P.2d 1315 (Colo. 1996). A defendant's constitutional right to confront witnesses does not supersede a victim's right to rely upon this privilege. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993).

*Exceptions:* 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), are not protected by this privilege. *People v. Kailey*, 2014 CO 50, 333 P.3d 89 (Colo. 2014). HIPPA regulations are consistent with *Kailey*. 45 C.F.R. § 164.512(j)(1)(i)(A), (B) and (j)(4). This privilege does not apply to involuntary certification proceedings under Title 27, *People v. Hynes*, 917 P.2d 328 (Colo.App. 1996), or 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 relating to the same incident that gave rise to a report of abuse or neglect. *Id.*

***Victim's Advocate Privilege, C.R.S. 13-90-107(1)(k):***

***(I) A victim's advocate shall not be examined as to any communication made to such victim's advocate by a victim of domestic violence. . . or a victim of sexual assault . . . in person or through the media of written records or reports without the consent of the victim.***

***(II) For purposes of this paragraph (k), a “victim's advocate” means a person at a battered women's shelter or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence or sexual assault and does not include an advocate employed by any law enforcement agency:***

***(A) Whose primary function is to render advice, counsel, or assist victims of domestic or family violence or sexual assault; and***

***(B) Who has undergone not less than fifteen hours of training as a victim's advocate or, with respect to an advocate who assists victims of sexual assault, not less than thirty hours of training as a sexual assault victim's advocate; and***

***(C) Who supervises employees of the program, administers the program, or works under the direction of a supervisor of the program.***

*Scope:* This privilege applies to communications and extends to records of assistance and services provided by a victims' advocate. *People v. Turner*, 109 P.3d 639 (Colo. 2005).

*Exceptions:* This privilege does not apply to communications with a victims' advocate who is employed by a law enforcement agency; communications with a person who does not otherwise meet the statutory definition of a “victim's advocate;” and criminal actions that do not involve domestic violence or sexual assault.

### ***Parent/Child Derivative Privilege, C.R.S. 13-90-107(1)(l):***

***A parent may not be examined as to any communication made in confidence by the parent's minor child to the parent when the minor child and the parent were in the presence of an attorney representing the minor child, or in the presence of a physician who has a confidential relationship with the minor child pursuant to paragraph (d) of this subsection (1), or in the presence of a mental health professional who has a confidential relationship with the minor child pursuant to paragraph (g) of this subsection (1), or in the presence of a clergy member, minister, priest, or rabbi who has a confidential relationship with the minor child pursuant to paragraph (c) of this subsection (1).***

*Exceptions:* 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 brought against either a parent or the 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 the parent-child legal relationship; a dependency or neglect action; 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)(l)(II).

*Waiver:* “[This privilege] may be waived by express consent to disclosure by the minor child who made the communication or by failure of the minor child to object when the contents of the communication are demanded.” C.R.S. 13-90-107(1)(l)(I).

### ***Inadmissibility of Certain Evidence, C.R.S. 19-3-207:***

***(1) Upon the request of the county attorney, special county attorney, or the city attorney of a city and county, the court shall set a hearing to determine the admissibility in a subsequent criminal proceeding arising from the same episode of information derived directly from testimony obtained pursuant to compulsory process in a proceeding under this article. . . . The court shall not enter such an order if the district attorney presents prima facie evidence that the inadmissibility of such information would substantially impair his or her ability to prosecute the criminal case.***

***(2.5) Notwithstanding any other provision of law to the contrary, a juvenile's statements to a professional made in the course of treatment ordered by the court pursuant to this article shall not, without the juvenile's consent, be admitted into evidence in any criminal or juvenile delinquency case brought against the juvenile; except that the privilege shall not apply to statements regarding future misconduct.***

C.R.S. 19-3-207(1), (2.5).

*Scope of Subsection (1):* Subsection (1) must be initiated by the petitioner in a dependency or neglect action. Subsection (1) is limited to evidence derived directly from testimony obtained through compulsory process in such a proceeding.

