Legal Ethics in Child Welfare Cases

By Jennifer L. Renne

with a Foreword by Jean Koh Peters
Legal Ethics in Child Welfare Cases

By Jennifer L. Renne

with a Foreword by Jean Koh Peters

Edited by Claire Sandt

Review and support from the Ethics Department staff at the ABA Center for Professional Responsibility

ABA Center on Children and the Law
National Child Welfare Resource Center on Legal and Judicial Issues
...a program of the Children's Bureau
Washington, DC
Dedicated to Rebecca
Table of Contents

Foreword ............................................................... v
Preface ............................................................... vi
Acknowledgements .................................................. viii

**Chapter 1**: Quality Representation ........................................ 1

**Chapter 2**: Protecting Client Confidences .................................. 17

**Chapter 3**: Representing a Client with Diminished Capacity ............ 33

**Chapter 4**: Handling Conflicts of Interest .................................. 47

**Chapter 5**: Interacting with Other Parties .................................. 61

**Chapter 6**: Ethical Issues in Litigation ...................................... 69

**Chapter 7**: Special Issues for Guardians ad Litem ........................ 79

**Appendices:**

**Appendix A**: Resources .................................................. 88

**Appendix B**: Select Model Rules and Commentary ..................... 90

**Appendix C**: Status of State Review of Professional Conduct Rules .... 112

About the Author ......................................................... 117

Index ................................................................. 118
Foreword

Thirty years after American federal legislation began to provide funding to state child welfare systems and 15 years after the U.N. Convention on the Rights of the Child directed the nations of the world to implement measures to protect children from abuse and neglect, lawyers, guardians ad litem, and other advocates grapple daily with the ethical problems raised in representing children, parents, and agencies in abuse and neglect cases.

Jennifer Renne, who has represented children in the trenches and now criss-crosses the nation regularly to provide support and training to child welfare advocates throughout the United States, makes an important and much needed contribution to our still emerging field in these concrete and nuanced essays on the dilemmas faced by advocates everyday. She brings the verve, creativity, and hopefulness of her public speaking to her readers in these essays, without for a moment losing sight of the children and families that all advocates seek to serve.

Her thoughtful examples evoke that Aaha! of recognition (Ah yes, I’ve been in this morass!), and then offers a hand up into a clearer eyed understanding of the dilemma and its potential resolutions. Her up-to-date knowledge of the newly amended ABA Model Rules of Professional Conduct educates practitioners to established professional standards, as well as changes which may be on the way to our local jurisdictions. Her many citations to state court and ethics opinions from around the country gathers materials that have never before been available in one place.

We are lucky to practice in a field where many rise to the challenge of representing children creatively, courageously, and compassionately, despite poor pay, systemic dysfunction, and daily invitations to despair. Jennifer’s work supports all who refuse to yield to these difficult pressures, and all who work to resolve the problems which prevent children and families from receiving the service they deserve.

Jean Koh Peters
New Haven, CT
July, 2004
Preface

After only a few short months working at the ABA Center on Children and the Law providing training and technical assistance to states on child abuse and neglect issues, I developed a training on “Ethical Issues in Child Welfare.” Before coming to the ABA, as a child advocate, my colleagues and I struggled with many ethical issues that didn’t seem to have clear, simple answers. Combining my child welfare experience with my interest and experience teaching professional responsibility, I developed a training comprised of hypothetical scenarios addressing ethical dilemmas that as lawyers for parents, children, and agencies, we all face. What began as a training became the idea for a book. There are still no clear, simple answers to ethical dilemmas, but I’ve tried to capture the essence of many of these issues, and provide guidance from ethics rules, ethics opinions, case law, and practical experience to enhance understanding of these compelling, complex dilemmas.

I see a real need for training and written material on this subject as there is a dearth of information on the application of ethics rules in the highly specialized field of child welfare law. After my trainings, I frequently hear from lawyers for parents, children, and child welfare agencies that they rarely, if ever, receive ethics trainings pertinent to their work. It’s not uncommon after a session for someone to tell me that their annual required ethics credits come from trainings on commingling client funds, lawyer advertising on the internet, or other issues completely unrelated to child welfare. Some have said the “Ethical Issues in Child Welfare” training was the first training they’ve ever attended that dealt directly with the challenges they struggle with daily.

Child welfare cases are unique—
• Parents face losing custody, possible termination of parental rights, and sometimes the threat of a criminal case, yet they must cooperate and work closely with opposing parties to achieve case goals and reunification.
• Agency lawyers face the challenge of dealing with multiple caseworkers while representing an agency that must act in the child’s best interest.
• To be effective, children’s lawyers and GALs must go beyond what they learned in law school in having children as clients, and dealing with service providers, caseworkers, parents, and other family members.
• In dealing with life or death issues that strike at the heart of family law matters, most lawyers in this field also struggle with high caseloads, turnover, and burnout.
• Ethical issues such as standards for competent representation, conflicts of interest, dealing with clients with diminished capacity, and confidentiality present unique and profound challenges in this arena for all advocates.
This book is an attempt to identify these issues, inform lawyers of their ethical obligations, and provide practical guidance on what to do in difficult situations where the appropriate course of action is not readily apparent. Ethical situations are not always easily resolved. My law school students sometimes leave class frustrated that the rules and case law don’t always dictate a simple, straightforward response. To me, this is the value of teaching and learning ethics—an opportunity to explore the nuances of each situation, engage in a dialogue with others, and ultimately decide on a course of action consistent with the ethics rules, case law, and one’s own conscience.

Further, the Child and Family Services Reviews (CFSRs), a new layer of federal review under the Adoption and Safe Families Act, have demonstrated the need for improved legal representation, and greater cooperation and participation from the legal community in achieving better safety, permanency, and well-being outcomes for families and children. This book helps lawyers fulfill this goal, by providing a better understanding of their ethical responsibilities in light of the unique challenges of child abuse/neglect cases. It supports lawyers in the dual goals of supporting and protecting one’s client, while working effectively with the court and other parties in the case to achieve timely, satisfactory results.

Jennifer L. Renne
Acknowledgements

Thanks to…
Claire Sandt, my editor, whose unwavering support and patience was critical in the writing of this book. Her focus on a practical approach helped to keep the book clear, concise, and useful. In addition to the long hours she spent brainstorming ideas and editing, she coordinated all efforts in the process of completing the book. For that and so much more, I’m extremely grateful.

George Kuhlman and Peter Geraghty, from the ABA Center on Professional Responsibility, who reviewed each chapter for accuracy and content. They were extremely generous in giving of their time, and their expertise on ethics and the Model Rules of Professional Conduct, and their knowledge of the complex nuances and interaction of the rules was invaluable.

Mark Hardin, whose ideas and insights provided valuable depth to the issues. Mark’s willingness to engage with the issues, and his commitment to improving legal representation helped keep me focused on producing a work with practical application.

Mimi Laver, whose encouragement and assistance made this book possible. Drawing on her experience writing standards of practice for agency lawyers, and representing the child welfare agency in a busy, demanding environment, she identified and worked through subtle, complex ethical issues for agency lawyers, and helped me better understand these challenges.

Jean Koh Peters, who reviewed the book in great detail. She was generous in sharing her experience and expertise, and brought a level of enthusiasm for the project that was motivational and inspiring.

Emily Cooke, our project director at the Children’s Bureau, whose good humor, leadership, and support I always gratefully appreciate.

Laura Pomeroy-Gerber, intern extraordinaire, who provided a fresh, vibrant perspective, edited for substance and form, and painstakingly cite checked the book.

Yvonne Brunot, for her administrative assistance, including handling details with the publication efforts.
“Poor quality legal representation results from a variety of factors ranging from the pressure of high caseloads to poor customs and low expectations of representation in the jurisdiction. The old reputation of juvenile and family courts as a lesser “kiddie court” persists in some places, despite the increased sophistication and complexity of both the law and the underlying interdisciplinary perspective required to handle these cases effectively. Child welfare is a unique and highly specialized area of practice, yet many advocates have not received training in handling such cases. In many States, neither ethical requirements nor practice standards for lawyers in child abuse and neglect cases have been developed.”1
How do we define “quality of representation?” What is the court’s role in enforcing basic ethical duties? How can lawyers protect themselves against a malpractice claim, and what can they do when they see representation so poor that the client suffers? Concerns about quality of legal representation, including a lack of experience, skills, and training, and high case-loads are widely documented. Court Improvement Project self-assessments identify legal representation or the need for improved legal training as a crucial element of reform.

This chapter looks at the ethical requirements relating to quality of representation, by examining three key ethical responsibilities that make up quality representation:

• competence, which includes training and case investigation;
• diligence, which includes caseload management and trial activities; and
• communication with the client.

The ABA Model Rules of Professional Conduct (Model Rules) provide ethical standards on what constitutes quality representation in these three areas. In examining dimensions of quality representation, this chapter describes cases where legal counsel failed to achieve a minimal threshold of performance and the impact on the client was significant enough that lawyers were liable for malpractice, subject to disciplinary action, or their representation was deemed “ineffective assistance of counsel.” Before looking at these cases, it is important to understand the consequences for unethical behavior.

**Consequences for Ethics Violations**

**Disciplinary Action**

All lawyers promise to uphold the law and to be guided by state ethics rules. A lawyer who violates these standards of professional conduct is subject to discipline. The purpose of disciplinary action is not necessarily to remedy an injured party, but to sanction unethical behavior. Discipline protects the integrity of the legal system, deters further unethical conduct, educates other lawyers and the public, and vindicates the public’s interest in preventing unethical behavior.

Disciplinary actions can result from a complaint from a client, another lawyer, or a judge. Many lawyer grievance commissions can bring investigations on their own, absent any specific complaint. A mistake or error in judgment is not unethical conduct, nor is an honest disagreement about how to handle a case. Unethical conduct means wrongdoing, a violation of a profession’s code of ethics. Due process entitles the lawyer to dispute the claim.

Ethics violations can result in a range of sanctions from censure (public reprimand), temporary suspension, or disbarment. In choosing a sanction, boards authorized to review ethics violations generally consider the seriousness of the duty violated, the lawyer’s mental state, the actual or potential injury to the client or the justice system, and other aggravating or mitigating circumstances.
The Difference Between Ethical Rules, Ethics Opinions, and Standards of Practice

**Ethical Rules:** Each state has a set of ethical rules, usually modeled after the ABA Model Rules of Professional Conduct or its predecessor, the ABA Model Code of Professional Responsibility.

**Ethics Opinions:** Each state has a body of ethics opinions where an ethics committee or its equivalent issues nonbinding informal opinions on “matters of special concern to the lawyer” requesting the opinion. The ethics committee issues written and oral informal advisory opinions usually in response to an ethical question from a lawyer. Usually these panels will answer lawyer inquiries orally, reserving the written opinions for complex questions, or questions that present a new twist on existing ethical issues or issues that are chronic and pervasive. A request for a formal opinion is often the best way to address a matter of general importance, and may or may not relate to a specific fact situation.

These opinions are distinct from ethics opinions written when a lawyer is brought by bar counsel for an alleged violation of an ethical rule. Ethics opinions are usually advisory and nonbinding. However, if the lawyer follows the advice of the opinion, that can be evidence used to defend against a subsequent disciplinary action or malpractice claim.

**Standards of Practice:** Sometimes referred to as “Guidelines,” Standards of Practice are nonbinding principles of practice. Some states have established formal standards for lawyers representing children. The American Bar Association House of Delegates adopted *Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases* in February 1996. The ABA Standards are advisory and have no legal authority in individual states. The ABA Standards clarify what is good practice in legal representation for children. Further, they provide a model for states to develop their own standards towards improving professional practices and assuring timely decisions on permanent placement of children.

State legislation could commit the state to a set of practice standards for lawyers in child welfare proceedings either by direct legislative provisions or by delegation to the state bar association, court system, or regulatory agency. Sanctions and penalties could be applied for not adhering to standards. Gross or repeat violations of the standards could be evidence of ethical violations. Standards are currently in place in several states, some modeled after the ABA Standards.
Malpractice
Another consequence of unethical conduct is the lawyer may be liable to a client for professional misconduct or negligence. The forum for a malpractice action is a court, and the purpose is to obtain compensation for the injured party. The three required elements to prove malpractice are: (1) a lawyer/client relationship, which creates a duty to use reasonable skill, prudence, and diligence, (2) a breach of duty either by negligence or breach of contract, and (3) injury to the client resulting from the lawyer’s actions or nonactions. Merely violating an ethical rule is not a basis for civil liability. However, violating a rule may be evidence used to support a civil claim because the lawyer has breached an applicable standard of conduct. Conversely, a lawyer can commit malpractice without violating an ethical rule, although such violation is relevant evidence when considering the breach of duty issue.

Ineffective Assistance of Counsel
Certain cases give rise to a constitutional right to counsel as guaranteed by the Sixth Amendment, notably criminal cases. Courts have consistently held that where the client has a constitutional (or statutory) right to court-appointed counsel, that right must include the right to effective assistance by the appointed lawyer; otherwise the right to counsel would be an empty formality. Based upon state law or judicial interpretation of the state's constitution, most states require that parents have court-appointed counsel in a termination of parental rights (TPR) case. In Lassiter v. DSS of Durham County, the Supreme Court said that while the Constitution does not require court-appointed counsel in every TPR case, in some cases due process requires the appointment of counsel, based upon a test established in Mathews v. Eldridge. In other words, even in the few states that do not guarantee a right to counsel, there may be such a right after the court considers: (1) the private interest at stake, (2) the government interest, and (3) the risk of error.

Some states extend this right to counsel to dependency proceedings, and some states provide a right to counsel when dependency proceedings may lead to criminal child abuse charges. Children have a right to counsel in delinquency cases. Also, the Child Abuse Prevention and Treatment Act (CAPTA) assures each child is appointed an advocate. To establish a violation of the Sixth Amendment right to counsel, a client has to show: (1) counsel's performance was so deficient that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced the client. Therefore, another possible consequence of failing to provide competent representation is that the lawyer may be deemed to have rendered ineffective assistance of counsel. Several cases discussed below involve such claims.
Key Ethics Issues

Competence (MR 1.1)

Case 1  The Alaska Supreme Court upheld a malpractice action brought by adoptive parents against the law firm that handled the adoption because the law firm failed to comply with the terms of the Indian Child Welfare Act (ICWA) in securing the adoption. The court held that lawyers must “have and use the knowledge, skill and care ordinarily possessed and employed by members of the legal profession,” and that the law firm’s failure to comply with ICWA’s consent procedures, which resulted in a challenge of the adoption, was malpractice.12

Lawyers have a duty to provide competent representation. Model Rule (MR) 1.1 provides that competent representation includes the following key components:

• legal knowledge
• legal skill
• thoroughness
• preparation

Incompetent representation can result from inexperience, lack of training, or more commonly, procrastination and neglect of client matters.13 Neglecting client matters can, but rarely does, lead to discipline unless there is a demonstrated pattern of neglect, or a single egregious violation.14 Although incompetent representation rarely leads to disciplinary action, incompetence can result in malpractice claims.

The Model Rules explain that in determining whether a lawyer uses the requisite knowledge and skill in a matter, relevant factors include:

• the relative complexity and specialized nature of the matter;
• the lawyer’s general experience, training and experience in the field;
• the preparation and study the lawyer is able to give the matter; and
• whether it is feasible to refer the matter to, or consult a lawyer of established competence in the field.15

Consider Case 1 above where the law firm handling an adoption of a Native American child failed to comply with ICWA provisions. Because of the relative complexity and specialized nature of adoption cases when ICWA applies, the lawyers in the firm were expected to be properly trained or consult a lawyer in the field with such training. Failure to provide competent representation resulted in a failed adoption, leading to a successful malpractice action by the adoptive parents against the law firm. This type of incompetent representation can result from insufficient attention to the case, or lack of knowledge, training, or experience. Either way, a lawyer risks malpractice liability when the client is harmed by the lawyer’s poor quality representation.

A recent unpublished ruling in Georgia16 allowed a lawyer to withdraw from a list of lawyers appointed to represent children and parents in juvenile court based upon the lawyer’s claim that he was unqualified. The lawyer, who specialized in real estate law, was granted his request after he successfully argued the client would suffer harm due to his lack of expertise and training in child welfare law.
**Training**

Child abuse and neglect is a highly specialized field of law that requires specific training. In addition to understanding the law, these cases involve complex family dynamics and human relationships, often requiring nonlegal training. Some states have minimum training and practice standards. Some jurisdictions require a minimum number of training hours per year. Failing to participate in required training or violating the established practice standards may support a disciplinary or malpractice case.

States without statutory or court rule-imposed minimum requirements and qualifications for court-appointed lawyers cite that as problematic. To promote uniformity among states, the National Association of Counsel for Children (NACC) is developing a certification process for lawyers handling dependency cases, including minimum training requirements. The ABA has promulgated *Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases*. To maintain the required knowledge and skill, the Model Rules advise lawyers to stay current on changes in the law and practice, attend trainings and educational programs, and comply with all continuing legal education requirements.

