

# Defense Counsel's Duties in Juvenile Delinquency Cases

Should a Guardian ad Litem be Appointed?

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*This article explores ethical and strategic issues that defense counsel face when considering appointment of guardians ad litem in juvenile delinquency proceedings.*

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Statutory factors govern the discretionary appointment of a guardian ad litem (GAL) in delinquency proceedings, and ethical and strategic considerations impact defense counsel's assessment of whether to request appointment of a GAL. For example, ethical issues arise when defense counsel has confidential information indicating that a juvenile client's wishes are contrary to his or her personal safety.

Juvenile court has historically been less formal than adult criminal court and more focused on rehabilitation than punishment, and juveniles are not afforded all of the same rights as adult defendants. Juveniles, by nature, are not as well-equipped as adults to make important

decisions about their lives and futures. This can lead many juvenile defense attorneys to believe they have a duty to stop a client from making a bad decision, or ask for the appointment of a GAL to act in the client's best interests. However, defense counsel is duty-bound to advocate for the client's expressed interests, whether the client is a 10-year-old child or a 45-year-old adult, and whether the client is making what the defender believes to be a good or a poor decision.

This article examines these issues in the context of defense counsel's duty to represent the expressed interests of juvenile clients and the duty of confidentiality pursuant to the Colorado Rules of Professional Conduct (Colo. RPC), national standards for juvenile defense,

and statutes regarding the appointment of a GAL in a delinquency case.

## **Defense Counsel's Duties**

In 1967, the U.S. Supreme Court afforded juveniles in delinquency court fundamental legal rights, including the right to counsel, in the landmark decision *In re Gault*.<sup>1</sup> Attorneys defending juveniles in delinquency court have the same ethical duties as all defense attorneys, including the duty to represent the expressed interests of the client.<sup>2</sup> As with all clients, defense counsel for juveniles are bound by confidentiality and the attorney-client privilege.<sup>3</sup>

These ethical obligations mean that, just as when representing an adult, defense counsel

must advocate at the direction of the client regardless of whether the attorney agrees with the client's position. This is true even if defense counsel believes that the client's decision is clearly not in his or her best interests.<sup>4</sup> This does not mean that defense counsel must immediately and blindly follow the client's expressed interests; to the contrary, defense counsel has an affirmative duty to counsel and advise clients toward decisions that are in their best interests.<sup>5</sup> Advice and counsel are only effective when defense counsel spends significant time with the client to learn about the client's life circumstances, learning and comprehension abilities, and goals. This approach allows counsel to employ age-appropriate communication strategies.

But if defense counsel has thoroughly and competently advised and counseled the client and the client persists in pursuing a course of action that counsel believes is not in the client's best interests, counsel must advocate for that position.<sup>6</sup> This is true even if the course of action might be harmful or even dangerous to the juvenile client. Often, defense attorneys believe that they have an ethical duty to actively prevent a juvenile client from making a decision that will put him or her in danger. However, defense counsel's duty of confidentiality to clients is fundamental to our system of justice, and this duty applies with equal strength to juvenile and adult clients.<sup>7</sup> Pursuant to Colo. RPC 1.6(b)(1), counsel may reveal confidential information to the extent he or she reasonably believes necessary "to prevent reasonably certain death or substantial bodily harm." This type of harm is reasonably certain to occur "if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat."<sup>8</sup>

Colo. RPC 1.14(b) provides:

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.

In such case, counsel "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 interest."<sup>9</sup>

Note that a juvenile does not have diminished capacity simply due to age,<sup>10</sup> nor does defense counsel's assessment that a juvenile client has made a poor decision mean that the juvenile suffers from diminished capacity.<sup>11</sup>

### **The GAL's Role in a Delinquency Case**

In delinquency cases, a GAL is an attorney who is appointed when there is no parent or guardian who can effectively act in the juvenile client's best interest, or when the best interests of the juvenile otherwise require such appointment.<sup>12</sup> The court is specifically precluded from deeming the GAL as a substitute for the juvenile's defense counsel,<sup>13</sup> and GALs in juvenile delinquency proceedings are not considered to be parties to the case.<sup>14</sup> The GAL's role is to represent the juvenile's best interests in a manner that promotes and protects the juvenile's rights,<sup>15</sup> and the GAL's duties and role in the case are set out by court order and in Chief Justice Directive (CJD) 04-06.<sup>16</sup>

