



COLORADO OFFICE OF
THE CHILD'S
REPRESENTATIVE

D&N Discovery for GALs and CFY

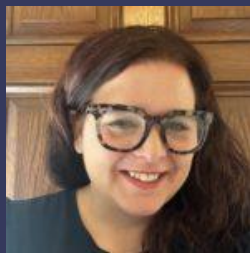
*Discovery Rules, Requests, Responses,
Reviewing (with children/youth),
and Resources*



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Who else is here today?



Please use the chat to type: Your name, years of OCR work, and JD(s) were you do OCR work.

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Please participate.



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1. Rules governing discovery



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The important context
of D&N cases



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Applicable rules and court orders

- CRJP are the D&N rules. CRJP 1.
- If CRJP or Title 19 do not address an issue in a D&N case, CRCP apply. CRJP 1.
- CRJP do not address discovery.
- So, we look to the CRCP. CRCP 26 does not apply to juvenile proceedings or other expedited proceedings unless otherwise ordered by court or stipulated by the parties.
- So, we are left with court orders (such as appointment order and CMOs) and stipulations.



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If discovery rules apply...

- CRCP 26 general rules regarding disclosures and discovery
- CRCP 27 Depositions Before Action or Pending Appeal
- CRCP 28 Persons Before Whom Depositions May be Taken
- CRCP 29 Stipulations Regarding Discovery Procedure
- CRCP 30 Depositions Upon Oral Examination.
- CRCP 31 Depositions Upon Written Questions
- CRCP 32 Use of Depositions in Court Proceedings
- CRCP 33 Interrogatories to Parties.
- CRCP 34 Productions of Documents and Things and Entry Upon Land for Inspection and Other Purposes
- CRCP 35 Physical and Mental Examinations of Persons
- CRCP 36 Requests for Admission
- CRCP 37 Failure to Make Disclosure or Cooperate in Discovery: Sanctions



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Tips and Discussion

Object to orders applying CRCP 26.

Do not stipulate to application of CRCP 26.

Advocate for orders that serve Children's Code purposes including the best/direct interests of children/youth and D&N timeframes.

Reach out to an attorney on the Appellate Litigation Support List or your OCR staff attorney liaison with unusual or contentious discovery issues.



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2. Requesting Discovery



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DO NOT OPEN THE DOOR TO
THE APPLICATION TO THE
DISCOVERY RULES BY
REQUESTING DISCOVERY!

First look to your
appointment order and/or
CMOs.



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If the court ordered that formal discovery applies, what discovery would you request as the GAL/CFY in our fact pattern?



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If formal discovery applies, procedural requirements like the following also apply.

Timing: Unless otherwise authorized by the CRCP, a court order, or a stipulation, discovery may not be requested before service of a CMO. CRCP 26(d).

Notice

- A party who wishes to take a depo must give reasonable written notice. CRCP 30(b)(1).
- Unless otherwise authorized by court order, reasonable notice is no less than 7 days before the depo. CRCP 121 § 1-12(1).
- Before serving depo notice, counsel must "make a good faith effort to schedule it by agreement at a time reasonably convenient and economically sufficient to the proposed deponent and counsel for all parties." *Id.*
- Before scheduling/noticing any depo, all counsel shall confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition." *Id.*

Subpoena

- Attendance at a depo may be compelled by subpoena. CRCP 30(1)(1).
- A subpoena may be served as authorized by court order consistent with due process or by delivery to the deponent. CRCP 45(b)(2). Service is also valid if the deponent signs a written acknowledgement or waiver of service. *Id.*



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Discovery requests must be **signed** and that signature means something.

Discovery requests must be signed by the party's attorney. CRCP 26(g)(2).