**Case Investigation**

**Case 2** The Supreme Court of Mississippi considered whether the guardian *ad litem* (GAL) adequately represented the children in a TPR action. Although the GAL cross-examined witnesses at trial, he neither interviewed the children before trial, nor investigated the case. His representation was therefore deemed inadequate. In his court report, the GAL merely acknowledged that he “agrees with the recommendation of [the agency].” There was no independent investigation, or independent report. The court found the GAL did not adequately perform his role, and he “failed to zealously inquire into and protect [the children’s] best interest… . The guardian ad litem should interview each child and prepare independent recommendations for the trial court’s consideration.” The lower court’s order granting TPR was vacated and the case was remanded.

**Case 3** In a delinquency case, the juvenile’s lawyer failed to interview his client, his client’s mother, or a witness until 15 minutes before a fact-finding hearing. The New York Court of Appeals found that “no preparation was undertaken for the defense of the case,” and that the juvenile respondent was not “provided with meaningful representation as guaranteed under the Constitution.”

Thorough, independent investigation of cases, at every stage of the proceedings, is key to providing competent representation. The lawyers in Cases 2 and 3 above failed to conduct much, if any, case investigation, and the court concluded that this failure damaged the clients’ interests. Although the appellate courts considered these cases illustrations of gross failures to prepare, such scenarios are common. Lawyers often conduct last minute “in the hallway” discussions 15 minutes before a fact finding hearing. GALs fail to meet in advance with their clients, and rely solely upon the caseworker’s report in preparing for a hearing.
Before accepting a case, lawyers need specialized training. Failure to receive training in these areas coupled with an injury to a client may result in a malpractice claim. Such training should include working knowledge of:

- federal laws, including the Adoption and Safe Families Act (ASFA), Multi-Ethnic Placement Act (MEPA), Indian Child Welfare Act (ICWA), Child Abuse Prevention and Treatment Act (CAPTA), Foster Care Independence Act of 1999, Social Security entitlements, and disability laws
- state child abuse and neglect and termination of parental rights laws
- evidence and trial procedure
- negotiation strategies
- appeals procedures
- legal permanency options
- adoption subsidies
- child development—cognitive, emotional, physical
- communication with clients in developmentally appropriate language
- medical issues and medical evidence in child abuse and neglect cases
- understanding of mental illnesses and mental retardation
- substance abuse issues
- family violence, including the impact of domestic violence on children
- cultural, ethnic, and socioeconomic issues
- available services and resources for families
- immigration laws
- education laws and resources
- professional ethics

In a dependency proceeding, competent representation goes beyond interviewing witnesses. It requires understanding the client, family dynamics, family history, availability and interest of relatives, and educational matters—to name just a few issues. The more a lawyer knows about the strengths and weaknesses of the family, the more likely the lawyer will get results.

Competent representation entails investigating the factual and legal matters. This includes contacting the agency, foster parent, or other caregiver; independently reviewing records from many sources (child protective services, disability, delinquency, mental and physical health, substance abuse, and education); and working with other lawyers and advocates throughout the case, well before hearing dates. Ideally, once the court date arrives, the groundwork is laid, and the parties are cooperating. Volunteer CASAs can be a good source...
of information, as they often have more time to perform their investigations. Insufficient investigation limits the options for a client, and limits the effectiveness of representation. (Children’s lawyers should refer to the ABA Standards of Practice for Lawyers Who Represent a Child in Abuse and Neglect Cases for specific guidance on case investigation).

**MR 1.3: Diligence**

**Case 4** The Kansas Board for Discipline of Attorneys found that respondent violated Kansas Rule of Professional Conduct (KRPC) 1.3 (diligence) and 1.4 (communication). The panel concluded that respondent failed to act with reasonable diligence and promptness when he failed to file a motion to modify custody and child support for approximately six months after being directed to do so, and violated KRPC 1.4 by failing to remain in contact with his client, notify his client of the hearing date, or notify his client about his relocation to Arizona. The lawyer was suspended indefinitely.

MR 1.3 requires the lawyer to be diligent and prompt when representing the client, and should be considered along with MR 1.1, the duty to provide competent representation. The rule specifies that lawyers should pursue client matters despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. Case 4 illustrates the potential consequences for failing to follow through on client requests, which unfortunately is common in child welfare cases. Even when the client’s interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness and in the justice system.

Diligent representation means having a reasonable caseload so the lawyer can keep the client informed and pursue with commitment and dedication the client’s interests.

**Caseloads**

**Case 5** The New York State Bar Association (NYSBA) issued an ethics opinion on whether a government lawyer, representing the social services agency, may accept more matters than the lawyer believes he or she may competently handle. The lawyer posing the inquiry carried a large caseload which could not be significantly reduced because of legal requirements (ASFA timelines), and believed that more matters were being assigned than could be competently handled by any given attorney.

The NYSBA issued an opinion that the lawyer could not neglect a matter or prepare inadequately. The attorney could not comply with the direction of an agency official to “just show up” or “just do the best you can” without preparation, if the result would be to represent the department incompetently. Citing MR 1.1, the opinion explained that ethics rules and principles fully applied to lawyers employed by the government to represent government agencies. If a government lawyer were to neglect matters or to prepare inadequately, the lawyer might violate not only the duty of competence, but also the duty to seek justice and to develop a full and fair record.
“A lawyer’s work load must be controlled so that each matter can be handled competently.” While organizations that represent parents, children, and agencies have been reluctant to impose caseload limits, Case 5 shows that carrying an excessive caseload violates a lawyer’s duty to provide competent representation. This duty cannot be avoided by obtaining the client’s (agency’s) consent, because a client can’t consent to incompetent representation. Nor does the directive of a supervisor alter the individual lawyer’s obligation to adhere to ethical standards.

All lawyers struggle with whether there should be caseload limits, and if so, what number of cases is appropriate. The U.S. Department of Health & Human Services found that primary causes of inadequate legal representation in child welfare cases are low compensation and excessive caseloads. Reasonable caseloads and fair compensation are essential. A client’s interests are often harmed by the passage of time or a change of conditions, and unreasonable delay can cause a client anxiety and undermine trust in the lawyer. Some jurisdictions have set reasonable caseload sizes that lawyers should not exceed to maintain “competence.” The U.S. Department of Health and Human Services recommends:

State law should set standards for caseloads and caseloads should be reevaluated periodically. No standards or training or professional devotion to duty will produce optimal results if caseloads are too high. Depending on the level of support, the complexity of the case, and whether or not a lawyer’s full-time interest is in child welfare cases, the caseload cap for a staff lawyer should be set at 100 children. States could enforce caseload standards through full public reporting of caseloads throughout the State, working with localities to bring their caseloads to acceptable levels, or establishing fines for the locality that exceeds caseload limits. Limits could also be enforced through court action, including holding local officials and individual practitioners in contempt.

Not only do lawyers have a duty to decline work they cannot handle competently, but supervisors also have a duty to ensure caseloads are manageable. Wisconsin’s ethics advisory board issued an opinion that a supervising lawyer has an ethical obligation not to assign more work than a single lawyer can handle.

Caseloads should not be exceeded when it would force lawyers to forego a fact investigation in a case, legal research necessary to develop a theory of representation, or monitoring court orders and agency case plans to help assure permanency for the child.

**Trial Activities**

**Case 6** In a child custody case, a mother asked her lawyer to petition the court to change the visitation arrangement from “unsupervised with father” to “supervised.” The lawyer failed to seek the appropriate court order, and the father kidnapped the child and took him to Jordan. The appellate court reversed the trial court’s dismissal of the malpractice action, finding that a jury could find a causal connection between the lawyer’s negligence and the mother’s injury.

MR 1.3 requires lawyers to fully participate in the court process, and to provide
diligent representation. This includes obtaining records, filing pleadings, presenting and cross-examining witnesses, and offering exhibits. Lawyers should seek appropriate services (by court order if necessary) to access entitlements, protect the child’s interests, and implement a service plan. Proactive participation begins at the shelter care hearing, or when the case first enters court, and does not end until the court enters the final disposition, whether that is reunification, adoption, case closure due to the child “aging out,” relative placement, or some other final disposition.

All lawyers should participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the child. Whether mediation is formal or informal, negotiated settlements are generally better for families because tensions are reduced, the family is more likely to participate in services because parents and children feel they have provided input into the case plan, and reunification or alternative forms of permanence occur faster.

Ongoing monitoring of the court’s orders ensures services are provided and the court’s orders are implemented in a complete and timely fashion. Staying in touch with the child, caseworker, third party caretakers, and service providers between review hearings is key to identifying implementation problems. When appropriate, lawyers should discuss options to appeal with clients.

Sidebar 3

**Excessive Caseloads: What Can Judges Do?**

The ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases suggest that trial court judges take one or more of the following steps to control lawyer caseloads:

- Expand, with the aid of the bar and children’s advocacy groups, the size of the list from which appointments are made.
- Alert relevant government or private agency administrators that their lawyers have an excessive caseload problem.
- Recruit special child advocacy law programs to represent children.
- Review any court contracts/agreements for child representation and amend them accordingly, so that additional lawyers can be compensated for case representation time.
- Alert state judicial, executive, and legislative branch leaders that excessive caseloads prevent lawyers from competently representing children according to state-approved guidelines, and seek funds to increase the number of lawyers available to represent children.
Consider Case 6 above where, during his representation, the mother’s lawyer failed to follow the mother’s request that the father’s visits be supervised. The court found that a jury could find malpractice based upon (1) the lawyer’s failure to provide a reasonable standard of care, and (2) the fact that the mother’s injury (abduction of her child) directly resulted from the lawyer’s failure to follow her request. A lawyer’s failure to follow through on a client’s request that results in damages or a loss for the client may subject the lawyer to civil liability in addition to disciplinary action.

Other Activities

Once a lawyer is appointed in a case, competent, diligent representation might mean pursuing other administrative or judicial issues on behalf of the client, even if those issues do not stem from the court appointment. The client’s interests may be served through proceedings not connected with the original dependency case. In such cases, the lawyer may be able to secure assistance for the client by filing or participating in other actions. For example:

- child support
- delinquency or status offender matters
- Social Security and other public benefits
- custody
- guardianship
- paternity
- personal injury
- school/education issues, especially for a child with disabilities
- mental health proceedings
- termination of parental rights
- adoption

MR 1.4: Client Contact

Case 7 In a California case, a lawyer’s representation of a father in a TPR trial was found deficient. Counsel did not respond to father’s phone calls over three months, counsel admitted the father called at least three times, left a return fax number, and stated he wanted a paternity test. Counsel did not seek to establish his client’s status as the presumed father, and counsel did not object to lack of notice to the client. The appellate court found this lack of communication and effort was ineffective assistance of counsel.34

Case 8 Counsel’s assistance was found “ineffective” because she (1) failed to object to the allegations in the abuse/neglect petition, (2) failed to request the appointment of a GAL for her client, the mother, who was depressed and psychotic, and (3) failed to meet with her client during the six-month period from when the case was opened until parental rights were terminated.35

Inaccessibility, unanswered phone calls, lawyers meeting clients for the first time in courtroom hallways, and lack of contact between lawyers and children all are examples of insufficient client contact that cause problems. MR 1.4 requires a lawyer to keep a client reasonably informed about the case and explain matters so the client can make informed decisions, and participate in the representation. Comment 4 to MR 1.4 says that a lawyer who regularly communicates with clients minimizes the client’s need to request information about the representation. When a client makes a reasonable request for information,
however, paragraph (a)(4) requires lawyers to promptly comply with the request; if a prompt response is not feasible, the lawyer must acknowledge the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.36

Lawyers should review all written orders to ensure they conform with the court’s verbal orders and statutorily required findings and notices. They should discuss the order and its consequences with their clients, including whether the order is final, or whether it may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished; this should be explained to all clients, including caseworkers.

Ordinarily, information is meant for a responsible adult client who can understand it. However, fully informing the client according to this standard may be impractical, for example, when the client is a child or has diminished capacity. (Chapter 3 addresses MR 1.14 and representing clients with diminished capacity.) However, even clients with diminished capacity are entitled to communicate with their lawyer, as provided under MR 1.4. Consider Case 8 above where the mother, who was hospitalized with mental disorders, still had a right to have her interests heard at dependency and TPR proceedings through counsel or a GAL.

Parents’ lawyers are discouraged from using “outside the courtroom” meetings as the sole contact with clients. Effective, quality representation depends largely on the lawyer’s relationship with the client.

Developing a relationship of trust is key. This is especially true when representing parents and children in abuse and neglect cases since they involve deeply personal issues and much is at stake. Consider Case 7 above where the father was not even a party to the case because paternity had not been established, yet the court found that his lawyer’s (lack of) performance was ineffective assistance by the lawyer’s failure to communicate with his client, or to assert paternity.

Agency lawyers should communicate with appropriate agency officials, usually the frontline caseworker, but sometimes also a supervisor. Lawyer/client relationships can deteriorate due to unreturned phone calls, missed case staffings, and unavailability while preparing for trial. (Chapter 2 covers MR 1.13 and agency representation issues.)

In some circumstances, a lawyer may be justified in not immediately communicating certain information when the client would be likely to react poorly.37 For example, a lawyer might withhold a client’s psychiatric diagnosis when the examining psychiatrist has indicated that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer’s or another person’s interests or convenience.

**Compliance Strategies**

In some jurisdictions, lawyers habitually fail to properly prepare their cases or be accountable to their clients. Monitoring lawyers’ ethical behavior can be challenging. Many problems described in this chapter persist because of insufficient disciplinary enforcement.
Establishing Relationships with Children: Tips for Children’s Lawyers and Guardians ad litem

Establishing and maintaining a relationship with a child is crucial to provide meaningful, quality representation.

Frequency of contact: The ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases recommend that contacts with child clients occur at least once every six months and at each key stage of the representation, usually before every scheduled hearing, and when apprised of emergencies or significant events impacting the child, such as changes in placement, school suspensions, or inpatient hospitalizations.

When contact should occur: Meeting with the child before court hearings allows the lawyer to assess the child's circumstances. This leads to a greater understanding of the case, which may lead to more creative solutions in the child's interest. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might exist, and what will happen next. They also allow the child to express her wishes and concerns.

Age of child: Representation quality often depends on the quality of the relationship with the child. In some instances, a child may be too young to understand the purpose of the proceedings or the issues involved. However, even very young children can and should be kept informed in an age-appropriate manner. The time spent getting to know the child will allow her to participate in the case, and will allow the lawyer to understand the case from the child’s point of view.

Location/Nature of contact: Meetings in the community, usually at the child’s placement, are preferred because the child may be more comfortable, and the lawyer will have a chance to observe how the child interacts with caretakers and others.

This role requires meaningful face-to-face contact and that, depending on the circumstances, contact might need to be more frequent. It will take a lawyer more than a couple of visits to establish a trusting relationship with a five year old who has been abused or to establish rapport with a teenager. The location of the meeting is an important, sensitive decision, and should be made with the child’s best interest the top concern.
Consider who is victimized by unethical practice. To sue for malpractice, the client must be aware of this right, and have the resources to bring the claim. Whether a client brings a malpractice claim, or files an ethical grievance depends on many factors, including experience, education level, and age.

Disciplinary actions and referrals in child protection cases are therefore rare, and usually only address outrageous situations. This is especially true in areas where lack of client contact, insufficient preparation, and unmanageable caseloads are the norm. Such conduct raises no eyebrows in some courts because judges, caseworkers, and even parents have become used to this low level of representation.

Given the lack of sophistication of most clients, especially children, there is a heavy burden on the legal community to be clear about ethical responsibilities when practicing in this field. Creative, effective approaches to policing ourselves and other lawyers should be sought.

Judge’s Role
Judges can ensure lawyers comply with the state’s ethics rules. They can support training and instruction for lawyers. They can routinely ask about case-related preparation, such as asking lawyers whether and how often they’ve contacted their clients. They can dismiss lawyers, or refuse to appoint the offending lawyers to future cases. If lawyers are not court appointed, they can push for a system of monitoring and review, or even performance-based contracts. This could include tying contracts to standards of performance, and requesting input from caseworkers, foster parents, other lawyers, and clients.

Other Lawyers’ Roles
Many lawyers are reluctant to report “one of their own” to bar counsel. Especially when lawyers work together regularly, reporting another lawyer can create a hostile, unfriendly, and awkward working environment, and can affect the functioning of the judicial process. Reporting misconduct can improve practice, though, and eliminate the worst offenders from handling child welfare cases.

MR 8.3(a) requires that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” This includes a violation of MR 1.1 Competence, MR 1.3 Diligence, and MR 1.4 Communication with Client. The comment to MR 8.3 suggests that the rationale for the rule is that self-regulation may be a better way to reveal improprieties, and that reports of apparently isolated violations may indicate a pattern of misconduct.38

Reporting a violation is critical when the client is unlikely to report either because he may not discover the offense39, or lacks the knowledge and ability to make such a complaint. The term “substantial” refers to the seriousness of the possible offense.40 A report should be made to the bar disciplinary agency unless
some other agency, such as a peer review agency, is more appropriate. When unsure about whether to report, or how to handle other ethical dilemmas, lawyers can request advice from the local bar association or the appropriate lawyer disciplinary agency.

