

WHO AM I AND WHAT IS MY ROLE? GAL ROLE, RESPONSIBILITIES, AND CONSIDERATIONS

Core Competencies I: Orientation for
New Attorneys & Case Consultants
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Introductions

- ▶ What are you most looking forward to about being a GAL/CFY?
- ▶ What are your main questions, concerns as you transition into this role?

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Goals of this session

- ▶ Understand the unique role of the GAL, CLR, and Counsel for Youth
- ▶ Understand the ethical obligations of the role of the GAL
- ▶ Identify practice standards and sources
- ▶ Get to know one another and brainstorm strategies and solutions for handling challenges of representing children

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Youth Feedback:

"She always was honest with me and answered all my questions the best she could."

"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's probably the best person I've met on my team. He always wants to know how I'm feeling and he understands me a lot, and I really like that about him."

"My GAL makes me a priority at all times no matter what is happening in her personal life."

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Sources of Authority

- ▶ Statute
- ▶ Chief Justice Directive
- ▶ Case law
- ▶ Contract

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CJD 04-06 background

- ▶ 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.
- ▶ OCR is statutorily charged with making recommendations to the Chief Justice concerning establishment of practice standards.

§ 13-91-102(1)(a), § 13-91-105

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More about CJD 04-06

- ▶ Establishes Colorado's GAL practice standards as a source of law, order of the court.
- ▶ Helps define GALs' ethical responsibilities under the Colorado Rules of Professional Conduct.
 - ▶ Specifically states GALs/CLRs are subject to all rules and standards of legal profession. **§ V.B.**
- ▶ Governs OCR's oversight and attorney evaluation processes.

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APPOINTMENT

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THE CLIENT

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Scenario #1

You are GAL for Kaley, age 14. Kaley is no longer feeling supported by her grandmother and wants to return home to her mother. Ms. Abrams, her mother, is out on bond but indications are that she has not begun to comply with her treatment plan, has no plans for getting Kaley to school, and lacks stable and adequate housing.

- ▶ *Who determines what position you will take in court?*
- ▶ *If not Kaley, what role do her wishes play in this position?*
- ▶ *How do you discuss your position with Kaley?*
- ▶ *What do you tell the court?*

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Colorado Rules of Professional Conduct

- ▶ Colo. Rule Prof. Cond. 1.2
 - ▶ Client sets objective; lawyer sets strategy in consultation with client.

§ V.D.1.

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Best Interests of The Child

- CLR and GALs do not have traditional attorney-client relationship with child.
- Client of GAL/CLR is best interests of child.
 - ▶ Relevant for analysis of Colorado Rules of Professional Conduct.

§ V.B., *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).

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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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Courtroom Advocacy

- ▶ CJD 04-06 provisions regarding stating youth provision:
 - ▶ A GAL in a D&N case shall 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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Strategies: Scenario #1


- ▶ How do you empower Kaley even if you cannot support what she wants to have happen?
- ▶ 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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Scenario #2


- ▶ Kaley and Abe (age 2) have been having weekly visits with each other, supervised by Kaley's paternal grandmother. After the last visit, Abe's foster parent noticed significant bruising on Abe. Kaley's grandmother reported that she left Kaley and Abe unattended in the living room and when she came back found Kaley hitting and shaking Abe. Depending on the results of the investigation, Kaley may face juvenile charges.

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Can you continue to
represent both Kaley and
Abe as their GAL?

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Rules and Guidance: 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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Other Complications: Scenario #2

- ▶ The realities:
 - ▶ Rural jurisdiction
 - ▶ Judicial pressure
 - ▶ No one else is getting off
 - ▶ Continuity of representation

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

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Scenario #3

- ▶ As a result of your creative and effective advocacy, Kaley has returned home to her mother. During one of your visits, she reports that her mother's drinking has resumed.
- ▶ A few days ago, her mother insisted on driving her to the store while she was intoxicated. She reports that her mother was swerving and that it was scary.
- ▶ She doesn't want to return to her grandmother's house, as she feels betrayed by the allegations her grandmother made about Abe.

