

UNDERSTANDING CONFIDENTIALITY ISSUES IN MULTI-DISCIPLINARY TEAMS

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Why Ethics Matters

- ▶ Juvenile Defense Teams are oftentimes composed of professionals from different disciplines, who have different professional and ethical obligations.
- ▶ Practitioners need to understand the rules to work together.
- ▶ We need to be able to justify our behavior and decision-making if asked.

Juvenile Defense Team

- ▶ A Juvenile Defense Team many times consists of:
 - ▶ Defense Attorney
 - ▶ Investigator
 - ▶ Social Worker

CRPC 1.6 Confidentiality of Information

- ▶ “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”

CRPC 1.6 Confidentiality of Information

- ▶ “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”
- ▶ (b) A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - ▶ (1) to prevent reasonably certain death or substantial bodily harm;
 - ▶ (2) to reveal the client’s intention to commit a crime and the information necessary to prevent the crime;”

Confidentiality for Juveniles

- ▶ Colo. Rev. Stat. § 13-90-107
- ▶ Waiver of the privilege of confidentiality. *People v. Curren*, 348 P.3d 467 (Colo. App. 2014)
- ▶ Consent

CRCP 1.14

- ▶ “(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of **minority**, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

CRCP 1.14

- ▶ “(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- ▶ (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”

