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Application to file Amicus Curiae Brief - Family Law Section - CBA

To: Charles Turner
Executive Director
Colorado Bar Association
CBA Amicus Committee

From: David Littman
Chairperson
Family Law Section
Colorado Bar Association

Date: April 2, 2009

A. Case
People v. Gabriesheski
2008-CO-0905.081

The People of the State of Colorado,
Plaintiff-Appellant
v.

Mark Joseph Gabriesheski,
Defendant-Appellee

Court of Appeals No. 07 CA 1016
Court of Appeals of Colorado, Division IV
September 4, 2008

El Paso County District Court No. 06 CR 3259
Honorable J. Patrick Kelly, Judge

The Amicus brief will be filed in the Supreme Court of Colorado, case 08 SC 945

Attached to this application are:

- a. Court of Appeals opinion
- b. Appellant's Opening and Reply Briefs
- c. Appellee's Answer Brief
- d. Appellant's Petition for Writ of Certiorari
- e. Brief in Opposition to Petition for Writ of Certiorari to the Colorado Court of Appeals
- f. Chief Justice Directive 04-06 , amended July 2006
- g. Copies of Colorado Rules of Professional Conduct 1.6 and 1.14
- h. Chief Justice Directive 04-05 amended July 2008

B. Filing deadline

The Petition for Writ of Certiorari has not been denied or granted as April 1, 2009.

C. The Family Law Section is concerned only with the issues regarding guardian ad litem.

The prosecutor in this case appealed asking the court of appeals to overturn the district court's ruling that the testimony of the social worker and the guardian ad litem be excluded.

Defendant was charged with two counts of sexual assault on a child. The victim is defendant's stepdaughter, who is also the subject of a dependency and neglect case, based on Gabriesheski's conduct, in which the child's mother is a respondent and defendant is a special respondent.

After defendant was charged, the child recanted. The prosecution then endorsed the guardian ad litem (GAL) appointed in the dependency and neglect case as a witness, arguing the GAL had information that the victim's mother had pressured the victim to recant the allegations of sexual abuse and that since the GAL represented the victim's best interest, the disclosure of the pressure placed on the victim to recant was in the victim's best interests.

Several weeks before trial, defense counsel's motion to have access to the GAL's file was denied because the GAL argued and the court found that communications between GAL and victim were privileged under § 13-90-107, C.R.S. 2007 and the GAL was prohibited from divulging any client communication unless the victim waived the privilege.

At the commencement of the hearing, defense counsel filed a Motion in Limine to preclude the testimony of the GAL at trial and the motion was granted. Prosecutor then advised the court that the people could not go forward and informed the court that she understood the court may dismiss for failure to prosecute. The court then dismissed the case for failure to prosecute but did not dismiss with prejudice.

The people filed the appeal challenging the district court's ruling excluding the testimony of the GAL since the communications between the GAL and the victim were subject to the attorney-client privilege under RPC 1.6.

The court of appeals affirmed. It relied on § 19-1-111(6) C.R.S. 2007 which requires that all persons appointed as GALs must comply with chief justice directives "concerning the duties or responsibilities of GAL in legal matters affecting children." C.J.D. 04-06 states all attorneys appointed as a GAL shall be subject to all of the rules and standards of the legal profession, including the additional responsibilities set forth by [Colo. RPC] 1.14. The court found the CJD included CPC 1.6 which is the attorney-client privilege provision. The previous CJD did not seem clear as to whether a Gal should be excused from strict adherence to the rules of professional conduct, as some jurisdictions had decided to do. For this court, the CJD resolved that issue for Colorado.

- D. The Family Law Section is unaware of any policy or principle of law adopted by the CBA on the issue of whether a GAL may be allowed to testify as to the child's best interest without the child's waiver of the attorney-client privilege of confidentiality.

The Section requests that the CBA accept as its policy, that in representing the best interest of a child client, attorney GALs shall not be held to strict adherence to RPC 1.6 and may disclose communications with the child without the waiver of the attorney-client privilege by the child. Further, that attorneys appointed as legal representatives of the child, be subject to Colo. RPC 1.6.