*Caveat:* Because subsection (1) does not provide for notice to the defense it may be vulnerable to a constitutional challenge based on the due process clause or the equal protection clause.

*Scope of Subsection (2.5):* Subsection (2.5) is limited to a juvenile's statements to a professional in the course of court-ordered treatment. Without consent, such statements are inadmissible in a criminal or juvenile delinquency case brought against the juvenile.

*Exception:* Statements regarding future misconduct.

### ***Crimes Against At-Risk Adults and At-Risk Juveniles, C.R.S. 18-6.5-104:***

***The statutory privileges provided in section 13-90-107(1), C.R.S., shall not be available for excluding or refusing testimony in any prosecution for a crime committed against an at-risk adult or an at-risk juvenile pursuant to this article.***

*Scope:* Crimes against at-risk adult or an at-risk juvenile, as defined by C.R.S. 18-6.5-102(9) and listed in C.R.S. 18-6.5-103, include assault in the first, second, and third degree; robbery; theft in the presence of a victim; caretaker neglect; sexual assault; unlawful sexual contact; sexual assault on a child; sexual assault on a client by a psychotherapist; criminal exploitation; and attempt, solicitation, and conspiracy to commit those offenses.

*Caveat:* This exception may be subject to constitutional limitations (e.g., effective assistance of counsel, due process of law, fair trial, privilege against self-incrimination).

## V. OVERCOMING A STATUTORY PRIVILEGE

*Waiver/Consent:* If a statutory privilege applies, the only basis for allowing any disclosure of privileged information is waiver by 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).

*A GAL's Discretion:* In some cases it may be in the child's best interests to permit disclosure of privileged information. 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.*

*Burden of Proof:* "[T]he burden of establishing a waiver is on the party seeking to overcome the claim of privilege. A waiver must be supported by evidence showing that 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) (citations omitted); see also, *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002), *L.A.N. v. L.M.B.*, 292 P.3d 942, ¶ 30 (Colo. 2013). A waiver may occur when a witness testifies to the substance of any treatment sessions or otherwise places his/her post-assault mental health in issue. *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

*Limited Scope Waivers:* The *L.A.N.* opinion allows "limited-scope waivers of the psychotherapist-patient privilege." *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).

*When Waiver Does Not Occur:* A victim in a criminal case does not waive the psychologist-patient privilege by 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); or by 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 does not result in waiver. *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993) (treating psychologist disclosed privileged information to police officer); *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990) (police officer observed two treatment sessions through one-way mirror). An express waiver of the physician-patient privilege with respect to hospital records does not result in an implied waiver of the psychologist-patient privilege with respect to other, subsequent treatment records. *People v. Pressley*, 804 P.2d 226 (Colo.App. 1990); *People v. Wittrein*, 221 P.3d 1076, 1082-1084 (Colo. 2009).

*No Balancing Test:* A privilege defined by section 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).

*6<sup>th</sup> 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).

*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).

## VI. PARTICULAR CONFIDENTIALITY STATUTES

### ***The Health Insurance Portability and Accountability Act (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:* Effective August 14, 2003, 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).

*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).

*Colorado Standards:* Colorado law is consistent with HIPAA regulations. *Id.*; see also, 45 C.F.R. § 164.512(a), (b), (c), (e), (f), and (j) (effective June 7, 2013).

### ***Child Abuse and Neglect Records***

*Confidentiality:* Generally, records and reports of child abuse or neglect are confidential. C.R.S. 19-1-307(1)(a). Child abuse and neglect records may include materials that are privileged under section 13-90-107, C.R.S.

*Statutory Exceptions:* There are numerous statutory exceptions to confidentiality. For example, 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).

*Judicially Determined Exceptions:* Discovery of child abuse and neglect records is governed by C.R.S. 13-90-107, not Crim.P. 16. *People v. Jowell*, 199 P.3d 38, 42 (Colo. App. 2008). A court may allow access to other persons “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).

*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.*

*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.