In a juvenile delinquency case, all appointments of GALs are discretionary.<sup>17</sup> By statute, the court may appoint a GAL when a parent, guardian, or relative<sup>18</sup> fails to appear at the first or any subsequent hearing; when the court finds

that a conflict of interest exists between the juvenile and the parent, guardian, or relative; or when the court makes specific findings that appointment of a GAL is necessary to serve the best interests of the juvenile.<sup>19</sup> Additionally, if a GAL has not already been appointed when the issue of competency is raised in a juvenile delinquency proceeding, the court may appoint a GAL.<sup>20</sup> A GAL may be appointed in a direct file case,<sup>21</sup> and a GAL appointment may continue following transfer of the juvenile delinquency case to adult court.<sup>22</sup> GAL appointments in direct file cases and cases transferred from juvenile to adult court continue to be discretionary appointments and must meet one of the three criteria listed in CRS § 19-1-111(2)(a)(I) to (III).<sup>23</sup>

The specific duties of a GAL in a juvenile delinquency proceeding are outlined in CJD 04-06.<sup>24</sup> Generally, a GAL meets with the juvenile, family, and community supports such as teachers or therapists to ensure that the juvenile understands the proceedings and can exercise his or her legal rights effectively, as well as to advocate for court orders that will promote the juvenile's best interests.<sup>25</sup>

Although the GAL is specifically bound by the rules of professional conduct, the GAL's client is not the juvenile but rather the juvenile's best interests;<sup>26</sup> therefore, no attorney-client relationship exists between the juvenile and the GAL.<sup>27</sup> As such, the GAL's testimony is not dependent on the juvenile's consent.<sup>28</sup> Additionally, the unique definition of "client" inherent in the GAL-juvenile relationship



permits the GAL to disclose confidential information without violating Colo. RPC 1.6 if he or she deems it must be revealed to ensure the juvenile's best interests.<sup>29</sup> Before making such a determination, the GAL must consult with the juvenile in a developmentally appropriate manner and consider the juvenile's position on the disposition of the matter before the court.<sup>30</sup>

In juvenile delinquency matters, CJD 04-06 repeatedly requires that the GAL perform his or her duties in a manner that is consistent with the juvenile's due process, statutory, and other rights,<sup>31</sup> and that the presentation of independent information regarding the juvenile's best interests be done in a manner that does not jeopardize the legal interests or due process rights of the juvenile.<sup>32</sup> Where the juvenile's best interests and the juvenile's stated interests are not aligned, the GAL's duty of zealous advocacy requires the GAL to advocate for the client's best interests, rather than the client's expressed interests.<sup>33</sup> However, such advocacy must still be consistent with protecting the juvenile's due process and statutory rights.<sup>34</sup>

#### Deciding to Request a GAL Appointment

Defense counsel's duty to zealously advocate for the client's expressed interests can sometimes pose a moral dilemma. Defense counsel will naturally want to protect the client, particularly if the client is very young, is developmentally immature, or insists on pursuing a potentially dangerous course of action. Counsel may feel that the best way to protect the client is to request appointment of a GAL, because while defense counsel is obligated to argue for the client's expressed interests, however ill-advised, the GAL can advocate for the "best" course of action. But defense counsel must consider how the decision to ask for a GAL appointment will affect the client's expressed interests; it is unethical for defense counsel to try to correct the client's poor decisions by requesting a GAL or to substitute his or her judgment for the client's.

This situation can be distressing and uncomfortable for defense counsel. For example, assume that defense counsel has a 13-year-old female client who has been arrested for the first time on a low-level offense and wants to return

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home. All indications are that the client will be released home, based on the information provided to the parties and the court. However, the client has told defense counsel that her stepfather, who lives in the home, has been touching her inappropriately. How should defense counsel proceed?