Following is the summary of argument included in the draft amicus brief:

The Colorado Court of Appeals in *People v. Gabriesheski* held that a guardian ad litem (GAL) may not disclose conversations with a minor child without the child waiving the attorney-client privilege. The appellate court relied on Chief Justice Directive 04-06 which requires all attorneys appointed as a GAL or child's representative to be subject to all the rules and standards of the legal profession including the additional responsibilities set forth by Colorado Rule of Professional Conduct 1.14. That rule provides that when an attorney determines a client with diminished capacity is in need of protection, the attorney is to seek the appointment of a GAL, conservator, or guardian, or the attorney is to reveal only those parts of conversations without the client's waiver. The directive and the rules place the attorney in the position of having to evaluate the potential harm to the client and to ultimately decide which action should be followed to in making a disclosure, which subjects the attorney to possible discipline by the OCR and/or the Colorado Supreme Court and also civil liability. Colorado case law, statutes and Chief Justice Directives require that a GAL represent the best interests of a child. If a GAL is held to a strict interpretation of the attorney-client privilege, the GAL is placed in an impossible conflict in fulfilling his or her duty. A lawyer representing a client with diminished capacity, which includes a child's representative has the authority under R.P.C 1.14 to request the appointment of a GAL. The GAL should then be exempt from R.P.C. 1.6. With revisions to R.P.C. 1.14 and 1.6 attorneys will accept appointments as GALs without fear of violating ethical rules and will be able to serve the best interests of clients with diminished capacity which includes children. The Colorado Supreme Court is the proper branch of government to clarify this issue by reversing the appellate

decision in *People v. Gabriesheski* and by revising CJD 04-06 and R.P.C. 1.14.

Prior to CJD 04-06, and the ruling in this case, the duty of the Child's Representative was to represent the best interests of the child in any domestic relations proceeding that involves allocation of parental responsibilities, C.R.S. § 14-10-116(1) amended 2005. This statute also provides that the legal representative shall comply with the provisions set forth in the Colorado Rules of Professional Conduct, and Chief Justice Directives. (C.R.S. § 14-10-116(2) 2005). This statute has not been rescinded since the 2008 Rules of Professional Conduct were adopted.

This issue affects all attorney GALS and all legal representatives of children whether it be in the juvenile court system, domestic relations, probate and criminal law. Without clear guidance from the Supreme Court, it becomes an ethical dilemma and potential malpractice trap for the appointees when trying to balance the mandate of the statute and the requirement of the Rules of Professional Conduct. Children need to know the rules as well.

- F. The Executive Council of the Family Law Section has determined by unanimous vote of the council that this controversy is an important one for the CBA to consider and has approved the position taken in the draft brief tendered to the CBA Amicus Committee.
- G. All members of the Family Law Section have a professional interest in this issue.
- H. Mary Jane Truesdell Cox, Cassandra Showell, and Danielle Moore of Cox Baker & Page, LLC and Deborah Anderson of Anderson and Baker, LLC and Bonnie Schriener, Esq., have written the draft brief on behalf of the CBA and are willing to complete the final brief if the CBA approves and if certiorari is granted..
- I. A draft of the brief to be filed is attached hereto as Ex. i..

- J. Perhaps the other sections of CBA that might be interested in the subject matter are juvenile law, probate law, and criminal law.

Respectfully submitted,



Mary Jane Truesdell Cox
Family Law Section Amicus Brief

Committee

For,

David Littman
Chairman
Family Law Section

Mary Jane Truesdell Cox

To: Melissa Nicoletti
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Subject: Draft of Application
Attachments: amicus brief application.doc

Melissa, Attached is the application for amicus brief. Please review and tell me if this is the format the committee is looking for. Also, as you can see, I will be attached many pages of paper. Should we just mail that to you rather than clog up your printers with an email. I await your reply.

Mary Jane

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