## ***Educational Records***

*Discoverability:* The discoverability of school 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 Protocol:* Two appellate cases, *People v. Bachofer*, 192 P.3d 454, 460 (Colo.App. 2008), and *People v. Wittrein*, 221 P.3d 1076, 1085 (Colo. 2009), prescribe conditions precedent for discovery of school records:

- The trial judge must determine whether the defendant articulated a good faith, specific need for information contained in school records.
- If the defendant meets this threshold showing of need, 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 to the defendant’s request for disclosure of school records.



- At hearing a trial judge must balance the defendant's need for the information against the privacy interests of the student and his/her parents.
- If the trial court, after considering all relevant case-specific factors, determines that the defendant's need outweighs any privacy interests, then it should review the records *in camera*.
- After conducting an *in camera* review the trial court may order disclosure of records that contain information materially favorable to the defendant and inculpatory information that will be of material assistance in preparing a defense.

*Applying the Balancing Test—Relevant Factors:* “[T]he court should consider (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.” *People v. Bachofer*, 192 P.3d 454, 460-461 (Colo.App. 2008).

### ***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. Such 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.” The court may conduct an *in camera* review, without either party present, to determine these issues. C.R.S. 24-4.1-107.5(2) (as amended by HB 15-1035).

## **VII. OTHER PRIVACY ISSUES**

### ***Involuntary Psychological Examinations***

*Authority to Require:* A trial court has discretion to order an involuntary psychological examination of a witness or victim only upon the defendant’s showing of a “compelling need or reason.” *People v. Chard*, 808 P.2d 351, 353 (Colo. 1991).

*Balancing Test:* “In deciding whether to grant a defendant's motion for the involuntary psychological examination of a child sexual-abuse victim, the court must weigh the defendant's right to a fair trial against the invasion of the victim's privacy interests. Children are entitled to the same constitutional guarantees as adults, including protection from unreasonable searches and seizures under the fourth amendment.” *Id.* (citations omitted).

*Relevant Factors:* In applying this balancing test, relevant factors include the possibility that the witness will experience “emotional trauma, embarrassment or intimidation” as a result of the examination and the “the likelihood of the examination producing material, as distinguished from speculative, evidence.” *Id.*

### ***The Rape Shield Statute, C.R.S. 18-3-407:***

*Scope:* This statute precludes evidence of specific instances of a victim's or witness's prior or subsequent sexual conduct, as well as opinion and reputation evidence concerning such conduct. "The purpose of the rape shield statute is to protect sexual assault victims from humiliating public fishing expeditions into their past sexual conduct, unless it is shown that the evidence is relevant to some issue in the case." *People v. Cook*, 342 P.3d 539, ¶ 36 (Colo.App. 2014). Prior victimization is considered "sexual conduct" under the statute. *People v. Kyle*, 111 P.3d 491, 496 (2004).

*Exceptions:* There are three exceptions to the statute—(1) evidence of a victim's prior sexual conduct with the accused, (2) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence, or (3) evidence that is relevant to a material issue in the case including, but not limited to, evidence of a history of false reporting of sexual assaults. *People v. Weiss*, 133 P.3d 1180, 1186 (Colo. 2006); *People v. Owens*, 183 P.3d 568, 573 (Colo. App. 2007).

*Offer of Proof:* The statute requires the moving party to file a supporting affidavit containing an offer of proof as to the relevancy and materiality of the proffered evidence. "An "offer of proof" typically states: (1) what the anticipated testimony of the witness would be if the witness were permitted to testify concerning the matter at issue; (2) the purpose and relevance of the testimony sought to be introduced; and (3) all the facts necessary to establish the testimony's admissibility." *Weiss* at 1186-1187; see also, CRE 103(a)(2).

#### *Procedure:*

If the court finds that the offer of proof is sufficient, the court shall notify the other party of such. If the prosecution stipulates to the facts contained in the offer of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set a hearing to be held in camera prior to trial. In such hearing, to the extent the facts are in dispute, the court may allow the questioning of the victim or witness regarding the offer of proof made by the moving party or otherwise allow a presentation of the offer of proof, including but not limited to the presentation of witnesses.