Signature is certification that to the best of the attorney's knowledge, information and belief, formed after a reasonable inquiry, the request is:

- (A) **consistent with [the CRCP] and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;**
- (B) not interposed for any **improper purpose**, such as to **harass** or to cause **unnecessary delay** or **needless increase in litigation cost**; and
- (C) not **unreasonable** or **unduly burdensome or expensive**, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues



Discovery requests must be limited in **scope**.

Unless otherwise authorized by court order consistent with the CRCP, discovery is limited to "**any matter,**

- **not privileged,**
- that is **relevant** to the claim or defense of any party
- and **proportional** to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within the scope of discovery **need not be admissible** in evidence to be discoverable." CRCP 26(b)(1).

(Non-D&N) caselaw indicates that the scope is usually broad.



Attorney-client privilege can limit discovery.

ACP protects communications between an attorney and a client related to legal advice. *State Farm Fire & Cas. Co. v. Griggs*, 419 P.3d 572, 575 (Colo. 2018).

The client holds the privilege. *Id.*

The client may waive this privilege expressly or impliedly. *Id.*

The client impliedly waives this privilege by disclosing privileged information to a third party. *Id.*



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Justice can require certain protective orders.

When **good cause is shown** in a motion accompanied by a certificate that the movant has **conferred in good faith** to resolve a discovery issue without court action, a court may issue “**any order which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense.**” CRCP 26(c).

Such protective orders may state that:

- the discovery will **not occur**,
- occur on **specified terms and conditions** or via a **method different** than the one selected by the requester,
- **certain matters not be inquired into**, and/or
- discovery be conducted with **only certain persons present**.

CRCP 26(c)(1-5).



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D&N attorney obligations are consistent with the purposes and limits of discovery.

GALs/CFY must “[e]xercise 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.**” CJD 04-06(V)(D)(1)(c).

RPC must engage in formal discovery “[w]hen needed.” CJD 16-02 (2021), Attachment A, 8.



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3. Responding to Discovery Requests



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DO NOT OPEN THE DOOR TO
THE APPLICATION TO THE
DISCOVERY RULES BY
RESPONDING TO A
DISCOVERY REQUEST!

First look to your
appointment order and/or
CMOs.



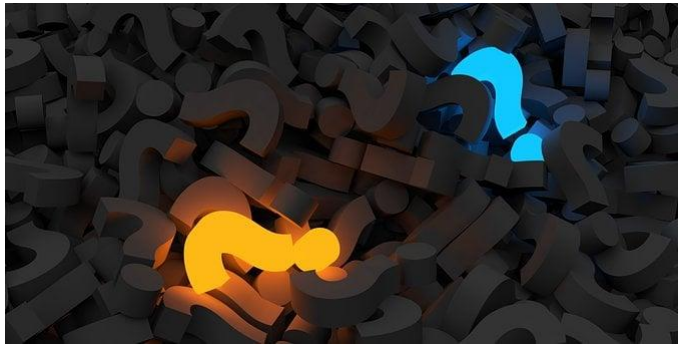
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What discovery request might you receive as
GAL/CFY in our fact pattern? From whom?



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How might you respond to that discovery request?



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File a motion.

Content

1. Conferral pursuant to CRCP 121.
2. CRCP 26 *et seq* do not apply and should not apply.
3. If the court finds that CRCP 26 *et seq* apply, then:
 - a. Requested discovery fails to meet procedural requirements,
 - b. Requested discovery exceeds the purpose/scope of discovery,
 - c. Justice requires protection orders.

Example: "CFY Forthwith Motion in Opposition" in today's materials and on the Litigation Toolkit.



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If a court orders you to respond to a request for a deposition...

Get protective orders: limited time and/or scope, location best for the child, and/or breaks. Video deposition?

Prepare the child.

- Explain what a deposition is in a developmentally appropriate manner. Not an interview/chance to tell your story. In a room, asked questions. If 100% know the answer, respond. If do not know the answer, say, "I do not know." It is okay to say, "I do not know." Practice Q&A: Was the light red or green?
- Take your time before answering. Pauses are okay.
- Let the client know you will take breaks, have snacks, etc. It is okay to ask for a break.
- Tell the truth.

