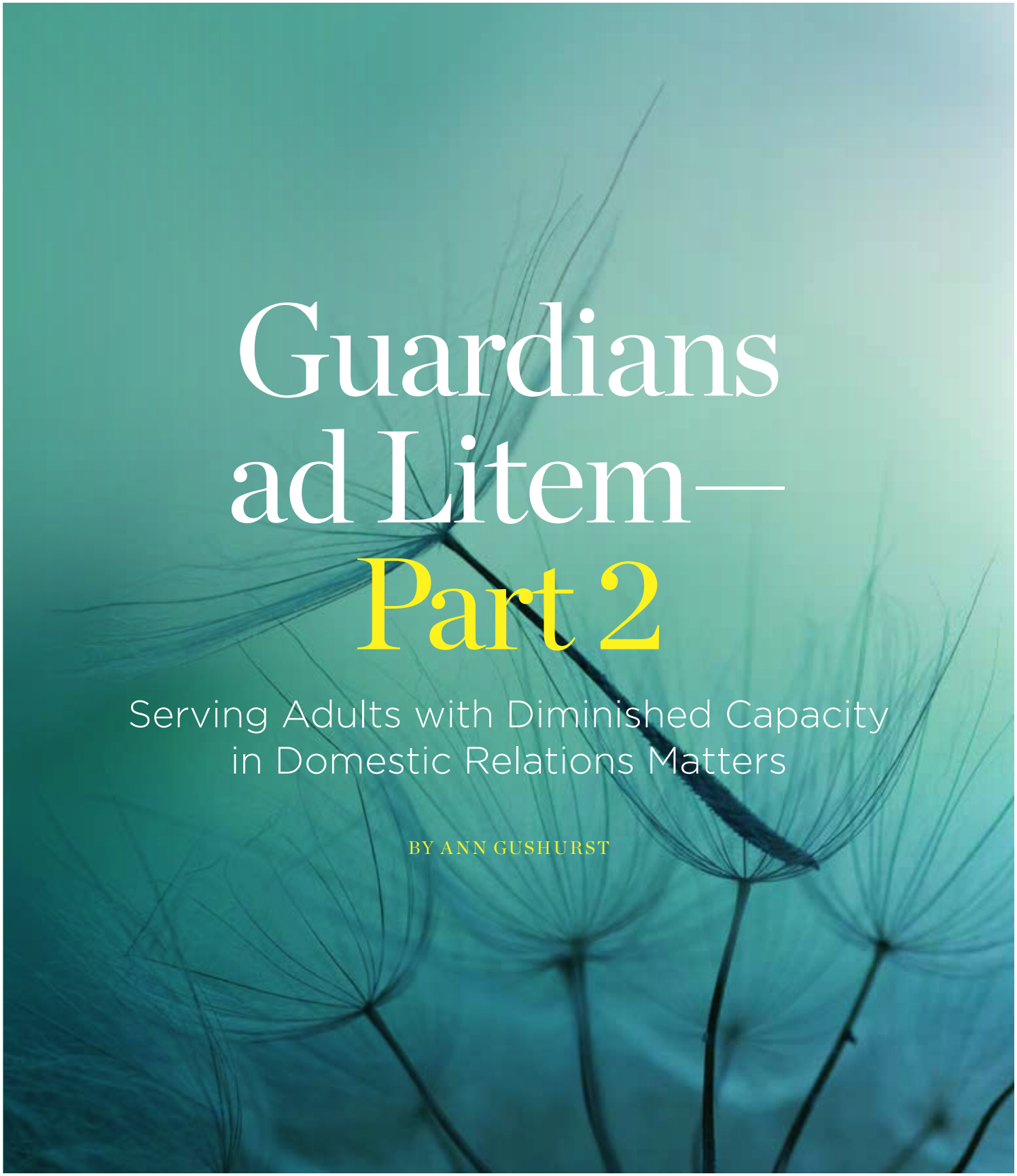

Guardians ad Litem—Part 2

Serving Adults with Diminished Capacity in Domestic Relations Matters

BY ANN GUSHURST

This two-part article explores the role of guardians ad litem in domestic relations proceedings and offers guidance on working with clients who may need a guardian ad litem appointed for them. This part 2 discusses practical considerations in such representation.