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Rules and Guidance: Scenario #3

- ▶ Colorado Rule of Prof. Cond. 1.6
 - Requires informed consent or implied authorization.
 - Applicability to best interests client?
- ▶ *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).
- ▶ 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.
- ▶ Statutory Provisions
 - § 19-3-304: GAL is not mandatory reporter.

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D&N GAL RESPONSIBILITIES

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Party Status of 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 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

► § 19-3-702(5)(e)

- In EPP cases when a child is not in a permanent home by 12 months, the GAL must provide a written or oral report at each permanency hearing specifying what efforts have been made and what services have been provided to facilitate identification of a permanent home.

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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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Court Coverage

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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Initial Visit Requirement

- ▶ Need to *personally* visit in placement within 30 days after appointment.
- ▶ Need to visit even if you already know the child through an existing appointment (i.e., JD).

§ V.D.4.a

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100 –MILE EXCEPTION

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

§ V.G

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Change of Placement Visit

- ▶ Change of placement visit is 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 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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Maintaining Contact with Child

- ▶ GAL must continue to maintain contact and ongoing communication with the child in order to:
 - 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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Comments from OCR's LEAP

"I think what I would like, for everybody who works in a system to see is that the more often youth see their GALs, I think they can build that trusting relationship where they can feel like they can talk to them. Because I know that you know especially when they have bad experiences, or when they don't feel like their GALs contact them very much, they don't really speak they don't really want to participate, you know because it's kind of pointless to them."

"I think it's important that they know who's representing them and they kind of know who's on their side when . . . they're coming from a place where they're not sure who's on their side and who to trust right now and stuff, so I think making that connection is really important."

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Initial Investigation (45 days)

► 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 (45 days)

► 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 (diligent efforts).
- 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-hand 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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CJD Compliance Form

DCR D&N CJD COMPLIANCE FORM

Case Number: _____

GAL: _____ Appointment Date: _____

Attended all court hearings? Y N Missed dates: _____

	Child 1	Child 2	Child 3	Child 4
1st days	INITIAL IN PLACEMENT VISIT			
	In placement visit			
	INITIAL INVESTIGATION			
	Interview Placement provider			
	Interview Parent 1			
	Interview Parent 2			
	Interview Parent 3			
	Interview Parent 4			
	Observe interaction Parent 1			
	Observe interaction Parent 2			
4th days	Observe interaction Parent 3			
	Observe interaction Parent 4			
	Review Court files, reports, records			
	First hand info- CW			
	First hand info- CASA			
	First hand info- Relatives			
	First hand info- School			
	First hand info- Therapist			
	Diligent search			
	ONGOING INVESTIGATION			
Ongoing	Maintain contact with child			
	Contact with placement providers			
	Contact with Caseworker			
	Contact with CASA			
	Contact with other professionals			

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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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D&N Appeals

- ▶ GAL must
 - Personally file a pleadingOR
 - Formally joining another party's pleading

§ V.D.6

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Transition Age Youth

- New program for “eligible youth”
- Youth-centered, voluntary
- Youth opts into program, resulting in dismissal of D&N/Article 3 proceeding and new proceeding under FYTP/Article 7 (exception for incapacitated youth).
- GAL becomes client-directed counsel at age 18 (with youth consent).
 - Youth is advised and Conflict of interest may require new attorney as counsel.
 - If youth deemed incapacitated, GAL stays on and new counsel is appointed.
- Eligible youth can reenter at any time until 21 or greater age allowed by federal law.
 - In pre-petition cases, counsel is assigned by OCR

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Juvenile
delinquency/direct file

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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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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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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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JD 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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Independent Investigation Topics

- ▶ 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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JD Independent Investigation Timing

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

§ V.E.3

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Who can do the investigation

- 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.

