

**ETHICAL ISSUES AND
GALS:
THE DIRECTIVE, THE RULES AND
HOT TOPICS**



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**The Office of Attorney
Regulation Counsel**

- Admissions
- Registration
- Continuing Legal Education
- Attorney Regulation
- Magistrate/Municipal Judge/ALJ Regulation
- Attorneys' Fund for Client Protection
- Inventory Counsel
- Unauthorized Practice of Law
- Special Counsel for Commission on Judicial Discipline



Guidance from CJ Directive 04-06

CJ Directive 04-06, Section V.B, provides, in part:

All attorneys appointed as GALs or Child's Legal Representatives shall be subject to all of the rules and standards of the legal profession. The unique statutory responsibilities of a GAL and a Child's Legal Representative do not set forth a traditional attorney-client relationship between the appointed attorney and the child; instead, the "client" of a GAL or a Child's Legal Representative is the best interests of the child. The ethical obligations of the GAL or Child's Legal Representative, under the Colorado Rules of Professional Conduct, flow from this unique definition of "client."

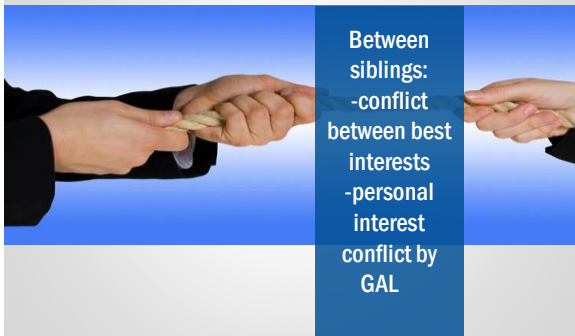
The Unique Role of the GAL




Topic 1: Conflicts



Conflicts: What are the issues?



The Analysis

<p>Identify the client/ clients. Unique to this role: BEST INTEREST</p>	<p>Colo. RPC 1.7 No direct adversity OR Significant risk that representation will be materially limited by lawyers' responsibilities to another client, former client or third person or personal interest of lawyer</p>	
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Consider...



Conflicts: What are the issues?

	<p>Friendships with others in the process: -department employee(s) -foster parent -department employee agrees with GAL, but department supervisor does not</p>	<p>Is your loyalty compromised? Even if not, is there a perception your loyalty is compromised?</p>
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Addressing Conflicts



- Fact-specific analysis
- Make record to court
- Court may require GAL to continue representation

Topic #2: Lawyer as Witness



CJ Directive 04-06
"At the court's direction and in compliance with Section 19-3-606(1), C.R.S., file written or oral report(s) with the court and all other parties."

"Conduct an independent investigation in a timely manner."

04-06, V.D(2,4)

People in the Interest of J.E.B., 854 P.2d 1372 (Colo. App. 1993)(when GAL makes recommendations as opinion based on independent investigation, GAL acts as witness and is subject to cross-examination)

Colo. RPC 3.7
Lawyer as Witness
-addresses issues of conflict and confusion when lawyer is advocate and witness
-note that the issues the Rule seeks to address are contemplated by the Directive

Topic #3 Investigations and Social Media



WHAT IS SOCIAL MEDIA?

Facebook, Twitter, LinkedIn, Instagram

Blogs and Comment Sections

Emails

Texts

SOCIAL MEDIA AS AN INVESTIGATIVE TOOL

Colorado Bar Association
Ethics Committee
Formal Opinion 127
“Use of Social Media for
Investigative Purposes”

Colorado Ethics Opinion
adopted September 2015

Public portion of social media

"The Committee concludes that simply viewing the public portion of a person's social media profile or any public posting made by an individual does not constitute a 'communication' with that person. Therefore, the lawyer's conduct in viewing such material does not implicate any of the restrictions upon communications between a lawyer and certain others involved in the legal system."

Prohibition against use of deception

Citing to Colo. RPC 8.4(c) and 4.1, the Committee stated: "[A] lawyer must never use deception to gain access to a restricted portion of a social media profile or website. This prohibition includes 'pretexting' and other forms of trickery through which the person seeking access to a restricted portion of a social media profile pretends to be someone other than himself or herself."

Requesting permission to view restricted portion of site from unrepresented person

"[L]awyers and their agents must provide sufficient disclosure to allow the unrepresented person to make an informed decision concerning whether to grant access to restricted portions of a social media profile."
-name of lawyer
-acting on behalf of client
-nature of matter related to lawyer's request

When lawyer knows the person is represented...