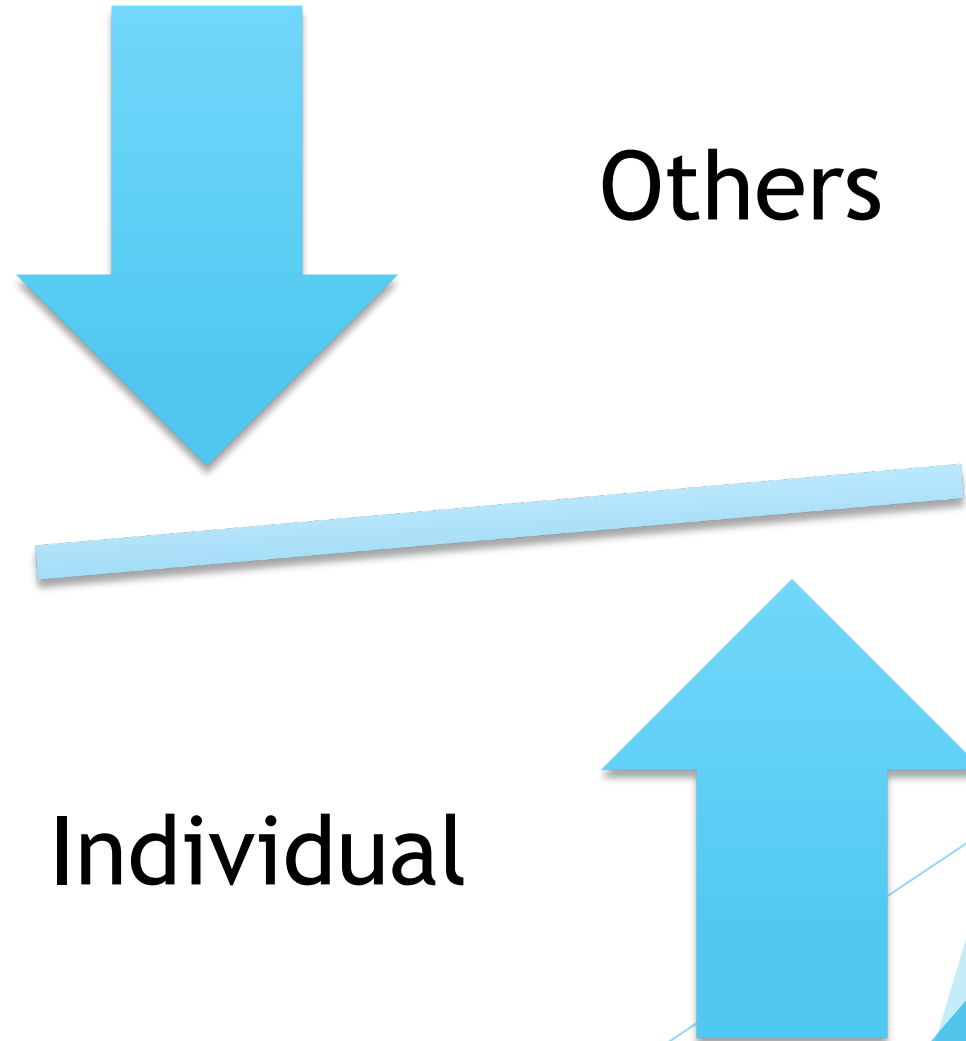
Hypothetical #1

- ▶ Your 16-year-old client comes to your office for a first meeting; his father arrives with him. His father wants to sit in on your meeting. Do you have to let the father attend the meeting? Should you let the father attend the first meeting?
- ▶ If his father does attend the meeting, does the father share the attorney-client relationship?
- ▶ Father is unable to attend the meeting, but he calls afterward to see what you talked about with his son. Do you tell him?

NASW Code of Ethics

Core Values:

- ▶ Service
- ▶ Social Justice
- ▶ Dignity and worth of the person
- ▶ Importance of human relationships
- ▶ Integrity
- ▶ Competence



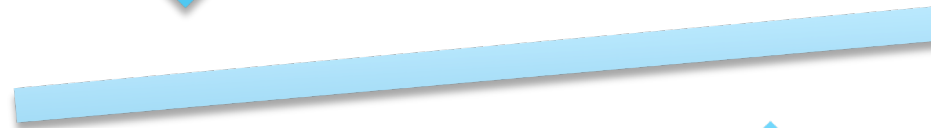
NASW Code of Ethics

Responsibilities:

- ▶ To Clients
- ▶ To Colleagues
- ▶ In Practice Settings
- ▶ As Professionals
- ▶ To Social Work
- ▶ To Broader Society



Individual



Others



Mandated Report: Child Abuse

STANDARD: Reasonable cause to know or suspect that a child has been abused or neglected.

RESPONSIBILITY: Report to county department, LEA, or abuse hotline

WHO: Social worker, mental health professional, licensed counselor and therapists

Section 19-3-304, C.R.S.

Civil Liability: Duty to Warn

Duty to protect or warn a third party only if the therapist actually believed or predicted that the patient posed a serious risk of inflicting serious bodily injury upon a reasonably identifiable.

- ▶ *Tarasoff v. Regents*

Authority that protects us:

CRPC 1.6

+

Section 13-90-107, C.R.S

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Sixth Amendment

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Fourteenth Amendment

+

Case Law About Defense Witnesses & Agents

+

Work Product Doctrine

CRCP 5.3

- ▶ “With respect to nonlawyers employed or retained by or associated with a lawyer:
 - ▶ (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
 - ▶ (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - ▶ (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - ▶ (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Models of Practice

NLADA: The Interdisciplinary Defense Team & Confidentiality

- ▶ Integrated Model or “Hand in Hand”
- ▶ Parallel Services Model or “Side by Side”
- ▶ Consultancy Model

National Legal Aid and Defender Association. (2016). The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know.

Because we
have ethical
obligations that
are tied to your
ethical
obligations...

- ▶ We have to talk... ASAP
- ▶ We have to tell you everything we know...
- ▶ We have to report to a SW supervisor too....
- ▶ After thorough discussion with both you and the supervisor, we have to follow your direction.....
- ▶ We need to document what needs documenting.....
- ▶because we are a member of the team we are bound by your confidentiality rules
- ▶ AAANNDDDD because we are a member of the team.....