This is the second in a series of two articles discussing the use of a guardian ad litem (GAL) in domestic relations cases. Part 1 dealt with the GAL's history and role. This part 2 discusses practical considerations attorneys face when representing clients with diminished capacity.

Assessing Incapacity

The Colorado Rules of Professional Conduct advise that "in taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."[1]

When a client has apparent capacity issues, the attorney must determine whether the client is unable to protect himself or herself or is making what the attorney considers to be bad decisions, which clients are generally entitled to make.[2] For example, the attorney must discern whether the client is agreeing to waive maintenance because she is a domestic violence victim or because she sees some logic in the bargain.[3]

Attorneys should investigate capacity issues when a client

- cannot make a decision or continually reverses course,
- refuses to communicate with the attorney,
- has conversations with the attorney that make no sense,
- attends meetings intoxicated,
- is incoherent,
- cannot remember conversations or decisions,
- is inconsolable around certain topics,
- seems to dissociate in the face of certain decisions or situations, or
- acts consistently against the client's best interests.

> "The best approach to resolving a capacity issue is to work with the client to find solutions. Attorneys can and should explain their duty in this regard by focusing on compassion; this will assure clients that the inquiries are motivated by zealous and connected advocacy rather than judgment."

Attorneys are first required to tell clients about their concerns[4] and should begin the discussion by asking clients whether they are depressed, suffering from anxiety, or using drugs or alcohol in ways that impair them. Dementia can be much more difficult to assess, but attorneys can directly address the issues they observe without labeling the problem. For example, the attorney might say, "You said this on Tuesday, but Wednesday you did not seem to remember saying this, and Thursday you said the opposite to me."

Attorney-client conversations should be limited to facts and avoid the attorney's judgments or feelings about the facts. Because judgments are likely to primarily trigger a defensive response, attorneys should avoid telling a client his or her decision is bad. Rather, attorneys should explain how the client's decision-making will render the desired outcome unlikely. It is key that attorneys document all conversations with detailed notes that establish common facts and send those notes to the client. Paralegals and other staff who regularly interact with clients should similarly document their interactions.

The best approach to resolving a capacity issue is to work with the client to find solutions. Attorneys can and should explain their duty in this regard by focusing on compassion; this will assure clients that the inquiries are motivated by zealous and connected advocacy rather than judgment. Counsel can ask for permission to speak to the client's physician or trusted relatives and friends. Attorneys can also suggest solutions

to the client that are appropriate to the situation, such as working with a therapist for issues that appear to be related to depression or anxiety. If a client chooses to seek therapeutic care, the attorney should consider asking for a release that allows the attorney to participate in the dialogue with the professional. And attorneys should remain aware that even if the client does not agree to a release, no rule prevents attorneys from sharing their concerns with professionals as long as they maintain the balance between keeping confidences and protecting the client as outlined in the professional conduct rules.

If these solutions don't work, appointment of a GAL or other advocate may be warranted.[5]

Choosing a Fiduciary versus a GAL

The Colorado Probate Code provides for appointments of a conservator, under CRS § 15-14-425.5, and a guardian, under CRS § 15-14-315.5. Both are fiduciaries who may petition the court for authority to file and maintain a dissolution action. Two points are relevant when considering such appointments versus a GAL appointment.

First, most guardians and conservators are appointed on the basis of clear and convincing evidence, but CRS § 15-14-401(b)(II) has an exception to allow appointment of a conservator on a preponderance of the evidence if "protection is necessary or desirable" and "the individual has property that will be wasted or dissipated" without such an appointment.