Conclusion
Quality representation can overcome many problems in the child welfare field, and is key to keeping children safe from abuse and neglect, and helping them achieve permanence. Clients are more satisfied with their experiences and more likely to comply with case plans and court-ordered services when their lawyers are interested, prepared, and involved in the process. States are beginning to address representation problems through the court process and disciplinary action. Lawyers have an obligation under MR 8.3 to report ethical violations. When clients lack the sophistication or knowledge to make such a report, lawyers have a duty to inform disciplinary boards when a lawyer’s performance has harmed the client. Malpractice liability, disciplinary action, or “ineffective assistance of counsel” findings should be pursued in appropriate cases to remedy problems stemming from poor quality representation.

Endnotes
2 To see various strategies states have used to address these problems, visit the following link to the National Court Improvement Catalog: http://www.abanet.org/child/cipcatalog/legalrepresentation.html.
3 Forty-one states have modeled their state rules of professional conduct on the Model Rules. Most of the remaining states have based their rules on earlier versions of the ABA Model Code.
4 MR, Scope. Cmt. 20. “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.”
8 In re D.B., 385 So. 2d 83, 90 (Fla. 1980).
9 In re Gault, 387 U.S. 1 (1967).
15 Model Rule1.1, cmt. 1.
16 Citation unavailable. For information about this case, see Rankin, Bill. “Judge Allows Lawyer's Removal from List.” The Atlanta Journal-Constitution, April 2003, G4.

17 For information about this certification program, contact NACC at 888/828-NACC, www.NACC.childlaw.org

18 These standards are available at www.abanet.org/child/childrep.html. Standards of Practice for agency attorneys are drafted and awaiting ABA approval, and Standards of Practice for parents' attorneys are forthcoming.

19 MR 1.1, cmt. 6.

20 D.J.L. v. Bolivar County Dep't of Human Servs., 824 So. 2d 617 (Miss. 2002).


22 A lawyer shall act with reasonable diligence and promptness in representing a client.


24 MR 1.3, cmt. 1.

25 MR 1.3, cmt. 3.

26 NYSBA Ethics Opinions 751 (1/31/02, revised 5/6/02).

27 MR 1.3, cmt. 2.

28 Because there are so many factors when determining a reasonable caseload, ethics committees are reluctant to recommend a raw number.


30 Ibid. Commentary to Guideline #3.


33 ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases, D-12.

34 In re O.S. v. Lee C., 126 Cal. Rptr. 2d, 571 (Ct. App. 2002).


36 MR 1.4, cmt. 4.

37 MR 1.4, cmt. 7.

38 MR 8.3, cmt. 1.

39 MR 8.3, cmt. 1.

40 MR 8.3, cmt. 3.
Chapter 2

Protecting Client Confidences

Lawyers handling child welfare cases face difficult ethical dilemmas when protecting client confidences.

• Agency lawyers must act in the best interest of the agency while helping the agency act in the child’s best interest. What are an agency lawyer’s ethical duties when she discovers the social worker has put the child’s safety or permanency at risk?

• Under what circumstances may a parent’s lawyer reveal confidential information? When, if ever, must a lawyer reveal such information? What are the ethical duties for a parent’s lawyer who learns the parent is continuing to abuse a child or is placing the child at risk of harm?

• Are there any limits on when a child’s lawyer should keep a client’s secrets? What if the child tells her lawyer something that raises a question about the child’s safety?

• How does a guardian ad litem (GAL) reconcile a statutory duty to present all facts to the court relating to the child’s best interest when a child has disclosed something and asks the GAL “not to tell anyone?”
The unique nature of child protection cases can make these decisions difficult for lawyers. It is unusual that parties, who are adversaries in court, must work together for the case to succeed. The adversarial process can pit the parties against each other, especially if hearings are contested and witnesses testify. While a social worker may perceive her testimony as simply “recounting the facts,” a parent may perceive the worker as testifying against the parent. This adversarial model sometimes leads parents’ and children’s lawyers to advise clients to withhold important information, and even not cooperate with the agency. This tendency to protect certain information can delay reunification, and can damage relationships between the parties. Where else in law is there a hearing with three (or more) parties who, after a contested trial, must sit down and cooperatively draft a case plan? The parties must then work together closely, ideally in a relationship characterized by trust and confidence, as they implement the case plan. Lawyers schooled in the adversarial model of justice must first understand the lawyer/client confidentiality rules as well as other ethical rules that guide practice. They must also understand the consequences of certain choices and their impact on the client given the unique context of a child abuse and neglect case. Balancing their duties to clients, such as protecting confidences, with their duty to advise the parents to cooperate to achieve reunification, can be challenging.

This chapter looks at lawyer/client confidentiality as an ethical issue for lawyers who represent parents, children, and child welfare agencies. It analyzes ethical issues by referencing the ABA Model Rules of Professional Conduct. It also contains a section on applying the confidentiality rules to GALs who are appointed to represent children’s best interests.

Parents’ Lawyers
When a child is in serious danger, should protecting that child supersede the lawyer’s traditional duty to protect lawyer/client confidences? Consider the following case from the perspective of the mother’s lawyer:

The Sands Case
The case involves neglect allegations that Jackie Sands, a single mother, is abusing drugs and has left her children, Jason (age 15), David (age 7), and Angela (10 months) home alone more than once, never overnight, but often for hours at a time in the evenings. Sometimes Jason is home, but often he is out with friends. Jason has begun skipping school, and his grades have recently dropped. The judge awards temporary care and custody to the agency at the shelter care hearing, pending the adjudication. The judge also orders a substance abuse evaluation for Ms. Sands.

The adjudication date has arrived. Mom’s drug screen shows she’s negative for all controlled substances. The agency’s case is weak because the witnesses who saw the children left home alone are unreliable, and may have been under the influence of drugs themselves, further undermining their credibility. During the interview, Ms. Sands tells her lawyer she faked the court-ordered substance abuse evaluation by using someone else’s urine. She instructs her lawyer not to reveal this information because she’s desperate to have her kids home.
ABA Ethics 2000 Revises Ethics Rules

The Model Rules of Professional Conduct were implemented in 1983. In 1997, the American Bar Association established the Commission on the Evaluation of the Rules of Professional Conduct to consider amending the Model Rules of Professional Conduct. The Rules had last been amended in 1983 and the purpose of the amendments was to:

- reflect developments in ethics, technology, and legal culture;
- provide guidance about increasingly complex client matters;
- enhance public confidence in the legal system; and
- promote national uniformity and consistency.

This effort resulted in the first global set of amendments to the Rules since they were adopted in 1983. The Commission completed its work in 2001. After extensive hearings and review, the ABA House of Delegates adopted the recommendations on February 5, 2002. Subsequently, in large part due to recent corporate scandals, the Task Force on Corporate Responsibility recommended additional changes to MR 1.6 (Confidentiality) and MR 1.13 (Representing an Organization). These changes were ratified by the ABA House of Delegates in August, 2003. For an explanation of the changes, see http://www.abanet.org/cpr/e2k-report_home.html. Several states have adopted the Ethics 2000 amendments and a number of states are holding committee meetings to consider amending their state codes in light of the changes to the Model Rules. For an overview of the Ethics 2000 Commission and Report, please see http://www.abanet.org/cpr/e2k-ov_mar02.doc

The significant changes to MR 1.6 are:

- Paragraph (a): Replace “consents after consultation” with “informed consent”
- Paragraph (b)(1): Modify to permit disclosure to “prevent reasonably certain death or substantial bodily harm”
- Paragraph (b)(2): Add paragraph permitting disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer’s services See also Comment [7].
- Paragraph (b)(3): Add paragraph permitting disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer’s services
- Paragraph (b)(4): Add paragraph permitting disclosure to the extent necessary to secure legal advice regarding lawyer’s compliance with Rules
- Paragraph (b)(6): Add paragraph permitting disclosure to comply with law or court order
Before answering the hypothetical, first consider what the rules say, and the underlying rationale and policy reasons for the confidentiality rule. The circumstances requiring parents’ lawyers to disclose information are controversial. The ethical rules give lawyers discretion, and seek to strike a balance between nondisclosure to protect the lawyer/client relationship, and disclosure to protect society (in this case, children).

On one hand, strengthening the confidentiality rules protects the lawyer/client relationship by encouraging open communication. Preserving client confidences helps develop the facts fully, which allows lawyers to effectively represent clients. The lawyer also needs this information to advise the client to refrain from wrongful conduct. The rule also protects the sanctity of the lawyer/client relationship, and protects the client’s privacy. The rule is grounded in the Fifth Amendment right against self-incrimination and the Sixth Amendment right to effective assistance of counsel.

On the other hand, loosening the restrictions on the confidentiality rules holds lawyers more accountable as “officers of the court,” to better protect society. Some argue that allowing or requiring lawyers to keep their clients’ secrets is inconsistent with public policy, reduces public confidence in the legal profession, and contributes to diminishing respect for lawyers. Sometimes the lawyer may be the only one aware of a dangerous, criminal, or threatening situation, and is in a unique position to prevent the contemplated harm.

Model Rule 1.6: Confidentiality of Information

Model Rule 1.6, amended in 2002, and again in 2003, addresses confidentiality (see sidebar #1 for amendment information). Most states have based their rules of professional conduct on the Model Rules. Since the amendments to the Model Rules are so recent, only a few states have adopted the changes. This chapter analyzes the issue under both the “old” Model Rule (current rule in most states), and the amended Model Rule.

The amended Model Rule provides that absent client consent, lawyers may not reveal information about the representation. The Model Rules provide six circumstances under which a lawyer may reveal otherwise protected, confidential information. The two relevant circumstances are (1) when the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm, or (2) to comply with a law or court order. The recent changes in the Model Rules expanded the grounds for permissive disclosure by eliminating the word “crime” from MR 1.6(b)(1). In other words, in most states that still follow a modification of the former Model Rules, a lawyer could reveal confidential information only to prevent the client from committing a criminal act that the lawyer believed was likely to result in imminent death or substantial bodily harm. Now there is a broader exception with no requirement of client criminal behavior.

The 2002 and 2003 amendments further expanded the grounds for permissive disclosure by changing “imminent death”
to “reasonably certain death,” and adding other circumstances under which a lawyer may reveal confidential information: (1) to secure legal advice about the lawyer’s compliance with these Rules; (2) to comply with other law or a court order, and (3) to prevent or mitigate substantial financial injuries to others.4

There are some state variations on this rule that impact primarily parents’ and children’s lawyers. In 11 states the lawyer shall or must reveal otherwise confidential information in certain circumstances (usually involving cases of substantial bodily harm or death).5

Therefore, under the Model Rules, the mother’s lawyer in the Sands case must keep the information confidential unless the lawyer reasonably believes that disclosure is necessary to prevent reasonably certain death or substantial bodily harm, or if the court or other law requires such disclosure. If either exception to the confidentiality rule applies, the lawyer may reveal the information, but is not required to. On one hand, these exceptions are meant to apply to extreme cases, and the Model Rules favor protecting the confidence. On the other hand, the examples above show the trend is towards expanding the grounds for permissive disclosure with some states actually mandating disclosure.

The confidentiality rule applies not only to matters communicated in confidence by the client but to all information relating to the representation, whatever its source.6 This distinguishes lawyer/client confidentiality from information subject to lawyer/client privilege (see sidebar #2 for information on the difference between confidentiality and privilege). In the Sands case, if the lawyer finds out from a neighbor (and not from his client) that the neighbor saw Ms. Sands using drugs, this information is considered confidential and protected (Chapter 6 addresses how to handle this neighbor’s statement in the context of litigation).

Model Rule 3.3: Candor Toward the Tribunal

Note that under the amended MR 1.6, no disclosure is mandatory, even when the purpose is to comply with a law or court order.7 In fact, the only disclosure obligation in the Model Rules is MR 3.3, Candor Toward the Tribunal. Under MR 3.3(a), regardless of whether information is protected by MR 1.6, a lawyer must disclose to the court when the lawyer has offered evidence that the lawyer knows is false.

Unless and until Ms. Sands insists on testifying that she’s clean, or until she wants her lawyer to refer to her “clean” drug evaluation, MR 3.3 does not come into play. Chapter 6, dealing with litigation issues, will take this case scenario further and explore how the confidentiality rules are impacted by MR 3.3 (Candor Toward the Tribunal), MR 3.4 (Fairness to Opposing Party and Counsel), MR 4.1 (Truthfulness in Statements to Others), and MR 1.2(d) (assisting a client in criminal or fraudulent activity).

Deciding Whether to Reveal

Under the Model Rules, the lawyer may choose to reveal confidential information only if one of the MR 1.6(b) exceptions applies. In deciding what to do, a lawyer should consider the consequences of revealing certain types of information versus withholding it. Child protection hearings are civil proceedings. However, there
is often a risk of criminal prosecution, and significant interests are at stake, including custody and placement of children. Parents risk losing their parental rights. Therefore, lawyers for parents need to balance protecting their clients from state action (losing custody of a child, TPR, criminal prosecution) with encouraging clients to cooperate with the state to regain custody of a child, and prevent losing their parental rights. This dilemma is explored later under the discussion on MR 2.1. Lawyers also need to balance the risks of not revealing, such as civil liability (discussed in sidebar #3).

**Children’s Lawyers**

Consider the Sands case from the view of the child's lawyer (distinct from the GAL representing the children's best interest, referenced below). While interviewing the children, Jason and David consistently say they would like to go home and live with their mother. Further, Jason says he has seen his mother use drugs, but he asks his lawyer not to tell anyone because he knows if this information comes out, he might be sent to a foster home.

When deciding whether to reveal Jason’s disclosures, a child’s lawyer may try to escape the ethical dilemma by say-
ing he does not have to reveal them because the mother’s drug use would become known through other channels. However, what if this is not the case? Drug screens can be inconclusive, and the agency may have no other eyewitnesses or ways of proving Ms. Sands’ drug use. Suppose, as well, that Jason tells his lawyer that he thinks it’s neat to have a lawyer, and that one thing he knows about lawyers is that “they keep their clients’ secrets.”

The analysis of MR 1.6 above applies here as well. Under the Model Rules, the lawyer must keep this information confidential unless one of the relevant circumstances under MR 1.6(b) applies. In other words, only (1) if the lawyer “reasonably believes that disclosure is necessary to prevent reasonably certain death or substantial bodily harm,” or (2) “to comply with a law or court order,” may the lawyer even consider revealing the information.

Remember, these exceptions are meant to address extreme cases, and the Model Rules favor protecting the confidence. A more common scenario arises when a child is a runaway and has told the lawyer his whereabouts. The court orders the lawyer to reveal the child’s location. The lawyer must consider all the consequences when deciding whether to reveal where the client is, including the future relationship with the child and the judge. The lawyer may choose to reveal the client’s whereabouts, pursuant to the court order and the accompanying risk of contempt of court for failing to comply with the court order. The disadvantages are that disclosing may jeopardize the relationship with the client, and the client may decide to stop communicating with the lawyer, which could make a bad situation even worse.

On the other hand, the lawyer may choose to protect the confidence. This may jeopardize the child’s safety because the agency still won’t know where the child is, and may also strain the lawyer’s relationship with the judge. The lawyer, however, may feel it is best to preserve the confidence so the runaway client is communicating with at least one professional in the case. Either choice is warranted under the ethical rules, and each has different consequences.

Model Rule 2.1: Advisor

Children’s and parents’ lawyers face a dilemma over when it is ethically permissible to withhold certain information because it’s confidential, or reveal information based on one of the exceptions. The lawyer has a choice, and should be aware of other considerations when determining whether to disclose.

An often overlooked ethical rule is MR 2.1, dealing with a lawyer’s duty to advise her client. The rule explicitly encourages lawyers to provide advice to clients that goes beyond purely legal advice. It encourages lawyers to advise on moral, social, economic, or other factors relating to the client’s situation. In the Sands case, the lawyer could consider advising Ms. Sands to seek treatment for a possible drug problem, or could advise her to admit the allegations on the petition and seek support from the child welfare agency.

The comments to MR 2.1 make clear that a client is entitled to straightforward advice expressing the lawyer’s honest assessment, and that legal advice often involves unpleasant facts and alternatives that a client may not want to confront. In presenting advice, the lawyer should attempt to sustain the client’s morale, for
example, by referring her to a mental health professional, or another person who can help her work through her problems. Although a lawyer is not a moral advisor as such, moral and ethical considerations affect most legal questions and may decisively influence how the law will be applied. Even if the lawyer thinks she could get this case dismissed based upon the weak evidence presented by the agency, the lawyer might advise Ms. Sands to admit the allegations, especially if the lawyer is concerned for the safety of the children and worries that if this petition is dismissed, another one will be filed in the future. The lawyer may also suspect that Ms. Sands is in danger. Opening a child protection case may also give Ms. Sands greater access to community resources, including drug treatment.

