CJD 04-06 Revisions

OFFICE THE CHILD'S REPRESENTATIVE (OCR)
NOVEMBER 8, 2022

1

Session Overview and Goals

Goals

- Review additions and revisions to CJD 04-06
- Explain reasoning and rationale for revisions and additions
- Discuss challenges and opportunities
- Share OCR's plan for resources and supports—and get feedback

Overview

- Conceptual overview of the changes
- Deep dive into various sections

2

CJD 04-06 Summary

- Update appointment authority and payment provisions
- Define professional responsibilities and role of CFY/GAL
- Guidance regarding conflicts and diminished capacity
- Emphasize youth contact through organization and guidance
- Further define advocacy responsibilities of CFY/ GAL in D&N
- Update investigative requirements in D&N (same for both GAL and CFY)
- FYTP practice standards
- Delinquency cases: coordination of representation and update reference to youth
- EDI principles and guidance

3

Appointment Authority

4

GAL and CFY appointment updates

CFY shall be appointed for youth age 12+ in D&N.

- GAL shall begin acting as CFY immediately upon youth's 12th birthday; unless court finds GAL appointment is necessary due to diminished capacity (court must then appoint separate CFY).
- New counsel must be appointed if attorney asserts conflict of interest for sibling group.
- Right to CFY in D&N may not be waived.
- Court may also appoint counsel for youth under 12 if necessary to protect interests of the child.

If CFY is appointed in D&N, court shall also appoint CFY in the adoption/relinquishment proceeding.

OCR is responsible for payment of CFY in D&N proceedings and mandatory CFY appointments in relinquishment/adoption.

§§ I.B.3, I.B.5, III.B, III.L

5

GAL appointment updates

GAL in D&N case continues until child is 12; court may continue GAL appointment when court determines that GAL is necessary due to diminished capacity.

- Age or developmental maturity may **not** be the sole basis for diminished capacity determination .
- GAL may not be a substitute for appointment of CFY.

GAL for minor parents in D&N.

- GAL may be appointed if parent has been determined to have a behavioral or mental health disorder or an intellectual and developmental disability by a court of competent jurisdiction.
- GAL is no longer a mandatory appointment for minor parents upon filing of TPR.

§ III.A

6

OCR Resources

- ✓ **Notice re transition**
- ✓ **Appointment order**
- ✓ **Motion for appointment of GAL**
- ✓ **Motion opposing appointment of GAL**
- ✓ **Age 12 checklist**

7

Professional Responsibilities

8

Role and Responsibilities

9

GAL/CLR role

- GAL/CLR do not have a traditional attorney-client relationship. Client is best interests of child/youth and Colo RPC flow from unique definition of client.
- Duty of confidentiality does not apply if information must be shared to ensure best interests.
- A GAL or CLR must explain to the child or youth their role and these limitations on confidentiality **and should check periodically on the child or youth's understanding of the role and limitations.**
- The GAL or CLR must consult with child/youth in developmentally appropriate manner and should consider child/youth's position in determining best interests.
- **GAL or CLR should explain determination for the child or youth's best interests and the basis for that determination in a developmentally appropriate manner.**
- **In determining best interests, GALs and CLRs should engage in an ongoing inquiry to avoid inserting personal desires, values, and beliefs into their assessment and to continually reflect on and work to mitigate their own biases. The GAL or CLR should endeavor to uncover what triggers their biases, employ investigative processes that use objective criteria to guide their advocacy recommendations and decision-making, and consider the legal rights and protections available to the child or youth.**

§ V.B.1

10

CFY Role

Child/youth is CFY's client; Colorado RPCs are analyzed in light of this attorney-client relationship.

The CFY must strive throughout every phase of the proceeding to:

- engage in developmentally appropriate communication with the youth
- continue to advise the youth client of their rights, the subject matter of the litigation, the CFY's role, what to expect in the legal process, and options available to the youth.

Developmentally appropriate communication means structuring all communication to account for the individual youth's age, level of education, cultural context, and degree of language acquisition to ensure the youth's ability to provide client-based directions regarding the objectives of the representation.