§ V.E.3

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Impact of Existing Appointments

- ▶ 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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Ongoing Investigation/Contact

- Maintaining contact and ongoing communication—not just in court. §V.E.4.
- Within 7 days of detention if juvenile is detained (diligent efforts). Other applicable duties listed in §V.E.2.
- If the juvenile is in an out-of-home placement, the GAL's assessment of the placement shall include an examination of the conditions of the juvenile's confinement or placement and the impact of those conditions on the unique needs of the juvenile. §V.E.3.c.

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100 –MILE EXCEPTION

- ▶ Also applies to delinquency cases!

§ V.G

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Non-Party Status of Delinquency 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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Scenario #4

Kaley, unfortunately, does get charged for assault against Abe. The court does order her into detention. She is represented by a defense attorney who makes an argument against detention but does not propose other alternatives to the court. You strongly believe that she is not a danger to the community or Abe and that sufficient protections can be put into place to allow her to stay with either her grandmother or mother.

How do you present this information to the court?

How do you work with defense counsel, given the concerns you have about her representation?

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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 document

§ V.F

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Domestic Relations

► § 14-10-116

- The legal representative of the child shall not be called as a witness in the case.
- While the legal representative of the child shall ascertain and consider the wishes of the child, the legal representative of the child is not required to adopt the child's wishes in his or her recommendation or advocacy for the child unless such wishes serve the child's best interest as described in 14-10-124.

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Domestic Relations

► § 14-10-116

- Within seven days after his or her appointment, the appointed person shall disclose to each party, attorneys of record, and the court any familial, financial, or social relationship that the appointed person has or has had with the child, either party, the attorneys of record, or the judicial officer and, if a relationship exists, the nature of the relationship.

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OTHER CONSIDERATIONS

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Can a GAL be called as a
witness?

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GAL as Witness

- ▶ 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.
- Colo. Rule Prof. Cond. 3.7 (Lawyer as Witness)
 - ▶ Some exceptions, including substantial hardship on the client.

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

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Case Dismissal

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

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Does the GAL have a right
to be notified of
placement changes?

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Placement Changes

- ▶ § 19-3-213(1)(a)
 - Duty to notify D&N GAL prior to change of placement; right to seek emergency hearing if disagrees.

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Should GAL be given a copy of relative/kin affidavit?

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Relative/Kin Affidavit

- ▶ § 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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What are some other considerations GAL should be aware of?

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ICWA & UCCJEA

- ▶ Examples of two areas where GAL independent investigation and advocacy is critical.
- ▶ ICWA
 - ▶ GAL has important role in ensuring compliance with ICWA. *People in Interest L.L.*, 395 P.3d 1209 1212-16 (Colo. App. 2017).
 - ▶ GAL's independent investigation must include assessment of any potential tribal affiliation. CJD 04-06(V)(D)(5).
 - ▶ GAL should promote inquiry, notice, procedures, and findings/record that comply with ICWA.
- ▶ UCCJEA
 - ▶ GAL should investigate and ensure court inquires where the child has lived over the last five years and whether there are any other cases/orders out of other states.
 - ▶ GAL should ensure court makes a record of any communication court has with other states.

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Confessions

- ▶ 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.
 - ▶ HB 19-1315 provided an additional protection where a juvenile asserts the responsible adult had an adverse interest but does not change caselaw that GAL may satisfy the responsible adult requirement.

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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.*

- ▶ Guidance re parent:
- ▶ Guidance re child: "too young or otherwise incompetent."
 - In FN 1, court declines to provide additional guidance.
 - 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.

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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Scenario #5

In the D&N case, Kaley has begun to see a therapist. How will you go about talking to her about the psychotherapist-patient privilege and determining whether she or someone else should hold the privilege?

If you determine Kaley should be the holder of her own privilege, what are your next steps?

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LEAP feedback on what new GALs should know:

Know what the youth wants.

Don't always be set in your way.

Don't have a "one size fits all" approach.

Not all youth are the same.

*Complicated problems may have complicated (or no)
solutions.*