When appropriate, the lawyer may recommend that the client consult with a professional in another field, such as a psychologist, social worker, or addictions specialist. When a client proposes a course of action that is likely to harm the client, the lawyer’s duty under MR 1.4 (discussed in chapter 3) may require the lawyer to offer advice. There is no general duty to investigate a client’s private affairs or to give advice that the client has indicated is unwanted, but a lawyer may give

Sidebar 3

Parents’ Lawyers: Other Considerations when Deciding to Disclose

Civil Liability
A lawyer may choose not to reveal even when disclosure could prevent reasonably certain death or substantial bodily harm. Under the amended MR 1.6, a lawyer may also choose not to reveal when disclosure is required by state law or a court order. This is because MR 1.6(b)(1) & (4) are permissive, not mandatory. However, beyond ethical rules, the potential for civil liability arises when a lawyer fails to warn a third party of a threat that the lawyer’s client made against the third party. This private cause of action would potentially arise from a legal duty to warn third parties of a client’s threat. Despite several lawsuits asserting damages, no courts have imposed tort liability on a lawyer who fails to warn based on a client’s threat, or based on the lawyer’s knowledge of a continuing crime, including child abuse. However, all jurisdictions permit such disclosure if the circumstances qualify as an exception under MR 1.6(b). The legal community is debating the issue of civil liability for lawyers, especially in light of recent cases where lawyers helped conceal client fraud and misconduct. (See Cooper, Davalene. “The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client’s Threat that Cause Serious Physical Harm or Death.” Idaho Law Review 36, 2000, 479.)
such advice when doing so appears to be in the client’s interest.10

**Model Rule 1.14: Client with Diminished Capacity**

This rule has special confidentiality provisions. It can be relevant when representing a client suspected of using drugs, especially if the client’s drug use has a significant impact on the client’s cognitive and social functioning. (Chapter 3 addresses representing clients with diminished capacity, including the confidentiality provisions.)

**Agency Lawyers**

**Model Rule 1.13: Organization as Client**

Suppose a social worker admits to the agency lawyer that she has altered dates on her case record. What are the lawyer’s duties to her, to other parties, and to the court? To understand how lawyer/client confidentiality applies to an agency lawyer, consider MR 1.13 regarding agency representation. (See sidebar # 4).

MR 1.13 says “a lawyer employed or retained by an organization represents the
Agency Lawyers: Who’s Your Client?

Several models of agency representation exist. The agency may be represented by:

- the attorney general’s office,
- the district attorney’s or prosecutor’s office,
- county attorneys,
- in-house counsel, or
- private, independent contractors.

Some models assume that the client is the child welfare agency. Determining who is the agency’s client is partly a function of the model of representation. Some states have a statute, court rule, or opinion on point that clearly resolves the issue. Most states, however, have not resolved the issue, and may even have different practices throughout the state. Usually when the child welfare agency is represented by the prosecutor’s office, the model is analogous to criminal cases, where the prosecutor doesn’t have a client per se, but instead represents the “people of the state,” or the “public interest.”

In most states the agency is the client, not the individual social worker, not the public, and not the child’s best interest. The ABA Center on Children and the Law and the U.S. Department of Health of Human Services have both recommended, in their “Practice Standards for Legal Representation of the Child Welfare Agency” (in child abuse and neglect cases) that the state define the agency lawyer role as the legal representative of the agency. (Guideline #8. http://www.acf.dhhs.gov/programs/cb/publications/adopt02/02adpt7.htm)

organization acting through its duly authorized constituents.” Therefore, a lawyer representing the child welfare agency represents the agency, not the individual social workers or employees.

What does this mean in practice?

To start, communications generally are protected by Rule 1.6, despite the fact that the lawyer represents the agency, not the individual social worker. For example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6.

If the actions of the social workers threaten substantial injury to the child welfare agency, the lawyer could not be compelled to reveal communications to someone outside the organization (e.g., law enforcement or opposing counsel such as the GAL). However, the lawyer must reveal knowledge of the social
worker’s wrongdoing to others within the agency, including supervisors. This is because the lawyer has a duty to proceed as is reasonably necessary to promote the best interest of the organization. For example, in the case scenario above, the lawyer may not have to reveal the social worker’s wrongdoing to anyone outside the agency (although the lawyer might choose to reveal, based on Comment [6] to MR 1.13, detailed below.) The lawyer, however, should reveal the wrongdoing to a supervisor or higher authority within the organization because the lawyer’s primary ethical responsibility is to protect the best interest of the organization. The lawyer may need to proceed “up the chain of command” within the agency to resolve concerns.

When a social worker makes a serious mistake, the lawyer should consider the following factors when determining how to proceed:

1. Protecting Client Confidence

Usually when the agency is represented by a county attorney’s office, or by the attorney general’s office, the agency is considered the client, but this is not always the case. Maine, for example, has case law saying that as the chief law officer of the state, attorneys general are vested with considerable discretion and autonomy to exercise power in the public interest. The AG’s paramount duty is to act as the legal representative of the people in controlling and managing the litigation of the state and in pursuing the public interest. The agency is not considered the client under this opinion, therefore the analysis under Model Rule 1.13 would not apply in Maine.

In states where child protection is county-operated, as opposed to state-operated, several models of representation may be used. Some counties have agency lawyers, hired to represent the agency. Other counties use prosecutors. Some smaller counties hire private contractors, and still others use a combination. See the chapter on “Conflicts of Interest” for information about how the various models present different types of conflicts. Also in that chapter is a detailed analysis of a West Virginia case (In re Jonathan G., 482 S.E.2d 893, 909 (W. Va. 1996).) where the prosecutor argued they are not bound by the agency’s wishes because the prosecutor’s office represents “the people.” The West Virginia Supreme Court ultimately decided that the relationship between the agency and the prosecutors is a pure lawyer-client relationship, therefore, the prosecutor is prohibited from advocating a position that is contrary to that of the agency.

Consult your state law to determine whether it has resolved the threshold question over who the client is. The ethical analysis varies if your state has not resolved this issue.
• the seriousness of the violation and its consequences,
• the scope and nature of the lawyer’s representation,
• the responsibility in the organization and the apparent motivation of the person involved,
• the policies of the organization concerning such matters and any other relevant considerations.14

The lawyer has to consider the nature of the wrongdoing under these criteria. For example, a caseworker who arrives at court late with an overdue court report may not warrant a call to the supervisor on the first or second incident. A chronic pattern of lateness or neglecting caseworker duties, however, may warrant such a call.

Duties to the Social Worker
Sometimes the child welfare agency’s interest may become adverse to an employee (in this case, the social worker). Developing the case scenario from above further, suppose the social worker not only admits that she altered dates in her case record, but that she also lied in the termination of parental rights trial. Assume she tells the agency lawyer that when she testified that she had no contact from the mother, this was untrue. She was too busy and overwhelmed at the time to respond to the mother, but that she also lied in the termination of parental rights trial.

The lawyer’s ethical duty is to proceed in the best interest of the organization. When the agency’s interest and the caseworker’s interest diverge, as in the above examples, additional duties arise with respect to the worker. MR 1.13 says that the lawyer:

should advise [the caseworker] that the lawyer cannot represent [the caseworker], and that [she] may wish to obtain independent representation.

Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for [the caseworker], and that discussions between the lawyer for the organization and the individual may not be privileged.15

Another way in which the agency’s interest may become adverse to that of the social worker is when the social worker places a child in a foster home and the child is injured while in foster care. The agency and the social worker may face civil liability. The agency lawyer, therefore, must explicitly warn the social worker that the lawyer represents the agency, and does not represent her, and that she may want to seek outside legal representation.

Additional Considerations
Agency lawyers should understand that the Model Rules suggest that confidentiality restrictions may be less for a government lawyer because public business is involved, and government agencies are held to a higher standard than private companies. The Model Rules explicitly allow a government lawyer to question fraudulent conduct more extensively than a lawyer for a private organization in similar circumstances, and specific federal or state law may authorize this.16

In other words, when the client is a governmental organization, a different
balance may be appropriate between maintaining confidentiality and assuring the wrongful act is prevented or rectified. This is especially relevant for agency lawyers because the agency has the prodigious task of protecting children, including keeping them safe from harm, and speeding permanency. Therefore, the agency lawyer has to balance the responsibility of protecting children with the ethical obligation to act in the best interest of the agency.

This analysis gets more complex when the child welfare agency is not represented by a government “agency lawyer,” but instead by the office of the attorney general, the district attorney’s office, or by private contractors. (Sidebar # 3 addresses these varying models of agency representation.)

Agency lawyers should also be aware that after the 2002 amendments to the Model Rules, the ABA Task Force on Corporate Responsibility recommended additional changes to MR 1.6 and MR 1.13, which went into effect in 2003. MR 1.6 now provides additional exceptions to the confidentiality provision where an attorney may reveal confidential information:

- “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;”
- “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

The language of MR 1.13 was strengthened to require the lawyer to refer the matter to higher authority in the organization, and permit disclosure outside the organization if the highest authority that can act on behalf of the organization fails to address the case-worker’s violation of the law, and that such violation is reasonably certain to result in substantial injury to the organization. These changes were implemented in light of recent corporate scandals where lawyers were criticized for not revealing their clients’ fraudulent conduct.

Withdrawal
The Model Rules provide for withdrawal if a client insists on pursuing a fraudulent course of conduct. MR 1.16 applies to all lawyers in this situation, including agency lawyers. (Chapter 6 explores permissive and mandatory withdrawal and other rules that prohibit a lawyer from assisting a client in criminal or fraudulent conduct.)

Guardians Ad Litem
Applying the confidentiality rules to GALs can be confusing. A difficult issue for a GAL is whether and to what degree to keep confidential certain communications between the GAL and child client. The confidentiality normally required in the lawyer/client relationship might prevent a GAL from carrying out the statutory duty to advocate what she thinks is in the best interest of the child. This is because MR 1.6 prevents the GAL from disclosing information provided by the child that arguably should be disclosed to the court for an adjudication of the child’s best interests under the statute.
Consequently, a GAL generally must bend the restrictions of MR 1.6 to disclose to the court relevant and necessary information provided by the child. There is no satisfactory way to resolve this ethical dilemma.

What, then, should the GAL do if the child-client informs the GAL of relevant facts that the child does not want to be divulged? This analysis applies only to lawyer GALs because nonlawyer GALs are not bound by a state’s code of legal ethics. Suppose, for example, that in the Sands case, the children are represented not by a lawyer, but by a GAL.

Different jurisdictions have devised a variety of approaches to help lawyer GALs ethically carry out their duties to the client and the court.

- In some states where a GAL is appointed to represent the child’s best interests, lawyer/client confidentiality still applies because state statute or case law prohibits disclosure without the child client’s consent.
- Some states mandate a confidential relationship, unless nondisclosure would result in harm, in which case a lawyer may breach confidentiality.
- Other states make clear that lawyer/client confidentiality does not apply. In one state, this is based on the theory that the GAL does not, in fact, represent the child, but instead represents the child’s best interests.

Many states do not have a statute or case on point, and there is no uniformity on how this issue gets resolved, even within a single state. One solution to the GAL’s dilemma is to attempt to prevent the possibility that the issue will arise. If a GAL plans to reveal client communications, including those the child does not want revealed, the GAL should advise the child client, before soliciting information from the child, that the information will not be confidential. The child then can make informed decisions about what to disclose.

This advice is especially important when representing older children who sometimes have a sophisticated understanding of what characterizes a lawyer/client relationship. Many young people see lawyers in movies, television, and other media. They, or someone they know, often have personal experience with the legal system. They may assume their lawyer will keep certain information confidential. For example, in the case scenario, Jason has trusted his GAL by disclosing information about his mother’s drug use. He also told the GAL that one thing he knows about lawyers is that “they keep their clients’ secrets.”

To make sure the GAL does not violate the trust of these young people, it is critical to let child clients know the GAL’s role is to tell the judge what the GAL thinks is best for the child and why. The GAL also should let the child client know he might have to reveal what they discussed to the judge, the social worker, or someone else.

Some states require the GAL to alert the child before any interview about the GAL’s roles and responsibilities, and that the GAL may provide information to the court or other parties, including communications that otherwise would be protected by the ethical rules governing the lawyer/client relationship. Absent such an advisement, the child’s sense of trust may be violated and confidence in the system designed to protect the child could be undermined.
Conclusion

Lawyers need to look at their own state's specific rules on confidentiality for guidance on when to disclose confidential client information. In some situations, the rules will not provide a clear answer on what the lawyer must do. In fact, most exceptions to the confidentiality rule are permissive rules, leaving the decision to the lawyer. Even if the rules permit disclosure, a lawyer needs to think through the decision, and weigh the consequences when faced with revealing or keeping the information confidential.

Endnotes

1 Assume the case is in a state where children under eight years of age may not be left home alone.
2 MR 1.6, cmt. 2.
3 MR 1.6.
4 MR 1.6(b)(3), (4), (6).
5 The following states have ethical rules that a lawyer “shall” or “must” reveal information to the extent the lawyer reasonably believes is necessary to prevent the client from committing a criminal act that will likely result in death or substantial bodily harm: Arizona, Connecticut, Florida, Illinois, New Jersey, Nevada, North Dakota, Texas, Virginia, Vermont, and Wisconsin. Note that several of these states are in the process of amending their ethics rules in light of the amendments to the Model Rules.
6 MR 1.6, cmt. 3.
7 The rule simply permits disclosure under these circumstances.
9 MR 2.1, cmt. 4.
10 MR 2.1, cmt. 5.
11 MR 1.13(a).
12 MR 1.13, cmt. 2.
13 MR 1.13 (b).
14 MR 1.13 (b), cmt 4.
15 MR 1.13(f); MR 1.13, cmt. 10.
16 MR 1.13, cmt. 6, 9.
17 MR 1.6(b)(2).
18 MR 1.6(b)(3).
19 MR 1.13(b)&(c).
20 MR 1.13(e).
21 A recent ABA survey in Michigan revealed a variety of ways GALs handled disclosing information the child-client did not want divulged. Some GALs felt that the confidentiality rules strictly applied to their representation of children, and would not reveal certain information even if they felt keeping it confidential might be to the detriment of the client. Others felt their duty to present to the court what they felt was in the client's best interest overrode a strict application of the ethics rules on confidentiality. Of the group that felt that there was no lawyer/client confidentiality with their child clients, some informed the clients of this, while others did not, fearing it would cause the client to withhold information.
22 Alaska Bar Association Ethics Opinion 85-4. Guardian Ad Litem Confidentiality. September 12, 1985. “The guardian ad litem is in every sense the child's attorney…[but] sometimes will take a position adverse to the position stated by the child. The guardian should explain his/her role to the child, in a manner consistent with the child's age and understanding. The child's natural trust and perception must not be abused. In that regard, a guardian should immediately explain his/her role to the child including (1) the fact that the guardian's role is to determine what is in the child's best interest, (2) that fact that the guardian may take a position contrary to the child's wishes, and (3) the fact that anything the child tells the guardian may be disclosed to the court if the guardian deems such disclosure to be in the child's best interests… the same reasons for the appointment of a guardian ad litem, namely the best interest of the child, also form the basis for the restraint placed on the duty of confidentiality. The lawyer appointed by the court to effect justice is not bound by the normal duty of confidentiality.”
Representing a Client with Diminished Capacity

When representing a client with diminished capacity, it can be difficult for the lawyer to know when to defer to the client’s wishes, and when to substitute his judgment for the client’s. It can be hard to determine issues of client autonomy, control of litigation, and decision making with a fully functioning client, but what if there are questions about a client’s capacity or ability to make decisions? This chapter focuses on representing clients with diminished capacity. While confidentiality issues are addressed, the chapters on confidentiality and conflicts of interest cover those topics in greater detail.
Many of our clients suffer from diminished capacity, defined as a client who is not fully functioning, whether as a result of substance abuse, age, or mental health issues. How a lawyer handles these delicate issues can profoundly impact the client-lawyer relationship. Effective advocacy, combined with empowering clients, can result in a more meaningful role for the lawyer, and will positively affect case outcomes. The following case study shows the complexity and challenging nature of such representation. The chapter provides guidance by explaining lawyers’ ethical duties under the relevant ethical rules. It also goes beyond the ethics rules to suggest practical ways child welfare lawyers can effectively represent clients with diminished capacity.

**The Mason Case** Consider the following case from the view of the child’s and mother’s lawyers. The case is set for a permanency hearing:

Candace, an 8 year old, is the subject of a child abuse and neglect proceeding. The case arose after a report of physical abuse by her mother, Rhonda Mason. During an interview with Candace, her lawyer tried to talk with her, but she didn’t make sense. Candace talked about butterflies really being angels come to earth. She did not seem to understand that she might be separated from her mother.

Her mother was interviewed by her lawyer. Ms. Mason seemed sullen, withdrawn, and depressed. She was nonresponsive throughout the interview. The next week, she stopped by her lawyer’s office unannounced, and demanded to meet with her. She was excited, agitated, and insisted that Candace shouldn’t have been taken from her. Based upon her extreme mood change, her lawyer asked her what happened. Later in the interview, she disclosed that she had been using drugs.