Team Members

- ▶ Are covered by privilege and confidentiality
- ▶ Are meeting with the client regularly
- ▶ Are collecting and reading all the records
- ▶ Are reviewing all of the discovery
- ▶ Are engaged in team meetings and strategy
- ▶ Are interviewing good and bad witnesses
- ▶ Are consulting with the team
- ▶ ARE THE DEFENSE TEAM (are representing client)
- ▶ Are GOAL DRIVEN advocates

CRCP 1.2

Scope of Representation

- ▶ “(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued... A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

Multidisciplinary Team (MDT)

- ▶ In a multidisciplinary team, “team members remain responsible for fulfilling their own professional roles while learning to take others’ roles and responsibilities into consideration.” U.S. Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (1998). *Forming a multidisciplinary team to investigate child abuse*. Washington, DC.
- ▶ GALs and Defense Attorneys serve different professional roles. When a Juvenile’s team includes both a GAL and a Defense Attorney, it is important that they understand the purposes and limitations of each other’s roles in order to effectively advocate for the Juvenile’s stated or best interests.
 - ▶ Both GALs and Defense Attorneys may utilize an SW/CC to enhance their professional role. In both circumstances, the SW/CC is legally an agent of the GAL or Defense Attorney utilizing their services.
 - ▶ Other members of MDT

Hi, I'm a GAL, How Do You Do?

In Colorado, GAL's are fully licensed attorneys, and thus are required to zealously advocate for their client (RPC 1.3).

CJD 04-06 V.E.3 requires that the GAL's advocacy be based on an independent investigation into:

- the juvenile's functioning, needs, and circumstances;
- the availability of defense counsel;
- whether a home or placement is in the juvenile's best interests and consistent with his or her rights;
- whether services and treatment provided address the juvenile's unique needs;
- whether there is any reason to believe the juvenile is incompetent to proceed;
- whether the juvenile understands the proceedings and the immediate and long-term consequences of his or her decisions throughout the proceedings;
- whether those consequences are consistent with the juvenile's best interests;
- the existence of any other pending cases involving the juvenile; and
- the need for court orders addressing family issues and parental accountability, including the filing of a dependency and neglect proceeding.

GAL Sleuthing



- Personally conduct a timely in-person meeting with the child in a setting that promotes meaningful communication. Ensure the child understands the role of the GAL, distinction between the GAL's role and that of defense counsel and limitations on the GAL's duty of confidentiality (section V.B). Obtain information relevant to the juvenile's best interests.

“The GAL's interview of the juvenile differs in important ways from the interview by defense counsel. The GAL's responsibilities do not include litigating the facts related to the charges or providing legal advice to the juvenile, and the GAL's interview and ongoing contact with the juvenile should not involve communication that is the responsibility of defense counsel, such as discussion about the facts of the case, advice about case objectives or information about legal strategy. The GAL's initial interview and ongoing communication with the juvenile should elicit information relevant to the juvenile's best interests, including information on topics enumerated in section IV.E.3”- Commentary to CJD 04-06 V.E.1

- Interview parents, kin, and current and potential placement providers;
- Interview other professionals or individuals necessary to assess and advocate for the juvenile's best interests, such as school personnel, pretrial service staff, probation officers, and treatment providers
- Repeat the above as needed for up-to-date information
- SW/CC can and ideally would be involved with clients who may have cognitive challenges/MH issues.



"The investigative activities required by this Section V.E.3 that are not personally assigned to the GAL may be performed by a qualified professional acting as an agent of the appointed GAL under the GAL's supervision."- Commentary to CJD 04-06 V.E.3

The 2 activities personally assigned to the JD GAL under CJD 04-06:

- Advocacy at court hearings
- The initial out-of-court interview with the juvenile (the GAL must be there, but if CC is able to join even better. CC can bring a second perspective immediately for short- and long-term planning.)

CCs can support the GAL role in any other activity. There are times where the CC's qualifications may bring a viewpoint or information to a case that would be unavailable to the GAL alone. For example, a CC may have:

- a broader knowledge of community resources specific to a specialized need of the juvenile
- a better understanding of a specific treatment model and who benefits from it
- the understanding needed to translate non-legal concepts such as IEP accommodations or mental health triggers and coping skills into a courtroom setting
- the CC can help by translating legalese into something the youth can understand according to their abilities. SW/CCs are trained to think in a systems approach that takes the legal realities into account but also evaluates all outside factors that may effect the legal case.

Ethics? Who needs 'em...