§ V.B.2

11

Commentary re CFY role

- *Duty to explain in a developmentally appropriate manner that supports **maximum input** in determining position.*
- *CFY should inform youth of relevant facts, applicable laws, ramifications of various provisions.*
- *Colo. RPC 1.2 delegation—CFY makes decisions with respect to manner of achieving objective.*
- *CFY may express an opinion re likelihood of success and share experts' recommendation, CFY's assessment of case and best position to take, and reasons underlying CFY's recommendation.*
- *CFY must remain aware of power dynamics and strive to understand what factors are influencing, strive to ensure that the youth's expressed preferences reflect the youth's actual position.*
- *CFY should attempt to determine what factors have been most influential or confusing/glided over by youth.*

§ V.B.2 commentary

12

Commentary re CFY's duty of confidentiality

In explaining CFY role to youth, CFY must explain duty of confidentiality under Colo. RPC 1.6 as well as limitations.

*CFY may advise the youth of implications of sharing or not sharing information but **must** explain that it is the youth's decision whether the CFY will share confidential information.*

§ V.B.2 commentary

13

Commentary re CFY's ability to request a GAL

- *Age or developmental maturity alone may not be basis for CFY's request of GAL appointment.*
- *Attorney considering protective action must consider Colo. RPC and whether **all** factors authorizing protective action under Colo. RPC apply.*

§ V.B.2 commentary

14

Commentary re transition from GAL to CFY

*Attorney should **discuss new role with youth.***

*Attorney should **take actions necessary to protect the rights and interests of the youth AND siblings** (if youth is part of sibling group).*

Examples of such actions:

- *Notifying court of change in appointment*
- *Analyzing for conflicts of interest*
- *Creating a separate client file when necessary to protect confidentiality.*

§ V.B.2 commentary

15

Duty of Loyalty

16

Transition from GAL to CFY role

The possibility/actuality that the attorney will take positions as CFY contrary to previous provisions the attorney took as GAL or that the attorney shared information about the child as GAL does **not** by itself create a conflict of interest under Colo. RPC 1.9.

§ V.B.4.a

17

Conflicting roles for the same youth

An attorney can **never** simultaneously serve as both GAL and CFY for same child/youth.

Attorney must decline any appointments that present this conflict of interest.

§ V.B.4.c

18

Sibling representation

- GALS, CLRs, and CFY may be appointed to represent multiple siblings if the attorney does not assert a conflict of interest.
- Attorney should assess at outset of the proceeding and **decline** appointment for one or more siblings if conflict exists.
  - If transitioning to CFY assess whether new responsibilities to youth client conflict with responsibilities to best interests of other siblings using CRCP 1.7 & 1.9
- An attorney's assessment of conflicts must be case-specific, as **joint representation of a sibling group alone does not create a conflict of interest**.
- CFY and GALs should
  - engage in developmentally appropriate communication to assess for conflicts,
  - explain conflicts and their implications, understand the child or youth's position regarding the conflicts,
  - and ensure that any consent required for ongoing representation is informed
  - continue to assess for conflicts throughout joint representation and, if conflict develops **take action to ensure the interests of any member of sibling group are not prejudiced.**

§ V.B.4.b

A **concurrent conflict** exists under Colo. RPC 1.7 if:

- representation of one client will be ***directly adverse*** to another client
- there is a **significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client** or a third person or by a personal interest of the lawyer.

19

Sibling Representation

In **implementing the informed consent provisions** of Colo. RPC 1.7 and 1.9 (*i.e., if conflict exists*):

- a CFY may rely on the **informed consent, confirmed in writing**, of a youth age 12 or older
- a GAL may rely on their **determination that the representation does not adversely impact the best interests of the child** and must document this determination in writing.

Attorney must make sure **all other requirements** for continued representation are met.

§ V.B.4.b

20

Duty of loyalty commentary

*The value of **preserving connections for children, together with the importance of the sibling relationship**, support the appointment of a single attorney to represent siblings to the greatest extent possible.*

*At the same time that attorneys must abide by their professional duty of loyalty to their client, attorneys for children and youth should also **seek to preserve continuity of legal representation and avoid unnecessary case transfers whenever possible**.*

Early and thorough assessment helps attorneys prevent need to conflict off at a time continuity would be negatively impacted.

Attorneys appointed as GAL, CLR, and CFY should continue to assess for conflicts but need not withdraw if there is a mere possibility that a conflict of interest will develop.