At the end of the shelter care hearing, Candace was continued in foster care. Her lawyer saw her twice in the 30 days between that time and the adjudication hearing, but she still seemed incoherent. Allegations against her mother were upheld, and Candace remained in foster care. The agency arranged for Candace to see a psychiatrist, who diagnosed her with a psychotic disorder. He prescribed antipsychotic medication and saw her once a week. Her condition improved considerably.

Candace is now in foster care with Mrs. Waite, who is 70 years old and has cared for hundreds of foster children, and adopted two of them. Candace is hard to handle and has massive temper tantrums, yet Mrs. Waite is patient and can always calm Candace down. Although she has a lifetime of foster care experience, Mrs. Waite has no formal training in caring for children with special needs.

A year after her foster care placement, Candace was doing well enough to have real conversations with her lawyer. Most of the time, she wanted to return to her mother’s house because she felt her younger brothers needed her to care for them. However, when Ray, Ms. Mason’s boyfriend, was living at the house, she seemed much less eager to return. When Ray was gone, Candace again wanted to live with her mother. If she couldn’t go home, Candace’s second choice was to live with her Grandmother Adelaide, Ms. Mason’s mother and Candace’s biological grandmother.
Ms. Mason wants Candace returned to her. If that isn’t possible, she wants Candace placed with her mother (Grandma Adelaide), who lives nearby. Mrs. Adelaide has shown interest in Candace, and has called her a few times and visited her twice, but Candace has never lived with her. Like Ms. Waite, Grandma Adelaide has no training in caring for children with special needs. Ms. Mason functions at a low level and has few child-raising skills. She was ordered by the court to attend parenting classes to prepare her for Candace’s possible return, but she rarely goes. She was also ordered to work with a parent aide who would help her with the younger children, but the parent aide reports that she often arrives at Ms. Mason’s home for her scheduled appointment and no one is home.

The agency wants the court to place Candace in a therapeutic foster home with a childless couple in their late twenties who have taken an intensive course in caring for children with special needs. They have also said that if they bond with Candace, they may be interested in adopting her.

Candace’s psychiatrist says the best thing would be either to keep her with Ms. Waite, where she has made so much improvement, or place her in the therapeutic foster home. He believes that if she is returned to her mother, she will probably not be given her medication regularly. Even if she is given medication, he says she will regress because Ms. Mason is unable to deal with Candace’s special needs. He’s nervous about placing Candace with Mrs. Adelaide since there’s been so little contact between Candace and her grandmother, and Mrs. Adelaide has no training in dealing with Candace’s special needs.

**Model Rule 1.14: Representing a Client with Diminished Capacity**

MR 1.14, amended in 2002, helps lawyers represent clients’ wishes when capacity is an issue. Lawyers have been frustrated with the lack of guidance from the ethics rules. While lawyers still have much discretion (and sometimes confusion) in deciding how to best represent clients with diminished capacity, the amended MR 1.14 provides more guidance. (See sidebar #1)

**Maintaining Normal Client-Lawyer Relationship**

The client-lawyer relationship assumes that the client, when properly advised and assisted, can make decisions about important matters. In other words, the presumption is that the client has capacity. The rule’s first instruction is that when a client’s capacity to make decisions is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.

Capacity may be diminished by a client’s age (as with Candace), drug addiction (as with Ms. Mason), mental impairment (as with both), or for some other reason. A “normal client-lawyer relationship” means the lawyer owes duties of loyalty, confidentiality, diligence, conflict of interest, competence, communication, and advice. The duty of loyalty means that “a lawyer shall abide by a client’s decisions concerning the objectives of representation,” and that the client has the ultimate authority to determine the purposes to be served by legal representation.
Maintaining a normal client-lawyer relationship requires communicating regularly. The commentary to the rules is clear that a client with diminished capacity often can understand, deliberate upon, and reach conclusions about matters affecting the client’s well-being. It further explains that “children as young as five or six years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

Assessing Client Capacity
In determining whether a client has capacity to make certain decisions, lawyers should know that they can have a strong influence on a client’s decisions. Paternalistic tendencies can be problematic for even the most well-intentioned parents’ and children’s lawyers. Lawyers need to be aware of the power dynamics and other factors that influence the relationship and representation.

Just because a lawyer disagrees with a client’s decision, or thinks what the client wants is not best for the client, does not mean the client lacks capacity to make decisions. A client’s decision may result from many things—fear, lack of understanding, subjective interests—not necessarily diminished capacity. The lawyer should focus on the decision-making process, not whether she approves of the decision.

Factors to consider when assessing client capacity:

- **Cognitive ability**
  In Candace’s case, her lawyer may need to talk to her therapist and psychiatrist to understand her cognitive ability since she’s been diagnosed with a psychotic disorder.

- **Emotional and mental development & stability**
  This often changes from one interview to the next, and can change dramati-
cally as in Candace’s case. For Ms. Mason’s lawyer, consider the impact of her drug use on her emotional and mental stability.

- **Ability to communicate**
  When the case first came in, Candace could not communicate her feelings. Through time, medication, counseling, and other interventions, she can now communicate.

- **Ability to understand consequences**
  Has the lawyer explained the case, including consequences of certain decisions to help the client understand? (Also see MR 1.4) Ms. Mason, for example, might not understand the seriousness of her lack of attendance at parenting classes.

- **Consistency of decisions**
  There is nothing wrong with saying to the court “Candace has mixed feelings, your Honor …” The lawyer should discuss in advance with Candace exactly what will be said to the judge.

- **Strength of wishes**
  If Candace had been adamant about wanting to return to her mother’s, and the foster mother had reported that she cried constantly for her mother, and that her behavior improved after visits with her mother, this would affect the advocacy efforts.

- **Opinions of others**
  See section below about considering bias when weighing this factor.

For children (in addition to above factors):

- child’s age (age alone is not dispositive)
- child’s developmental stage

The amended Commentary to the Model Rules says that in determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as:

- the client’s ability to articulate reasoning leading to a decision;
- variability of state of mind;
- ability to appreciate consequences of a decision;
- the consistency of a decision with the known long-term commitments and values of the client;
- in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostian.5

Candace’s lawyer, for example, could consider that while usually Candace says she wants to be home with her mother, sometimes she says otherwise, depending on whether her mother’s boyfriend, Ray, will be around. She can articulate reasoning leading to her decision; usually she says she wants to go home because her younger brothers need her to care for them. This can be hard for her lawyer because a well-trained children’s lawyer will recognize these signs of a “parentified” child, a child who plays the role of parent or the adult in caring for younger siblings. While Candace’s lawyer may feel it is best for Candace to remain in foster care, Candace has been clear about her reasons for wanting to go home. Candace’s and Ms. Mason’s lawyers should talk to the treating mental health professionals to get their assessments of client capacity and “best interest.”

Candace’s lawyer also should consider Candace’s mental health issues. At the
outset of the case, Candace most likely lacked capacity to participate in decisions. At the first interview, it was impossible to determine what Candace wanted. Lawyers need to frequently reassess capacity as interventions such as therapy, medication, and substance abuse treatment can improve the client’s level of functioning and ability to participate in the case.

Ms. Mason’s lawyer needs to consider how interventions such as substance abuse treatment may improve her functioning. The Model Rules also suggest that lawyers have a duty to maximize client capacities, so lawyers should always consider what interventions may increase capacity, discussed in greater detail below. Parents’ lawyers should take a proactive role in maximizing client capacities, and keep in mind their duties to advise the client under MR 2.1. (See sidebar 3)

**Viewing Capacity as a Continuum**

Just because a client has diminished capacity, a client may be able to understand, weigh, and reach conclusions about matters affecting her well-being. Candace, for example, may not understand permanency issues, and may not be able to answer how she would feel about returning home if Ray lived there full time. But she may understand and give her reasons on issues such as visitation, including how often and under what conditions (unsupervised, supervised by grandmother, supervised by her case-worker) she would like to visit her mother.

Increasingly, the law recognizes degrees of capacity. For example, the earlier version of MR 1.14 was titled “Representing a Client with a Disability.” The amended MR 1.14 is titled “Representing a Client with a Diminished Capacity,” implying that capacity is measured along a continuum, and is not an either/or prospect. Even when a client is impaired, she can participate in some decisions. In other words, a client may have capacity for some issues, but not others. A recent Wisconsin case held that there are different levels of capacity, and that a juvenile who has been declared incompetent to participate in the delinquency proceedings does not necessarily lack capacity to understand the sanctions in the “juvenile in need of protection and services” case.

**Taking Protective Action**

Lawyers have always had the option of requesting a guardian or taking other protective action on behalf of a disabled client. However, the earlier version of the Model Rules offered little guidance on what “other protective action” meant. Therefore, the only form of protective action expressly provided for under the old rules was to ask that a guardian be appointed for the client, considered an extreme measure.

The amendments to MR 1.14 add guidance regarding protective measures that may be taken short of requesting a guardian. These include:

- consulting family members,
- consulting with professionals who can protect the client, and
- using a reconsideration period to clarify or improve circumstances.

For example, if Ms. Mason comes to court on drugs and she cannot make certain decisions, her lawyer could ask to postpone the hearing (without disclosing the reasons) to give Ms. Mason time to improve her circumstances and her frame
of mind (an example of maximizing client capacities). This may be an unsuccessful strategy, and the court may place limits on the number of continuances, but Ms. Mason's lawyer needs to attempt to maximize his client's capacity, and needs to protect his client.

Candace's lawyer could consult family members or treating mental health professionals to help make decisions on her behalf. The rules further provide 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**
  For example, if Candace's mental health regresses again, her lawyer would make decisions based on wishes Candace had expressed in the past.

- **the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible**
  The lawyer is not substituting his judgment for the client.

- **maximizing client capacities**
  Ms. Mason's lawyer might encourage drug rehab, and/or medication for her to improve her functioning and enhance her capacity to participate.

- **respecting the client’s family and social connections**
  Ms. Mason’s lawyer, for example, might be reluctant to provide Grandma Adelaide information that might damage the mother/daughter relationship, even if the lawyer thought Grandma Adelaide would be better off knowing Ms. Mason’s situation.

When consulting family members or professionals involved with the case, the
Sidebar 3

Assessing Children’s Decision-Making Abilities

When assessing whether the child’s decision-making abilities are impaired, ask:

- Can the child understand the nature and purpose of the proceedings?
- Does the child understand the risks & benefits of her position?
- Does the child understand consequences of courses of action?
- Has the lawyer explained, and does the child understand alternatives?
- Can the child express his/her desire concerning the proceeding with some degree of clarity and reasonably communicate his/her wishes?
- Is the child being influenced by adults?
- Am I (the lawyer) influencing the child?

lawyer must keep the client’s interests foremost in her mind. To the degree possible, a lawyer must look to the client to make decisions.

The lawyer should also be aware of any biases and misunderstandings that family members or others may have, and attempt to weigh these factors in determining the client’s objectives. In representing Candace, for example, her lawyer would be aware of factors that may influence others’ assessment of the case. For example:

- Agency supervisor: may want to move her from Ms. Waite’s home to the younger foster parents because Ms. Waite is not willing to adopt, and the agency is under pressure to facilitate adoptions.
- Grandma Adelaide: may say she can’t take Candace, but doesn’t disclose her reason is that she can’t afford it. Perhaps she doesn’t realize she would be eligible for a foster care or adoption subsidy.
- Social worker: hasn’t told Grandma Adelaide that she may be eligible for financial assistance and services if she agrees to take Candace because the social worker does not want to place Candace there.
- Candace’s mother: wants Candace to return home.

Thus, under the Model Rules, the lawyer should speak to others who have an interest in the case to get their input on what Candace wants. But the lawyer should be aware of any bias or misunderstanding that may impact Candace’s return home.
Appointing a Guardian

When a client’s capacity is severely diminished and other less onerous protective actions are not successful, a lawyer can ask the court to appoint a guardian for the client. While this is sometimes appropriate, it can traumatize the client and undermine the client-lawyer relationship. In Candace’s case, her lawyer has been telling her for two years that she will advocate for what Candace wants. If the lawyer then asks to have a guardian appointed, and the guardian recommends that Candace be placed in the therapeutic foster home, this could upset Candace, who has trusted the lawyer to keep her word. It may cause clients to lose trust in the judicial process and not cooperate with the case plan. It also tips off the judge that the lawyer doesn’t think the client can make decisions on her own.

Maintaining Client Confidentiality

In taking protective action on behalf of a client, such as talking to Candace’s family members, lawyers sometimes wonder how the confidentiality rules apply. The Model Rules clearly instruct the lawyer to keep client confidences, disclosing them only to protect the client’s interests. Lawyers can disclose information in order to perform their job responsibilities, as long as such disclosure is in the client’s best interests. The commentary acknowledges that this is an unavoidably difficult position. On one hand, the lawyer may need to disclose otherwise protected information to help make decisions for the impaired client. On the other hand, the lawyer is duty bound to maintain confidences.

Disclosing a client’s condition could harm the client’s interest. For example, in representing Ms. Mason, the lawyer would not disclose that his client is on drugs. Sometimes simply revealing that the lawyer suspects a disability or diminished capacity violates the confidentiality rules. For example, the Wisconsin Supreme Court recently held that a lawyer violated privilege by testifying about his basic impressions, perceptions, and opinion on a client’s competence to stand trial. (For guidance on the difference between privilege and confidentiality, see the chapter on Protecting Client Confidences.) Therefore, at the first phase of the case when Candace is behaving bizarrely, and her lawyer is unable to ascertain any of Candace’s interests, it might be appropriate for her lawyer to discuss with Candace’s psychiatrist her impressions of Candace’s overall functioning. The doctor could offer guidance on how to more effectively communicate with Candace. As the Model Rules acknowledge, this is an unavoidably difficult position because the lawyer might need to disclose otherwise protected information for the purpose of getting guidance on representation.

Eliciting Client’s Position

When a lawyer has concluded that although impaired, the client can understand certain issues, and provide input on decisions, the lawyer should elicit the client’s position in the case. The lawyer should explain her role, including what information the attorney may reveal about the client to protect her best interests. It’s important to establish this up front so
the client doesn’t later feel betrayed by her lawyer. Interviews with the client should take place where the client feels comfortable. Candace’s lawyer, for example, should visit her in her foster home instead of relying on contacts in the courthouse.

Lawyers should ask developmentally appropriate questions, provide advice and guidance without persuasion or manipulation that might influence a young client’s decision-making. The lawyer should also be aware of verbal and non-verbal expressions and communications from the client. For example, in visiting Candace in her foster home, her lawyer can observe interactions between her and Mrs. Waite. At court, Ms. Mason’s lawyer can observe the way Ms. Mason interacts with her daughter. She can talk to foster parents, social workers, a psychologist or therapist, family members, and any other person who might have insight into the child’s feelings and preferences.

The key to representing children and parents is developing a good relationship. Getting to know the client helps the lawyer understand the case from the client’s view. It empowers the client to participate in her case, and gives her a sense that someone is advancing her interests. (See sidebar 4.)

**Advocating in Court**

Once the lawyer has determined what the client wants, and whether she suffers from diminished capacity, the lawyer must present her client’s position in court. Many lawyers consider their job to be “the mouthpiece of the client,” merely reiterating to the court what the client wants. Advocacy is more complicated. **Working with others in the case, lawyers should craft a solution so that what the child wants actually is in the child’s best interest.**

The more the lawyer knows about the client, the more effective the representation. It’s not about standing up in court repeating what the client has said. It’s about doing the legwork before the hearing, and finding out the family situation. The more prepared, the better the lawyer can explain to the client her options and the consequences of certain decisions. Candace’s and Ms. Mason’s lawyers should negotiate a strategy that can allow Candace to return home safely because this is what their clients want. Ensuring a safe return also makes this outcome in Candace’s best interest.

For example, Candace tells her lawyer she wants to go home to her mother’s, and if she can’t, then she wants to be with her Grandma Adelaide. Her lawyer’s job is to try and have this outcome be in her best interest. The lawyer should contact the caseworker and find out if Candace can return home safely, and if not, why. Candace’s second choice is to be with her grandmother. Steps Candace’s lawyer can take to ensure a safe return or to have Candace placed with her grandma are:

- contacting Grandma Adelaide to find out if she’s interested in the placement;
- finding out if she knows she may be eligible to be licensed as a foster parent for Candace and receive services to meet her special needs;
- determining if the agency has been in contact with grandma;
- telling the social worker that Grandma Adelaide might be willing if she gets some services;
• identifying other issues to be addressed before Candace can go home, such as:
  • Ms. Mason’s drug problems
  • the reasons why Ms. Mason’s attendance at parenting classes has been poor. Does she need transportation? Do the sessions conflict with her work schedule? Does she feel the classes aren’t relevant? If so, perhaps she can learn better parenting skills by observing how Ms. Waite handles Candace’s temper tantrum.
  • the reasons why Ms. Mason is not always available for the parent aide
  • whether Ms. Mason needs support with the other two children still at home;
  • talking to Ms. Mason’s lawyer about getting a protective order against Ray, if there’s a basis for one;
  • talking to Candace’s therapist and psychiatrist to find out how she’s doing and whether medication and therapy have improved her mental health condition;

Sidebar 4

Seven Questions to Keep Us Honest

These questions are from Jean Koh Peters’ book Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions. They are an excellent reference for lawyers representing children.