Second, in conservatorships or guardianships where a ward is either incapable of consenting or *does not* consent to the filing of a petition for dissolution, the court must make a finding that the action is in the ward's best interests "based on evidence of abandonment, abuse, exploitation, or other compelling circumstances."[6] If a client's impairment supports the appointment of a guardian or conservator on a clear and convincing basis, or jeopardizes their financial situation sufficiently to support appointment of a conservator on a preponderance of the evidence, an appointed guardian or conservator can file or maintain an action for dissolution.

However, a fiduciary appointment is only made when warranted, and many clients who are struggling during a divorce may be struggling because of the divorce.[7]

Liability Issues

Few experiences are as anxiety-producing as dealing with a client with a diminished capacity that deleteriously impacts their lawsuit. Colo. RPC 1.14, cmt. 8 notes that "the lawyer's position in such cases is an unavoidably difficult one," especially given an attorney's dual roles to protect both the client's interests and confidences, which creates a bind when disclosure of diminished capacity would or could compromise the client.

When considering a GAL or other fiduciary appointment, an attorney must first address whether the client has needs beyond the current litigation warranting more permanent and comprehensive help. A client who cannot make any competent decisions at all will likely need a guardian or conservator; one who has difficulty communicating, problems that come and go, or problems making decisions around one or more discrete issues in a specific litigated matter is likely best served by a GAL.[8]

Presumably, a client will offer less resistance to a GAL appointment, which is limited to the pending litigation, than to the prospect of a permanent or long-term fiduciary. However, as illustrated by *In re Marriage of Sorensen*, discussed in detail in part 1, a client may be very resistant to a GAL appointment. In such cases, presenting evidence of diminished capacity in pursuit of an appointment may violate attorney-client privilege[9] or prejudice the client's interests. For example, such evidence could be used against a client in making an allocation of parental responsibilities. And even when parenting is not an issue, courts have found a constitutionally protected liberty interest in both "avoiding the stigma of being found incompetent" and "in retaining personal control over the litigation."[10]

Colo. RPC 1.14(b) notes that "in appropriate cases" an attorney may have to seek the appointment of a "guardian ad litem, conservator or guardian." Comment 7 further explains that "appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require." Thus, though the rules address *how* an attorney should protect a client with capacity issues[11] with a caution that doing so may negatively impact a client, they lack precise instruction on *what* action an attorney should take and *when* action should be taken.[12]

Two formal ethics opinions discuss the representation of clients with diminished capacity in litigation generally and in protective proceedings.[13] These opinions emphasize that the attorney-client privilege is not entirely abrogated by a client's diminished capacity and focus on the attorney's duty to protect the client from such diminished capacity. But there is no concrete guidance on how to reconcile the client's right to determine the objectives of the representation with the attorney's duty to protect the client when the client does not want the protection, except that "the lawyer for a client with diminished capacity may seek the appointment of a guardian to protect the client's interests if there is no less drastic alternative."[14] A recent article also notes the difficulties of the attorney's conflicting duties in allowing the client to direct the case while potentially seeking a GAL appointment to protect the client against the client's wishes.[15] In short, there are no bright-line tests for when an attorney should or must seek a GAL appointment for a client.

Many cases note the *court's* duty to appoint a GAL when made aware of a litigant's potential incapacity issues, but the author could find no cases imposing a similar duty on a client's attorney. Notably, some cases hold that a divorcing spouse has a duty to notify the court of the other spouse's incapacity in a default proceeding.[16] This spousal duty to notify the court suggests, by extension, that the same duty applies to the opposing spouse's attorney. Paradoxically, no such duty applies to the attorney representing the spouse with the alleged diminished capacity.

Some cases addressing attorney-client relationships that have become problematic because of client capacity issues offer instruction. In an Illinois case,[17] a lawyer believed his clients were entering into a deteriorating mental state, so he added a provision to their durable powers of attorney and living wills that prevented them from altering the documents.