§ V.B.4.b

21

Duty of loyalty commentary

*In analyzing conflicts under Colo. RPC, attorneys may consider that following circumstances alone will **not create a conflict:***

- *Siblings are of different ages*
- *Siblings have different parents*
- *There is purely a theoretical or abstract conflict of interest among siblings*
- *Attorney previously represented one or more of siblings in another proceeding*
- *Some of siblings are more likely to be adopted than others*
- *Siblings have different permanency plans*
- *Siblings express conflicting desires or objectives, but the issues are not material to case*
- *Siblings give different or contradictory accounts of events, but issues involved are not material to the case.*

§ V.B.4.b

22

Duty of loyalty commentary

If a conflict develops, in assessing whether the Colorado Rules of Professional Conduct require an attorney to withdraw from representing one or all children in a sibling group, the attorney should consider whether

- *The attorney **has exchanged confidential information relevant to the conflicting issue** with any sibling whose interests conflict with those of the siblings the attorney continues to represent*
- *Continued representation of the sibling(s) would otherwise **prejudice any other sibling formerly** represented by the attorney.*

§ V.B.4.b

23

OCR Resources

- ✓ **Engagement letter**
- ✓ **Talking points for youth about role**
- ✓ **Diminished capacity decision framework and training (November 16th)**
- ✓ **Sibling conflicts decision framework and training (November 30th)**
- ✓ **Safety guide training and resources**
- ✓ **Case Consultants**

24

Advocacy Responsibilities

Dependency and Neglect

25

Reasons for changes to advocacy responsibilities

- ✓ Better reflect national standards.
- ✓ Address questions/potential issues raised regarding children/youth as parties.
- ✓ Address new notice requirements.
- ✓ Acknowledge right to attend court.
- ✓ Support attorneys' attendance at meetings and staffings.
- ✓ Promote coordination of representation between proceedings.

26

Advocacy updates

Attorneys shall **provide legal advocacy throughout the proceeding**.

- Attend all court hearings
- Provide **developmentally appropriate notice** and **advance the child/youth's right to attend court**.
- Exercise **discovery** necessary to provide effective representation and advocate against discovery requests that are unduly burdensome, unreasonable, outside the legal scope of discovery, or made for improper purposes.
- **Attend meetings and staffings** concerning the child or youth as needed.
- As necessary, **coordinate legal representation** on D&N case with legal representation by GALs on other cases.
- Advocate for findings regarding the holder of the child's or youth's **psychotherapist-patient privilege** when necessary to protect the rights and interests of the child or youth.

§ V.D.1

27

Attend all hearings

As **GAL**, advocate for child's **best interests**.

- Present relevant independent information through recommendations, motions, witness examination
- State child's position when ascertainable (unless child informs GAL that they don't want position reported)

As **CFY**, advocate for youth's **expressed interests** through:

- Oral or written motions
- Witness examination
- Legal and factual arguments
- Monitoring and advocating for compliance with court orders
- Other legal means

§ V.D.1.

28

Right to attend court

Advance child our youth's right to attend and meaningfully participate by:

- Discussing the court process
- Explaining right to attend court and benefits
- Identifying barriers and advocating for elimination of barriers
- Conducting a post-hearing follow up with the child or youth

§ V.D.1.b

29

Attend all hearings

Attend meetings and staffings concerning the child or youth as needed.

§ V.D.1.

30

Psychotherapist-patient privilege

If appointed privilege holder as GAL:

- Engage in advocacy necessary to protect the child's privilege
- Ensure GAL's exercise of privilege is consistent with best interests AND informed by the child's position

As **CFY**, represent the youth with regard to the exercise of their privilege

§ V.D.1.f

31

OCR Resources

- ✓ **Updated court observation sheet**
- ✓ **Discovery motions**
- ✓ **Notice supports**
- ✓ **Motion for youth court attendance**
- ✓ **Youth in court training (December 9)**
- ✓ **OCR's Youth page**
- ✓ **Appointment order**
- ✓ **Updated privilege motions**
- ✓ **Meetings chart**

32

Child/Youth Contact

Dependency and Neglect

33

Basis for child/youth contact revisions

- ✓ Goal of emphasizing child/youth contact by putting all provisions in one place
- ✓ OCR's Engaging and Empowering Youth work
- ✓ OCR's Lived Experts Action Panel
- ✓ Revised NACC Recommendations

34

Child/Youth Contact Overview

Attorney must engage in **timely, regular and meaningful communication** with the child/youth:

- Conduct an in-person placement visit as soon as is reasonable but in no event later than 30 days following the appointment.
- Conduct an in-placement change of placement visit within 30 days following the change of placement.
- Maintain contact and ongoing communication with the child/youth.

§ V.D.2

35

Initial in-placement visit

Must be as soon as is reasonable but **w/in 30 days**.

GAL

- Interview child if appropriate to developmental level.
- Explain role of GAL and child's rights in developmentally appropriate manner.
- Observe child with caregiver.
- Assess child's placement.