1. In making decisions about the representation, am I making the best effort to see the case from my client’s subjective point of view, rather than exclusively from an adult’s point of view?

2. Does the child understand as much as I can explain about what is happening in her case?

3. If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?

4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

5. Is it possible that I am making decisions for the gratification for the adults in the case, and not for the child?

6. Is it possible that I am making decisions in the case for my own gratification and not for that of my client?

7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

• exploring family counseling with grandma, Ms. Mason and Candace;
• talking to Candace again, keeping her informed, and finding out if her feelings have changed.

As Candace’s lawyer, these steps are also empowering Ms. Mason to participate in case planning which supports the ultimate goal of reunification. Getting all players on board is key. Even if no agreement is reached before court, Candace’s lawyer should come to court and present the plan to the judge, explain Candace’s position, and why it might be best for her to be at home instead of in foster care. Explain how Candace can be returned safely, which includes addressing the relevant issues in the case—protective order against Ray, Ms. Mason’s continued participation in drug rehab, Ms. Mason learning to address Candace’s mental health needs, ongoing therapy for Candace, possibly including other family members, support from extended family and Grandma Adelaide and so forth. This is advocacy. The goal is to achieve a result for the client. Candace is empowered knowing her lawyer is working for her, even if she has mixed feelings.

This type of advocacy also helps the judge make a best interest determination—the judge must understand the case from each party’s perspective, not just what they want, but why they want it. The judge can consider other options presented by the lawyers who know the family dynamics and who have prepared solutions that enhance safety and support reunification.

Conclusion

Representing clients with diminished capacity takes the same hard work as representing a client where capacity is not an issue. Lawyers should begin with the premise that all clients have capacity to direct the representation. When a client’s issues are so serious that the lawyer is concerned that the client cannot understand the proceedings, or make reasoned decisions, the lawyer can look to the ethics rules for guidance. A poor decision by a client can result from fear, confusion, or other subjective concerns. The lawyer has a duty to explain matters to the client and maximize the client’s decision-making ability.

Spending time with a client, talking to others about the case, being prepared, and knowing the case from the client’s view are essential. The lawyer’s job is not to repeat the client’s position to the court, but to craft a solution so that what the client wants actually is in the best interest of the child. This doesn’t mean trying to manipulate the client’s desires, but rather working to provide services and creative solutions. This applies not only to lawyers for children, but parents’ lawyers too, as many parent’s lawyers merely state to the court the parent’s position without attempting to craft the parent’s position as one that will keep the child safe. When all parties are well represented, children and families are served by the system and outcomes improve.
Representing a Client with Diminished Capacity

Endnotes

1 This article applies to children's lawyers representing the child in a traditional client-lawyer relationship as opposed to a guardian ad litem, representing their view of the child's best interest. MR 1.14 is less relevant to a GAL whose advocacy is not client-centered or client-driven.

2 MR 1.14(a).
3 MR 1.2.
4 MR 1.14, cmt. 1.
5 MR 1.14, cmt. 6.
6 MR 1.14, cmt. 5.
7 MR 1.14, cmt. 1.
8 In re Eugene W., 641 N.W.2d 467 (Wis. Ct. App. 2002).
9 MR 1.14(b).
10 MR 1.14, cmt. 5.
11 MR 1.14, cmt. 5.
12 MR 1.14(b).
13 MR 1.14, cmt. 7.
14 MR 1.14(c).
15 MR 1.14, cmt. 8.
16 MR 1.14, cmt. 8.
17 State v. Meeks, 666 N.W.2d 859 (Wis. 2003).
18 Before the Model Rules changes, the ABA issued an ethics opinion on whether a lawyer who reasonably believes a client has abused prescription medication resulting in an inability to communicate or reach adequately informed decisions violates the MR 1.6 provision on confidentiality by discussing the client’s condition with the client’s physician. The opinion finds that such communication does not violate MR 1.6 because it is “impliedly authorized.” The client cannot give consent, and it is not possible to seek the appointment of a guardian without disclosure to the court, and without such communication with the physician, the client risks serious harm. ABA Comm. On Ethics and Prof’l Responsibility, Informal Op. 89-1530 (1989).
Handling Conflicts of Interest

- May a parent’s lawyer in an abuse/neglect proceeding represent both mother and father?
- In representing siblings, when does a conflict of interest arise for the child’s lawyer, and what is the best course of action?
- Does a part-time contract lawyer for the child welfare agency have a conflict with handling a private practice concentrating in family law?
- Does a guardian ad litem (GAL) have a conflict in representing both a teenage client and her baby when the agency brings a petition to obtain custody of the infant whose underage teenage mother is in foster care?
Loyalty, independent judgment, and zealous advocacy are essential elements in the lawyer’s relationship to a client. Conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client, a third person (nonparty), or from the lawyer’s own interests. Conflict analysis is very fact specific, as the following cases show. These cases describe potential conflicts and are analyzed under the Model Rules of Professional Conduct.

Conflicts for Children’s and Parents’ Lawyers

The Ford Case (child’s lawyer representing siblings): The lawyer for Michael Ford, age 11, and his brother, Dwight, age 10, has represented the brothers for two years. The original allegations were sex abuse charges against Michael and Dwight’s mother. When the case first came in, the boys were placed in foster care where they did poorly. They were occasionally truant from school, and Michael started acting out and behaving aggressively. After six months in foster care, they were placed with their maternal grandmother. This placement didn’t work out either, partly because grandma was elderly and had limited ability to discipline two spirited boys. After they had been in a second foster home for two more months, the diligent search for their father paid off. The boys were immediately placed with their father, perhaps prematurely—no home study was ever done, but their social worker placed them quickly because she was anxious to get them out of foster care and with their father.

In preparing for an upcoming permanency hearing, the lawyer does a home visit and separate interviews with the boys. Michael reveals that his father has been beating him with an electrical cord, and that he’s been locked in his room for three days at a time, given only dry oatmeal to eat. Later in an interview with Dwight, he tells the lawyer that although his father is strict, he has not laid a hand on either him or his brother. Punishment typically involves being put on restriction, TV being taken away, things like that. Nothing out of the ordinary. Dwight says Michael is not getting along with his father now because he is strict, enforces curfew, and makes them do their homework every night. Michael is used to getting away with a lot when living with his mother, grandmother, and in the two foster homes. Is there a conflict of interest? What should the lawyer do?

The Pierce Case (parent’s lawyer representing both parents): The lawyer for Rayna Pierce has been the family lawyer for many years, having represented the Pierces in many matters. Mrs. Pierce calls her lawyer and tells him that child protective services is investigating a child neglect referral against her adult son, Gregory, and his wife, Angel, regarding their son Jason who is in first grade. Apparently one of the teachers at Jason’s school reported that Jason has been coming to school in dirty clothes, hungry, and tired. His behavior has deteriorated, and he constantly fights with the other children. The caseworker’s attempts to contact Jason’s parents have been unsuccessful, and when he failed to show up at school for an entire week, she called child protective services. A hearing is set for the following day to determine whether Jason is safe remaining at home while the case is investigated, and Mrs. Pierce asks the lawyer to meet with Gregory and Angel.
At the meeting they explain that things have been stressful at home and they admit they haven’t paid close attention to Jason lately, but they deny that any abuse or neglect has occurred. Should the lawyer represent Angel and Gregory at the shelter care hearing?

In determining whether the parents’ and children’s lawyers in the above two cases have a conflict of interest, the Model Rules on point are MR 1.7 (whether a conflict exists between current clients) MR 1.9 (whether a conflict exists between former clients), and 1.10 (whether one lawyer’s conflict applies to other members of the firm). Other rules on scope of representation (MR 1.2), confidentiality (MR 1.6), terminating representation (MR 1.16), representing an agency (MR 1.13), successive employment, and whether the conflict “follows” the lawyer (MR 1.11) apply as well.

MR 1.7 Conflict of Interest: Current Clients
Prohibiting lawyers from representing clients when there is a conflict of interest is grounded in the notion that lawyers owe clients duties of loyalty, independent judgment, zealous pursuit of client objectives, and client confidentiality. When representing Client A compromises the duties the lawyer owes to Client B, there is a conflict. The key question is whether pursuing one client’s objectives will prevent the lawyer from pursuing another client’s objectives, and whether confidentiality may be compromised.

MR 1.7(a)(1) prohibits representing a client if that client’s interests are directly adverse to another client, even if the matters are unrelated. This is because clients feel betrayed, and may fear the lawyer will pursue their case less effectively. Even when there is no direct adverseness, representation is also prohibited under MR 1.7(a)(2) if 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, a third person or by a personal interest of the lawyer. The conflict forecloses alternatives that would otherwise be available to the client. (See sidebar #1.)

This issue applies not only to an individual lawyer, but also to two lawyers from the same office representing different clients in the same matter. An Illinois case recognized such an impermissible conflict of interest where one public defender was appointed to represent the mother, and another public defender from the same office was appointed to represent the children.

Questions the Lawyer Can Ask to Determine Whether a Conflict Exists
• Does representing one client foreclose alternatives for the other?
• Will confidential information from Client A be compromised in representing Client B?
• Can the lawyer comply with the duties owed to each client, including the duty to pursue each client’s position?
• Will the client “reasonably fear that the lawyer will pursue that client’s case less effectively out of deference to the other client?”
• Can the lawyer ask for consent? (addressed later)

Is Withdrawal Always Required?
Conflict of interest analysis can get complicated, not only determining whether there is a conflict, but what to do if there is. Withdrawal is usually, but not
Understanding “Directly Adverse” and “Materially Limited”

MR 1.7(a)(1)'s prohibition against representing two clients whose interests are “directly adverse” means that a single lawyer cannot advocate on behalf of Client A against Client B if that lawyer also represents Client B, even if the matter is wholly unrelated. For example, if a lawyer represents Joe in a divorce case, and Joe gets into a car accident where he hits Bob, that lawyer cannot represent Bob in a personal injury action against Joe. Their interests in another matter are “directly adverse.”

MR 1.7(a)(2) prohibits simultaneous representation when the lawyer would be “materially limited” because of an obligation to another client. This applies even when there is no direct adverseness. For example, one lawyer representing multiple co-defendants in a criminal action might be materially limited in his representation. Suppose one defendant would benefit (receive a better plea offer) by testifying against the other co-defendant. Their interests in the case are not directly adverse, but the lawyer is materially limited because he cannot recommend a desirable outcome for one co-defendant without harming the other client.

The ABA has said that “whether or not the lawyer’s representation in one matter may be “materially limited” by her responsibilities to other clients (or vice versa) depends on the extent to which either client would be adversely affected by the outcome of the other’s matter, and on whether the lawyer’s diligence or judgment on behalf of one client would be compromised by her relationship or identification with the other. This in turn may depend upon the issues at stake in a matter, the particular role the lawyer is playing in it, and the intensity and duration of her relationship with the lawyers she is opposing.” ABA Formal Opinion 97-405: Conflicts in Representing Government Entities (1997).
always mandatory. Most withdrawals based on conflict of interest will be mandatory, not permissive withdrawals because MR 1.16(a)(1) requires withdrawal when continued representation will result in a violation of another rule (here, 1.7 and/or 1.9). After withdrawal, the lawyer must still maintain confidences.⁶

Whether the lawyer may continue to represent any of the clients is determined by the lawyer’s ability to comply with duties owed to both clients. The rules provide that even if there is a conflict, the lawyer can continue to represent both clients if:

- the lawyer reasonably believes he can provide competent and diligent representation to both clients,
- the representation is not prohibited by law,
- the representation does not involve an assertion by one client against another, and
- both clients consent in writing.⁷

MR 1.7 makes clear that the mere possibility of harm does not require disclosure and consent, or withdrawal. The critical questions are the likelihood that a difference in interests will materialize and, if it does, whether it will significantly interfere with the lawyer’s independent professional judgment in pursuing client interests.⁸

**Will Loyalty or Confidentiality be Compromised?**

If the duties of loyalty or confidentiality are compromised, the lawyer cannot represent both clients because doing so would not be providing “competent and diligent representation” to both. Conflicts analysis can be tricky because often conflicts occur in a matter of degrees. Consider the Ford case. In that case, both boys tell their lawyer two different stories—one claims he is being abused, locked in a closet, etc., and his brother says this is not true. The lawyer has a potential conflict, but **may or may not** need to withdraw from the case, depending on the circumstances. The boys’ different accounts of what happened do not necessarily mean the lawyer must withdraw. The first consideration is their respective positions. If Michael wants to leave the house, and Dwight wants Michael to leave the house, the lawyer may be able to negotiate that outcome without going to trial. If Michael wants to leave the house, but wants Dwight to come with him, or if the boys insist on staying together, the lawyer may not be able to continue to represent both boys because negotiating for one outcome undermines the other boy’s position.

**Is the Case Going to Trial?**

If the case is going to trial, the lawyer almost certainly must withdraw from representation because cross-examining and arguing on behalf of one client undermines the position of the other. For example, in representing Michael, the lawyer would have to cross-examine Dwight, attempting to discredit Dwight’s version of the facts, an untenable position for the lawyer. If, however, the case is not going to trial, it is *possible* that the lawyer can negotiate an outcome that is consistent with each client’s objectives. If Michael wants to be removed, and there is no opposition from their father or any other party, and the case doesn’t go to trial, the lawyer can remain in the case.
What Special Case Circumstances Exist?

Whether the lawyer needs to withdraw from the case depends on the circumstances. If the lawyer can continue to preserve confidential communications, and zealously pursue each client’s objectives, he may remain in the case. The lawyer must explain the potential conflict to each client, and each client must consent in writing. Because informed, written consent is now required under the amended Model Rules, the lawyer may have to withdraw from conflicts cases involving younger children who cannot give informed written consent. Consent can be revoked any time.9

Is the Conflict Foreseeable?

Where conflicts are foreseeable, the lawyer should not undertake the representation unless the lawyer obtains the informed consent of each client in writing.10 Some situations are so inherently fraught with risk of a conflict that a lawyer should not undertake the representation. In the Pierce case, the lawyer should not agree to represent both parents because their interests will likely conflict. In child abuse/neglect cases, sometimes only one parent is committing the abuse/neglect. It is not always apparent which parent that is, especially at the initial stage of the case where the agency has usually had fewer than three days to investigate. Also, after the agency’s initial cursory investigation, additional allegations of abuse/neglect can surface, sometimes pitting parents against each other.

The lawyer also has to consider the possibility of criminal charges being filed against one parent or both. Some states appoint a lawyer to represent both parents, usually because of the expense of appointing separate counsel for each parent. In Utah, for example, counsel is appointed by statute to represent both parents, but only when at the time of appointment, the interests of both parents are identical. In an ethics advisory opinion, a voluntary committee of the Utah Bar Association found that ongoing representation of both parents in a dependency case violated Utah Rule 1.7 and 1.9 (based substantially upon the Model Rules), where the parents had separated and the mother denied knowledge of the father’s abuse.11

Therefore, lawyers should avoid any joint representation where conflicts are foreseeable. If a conflict develops after representation has begun, the lawyer usually must withdraw. Withdrawal is not mandated if the lawyer has obtained written consent from both clients, and if the lawyer can fulfill duties to both clients.

Will the Conflict be Waived?

Clients can, of course, waive the potential conflict, even if it is foreseeable. Often, access to affordable counsel is a big issue for parents, and sometimes is the reason they waive the potential conflict. In waiving the potential conflicts, often clients are not harmed and their lawyers are capable of diligently and competently representing them.

MR 1.10: Imputation of Conflicts

MR 1.10 imputes the conflict to members of the entire firm or agency. In other words, if one lawyer in the firm can’t handle the case due to a conflict of interest, then no lawyer in the firm can.12 The exception is if the case involves a conflict
with a firm the lawyer no longer works for; if the lawyer did not personally handle the case, and has not acquired confidential information, the firm may represent the current client.

MR 1.9: Duties to Former Clients
A lawyer continues to owe duties even after the lawyer-client relationship ends. MR 1.9 builds on the rationale of MR 1.7, and extends the reasoning of MR 1.7 to include former clients.13 In other words, clients need to be confident that their former lawyer won’t compromise their duties of loyalty and confidentiality. However, because the client is a former client, the standard is not as strict. This is because the narrower the test, the fewer clients a lawyer could represent. MR 1.9 attempts to strike a balance between preserving client confidence in the system, and not overly restricting clients’ choice of counsel or overly restricting the lawyer’s client base. With present clients, direct adversity, even in substantially unrelated matters, creates a potential bar to representation; with former clients, the matter in which direct adversity exists must be substantially related to the previous subject matter.

MR 1.9 says that if a lawyer has formerly represented a client in a matter, the lawyer shall not represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client (unless the former client gives informed consent, confirmed in writing).