The clients sued, and the lawyer claimed he was simply following Rule 1.14 and that his actions were the type of protective measures the rule required based on his belief that one of the plaintiffs could not act in her own interests. While the attorney prevailed on appeal, this case highlights the potential risks in taking unilateral actions to protect clients exhibiting incapacities or potential incapacities.

Simply put, while there may be no explicit duty to seek a protective appointment for a client, circumstances may force an attorney to do so. The attorney must then decide what type of appointment is preferable and how to proceed. A reported Ohio case suggests that an attorney enters into an adversarial relationship with a client if the attorney seeks appointment of a guardian as opposed to seeking appointment of a GAL, which is identified as being the "generally appropriate course of action."[18] However, as *Sorensen* amply illustrates, the mere act of filing a motion for appointment of a GAL can place an attorney at odds with the client. A New Hampshire attorney pursued a guardian appointment for his client without first discussing the matter with the client, and his actions resulted in a two-year suspension.[19] Similarly, the Washington Supreme Court suspended an attorney for 18 months because he attempted to file a guardianship petition against his former client without any investigation into her state of mind or competency.[20]

Although these out-of-state cases deal with guardians rather than GALs, the capacity issues are similar. Most professional conduct rules require attorneys to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client"[21] but allow, under Colo. RPC 1.14, that the lawyer's duties may include consulting with family members or "seek[ing] guidance from an appropriate diagnostician."[22] Attorneys should thus take Rule 1.14 and its commentary at face value and proceed cautiously in this area.

The Mechanics of an Appointment

GAL appointment proceedings are client focused. This attention to the client's needs begins with the attorney's approach to the issue and continues throughout the court proceedings.

The Client Focus

As discussed above, once the attorney decides to pursue a GAL appointment, the first step is to explain this decision to the client before taking any action. Further, as discussed in part 1, a GAL appointment can involve deprivation of constitutionally protected rights, so the client must understand the attorney's concerns and why the attorney wants to pursue the appointment.

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An allegedly incapacitated person's (AIP) choice of a guardian is given priority[23] in guardian and conservator appointments, and offering a client this choice may alleviate some client concerns. Courts have held that a court-appointed attorney has a duty to advocate for the client's choice of guardian as well as the client's position with respect to the underlying capacity issue.[24] This same duty presumably applies to GAL appointments. A New Jersey case held that the primary duty of an attorney representing a developmentally disabled person is to protect that person's rights, including the right to make decisions on specific matters.[25]

Procedural Issues

If a client is averse to a GAL appointment, the attorney may have to follow *Sorensen* by filing a motion for a GAL appointment and then withdrawing from representation. Under *Sorensen*, the court must hold a hearing if such a motion is filed and the AIP objects to the appointment.[26]

A hearing would likely not be required if a client consents to the appointment of a GAL who will not be granted decision-making powers. In this situation, the motion should include allegations and supporting affidavits to allow the court to grant the motion on the pleadings under CRCP 121(1-15)(4). Further, the attorney should avoid a hearing where appropriate to allay client anxiety over participating in a hearing that includes evidence of the client's mental status. But under CRS title 15, an appointment involving a deprivation of constitutionally protected rights can only be made by clear and convincing evidence,[27] which may be difficult to make upon the pleadings and may thus require a hearing.