#### Ethical Considerations

Defense counsel does not have to disclose the information about the stepfather. There is no situation in which an attorney must disclose a client confidence. An attorney *may* ethically disclose a confidence under Colo. RPC 1.6 if the disclosure will prevent reasonably certain death or substantial bodily harm that is imminent (or if there is a present and substantial threat that it will occur later if the attorney fails to take action necessary to eliminate the threat).<sup>35</sup> The term "substantial bodily harm" is not used commonly in Colorado's criminal code. However, the term "serious bodily injury" is defined in the criminal code as

bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.<sup>36</sup>

Thus, to disclose this information, defense counsel must believe that unless he or she discloses the allegations of past inappropriate touching by the client's stepfather to the court, the client will die or suffer substantial bodily harm. Absent specific information from the client that she will almost certainly suffer that level of harm upon returning home, defense counsel cannot rely on this exception to Colo. RPC 1.6 to disclose the confidences the client asked to have safeguarded. Defense counsel may be tempted to consider this 13-year-old client to have diminished capacity due to her immaturity, thus allowing disclosure of this information pursuant to Colo. RPC 1.14.<sup>37</sup> However, as noted above, defense counsel must understand that while the client's age may factor into a determination that the client has diminished capacity, a juvenile client does not have diminished capacity simply due to age.<sup>38</sup> Further, a juvenile client does not suffer from diminished capacity by the simple fact of making what defense counsel considers a terrible decision.<sup>39</sup>

Even where defense counsel believes the client suffers from diminished capacity, clients with diminished mental capacity often have the

ability to understand, deliberate upon, and reach conclusions about matters affecting their own well-being. For example, “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”<sup>40</sup>

Therefore, defense counsel’s determination that a client has diminished capacity does not empower counsel to share client confidences at will and act as a “best interests” rather than an “expressed interests” advocate. In such a situation, defense counsel “shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client.”<sup>41</sup> This includes abiding by the rules regarding competence, diligence, communication, and confidentiality, as well as acting as an advisor and adhering to the duty to advocate for the client’s expressed interests.

In short, defense counsel cannot sidestep counsel’s duty under Colo. RPC 1.6 by requesting a GAL be appointed to gather and disclose the information that defense counsel is prevented from disclosing. Further, counsel cannot invoke Colo. RPC 1.14 to sidestep Colo. RPC 1.6 unless the client has diminished capacity for reasons not limited to simply the client’s age, maturity, or disagreement with counsel’s belief of what is in the client’s best interests.

### **Should Defense Counsel Request a GAL Appointment?**

Notwithstanding the limitations imposed by the ethics rules, defense counsel may still believe that a reasonable alternative to disclosure is to request appointment of a GAL. Although it appears to others that the client is safe at home, defense counsel knows that she is not. Defense counsel may feel that the client is too young to make and appreciate the consequences of this decision and that it is counsel’s role to somehow intervene.

However, as with any other client confidence, if the client asks defense counsel not to disclose the information about her stepfather, defense counsel must not do so. The client’s expressed interest is to go home, and defense counsel must argue for her release from detention to her home.

## **WHAT DOES A GAL DO IN A DELINQUENCY CASE?**

CJD 04-06 specifically ensures that a GAL in a delinquency case

- conducts timely, in-person meetings with the juvenile in a setting that promotes meaningful communication;
- educates the juvenile on the differences between a GAL and defense counsel and the limits on the GAL’s duty of confidentiality; and
- attends all court hearings and advocates for the juvenile’s best interests in a manner consistent with the juvenile’s due process and statutory rights.

CJD 04-06 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.

But in addition to arguing for the client’s release home, defense counsel *may* request that a GAL be appointed to represent the client’s best interests. However, this does not relieve counsel of the duty to advocate for the client’s expressed interests. And before requesting a GAL, defense counsel must advise the client of the GAL’s role and the limits of confidentiality between the client and the GAL. At times, defense counsel may advise the client that with appropriate safeguards (such as not discussing the facts of the case), having a GAL appointed may further

the client’s expressed interests. For example, sometimes a GAL’s best interests advocacy may support the client’s expressed interests, as the GAL may independently investigate and advocate for such things as access to services, least restrictive placement options, and access to immigration protections. The GAL may also have information to assist in plea negotiations or mitigation, and because the GAL offers this information from a best interests advocacy position, it will bolster the persuasiveness of similar arguments made by defense counsel.