“All attorneys appointed as GALs shall be subject to ALL of the rules and standards of the legal profession. The unique statutory responsibilities of a GAL do not set forth a traditional attorney-client relationship between the appointed attorney and the child; instead, the “client” of a GAL is the best interests of the child. The ethical obligations of the GAL, under the Colorado Rules of Professional Conduct, flow from this unique definition of “client.” Because of this unique relationship, an 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. A determination by the GAL of a child’s best interests must include consultation with the child in a developmentally appropriate manner (SW/CC much??) and consideration of the child’s position regarding the disposition of the matter before the court. A GAL must also explain to the child the limitations on confidentiality.” CJD 04-06 V.B

Ethics

For

Everyone



!!

CJD 04-06 indicates that CCs are acting as agents of the GAL. Since all the rules of professional conduct apply to GALs, that would mean Rule 5.3 does too.

“Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline”- Comment 2 to RPC 5.3

- 1.1 (competence)
- 1.2 (allocation of authority)
- 1.4 (communication with client)
- 1.6 (confidentiality)
- 5.4(a) (professional independence of the lawyer)
- 5.5(a) (unauthorized practice of law)

In short- the GAL needs to make sure that the CC understands and complies with any rule of ethics that would be applicable to the situations that arise in each responsibility assigned to the CC.

Mandatory Reporting, Social Work Ethics, HIPPA, the whole Shebang.

Not all of these apply to all CCs

- There is still the training and professional expectations that have a common understanding with SWs or licensed professionals with similar background.
- GAL CCs come from a variety of different backgrounds. (Education/Disability, Therapy, DHS.)
- Some GAL CCs are part time and do other jobs in addition to being CCs. The various laws and regulations a CC must comply with when performing their additional job may not apply when performing tasks on cases for the GAL.
- **Clear communication is key, as with anything but especially in this area.**
- CC is different than the professional hired for an evaluation.
- Anyone can report a case.

GAL vs CC

The Grudge Match

Before there is a conflict, develop a protocol for how potential ethical issues will be discovered and discussed. The GAL is responsible for creating this system and making sure the CC understands the system and when it needs to come into play (RPC 5.3)

- Example: anytime the CC believes they are ethically obliged to share information with someone other than the GAL (or, if in a law firm with more than one attorney, outside of the firm), the CC will first notify the GAL about the information, how they received it, who they feel it needs to be shared with, and why they believe they have a duty to provide that information outside the firm. The GAL should review the information and provide a response within a short period of time (eg, 24 hours). If additional discussion is needed, that happens as soon as possible.
- Remember that both the GAL and the CC can reach out to an OCR staff attorney or the Case Consultant Coordinator to brainstorm and/or get additional perspectives

Talk to each other and seek to understand each other's perspective and see if there is a solution that promotes the juvenile's best interests while satisfying the ethical requirements on both the GAL and CC

- Take the time to understand WHY each professional is taking a particular position

Ultimately, if there is no resolution, because the CC is the agent of the GAL, the GAL makes the final decision on whether the information is shared.

Communication
Communication
Communication
Communication
Communication
Communication
Communication

(Did I mention
communication...)

Discuss anticipated advocacy areas with the GAL/CC prior to the activity.

Ensure both of you know the relevant facts

Ensure the sharing of expertise in forming the position

If there is disagreement between the GAL and CC, ensure the CC knows the final position and

- Can advocate for it, or,
- If some ethical or other obligation prevents the CC from advocating for the position s/he disagrees with, discuss how the CC will communicate to those outside the GAL-CC team that the GAL will address that advocacy area personally

If an unexpected advocacy area comes up in and the CC is unaware of the GAL's position, the CC should be comfortable deferring the decision until the CC and GAL have time to consult. If this comes up:

The CC should gather as much information as possible about the positions of the other involved persons and facts/expertise supporting those positions (advocacy role vs. investigative role)

Advocacy can include the CC asking questions to make sure all avenues have been explored, even without taking a final position

The CC should communicate the information to the GAL as soon as possible, if not during activity. CC should not share any personal positions prior to discussing it with the GAL.