Sorensen points out a potential problem with seeking a GAL appointment in a dissolution matter where the opposing spouse disagrees with the appointment. There, husband opposed wife's post-decree attempt to set aside the decree. The Court of Appeals remanded the case for a hearing on whether, at the time of the decree, wife was incapacitated and in need of a GAL, allowing husband to argue that she had not been. But *Sorensen* is distinguishable from pre-decree appointment situations where parties have not reached a settlement. Further, an AIP may request that the protective hearing be closed under CRS § 15-14-308(1), so an adverse spouse may not be entitled to attend. If a hearing is closed, the court may grant or

deny a request to attend based on whether a person's attendance would serve the AIP's best interests.[28] Because title 15 is predicated on ensuring the protected person's rights, while a spouse might be called to testify in support of an appointment, such spouse is not a party to a title 15 proceeding and could be excluded if their presence would be detrimental to the AIP.[29] Excluding a divorcing spouse with adverse interests to the AIP would likely be found to serve the best interests of most AIPs.[30]

In addition, a divorcing spouse likely lacks standing to object to a GAL appointment for the other spouse. Standing has only been granted to third-party intervenors who credibly pleaded that they had the best interests of the AIP at heart; given the adversarial nature of a dissolution proceeding, that standard would not be met by a spouse in a divorce.

It is unclear if the above protections are applicable to a GAL hearing under CRCP 17(c). Other jurisdictions have concluded that "the appointment of a next friend—for due process purposes—should parallel procedures established in the probate court for appointment of guardians."[31] As this question remains open in Colorado, practitioners should consider the relative merits of moving for a GAL appointment under CRS § 15-14-115 rather than Rule 17(c). The title 15 protections allow a judge outside the dissolution matter to decide the GAL issue and thus insulates the AIP from potential prejudice resulting from disclosure of the intimate details of their alleged incapacity in the dissolution case.

The Appointment Order

GAL appointments can include a panoply of powers and duties, from helping the client understand what is going on and stay organized, to assisting with settlement and trial decisions. Consequently, the appointment order should be precisely tailored to protect the person in the least restrictive manner possible. Colorado law embraces this concept for guardian and conservator appointments, and the same principles should apply to GAL appointments.[32]

The appointment order should clearly set out the GAL's role in the litigation. This is particularly critical for GALs granted decision-making powers or the ability to sign documents such as financial affidavits. In these instances, the order should grant these powers based on clear and convincing evidence. States that permit GALs to approve or disapprove settlements are instructive in this regard.[33] GAL duties that do not implicate a deprivation of the client's constitutionally protected rights, such as helping with attorney-client communications, may be supported by findings made upon a preponderance of the evidence.

The order should state who will pay the GAL. This is typically a marriage expense in Colorado because Colorado is a no-fault state.

Lastly, as with a conservatorship, the order should terminate when an AIP no longer needs protection, with the final decree in a dissolution matter or upon completion of post-decree transfers.[34]

Working with the GAL

A GAL represents the ward's best interests[35] and should "be truly dedicated to the best interests of the person on whose behalf he seeks to litigate."[36] On the other hand, the attorney takes direction from the client/ward, and short of being told to do something the attorney finds repugnant, is bound to carry out their instructions. Accordingly, the roles of GAL and attorney differ, even though both work for the same client. But in practice, the line drawn on this difference can be elusive. Justice Márquez succinctly summarized this quandary in a dissent: "The United States as a whole still reflects a lack of consensus as to the role of the guardian ad litem."[37]

Attorney-client privilege is a primary concern for attorneys navigating the roles of attorney and GAL,[38] especially where the GAL's primary task is to advocate for a ward's best interests. Some courts have noted that a ward could invoke the right to an attorney during a GAL interview because "to the extent such an interview may reveal information protected by the attorney-client relationship, the right to counsel helps prevent the inadvertent disclosure of privileged information."[39] In any event, whatever is said to the GAL may be subject to disclosure, so attorneys should ensure the client ward is aware of this risk.

Conclusion

Attorneys must remain vigilant to spot client capacity issues. Once identified, attorneys must discuss such issues with clients and then assess how to proceed. Those opting for a GAL appointment should adhere to the ethical and legal requirements for such appointments to ensure that the client's best interests are served. CL

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NOTES

1. Colo. RPC 1.14, cmt. 5.

2. *S.T. v. 1515 Broad St., LLC*, 227 A.3d 1190, 1193 (N.J. 2020) ("Lawyers and judges may conclude that a client's decision to turn down a settlement offer is mistaken or even foolish, but in a system of justice that respects the right of every individual to control her personal destiny, the client's decision must be honored."); *United States v. Perez*, 603 F.3d 44, 48 (D.C.Cir. 2010) (defendant's ill-advised legal strategy is ordinarily not justification to question a defendant's competency).