If after such a discussion the client wishes for defense counsel to request a GAL, defense counsel should do so.

On the other hand, if the client understands the GAL's role and how a GAL might benefit her, but yet does not want defense counsel to request a GAL, defense counsel should not make such a request. Defense counsel has no affirmative obligation to request a GAL appointment in a case and should only do so over a client's objection if the Colo. RPC 1.14 criteria are met. This is particularly important in a case such as the above hypothetical, where a GAL will almost certainly not support the client's wish to return home and thus frustrate the client's expressed interests.

Again, this is not to suggest that defense counsel should blindly support and advocate for decisions that appear to be unwise or dangerous. Defense counsel's duty is to advise and counsel the client to ensure the client makes knowing and informed decisions. In the hypothetical, defense counsel must discuss with the client the potential harms of returning home and investigate and discuss alternative placement options. Counsel should also explain the client's right to report the allegations to law enforcement, discuss available community-based services, and try to persuade the client to do what is best for her health and safety. But if after such discussions the client persists in her wish to go home and not disclose the allegations, defense counsel must honor those wishes. Defense counsel should make sure the client knows how to reach both counsel and the police, but ultimately must argue for the client to go home without disclosing the client's confidences.

**Should Defense Counsel Object to a GAL Appointment?**

Assume that defense counsel decides not to request a GAL appointment, based on the analysis above and the client's decision. If another party requests a GAL appointment or the court on its own appoints a GAL, defense counsel must now decide whether to object.

Just as defense counsel must advocate for the client's expressed interests, defense counsel should oppose any action that would undermine the client's expressed interests. Defense counsel

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should anticipate that if a GAL is appointed under the hypothetical facts and the client discloses to the GAL the same information that she disclosed to defense counsel, the GAL will not recommend that the client return home. And defense counsel should reasonably anticipate that the GAL will request an order for a dependency and neglect investigation. Both will impede the client's expressed interests to return home.

Further, defense counsel should affirmatively advocate for the client's decision against a GAL appointment. In so doing, defense counsel cannot make a false statement.<sup>42</sup> For example, defense counsel cannot support an objection to a GAL appointment by arguing that there is no allegation of wrongdoing against any adult in the home. Defense counsel should, however, support the argument with facts such as the mother's presence in the courtroom and willingness to take her daughter home. With the client's permission, counsel may also want to advise the court that he or she counseled the

client about the GAL's role and the potential benefits of a GAL appointment, and the client does not want a GAL appointed.

**Conclusion**

Criminal and juvenile defense attorneys have a duty to zealously represent their clients' expressed interests. This duty is not diminished when a client is young and expresses interests that defense counsel believes to be bad for the client. Although defense counsel has a duty to counsel and advise the client about the options and the pros and cons of those options, defense counsel must advocate for the client's expressed interests, whether or not counsel believes them to be best for the client.

Unlike defense counsel, a GAL has a duty to advocate for the best interests of the client regardless of the client's expressed wishes. Because a GAL is not bound by the same ethical constraints as defense counsel, and because the GAL has more freedom to disclose information learned from the client, defense counsel should not request a GAL appointment unless the client has been fully advised and expresses an interest in having a GAL appointed. Defense counsel should only request a GAL over her client's wishes if he or she believes the client has diminished capacity for reasons beyond the client's age and maturity.

Further, if the client does not wish to have a GAL appointed, or such appointment would run counter to other expressed interests of the client, defense counsel should object to another party's request for a GAL appointment. **CL**



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## NOTES

1. *In re Gault*, 387 U.S. 1 (1967).
2. Colo. RPC 1.2.
3. Colo. RPC 1.6. See also National Juvenile Defense Standards (NJDC Standards) 1.2, <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>; Sterling, "Role of Juvenile Defense Counsel in Delinquency Court" at 8 (National Juvenile Defender Center Spring 2009) (citing ABA Model Rules of Prof'l Conduct Preamble, R. 1.14(a), 1.2(a)):

Operating under a client-centered model of advocacy allows juvenile defense counsel to enhance immeasurably the fundamental fairness of the system. Because no other courtroom actor serves the juvenile's expressed interests, without juvenile defense counsel, the juvenile would be subjected to a pre-Gault proceeding in which protecting the juvenile's due process rights are relegated to a mere technicality.