Because conflicts are imputed to all lawyers within a firm, this scenario commonly arises when an agency represents parents and/or children, (e.g., public defender agency or a legal services agency), but can arise for private lawyers as well.

Some examples:
• A public defender agency represented a father in a prostitution case, and then three years later, another lawyer from the office was appointed to represent the mother in a dependency case where the allegations included sexual abuse by the father.
• A lawyer in the housing unit of a legal services office represents a couple in a landlord/tenant matter. A month later, a lawyer in the child advocacy unit is appointed to represent the child in a dependency action.
• A private lawyer represented a woman in a civil action suing her employer for sex discrimination. That same lawyer gets appointed five years later to represent her child in a dependency action.

These potential conflicts can be significant for large statewide agencies that represent hundreds of clients a year in many matters. They can be difficult as well for private lawyers, especially those practicing in small, rural towns where the client base is limited.

MR 1.9 requires that the matter be the same or substantially related, and that the former client’s interests be materially adverse. At first glance, some matters may seem unrelated. Many agencies, however, will choose not to undertake the subsequent representation because the risk of a conflict developing is too high, or because the former client will feel betrayed. On one hand, information acquired in a prior representation may be obsolete due to passage of time. On the other hand, if confidential communications or other duties will be compromised, a conflict may exist. For example, in scenario #2
above, a housing matter may at first appear unrelated to a dependency action. But suppose the landlord/tenant matter was an eviction proceeding based upon the allegation that illegal drugs were being used on the premises, and that the couple’s remedy to the problem was to put their teenage son out of the house, thereby prompting the filing of the dependency petition.

To determine whether the matters are substantially related, and whether the parties’ interests conflict, the lawyer should consider the circumstances of each case, including the underlying issues, the risk of confidences being compromised, and the passage of time. A Wisconsin case found an impermissible conflict of interest where a lawyer appointed as GAL for a child had previously represented another party seeking emergency detention for the child. The matters were found to be “substantially related,” therefore a Rule 1.9 violation.14 MR 1.9 attempts to strike a balance between protecting and preserving lawyer-client relationships, and not unnecessarily limiting future lawyer-client relationships.

Conflicts for Guardians Ad Litem

Case law is split on whether GALs must follow their states’ ethics rules. Because in some states GALs do not owe the fundamental duties of loyalty (client sets objectives) or confidentiality, they don’t owe a duty to avoid conflicts either. To the degree that a state’s rules of professional conduct do apply, the conflicts analysis described in this article applies. However, GALs are typically given more latitude because of their duty to represent the best interest of the children. If a GAL is not duty-bound to follow a client’s wishes, or to preserve confidences, then the GAL may be able to represent siblings who have inconsistent preferences. Consider the following case:

**The Robinson Case** A GAL represents Mark, a 17 year old, and Angela, his two-year-old sister in a case that’s approaching a permanency review. Both children are placed together in nonrelative foster care. Their mother has failed repeatedly at drug treatment, and after the children were removed, she lost motivation to address her mental health issues. She is currently not on prescribed medication or in therapy. The agency changes the permanency plan for both children to adoption, and prepares to file for TPR. Mark wants to go home, vehemently opposes termination, and he wants Angela to return home with him, having essentially raised her since birth. The GAL is persuaded that termination of parental rights is not in Mark’s best interest, but thinks Angela would be best served by termination, freeing her to be adopted by a maternal aunt who has expressed interest.

**Does the GAL Have a Conflict of Interest? If So, What Should He Do?**

Consider these facts:

- Mark is bonded to his mother and not doing as well in the new school that he has been attending since his removal.
- Returning Mark home would mean he would attend the high school where he was doing better, and which he had attended for three years.
- Because of his age, Mark’s mother’s occasional drug use and mental health issues do not impact his safety and
well-being to the same degree as they affect Angela.

Given these and other considerations, the GAL might conclude that Mark’s best interests are met by returning home, but that removal from the home would be in Angela’s best interests.

In this situation, the lawyer (not GAL) performing the traditional role of counsel would have to withdraw from representing Angela and perhaps Mark. The conflicts analysis for the lawyer under the traditional model would require evaluating whether zealously pursuing Mark’s objectives would block pursuing Angela’s best interests, directly or indirectly.

Arguing that Mark should be able to return home might (but not necessarily) undermine arguing that Angela should remain in foster care, and the lawyer likely has acquired confidential information from Mark that would be useful in arguing for Angela’s removal. A lawyer in the traditional role of counsel would likely compromise the duties of loyalty and confidentiality the lawyer owes Mark, hence the conflict.

These conflicts are viewed differently by the GAL whose duty is to protect the children’s interests, even if contrary to the children’s wishes. From the GAL’s perspective, there may not be a conflict of interest because the arguments for placing the children, although seemingly contradictory, ultimately serve their best interests. Thus, the GAL would not
need to withdraw from representing either child.

Nevertheless, when a GAL represents the best interests of multiple clients there may be a conflict. Slightly changing the facts changes the analysis and the outcome of the ethical dilemma. Suppose, for example, it is in Mark’s best interest to continue to be placed with his younger sister. His therapist says that his sibling bond is his strongest familial tie; therefore, he should remain with her. However, what if Angela’s treatment provider thinks otherwise? Suppose her play therapist or her caseworker says that Mark is a bad influence on her. The GAL faces a quandary. Advocating for the best interests of one sibling (remaining together according to Mark’s therapist) may harm the best interests of another sibling (Angela). In this case, the GAL should ask the court to appoint a different GAL for Angela.

**Can the GAL Withdraw from One, But Not the Other Case?**

In contrast to the Ford case where the child’s lawyer should withdraw from both cases, in the Robinson case the GAL could ethically withdraw from Angela’s case, but remain in Mark’s case. This is because the GAL has received no confidential information from the two year old, and Angela will probably not feel her loyalty has been betrayed since she is too young to appreciate the nature of her relationship with the GAL. If the GAL is in a jurisdiction where there is a duty to preserve confidences, then it would be unethical for the GAL to remain in Angela’s case and support termination because Mark may have provided confidential information to the GAL. Even when confidences are not an issue, the GAL should not withdraw from Mark’s case while continuing to represent Angela because Mark will feel betrayed by his former advocate, who is now working against his objectives.

A Utah ethics opinion clarifies that while there is no per se prohibition on the same GAL representing siblings, the GAL can only do so (1) when the interests of the siblings are not directly adverse, (2) the representation of one sibling will not materially limit the GAL’s responsibilities to another sibling, or (3) it is not reasonably foreseeable that the GAL will obtain confidential information of one sibling that may be used to the disadvantage of another sibling.¹⁵ (Utah’s GALs are appointed to represent the child’s best interests, and must preserve the confidences of the child). The opinion gives examples of other conflicts such as when one sibling abuses another.

**What Should a GAL Do When There is a “Conflict” Between What the Child Wants and What the GAL Thinks is Best?**

This is not an ethical “conflict of interest” because it doesn’t involve a conflict between two clients, nor does it involve a conflict between the client and the lawyer’s personal interests (covered in MR 1.8). (This issue is addressed in the last chapter, “Special Issues for Guardians Ad Litem.”) Courts have found that where there is a duty for a lawyer to represent a child’s best interests as well as the child’s expressed wishes, in order for the lawyer to fulfill both duties, these interests must be aligned.¹⁶ Otherwise, there is a conflict and a separate lawyer should be appointed for the child.
What Other Conflicts Arise for GALs?
Another common example is when the agency brings a petition to obtain custody of an infant whose underage teenage mother is in foster care under the agency’s legal custody. This is a conflict for the GAL because what is in the best interests of the young mother may conflict with what the GAL thinks is best for the baby. In this case, the GAL should decline the appointment from the outset. The reasoning is similar to the discussion above for why parents’ lawyers should decline an appointment to represent both parents—that there is a foreseeable potential for conflict in the future.

Conflicts for Agency Lawyers
Child welfare agency lawyers face a number of potential conflicts. For example:

Conflicts Between the Caseworker and Lawyer
Suppose the agency lawyer is preparing for the upcoming permanency hearing in a case where the worker wants to continue pursuing a permanency plan of reunification. The agency lawyer thinks the parents have made insufficient progress on the case plan, and that the permanency plan should be changed to adoption. If the lawyer and caseworker cannot resolve their disagreement, the lawyer can consult the caseworker’s supervisor, and explain her reasons for recommending a permanency plan of adoption (e.g., legal considerations such as ASFA timelines). If the supervisor thinks that reunification is the appropriate permanency plan, the lawyer may accept this, or it may be appropriate for the lawyer to go up the chain of command if the lawyer has concerns that the supervisor’s position may be not be in the best interest of the agency, or violates the law.

Ultimately, under MR 1.2 (client determines objectives of the litigation), and MR 1.13, the agency determines the position. MR 1.13, Comment 3 says that “When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.” When the lawyer knows the organization may be substantially injured by the worker, or the worker has violated the law, different considerations apply. (Chapter 2 explores the lawyer’s duties when faced with such circumstances.)

The Agency is Represented By the Prosecutor’s Office in the Dependency Case
The potential for conflict exists when the agency is represented by the prosecutor’s office. For example, the prosecutor’s office is pursuing a delinquency charge against a teenager who is in foster care and under the agency’s legal custody. By virtue of her oath, the prosecutor has a duty to pursue the delinquency case, and may be recommending placement in a detention facility that is not in the child’s best interest. Another example is where the prosecutor’s office is pursuing a criminal action arising out of abuse allegations against parents, but incarceration of the parents is not in the child’s best interest, and won’t facilitate reunification. Often the goals of the child welfare and criminal justice systems are at odds.
Further complicating the issue is that unlike attorneys appointed to represent the agency, there is some question as to whether prosecutors represent the agency, or the state. In criminal cases, as the representative of the state or “the people,” the prosecutor has discretion whether to file a complaint, how to proceed, etc., as opposed to the traditional lawyer/client relationship where the lawyer acts according to the client’s wishes.

In West Virginia, the prosecutor’s office represents the child welfare agency.\(^{18}\) Since the lawyers have a duty to represent the state and exercise prosecutorial discretion, they do not consider themselves bound to advocate the agency’s position. In a case where the prosecutor disagreed with the agency over whether a petition for termination of parental rights should be filed, the attorney general’s office entered its appearance on behalf of the agency because of the disagreement. Because the prosecutor remained actively involved in the case, the agency appealed. In a series of opinions, the West Virginia Supreme Court ultimately decided that the relationship between the agency and the prosecutors (under the statute cited above) is a pure lawyer-client relationship; therefore, the prosecutor is prohibited from advocating a position that is contrary to that of the agency.\(^{19}\)

**Conflicts Between Agencies**

A MR 1.7 conflict arises when different agencies that the lawyer represents (e.g., the social services agency, department of health, and/or board of education) disagree. Because the agency lawyer represents the agency, not the individual caseworker,\(^{20}\) a conflict occurs when the various agencies disagree on issues of permanency planning strategy, or placement. This conflict typically arises around financial issues when neither agency wants to pay, for example, for an expensive residential treatment center. Here are two approaches states have devised to analyze this conflict.

1. **Hawaii solution**—The Office of Disciplinary Counsel in Hawaii, in a formal opinion,\(^{21}\) determined that this is not a conflict of interest under Hawaii Rule 1.7 (based on MR 1.7). The rationale was that the attorney general’s office (agency representing the child protection agency) is made up of executive agencies, but is one entity. A director, who is empowered to make decisions for the agency, heads each agency. Sometimes decision-making authority is delegated to a subordinate, but ultimately, when employees *within the agency* disagree, the director makes the final call. When agency directors disagree, the governor, as head of the executive branch, resolves the conflict. Therefore, the executive branch has the power and responsibility to resolve differences between the agencies. The attorney general’s office represents the state, the state has a mechanism to resolve its own conflicts, and therefore there is no “conflict of interest” from a legal ethics point of view.

2. **Maine solution**—In Superintendent of Insurance *v. the Attorney General*,\(^{22}\) the court held that as chief law officer of the state, the attorney general (AG) has considerable discretion and autonomy. “The AG may exercise all such power… as public interests may require, and may institute all such actions as he deems necessary for the enforcement of the laws of the state.” Two fundamental duties of the AG are (1) to control and manage the litigation of the state, and (2) act as legal representative of the people in pursuing public interest. *This duty is para-
mount. The AGs do not, in fact, represent the agency, and instead represent the “public interest.” Therefore, when agencies disagree, it is up to the AG to resolve the dispute by resolving the disagreement in the way that will maximize the public interest. Conflicts issues are within their discretion to resolve, thereby resolving the ethical concern.

**Conflicts for Part-Time Contract Lawyers**

Another conflict involves lawyers who have a private practice and work part time for the agency. This can arise when the lawyer is appointed in a child protection case, and has represented the parent in another matter. Some states (especially those that use part-timers) have ethics opinions on what is and is not a conflict of interest. The opinions look at the facts of the situation under MR 1.7 and 1.9, and the analysis in those sections apply to this scenario. A Wisconsin case held that it is an impermissible conflict of interest for a lawyer to serve as a child’s GAL in a dependency case where the lawyer had previously represented the state in paternity and child support proceedings against the father. (Interestingly, the conflicts issue was not raised by the father, but by the mother. Any party in the case can raise conflicts issues.)

Another conflicts question is whether a part-time government lawyer can sue another part of the government on behalf of a private client. ABA Formal Opinion 97-405 held that a lawyer representing a government entity may not agree to represent a private party against her own government client, absent the informed consent of both clients. (MR 1.7(a) prohibiting representation that is “directly adverse.”) However, the lawyer may represent a private client against another government entity in an unrelated matter, as long as the two government entities are not considered the same client, and as long as the requirements of Model Rule 1.7(b) are satisfied, specifically that representation of one client is not “materially limited” by duties to another.

**“The Revolving Door”**

“The revolving door” refers to lawyers who change jobs. Suppose a public defender leaves her job to join the county attorney’s office to represent the child welfare agency. Clearly, based on MR 1.9, the lawyer cannot represent the agency in a matter where that lawyer represented another party such as the parent or child. The Supreme Court of Michigan found Rule 1.9 and 1.11 violations in a termination of parental rights case, where the agency lawyer had previously represented the mother, despite the lawyer not remembering anything about the hearing or the client. However, to avoid restricting lawyers from seeking government employment, MR 1.11 allows for that lawyer to be “screened” from the case. In other words, MR 1.10, which imputes conflicts to all members of the same firm, does not apply. MR 1.11 provides that the conflicted lawyer who personally and substantially participated in the representation may be screened from the case so other lawyers from that office are able to represent the agency.

**Conclusion**

The rationale for the conflicts rules is that lawyers owe fundamental duties to clients. When these duties are compromised, the lawyer must act, usually by withdrawing. Conflicts of interest for child welfare
lawyers are complex and involve a detailed analysis of the case facts. Remember to apply the right rule.

To review:
• For current clients/ simultaneous representation, MR 1.7 applies, and the lawyer should ask the questions posed in that section.
• For former clients, consult MR 1.9.
• Under MR 1.10, conflicts are imputed to all lawyers in the firm.
• The exception to this is when a former government lawyer accepts employment representing parents and/or children, or vice versa, in which case the lawyer should consult MR 1.11, and establish appropriate screening mechanisms as provided by the Rule.

Endnotes

1 MR 1.7, cmt. 6.
2 MR 1.7, cmt. 8.
4 MR 1.7, cmt. 4.
5 MR 1.7, cmt. 5.
6 MR 1.6, cmt. 14; MR 1.7, cmt. 5.
7 MR 1.7(b)(1) – (b)(4).
8 MR 1.7, cmt. 8.
9 MR 1.7, cmt. 21.
10 MR 1.7, cmt. 3.
12 MR 1.10
13 MR 1.9.
16 In re Stacey S., 737 N.E.2d 92 (Ohio Ct. App. 1999).
18 “The prosecuting lawyer shall render to the state department of welfare, division of human services … such legal services as the department may require.” W.Va. Code § 49-7-26.
20 MR 1.13(a).
22 Superintendent of Insurance v. the Attorney General, 558 A.2d 1197 (Me. 1989).
23 In re Steven R.A., 537 N.W. 2d. 142 (Wis. 1995).
24 In re Osborne, 589 N.W.2d 763 (Mich. 1999).
25 See MR 1.11 for effective screening measures.
Interacting with Other Parties

Out-of-court contact with caseworkers, parents, children, and other lawyers is common for child welfare lawyers. The informal nature of the interactions makes adhering to the ethics rules limiting such contact challenging. This chapter explains how to apply the ethical rules when child welfare lawyers are interacting with parties in the case, specifically parents, children, and caseworkers.
Lawyers are not restricted when communicating with people such as police officers, court appointed special advocates (CASAs), foster and adoptive parents (unless the caregiver is represented), because they are not parties to the case. This chapter addresses the following ethical questions:

Parents’ lawyers:
- May a parent’s lawyer interview a caseworker outside the presence of agency counsel?
- May a parent’s lawyer interview a child without the child’s lawyer or guardian ad litem (GAL) present if the lawyer has permission from the child’s parent?
- What are the ethical issues involved in advising the parent not to speak with the caseworker or the agency lawyer without you present?