3. For example, a person is bound to a contract even if the contract offers no benefit. *Rifle Potato Growers' Co-op. Ass'n v. Smith*, 240 P. 937, 938 (Colo. 1925). *See also In re Marriage of Manzo*, 659 P.2d 669, 671 (Colo. 1983); *In re Marriage of Thornhill*, 200 P.3d 1083, 1084 (Colo.App. 2008), *aff'd in part, rev'd in part on other grounds*, 232 P.3d 782.

4. Colo. RPC 2.1.

5. The issue of appointing a GAL can come before the court on request of the AIP's attorney (a common situation in Colorado) or a third party, such as the client's child or spouse, or the court may sua sponte raise the issue under CRCP 17(c).

6. CRS §§ 15-14-315.5(1)(a) and -425.5(1)(a).

7. *See In re Smith-Guzman*, 819 N.Y.S.2d 851 (N.Y.Sup.Ct. 2006) (GAL's authority relates only to the pending litigation and is limited by the continued presumption of mental competency

for all other purposes).

8. *See In re Smith-Guzman*, 819 N.Y.S.2d 851.

9. Colo. RPC 1.14(c) states: "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), 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 interests." "[T]o the extent necessary to protect the client's interests" is not defined.

10. *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 651 (2d Cir. 1999).

11. "Capacity" and "competency" are used interchangeably to refer to cognitive power (1) sufficient for the legal ability to do something (i.e., contractual capacity or testamentary capacity) and (2) diminished to the point of requiring legal assistance in the form of a guardian, GAL, or conservator. Thus, a client's capacity may be sufficient to engage in a lawsuit but insufficient to a degree that requires a GAL.

12. One scholar stated, "unlike the statutory schemes which govern guardianships and conservatorships, the rules for appointment of a guardian ad litem provide virtually no guidance concerning the process that is to govern such appointments, when such appointments are appropriate, who is qualified to be appointed, the role the appointee is to play in the litigation, and other such critical issues." Harkness, "'Whenever Justice Requires': Examining the Elusive Role of Guardian ad Litem for Adults with a Diminished Capacity," 8:2 *Marquette Elder's Advisor* at 3 (2006).

13. Colo. Formal Ethics Op. 126, "Representing The Adult Client With Diminished Capacity" (May 6, 2015), notes that "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 interests."

14. *Id. See also* Colo. Formal Ethics Op. 131, "Representing Clients With Diminished Capacity Where the Subject of the Representation Is the Client's Diminished Capacity" (Sept. 13, 2017).

15. Kirkland, "Guidance on Representing Clients with Diminished Capacity," 47 *Colo. Law.* 44 (Feb. 2018).

16. *Sarfaty v. Sarfaty*, 443 N.Y.S.2d 506 (N.Y.App. Div. 1981) (noting the burden upon a plaintiff who has notice that a defendant is under a mental disability to bring that fact to the court's attention and permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interest). *See also Covey v. Town of Somers*, 351 U.S. 141 (1956), which invalidated notice to a person known to be incompetent for failing to meet the 14th Amendment's Due Process clause requirements); *Billings v. Billings*, 187 A.2d 333 (Vt. 1963) (vacating a divorce decree on grounds that a divorcing spouse had a legal obligation to inform the court of the incompetency of the other spouse).

17. *Dunn v. Patterson*, 919 N.E.2d 404 (Ill.App. 2009).

18. *Kutnick v. Fischer*, 2004-Ohio-5378, ¶¶ 75–76.