4. Sterling, *supra* note 3 at 12.
5. *Id.* at 8; NJDC Standards 1.2.
6. Note, however, that attorneys not appointed by the court have the option to withdraw under these circumstances. It is in the court's discretion whether to grant such a motion. See Colo. RPC 1.16(b)(4).
7. Sterling, *supra* note 3 at 12 ("There is no exception to attorney-client confidentiality in juvenile cases for parents or guardians," or the client's best interests, "[e]ven if revealing the information might allow the client to receive sorely-needed services").
8. Colo. RPC 1.6, cmt. 6.
9. Colo. RPC 1.14(c).
10. Sterling, *supra* note 3 at 10 ("Minority does not automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client's expressed interests.").
11. *Id.*:  
Nor does a juvenile's making what juvenile defense counsel considers to be a rash or ill-considered decision constitute grounds for finding that the client suffers from diminished capacity. In fact, because of the unique vulnerabilities of youth, it is all the more important that juvenile defense attorneys firmly adhere to their ethical obligations to articulate and advocate for the child's expressed interest, and to safeguard the child's due process rights. In other words, in direct contrast to the pervasive informality that characterizes juvenile court practice in so many jurisdictions, minority sharpens defense counsel's ethical responsibilities, instead of relaxing them.
12. CRS § 19-1-111(2).
13. CRS § 19-1-111(2.5).
14. CRS § 19-1-111(3).
15. CJD 04-06(V)(E) (rev. Jan. 1, 2016), [www.courts.state.co.us/Courts/Supreme\\_Court/Directives/04-06%20\\_Amended%202016%20Jan1%20%20Attach%20A%202018%20final.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-06%20_Amended%202016%20Jan1%20%20Attach%20A%202018%20final.pdf).
16. CRS § 19-1-111(6).

17. *Ybanez v. People*, 413 P.3d 700 (Colo. 2018).
18. CRS § 19-1-111(2) includes "parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent."
19. *Id.*
20. CRS § 19-2-1301(4).
21. CRS § 19-2-517(8); *Ybanez*, 413 P.3d at 710.
22. CJD 04-06(III)(C); *Ybanez*, 413 P.3d 700.
23. *Ybanez*, 413 P.3d 700 (holding that there is no constitutional or statutory entitlement to appointment of a GAL in a direct file or transfer case; it would be an abuse of discretion for the trial court to appoint a GAL for a juvenile charged as an adult for reasons outside those enumerated in CRS § 19-1-111(2)(a)(I)-(III); and a trial court does not abuse its discretion by failing to appoint a GAL sua sponte when one of the criteria could have been met).
24. CRS § 19-1-111(6).
25. CJD 04-06(V)(E)(3) and (4).
26. CJD 04-06(V)(B).
27. *People v. Gabriesheski*, 262 P.3d 653, 660 (Colo. 2011).
28. *Id.*
29. CJD 04-06(V)(B).
30. *Id.*
31. CJD 04-06(V)(E).
32. CJD 04-06(V)(E)(2).
33. *Gabriesheski*, 262 P.3d at 659.
34. CJD 04-06(V)(E)(2).
35. There are other exceptions to Rule 1.6 that do not apply to this factual scenario. See Colo. RPC 1.6(b)(2) to (8).
36. CRS § 18-1-901(3)(p).
37. Pursuant to Colo. RPC 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.*  
(Emphasis added.)  
Pursuant to Colo. RPC 1.14(c), in such case, 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 interest."
38. Sterling, *supra* note 3 at 10.
39. *Id.*
40. Colo. RPC 1.14, cmt. 1.
41. Colo. RPC 1.14(a).
42. Colo. RPC 3.3(a)(1).

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