C.R.S. 18-3-407(2)(c).

*Additional Limits on Admissibility:* Even if an exception applies, admissibility is subject limitations based on relevancy, CRE 401, and prejudice, CRE 403. *Cook* at ¶ 38. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

*Alternative Suspect:* A defense based on an alternate suspect is likewise subject to limitations based on relevancy, probative value, unfair prejudice, confusion of issues, and waste of time. *Cook* at ¶ 39.

- *Motive, Propensity, and Opportunity:* Evidence of another person's motive, propensity, and opportunity to commit a crime does not suffice. *People v. Salazar*, 272 P.3d 1067, ¶

21, 26 (Colo. 2012). To be admissible, there must be evidence that such other person committed an act directly connecting him or her with the crime charged. *Id.*; see also, *Cook* at ¶ 40.

- *Identification*: If evidence of an alternate suspect is offered for the purpose of challenging the alleged victim's identification of the perpetrator "the alternate suspect's prior act or crime must be similar to the present crime to be relevant and admissible." *Id.* Furthermore, the acts and surrounding circumstances must be sufficiently distinctive or unusual to support a finding that the same person was involved in both cases of sexual assault. *Salazar* at ¶ 26; *Kyle* at 498.
- *Precocious Knowledge*: When evidence of an alternate suspect is offered for the purpose of showing the source of precocious sexual knowledge on the part of an alleged child victim, "The probative value of evidence of a child's exposure to other sexual conduct and the balance of that probative value against countervailing considerations to admissibility will necessarily depend on the nature of the sex acts involved, as well as the age, circumstances, and other sources of knowledge to which the child in question might be privy." *Pierson v. People*, 279 P.3d 1217, ¶ 18 (Colo. 2012). The proponent's offer of proof must set forth specific evidence about the sexual sophistication of the particular child victim and demonstrate a range of knowledge that extends beyond "a basic awareness of male sexual anatomy and an awareness that applying pressure to her own external genitalia could be painful." *Id.* at ¶ 18-20.

### ***Mistreatment of At-Risk Adults***

*Mistreatment Records and Reports*: Law enforcement agencies, district attorneys, and county departments of social services are jointly responsible for investigating reports of mistreatment of at-risk adults. C.R.S. 26-3.1-103. Each agency is responsible for maintaining the confidentiality of information exchanged during the investigation. *Id.* at (2). Reports of the mistreatment of an at-risk adult are confidential. C.R.S. 26-3.1-102(7)(a). Disclosure of such reports is permitted "only when authorized by a court for good cause." C.R.S. 26-3.1-102(7)(b). "Such disclosure shall not be prohibited when: (I) A criminal complaint, information or indictment based on the report is filed. . . ." *Id.* at (7)(b)(I).

*Court-Ordered Protective Services*: If a county department determines that an at-risk adult has been mistreated or exploited it may petition the court for an order authorizing protective services and for the appointment of a guardian or conservator. C.R.S. 26-3.1-104. The court must appoint a lawyer to represent the respondent. C.R.S. 15-14-305(2)

*Reports of Condition*: A court-appointed guardian must report to the court concerning the ward's condition. C.R.S. 15-14-31(1). Information concerning the ward's condition is confidential and "shall be open to public inspection only upon an order of the court based on a finding of good cause . . . ." *Id.* at (4)(b).

*Service Records*: If an at-risk developmentally disabled person receives services from a community centered board, such records "shall be confidential and subject to the evidentiary privileges established by law." C.R.S. 27-10.5-120(1), (2). "The disclosure of this information

and these records in any manner shall be permitted only: . . . To persons authorized by an order of court issued after a hearing, notice of which was given to the person, parents or legal guardian, where appropriate, and the custodian of the information . . .” C.R.S. 27-10.5-120(2)(g).