19. *See In re Wyatt's Case*, 982 A.2d 396 (N.H. 2009).

20. *See In re Disciplinary Proceeding Against Eugster*, No. 200,568-3 (Wa. 2009).

21. Colo. RPC 1.14(a).

22. Colo. RPC 1.14, cmts. 3, 5, and 6.

23. *In re Estate of Runyon*, 2014 COA 181, ¶ 26.

24. *In re Guardianship of Macak*, 871 A.2d 767, 772 (N.J.App. 2005).

25. *Matter of M.R.*, 638 A.2d 1274, 1276 (N.J. 1994) (concerning whether the AIP could choose her guardian between her parents).

26. *Sorensen*, 166 P.3d 254, 258 (Colo.App. 2007) ("We further conclude that the preferred procedure *when a substantial question exists* regarding the mental competence of a spouse in a domestic relations proceeding is for the trial court to conduct a hearing to determine whether or not the spouse is competent, so that a guardian ad litem may be appointed if needed.") (emphasis added).

27. *Sabrosky v. Denver Dep't of Social Services*, 781 P.2d 106 (Colo.App. 1989).

28. CRS § 15-14-308(2).

29. *See Lopez v. CSX Transp., Inc.*, 3:14-cv-257, 2021 WL 3682905 at *6 (W.D.Pa. Aug. 19, 2021) (noting that nothing in the rule suggests that the court must include the opposing party when making inquiries as to the GAL appointment).

30. One judge has noted the similar criminal law practice of a *Bergerud* hearing, which is held without the prosecutor. *See People v. Bergerud*, 223 P.3d 686 (Colo. 2010).

31. *Abbott v. G.G.E.*, 463 S.W.3d 633, 644 (Tex. App. 2015).

32. CRS §§ 15-14-311 (1)(a)(II) and -409(2).

33. *E.g.*, *1234 Broadway LLC v. Feng Chai Lin*, 883 N.Y.S.2d 864, 876 (N.Y.Civ.Ct. 2009) ("An advisory notice offers courts instructions on how to monitor GALs . . . The notice provides that before the court approves and so-orders a stipulation settling a proceeding, the court should ascertain on the record that the GAL has at least (1) met with the ward; (2) determined the ward's desires; (3) investigated and weighed all factors in recommending a settlement in the ward's best interests; (4) developed a plan for assistance; (5) followed the plan; (6) informed the court whether the ward agrees or disagrees with settlement; and (7) taken all steps to bring the ward to court. By requiring the GAL to carry out these seven steps, the court can prevent the ward's rights and interests from being overlooked.") (internal citations omitted).

34. *See* CRS § 15-14-431.

35. *United States v. Pfeifer*, 121 F.Supp.3d 1255 (M.D.Ala. 2015); *Sturdza v. Lewin*, 16-cv-02174 (APM), 2017 WL 2655093 at *2 (D.D.C. June 20, 2017); *Gross v. Rell*, 40 A.3d 240, 258 (Conn. 2012). *See also People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011) ("Rather than representing . . . the demands or wishes of the child, the legal responsibility for whom is at issue in the proceedings, the guardian ad litem is statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child.").

36. *AT&T Mobility, LLC v. Yeager*, 143 F.Supp.3d 1042, 1054 (E.D.Ca. 2015) (internal citations omitted).

37. *Gabriesheski*, 262 P.3d at 662.

38. *Id. See also Kolar v. Preferred Unlimited Inc.*, 02472 July Term 2008, 2010 WL 4358353 (Pa.Com.Pl. July 18, 2010) (though GAL was an attorney, information about GAL's activities and invoices could be sought because neither contained privileged information).

39. *In re Guardianship of Jennifer M.*, 779 N.W.2d 436, 440 (Wis.App. 2009); *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 136 (3d Cir. 2002) (noting that GAL is appointed to "advance the best interests" of the incompetent individual).