CFY

- Interview the youth.
- Explain the role of CFY and youth's rights.
- Observe the youth with caregiver.
- Assess youth's placement.

§ V.D.2.a

36

Change of placement visit

Must be as soon as is reasonable but **w/in 30 days** following placement change for both GAL and CFY.

§ V.D.2.b

37

Maintain contact and ongoing communication

As GAL, to continue to:

- assess the child's best interests
- consider their position in determining best interests
- state their position to court

As CFY, to continue to:

- advise of legal rights
- educate about legal process
- Inform of case developments and info CFY has gathered through independent investigation
- Provide legal counsel and advice
- Advocate for the youth's objectives

§ V.D.2.c

38

Ongoing contact commentary

- ***Consistent contact and trauma-informed culturally responsive communication are necessary predicates to relationship***
- ***Frequent and intentional*** *communication.*
- *Tailored to youth's* ***individual circumstances and preferences***
- *Flexible,* ***open to child's unique preferences and needs***
- *Face to face, phone calls, video chats, text messages*
- ***Ask children*** *how and when they prefer to communicate*
- *Modify plan to accommodate youth preferences*
- *Do not construe lack of communication as reason to decrease/halt communication—nor should assume youth isn't interested in case*

§ V.B.4.c

39

More guidance regarding youth contact

Youth surveys*: contact correlated with trust, believe GAL knew what was best, desire to attend court.*

LEAP *emphasized importance of quality contact*

- *Listening to children/youth,*
- *Caring, treating them as person as respect,*
- *Periodically revisiting important topics,*
- *Preparing them before court and debriefing after court.*

NACC

- *Before and after each court hearing*
- *Monthly contact (phone call, video visit, in person visit, other meaningful contact/correspondence)*
- *To meet in school or community should be made after consultation about comfort level, discussion of pros and cons, and confidentiality.*

§ V.B.4.c

40

OCR Resources

- ✓ **Talking points document.**
- ✓ **Engagement letter.**
- ✓ **Bill of rights sheets on OCR's youth page.**
- ✓ **CARES reports.**

41

Independent Investigation

Dependency and Neglect

42

Independent investigation (§ V.D.3)

Initial 45 Days	
	Personally meet with placement providers
	Personally interview each parent
	Make diligent efforts to observe child/youth interaction with Parent
	When possible, meet with proposed placement providers and observe child/youth with them
	Review Court files, relevant records, reports and documents
	Obtain first-hand info from caseworker
	Obtains first-hand info from CASA
	Obtain first-hand info from relatives
	Obtain first-hand info from school personnel
	Obtain first-hand info from therapists/treatment providers
	Confirm Diligent Search
	Visit home from which child was removed, when appropriate

43

Interviewing parents commentary

- *In person meeting is not required, but attorney should strive to interview* ***parents in a setting that promotes meaningful and open communication*** *about attorney's role and child's and family's strengths and needs.*
- *Make efforts to* ***conduct interviews outside the courthouse whenever possible****.*
- *Convey to parent that attorney values info they have about their children and families.*
- *Staffings/meetings does not fulfill this requirement.*
- *Pursuant to Colo. RPC 4.2, attorney must obtain consent of RPC to interview parent or use team member to interview parent.*
- *If unable to arrange an interview or obtain consent of counsel, document efforts.*

§ V.D.3.b

44

Initial investigation commentary

The CFY's initial investigation sets the groundwork for the entire dependency and neglect case.

An effective initial investigation is ***critical to providing competent legal advice and counsel to the youth to support the youth in taking well-informed positions.***

An effective initial investigation ***allows the CFY to make early assessments of the case which will support the CFY in advising the youth client*** *about their right to* ***safety****, help the youth client formulate safety plans, discuss* ***permanency goals and family connections****, inform the client about* ***options and possible outcomes****, offer the attorney's best judgment as to how the judge is likely to rule on certain matters and the attorney's opinion, if any, regarding the best course of action, and elicit the client's preferred option and alternative preferences if the court does not accept the client's first choice.*

§ V.D.3

45

Initial investigation commentary

Regardless of role, in conducting this initial investigation, the attorney should explore the ***child or youth's cultural and other identities, religious practices, family traditions, holidays, and extracurricular interests and activities****.*

The attorney should ***continually strive to practice cultural humility, reflect on and work to mitigate the attorney's own biases, and restrain from inserting personal desires, values, and beliefs into their assessment, advice, and advocacy.***

§ V.D.3

46

Ongoing investigation

Continue to perform an ongoing investigation as necessary to represent youth (as CFY) and best interests of the child (as GAL).