During the deposition...

- Take breaks. Cannot take a break if a question is pending. During breaks, keep your conversation positive and supportive.
- Bring snacks.
- Object and tell the child not to answer if a question is attorney-client privileged and/or beyond the scope of the protective orders.

After the deposition...

- BE POSITIVE!
- Create and execute a plan with the child: get something to eat, therapy session.



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If a court orders you to respond to a request for written discovery...

Requests for Admission

- Consider objections. If you do not object, you waive your objection.
- Admit neutral facts.
- Push back against narratives.
- Admit, deny, or lack sufficient information.
- Failure to deny is to admit.

Interrogatories

- Consider objections. If you do not object, you waive your objection.
- Use the phrase, "upon information and belief."
- Draft a paragraph or two that is your theory of the case. Use that theory to respond to a ROG. Refer back to that answer when responding to other ROG.

Process

- Read the questions.
- Talk with the child in a developmentally appropriate manner. Get the facts.
- Draft the responses.
- As developmentally appropriate for the child, send responses to client and/or meet with client to review and make changes.
- **Client signs.**



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4. Reviewing discovery with children/youth



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Context: GAL/CFY access to information

GAL/CFY must be provided with:

- All reports relevant to a case, and
- Fingerprint-based criminal history (if ordered by court).

Must have access to confidential info concerning child/youth, including but not limited to:

- Educational records,
- Medical records,
- Mental health records,
- Social service agency files,
- Court records (including those involving allegations of abuse/neglect and delinquency records),
- Other information regarding the child relevant to the proceedings, and
- Reports that form the basis of recommendations to the court.

Does not confer independent right to info regarding confidential/privileged info about parents.

GAL/CFY must have access to child or youth.

CRS 19-3-203(4).



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Child/youth access to information

GAL	CFY
<p>A GAL's determination of child's/youth's best interests must include consultation with the child/youth in a developmentally appropriate manner and consideration of the child's/youth's position. CJD 04-06 V(B)(1).</p> <p>The GAL should explain their determination of the best interests of a child/youth and the basis for that determination to the child/youth in a developmentally appropriate manner. <i>Id.</i></p>	<p>CFY must strive to engage in developmentally appropriate communication with the youth and to advise the youth of their rights, the subject matter of the litigation, the CFY's role, what to expect in the legal process, and options. CJD 04-06(V)(B)(1).</p> <p>"A CFY has a duty to explain to the youth in a developmentally appropriate manner the information that will assist the youth in having maximum input in determining the particular position at issue. A CFY should inform the youth of the relevant facts and applicable laws and the ramifications of taking various positions." Commentary to CJD 04-06(V)(B)(2).</p>



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5. Resources related to discovery



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Where can we go for help?

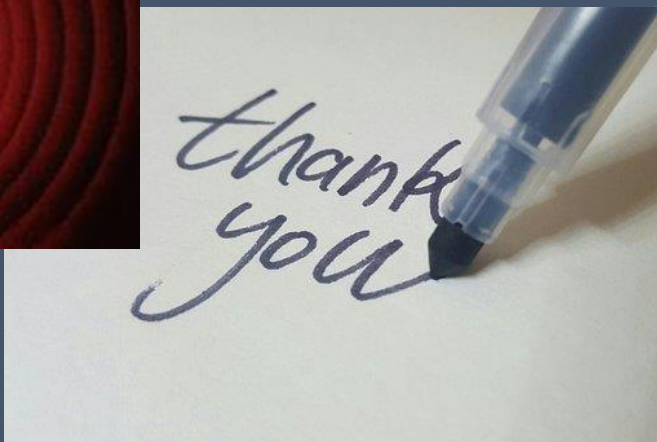
Materials provided today.

OCR staff attorney liaison.

Appellate list attorneys.



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