"In the course of representing a client, a lawyer may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by another lawyer in that matter, without obtaining consent from that counsel."
See Colo. RPC 4.2

Asking someone who has access to obtain the information

"The lawyer's ethical obligations when dealing with the third person on behalf of a client will partially depend on the status of the third person. Under no circumstances may the lawyer request that the third person make requests for new or additional information from a party or witness if the lawyer would be legally or ethically prohibited from requesting or obtaining it directly."

Jurors and Judges

Communication is governed by Colo. RPC 3.5. Prohibition on *ex parte* communication with judges and prospective and sitting jurors may be implicated by social media communication.

Colo. RPC 8.4(c) was amended in September 2017

It is professional misconduct for a lawyer to:

c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;



Topic #4: File Retention



Directive, Contract and Rule

CJ Directive

"Attorneys shall maintain records of all work performed relating to court appointments and shall make all such records available to the OCR and/or to the court for inspection, audit and evaluation in such form and manner as the OCR or court may require, subject to the attorney work product doctrine and any other applicable privileges."
04-06, IV. B(3)

OCR Contract
"Accurately maintain all records of all work performed pursuant to this Agreement..."

Colo. RPC 1.16A

Client File Retention
-note other retention requirements may apply

Colo. RPC 1.16A

Client authorizes destruction of the file in writing signed by the client, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter

OR

Lawyer gave written notice to client of lawyer's intention to destroy the file on or after date in notice, but not less than 30 days after the date of notice, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter

OR

After expiration of 10 years following termination of representation, destruction is permissible, WITHOUT notice to client, provided no pending or threatened legal proceedings known to the lawyer AND lawyer has not agreed to the contrary

Note the separate and specific deadlines for criminal matters. Colo. RPC 1.16A(c).

Consider...

10 years following termination of representation

Return file to...?

Involve criminal matter?

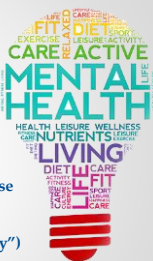
Do other retention requirements apply?

Topic #5: Your Well-Being



Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns (the "Law Student Survey")

- J.M. Organ, D. Jaffe, K. Bender
- 66 J. Legal Educ. 116 (2016)



How did this become an issue?

The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys (the "Hazelden Study")

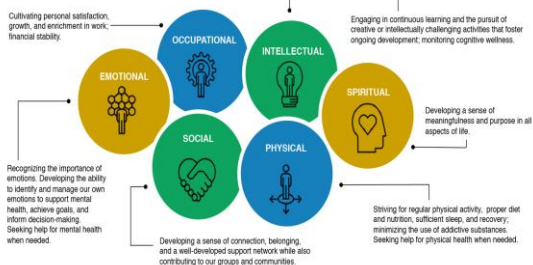
- P.R. Krill, R. Johnson, & L. Albert
- 10 J. Addiction Med. 46 (2016)

THE PATH TO LAWYER WELL-BEING: Practical Recommendations For Positive Change

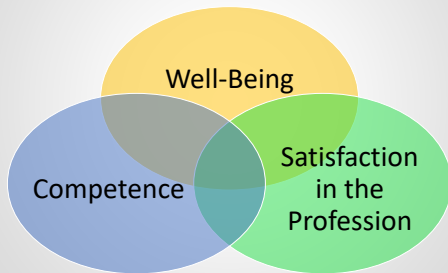
THE REPORT OF THE NATIONAL TASK FORCE ON LAWYER WELL-BEING

What is lawyer "well-being"?

A continuous process in which lawyers strive for thriving in each dimension of their lives:



Relevant to all Practitioners



Tips for Success

1. Prioritize health
2. Set and honor boundaries
3. Know your triggers
4. Develop coping mechanisms
5. Utilize resources, such as Colorado Lawyer Assistance Program and OCR
6. Rule of 3



ADDITIONAL RESOURCES

Office of Child's Representative
➤ coloradochildrep.org
Office of Attorney Regulation Counsel
➤ coloradosupremecourt.com
Colorado Lawyer Assistance Program (COLAP)
➤ coloradolap.org
Colorado Attorney Mentoring Program (CAMP)
➤ coloradomentoring.org
Colorado Bar Association: cobar.org
➤ Law Practice Management
➤ Casemaker
➤ Member benefits
Ethics Hotline – 303-860-1115