Shall include maintaining contact and communication with placement providers, caseworker, CASA, other parties, and other persons or professionals necessary to ensure ongoing and timely assessment/representation of the child's/ youth's interests.

§ V.D.4

47

OCR Resources

- ✓ **Appointment order**
- ✓ **D&N CJD checklist**

48

Appellate Responsibilities

Dependency and Neglect

49

Appellate responsibilities

Ensure the interests of the child or youth are represented on appeal by either personally filing a pleading or formally joining another party's pleading in a manner that represents the child or youth's interests.

§ V.D.5

50

Appellate responsibilities commentary

As allowed by Colorado Appellate Rules, a GAL or CFY of record at the trial level may arrange for appellate representation by another OCR-qualified attorney.

While ***GALs should participate in all dependency and neglect appeals****, a* ***CFY's determination of whether to participate in an appeal and what position to take will be determined by the youth client****.*

A CFY should
- *advise the youth of their right to appeal*
- *take necessary actions to preserve and perfect the youth's appellate rights.*

If the youth directs the attorney not to file an appeal or not take a position in response to another party's appeal, the CFY should advise the youth about the importance of participation in the appellate process. If the youth continues to direct the CFY not to pursue an appeal or not to participate in an appeal after that consultation, the CFY shall document the youth's decision not to file and the consultation that occurred.

§ V.D.3.f

51

OCR Resources

- ✓ **Appellate litigation support list**
- ✓ **Appellate RTC memo series**
- ✓ **Appellate training and qualification**

52

Equity, Diversity, and Inclusion

53

New EDI provisions

- Training—2 CLEs per year
- Determination of best interests
- Developmentally appropriate communication definition
- Independent investigation commentary

54

Delinquency

55

Delinquency updates

"Juvenile" changed to "youth" throughout CJD.

Language added to V.E.3.1 requiring investigation of status of other cases, potential impact of resolution of cases on each other, and coordination of representation on JD case with representation of any GALs/CFYs on other cases as appropriate.

56

Foster Youth in Transition

57

Advocacy Responsibilities

Advocate for the youth's rights to developmentally appropriate, voluntary, and youth-driven services and supports.

Same advocacy requirements as for D&N

MINUS psychotherapist-patient privilege responsibilities.

PLUS both informal and formal advocacy at both the county and state level to ensure the youth has full access to all services and supports provided by Colorado's Foster Youth in Transition

§ V.F.1

58

Youth contact responsibilities

- Initial meeting: In person meeting within 30 days, in location that promotes meaningful and confidential communication but need not be at youth's placement if youth requests meeting elsewhere
- Same maintain contact provisions as D&N and same guidance/commentary.
- NO change of placement visit.

§ V.F.2

59

Independent investigation responsibilities

Contacting professionals, providers, and resources necessary to assess youth service and support needs, advise youth about their legal rights, and provide effective legal advocacy

Given voluntary nature, should be done with youth consent and input

§ V.F.3

60

Independent investigation responsibilities

Should include an assessment at a minimum of youth's rights to the following:

- **Medicaid and other public benefits** enrollment assistance;
- Safe, affordable, and stable **housing**;
- **Employment** or **financial support**;
- Access to health and education **records**, **driver's license**, and/or other government-issued identification card;
- Support in pursuing their **educational goals** and applying for **financial assistance**;
- Criminal/juvenile record **expungemen**t;
- Support in applying for **Special Immigrant Juvenile Status** or other applicable immigration relief;
- Support in accessing **information about relatives, siblings, kin**, and other individuals important to the youth and maintaining and building relationships with those relatives and individuals.

§ V.F.3

61

Independent investigation responsibilities

Continue to perform an ongoing investigation as necessary to represent, advise and counsel the youth.

The CFY should **consult with the youth client** about the scope of this investigation and **obtain necessary authority** for the release of information.

§ V.F.4

62

Independent investigation responsibilities

Ensure the youth's interests are represented in any appellate matters by advising youth of their rights to appeal, taking necessary actions to preserve and perfect the youth's appellate rights, and providing competent representation during any appellate proceedings or arranging for substitute appellate counsel from OCR's approved list of appellate attorneys.

§ V.F.5

63

OCR Resources

- ✓ **FYTP page and resources**
- ✓ **Litigation toolkit**
- ✓ **Monthly FYTP office hours**
- ✓ **Case Consultant program**

64

65

Thank You!

66