Children’s lawyers and lawyer-GALs:
- What should child’s counsel do when certain people (i.e., police, agency lawyer, parent’s lawyer, caseworker) want to interview the child?
- Can a GAL use the caseworker as an intermediary when interviewing a parent?
- What are the ethical issues involved in speaking with caseworkers and/or parents outside the presence of their lawyers?

Agency lawyers:
- What should the agency lawyer do when parent’s counsel is persistently questioning, even harassing the caseworker? What can the agency lawyer do to protect the caseworker and the agency?
- May agency lawyers speak with parents outside the presence of their counsel?
- May agency lawyers instruct the caseworker to ask specific questions of the parents?
- What about interacting with unrepresented parents?
- May an agency lawyer join a psychologist in interviewing a child outside the presence of child’s counsel?

Communicating with Represented Parties
Model Rule 4.2 states that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer …” There are two exceptions: (1) the lawyer has the consent of the other lawyer, or (2) the lawyer is authorized by law or a court order to communicate with the unrepresented party.

The rule protects parties against overreaching by opposing counsel, safeguards the lawyer-client relationship from interference, and reduces the likelihood that clients will disclose confidential information that will harm their interests. In interpreting MR 4.2, the ABA Committee on Ethics and Professional Responsibility reiterated the importance of protecting the lawyer-client relationship from interference by opposing counsel, noting that the rule expands on the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to effective assistance of counsel.

The rule applies even though the represented person initiates or consents to the communication. So even if a parent approaches a GAL with questions or comments about the case, the GAL must
immediately end communication unless the GAL gets consent from the parent’s lawyer.3

Difficulty arises when applying MR 4.2 because the parties in dependency cases work closely together outside of court. The caseworker and child’s counsel, in particular, have extensive contact with parents and children, almost always outside the presence of the other lawyers. Issues arise not only when a lawyer is preparing for court, but during home visits, educational meetings, case staffings, and other routine activities. The following sections explain the nuances of MR 4.2, and examine case law and ethics opinions from around the country that have addressed these issues.

Communication May Not be About the “Subject of Representation”

Consider the following scenario:

The child’s GAL [a lawyer] arrives early for a permanency hearing in order to talk to the parties and interview her client, a 12-year-old girl who was returned home last month. She sees the mother.

(1) Can the GAL ask the mother where her daughter is?

(2) Can the GAL ask the mother how the child has adjusted since returning home?

A recent District of Columbia ethics opinion4 poses this hypothetical, and explains unequivocally that the GAL cannot ask how the child has adjusted since returning home (Question #2). MR 4.2 is clear that the GAL may not communicate with the parent about the substance of the case without consent from the mother’s lawyer. The GAL is authorized by law to perform the dual role of advocate and factfinder, but the authorizing legislation gives no authority to the GAL to collect information from the child’s parents without consent from the parents’ lawyer. The opinion acknowledges that the boundary set by the rule may be inconvenient or cumbersome, but is necessary because it protects the parent, who may be at risk of criminal liability as well as termination of parental rights.

Regarding question #1, the District of Columbia opinion allows the GAL to pose such a question. Even though MR 4.2 states no exception for contact limited to purely administrative questions, asking the whereabouts of the child does not thwart the purpose of the rule. The parent is not being asked for information about which advice of counsel may be sought. Keep in mind, though, that if the child had run away and gotten into some trouble, even this simple question might lead to substantive communication. Also, MR 4.2, Comment 4 permits communication about matters outside the representation. Therefore, lawyers are generally allowed to discuss “administrative issues” with a parent, including asking about the child’s whereabouts, or setting up an appointment for a home visit.

While there is no guidance in the rule as to what type of communication qualifies as “administrative in nature,” the District of Columbia case makes the analogy to ex parte lawyer/judge communications where it is generally understood that scheduling matters and other nonsubstantive matters can be discussed outside the presence of all counsel. When the child is living with the parent, especially in the case of a preverbal child, home visits with child’s counsel can be awkward because
child’s counsel cannot discuss anything substantive with the parent. The child’s lawyer could either ask the parent’s lawyer to be present for the home visit or ask the parent’s lawyer for consent beforehand.

**Communicating with the Child**

MR 4.2 applies equally to protect child and adult clients. Neither parents’ lawyers nor agency lawyers should interview the child outside the presence of child’s counsel, without consent of child’s counsel. Three states (South Carolina, North Carolina, New York) and the District of Columbia have directly addressed this question in ethics advisory opinions, which held that as represented parties, children in an abuse/neglect case are protected by MR 4.2. Note that ethics advisory opinions are not law, so may or may not be persuasive legal authority. One case acknowledges that the barrier imposed by MR 4.2 may be costly and cause a loss of informality and access to direct communication, but that the rule applies nonetheless.

Getting the permission of the parent to interview the child has no effect on applying the rule. While lawyers must be sensitive to the potential ethical violations of interviewing the child, generally social workers and police may conduct such interviews. Prosecutors and agency lawyers, however, may be limited in using caseworkers and police as their agents when interviewing the child, an issue covered in the next section.

**Communicating with Parents by Opposing Counsel**

MR 4.2 prohibits opposing counsel from communicating with parents outside the presence of counsel unless the parent’s lawyer consents. A harder question involves communicating with the parent through a third party, such as the caseworker.

Consider the following scenario: The school holds a meeting to review a child’s IEP. The caseworker, probation officer, school personnel, GAL, and the mother are present. During the meeting, is it permissible for the GAL to suggest questions for the caseworker to ask the mother?

A District of Columbia ethics opinion uses this scenario to assess whether the GAL, who may not talk to the mother on any matters of substance (without permission from her lawyer), may relay questions to the mother through a social worker. The opinion states that the answer is clearly no; this would be an ethical violation by the GAL. The reasoning is based in part on the MR 4.2 commentary (in District of Columbia and most states), which states that not only can the lawyer not question or communicate directly with the party without counsel present, but the lawyer cannot cause another to do so either. The commentary to MR 4.2 says, “a lawyer may not make a communication prohibited by this Rule through the acts of another.” Further, MR 8.4 states that it is professional misconduct for a lawyer to (a) violate or attempt to violate the Rules of Professional Misconduct, knowingly assist or induce another to do so, or do so through the acts of another.” Citing MR 4.2 and MR 8.4, the District of Columbia opinion concludes that a GAL may not use a social worker or any other third party as a go-between to circumvent MR 4.2.
ask is complicated because caseworkers must investigate cases, and work with parents. So where is the line between permissible caseworker/parent interaction, and lawyers directing caseworkers to circumvent 4.2 prohibitions?

First, parties may communicate directly with each other.8 Second, caseworkers are not only permitted, but mandated by law to investigate cases, and work with the parent to achieve reunification. The exception to MR 4.2 that allows ex parte contact “when authorized by law” means that the law must expressly authorize the lawyer to interview the represented parent outside the presence of counsel (which no state permits). In this context, the law applies to the caseworker, not the lawyer. Courts and practitioners therefore struggle with the permissible limits of “using” the caseworker to ask the parents questions that they (the lawyers) are prohibited from asking under MR 4.2.

A New Jersey case looked at this question where a caseworker interviewed a father outside the presence of counsel. Because the father was also being criminally charged, the court considered whether the caseworker’s interview violated the father’s Fifth and Sixth Amendment rights in addition to MR 4.2. In concluding that the interview was not a 4.2 violation, the court found (1) the father was not “in custody” at the time of the questioning, and (2) there was insufficient proof that the purpose of the questioning was to aid the prosecution. The prosecutor had not instructed the caseworker to conduct the interview.9 Agency lawyers, in particular, should be aware of this potential issue when advising caseworkers who are interviewing parents outside the presence of counsel.10

They can guide investigations, but have to be sensitive to the dividing line between guiding investigations and violating MR 4.2.

Parents’ lawyers who are concerned about protecting their clients, especially in the preadjudication phase where allegations have not been sustained, should make clear to caseworkers, GALs, children’s and agency lawyers that they are not consenting to any contact with their client without their presence. On the other hand, the success of the reunification efforts depends on a strong working relationship between the caseworker and parent, so parents’ lawyers have to be very sensitive when advising clients. They should encourage as much cooperation as possible, while protecting their client’s rights. In fact, post-disposition, parents’ lawyers need to advise their clients that lack of cooperation with social services may have adverse consequences, including termination of parental rights.

**Communicating with Caseworkers**

May a parent’s lawyer, child’s lawyer, or GAL communicate with the caseworker outside the presence of the agency lawyer? In most jurisdictions, the caseworker is not the “client” of the agency lawyer, because the agency lawyer represents the child welfare agency, not the individual caseworker. However, the commentary to MR 4.2 says in the case of an organization, the rule prohibits communication with an employee who “supervises, directs, or regularly consults with the organization’s lawyer, or has the authority to obligate the organization.”11 There is some disagreement as to whether line caseworkers fall under that definition.
Another comment says that permitted communications that are “authorized by law” may include the “right to communicate with the government.” Note that “authorized by law” refers to the communication between the opposing counsel and represented party. Because of these two comments, whether opposing counsel can speak directly with the caseworker without agency consent is not clear.

A New Mexico case held that a GAL is not prohibited from ex parte contact with social workers outside the presence of agency lawyers because GALs are not performing the traditional role of lawyer, so they are not “adversaries.” GALs perform multiple roles, including “acting as an extension of the court by performing the quasi-judicial functions of investigating the facts and reporting to the court what placement was in [the child’s] best interests.” (emphasis in original).

A second question raised in the case was whether the analysis changes if the GAL retains a lawyer to sue the agency. The court acknowledged that this presents a harder question because the child and the agency are now clearly adversaries. However, the court held that this fact “does not cause a metamorphosis of the role of the GAL into that of a traditional lawyer representing the client. The GAL’s statutory duty of independent investigation and reporting to the court continues unabated.” Therefore, the court found that the ethical prohibition against communicating outside the presence of counsel does not apply to GALs even when the child and agency are adversaries. Note that the reasoning in the New Mexico case differs from that of the District of Columbia opinion where GALs (with the same statutory obligation to investigate cases and report to the court their assessment of the child’s best interests) are required to adhere to the code of ethics. This illustrates states’ opposite views on whether the ethics codes apply to GALs.

A Michigan Court held that parents’ lawyers and GALs (in Michigan, GALs are required to be lawyers) may speak directly with the caseworker outside of the presence of agency counsel based on the importance of the parents’ lawyers and GALs having access to the caseworker, and the role of the agency in bringing the action against the parent. As a practical matter, parents’ lawyers need access to the caseworker to adequately prepare. Given the frequency of contact between caseworkers and lawyers representing parents and children, an underlying concern was the administrative costs of a rule that would require the presence or permission of agency counsel.

“Child Protection proceedings are unique. Although the proceeding is considered a civil proceeding . . . it has many similarities to a criminal case and important constitutional rights are at stake . . . In child protection cases the parents or child’s attorney needs to contact the caseworker to prepare for trial and to assist the client to understand and comply with FIA or court requirements. Requiring the attorney for parents or children in child protective proceedings to obtain the consent of the FIA attorney before contacting the worker would involve the FIA attorney in the day to day case management activities of the caseworker.”

When interviewing government employees, some states give opposing counsel more latitude. As interpreted in an ABA Formal Ethics Opinion, the right
to speak with government officials is grounded in the public policy of ensuring citizens’ right to access government decision makers.\textsuperscript{20} If such contact is expressly authorized by law (an exception to MR 4.2), then the lawyer is permitted to contact the government workers, but must adhere to MR 4.3 (discussed in next section), and MR 4.4 (a), which prohibits a lawyer from using methods intended to embarrass, delay, burden, or violate the legal rights of a third person.

Communicating with Unrepresented Parties

In dealing with someone who is not represented by counsel, MR 4.3 states that a lawyer cannot state or imply that they are disinterested, or without bias.\textsuperscript{21} When the lawyer knows or reasonably should know the unrepresented person misunderstands the lawyer’s role, the lawyer must make reasonable efforts to correct the misunderstanding. As counsel almost always represents children and the agency, the group that this rule will apply to most often is \textit{pro se} parents.

Pro Se Parents

Lawyers must be careful when interacting with parents who proceed without counsel. There are often so many different players in a dependency case that a parent can get confused about the respective roles. Lawyers must make sure \textit{pro se} parents understand the lawyer’s role in the case, who they represent, and their position. MR 4.3 also states that the only advice the lawyer may give to an unrepresented party is the advice to “get a lawyer.”

Parents can get confused about the lawyer’s role and obligations, especially when the parent’s and child’s positions are aligned. For example, when the child’s lawyer is arguing that the child should be returned home, the parent perceives that the child’s lawyer is “on her side,” and may reveal information that she shouldn’t. The child’s lawyer needs to explain to the mother that she represents the child, that information exchanged with the mother is not protected by confidentiality, and that the child’s position may change. Lawyers for the agency and children can recommend to parents that they should get a lawyer, and can help them do this by letting them know how to contact the public defender’s office, for example. The parents can also speak directly with the judge about the public defender’s service, or other resources for people with limited means, such as a list of private lawyers who take these cases on a sliding scale fee basis.

Conclusion

The ethics rules prevent lawyers from communicating with parties outside the presence of their lawyer, absent consent from that lawyer. MR 4.3 also protects unrepresented parties. Applying these fairly straightforward ethics rules, however, can be complicated by issues that arise in dependency cases, such as:

- the frequency of out-of-court contact between lawyers and parties;
- the role of the caseworker in investigating the case and providing intensive follow-up services;
- the quasi-criminal nature of the proceedings and the risk of a criminal case being filed against the parent; and
- the unique role of the GAL, and the unresolved ethical questions about GAL practice.
Only a handful of states have resolved the ethical dilemmas raised by these issues, with varying results. Therefore, lawyers in this field need to be aware of what the rules say, and how their states interpret the rules. Absent a case or ethics opinion on the subject, lawyers should be aware of the potential risks when interviewing represented parties outside the presence of counsel, and should also seek to protect their clients from such interviews by opposing counsel. Lawyers can also seek guidance from their state or local bar association by requesting an ethics opinion when the correct action is not clear under the rules.

**Endnotes**

1 MR 4.2, cmt. 1.


3 MR 4.2, cmt. 3.

4 District of Columbia Ethics Opinion No. 295 (February 15, 2000).


6 MR 4.2, cmt. 4.

7 District of Columbia Ethics Opinion No. 295 (February 15, 2000).

8 ABA Formal Opinion 92-362 addresses the issue of parties communicating directly with each other, and suggests in some instances, such as when a lawyer has reason to believe that opposing counsel has not communicated an offer of settlement to the client, that it may be appropriate under MR 1.4 and MR 1.2 for the lawyer to advise his client to speak directly with the opposing party to verify whether the party was informed of the settlement offer.


10 State v. Miller, 600 N.W.2d 457 (Minn. 1999). (Minnesota Supreme Court found Rule 4.2 violation where prosecutor did not terminate interview with defendant when prosecutor knew defendant was represented by counsel; prosecutor ratified police detective’s conduct.)

11 MR 4.2, cmt. 7.

12 MR 4.2, cmt. 5.


14 Ibid., 164.

15 Note that the D.C. ethics opinion is nonbinding.

16 This issue is explored more fully in the chapter on “Special Issues for Guardians ad Litem.”

17 The distinction between this scenario and a criminal defendant’s lawyer’s right to speak to the police or any other witness without 4.2 restrictions is that those witnesses are not the prosecutor’s clients.


19 Ibid.


21 MR 4.3.
Ethical Issues in Litigation

- What should a parent’s lawyer do when a client indicates she’s lied to the social worker or the court?
- What should a child’s lawyer do when he suspects the child’s recent recanting of sexual abuse allegations is due to pressure from the mother?
- What should an agency lawyer do when the caseworker lies about the extent of her efforts to provide reunification efforts to the mother?
- A child’s lawyer is called as a witness in one of her cases. What do the ethics rules say about her testifying?
- Between hearings, outside the presence of other counsel, a judge asks an agency lawyer how a parent in a case is doing. How should the lawyer respond?
- What can lawyers say to the press about a high profile child sex abuse case that has interested the media?
This chapter offers child welfare lawyers guidance on handling ethical issues that arise during litigation. Part I deals with handling false information. Part II addresses the less common, more easily resolved issues such as discovery, lawyers as witnesses, meritorious claims, trial publicity, *ex parte* contact, and reporting misconduct of other attorneys.

Handling False Information

Knowing how to balance duties to the court and duties to clients when dealing with false information from their clients is the most challenging and common issue lawyers face during litigation. Case examples address: clients who lie under oath, parties who obstruct access to evidence and alter documents, and truthfulness in negotiations.

**The Sands Case** A parent’s lawyer is appointed to represent the mother, Jackie Sands, in a case where she is alleged to have left her children, Jason (age 15), David (age 7), and Angela (10 months) home alone more than once. It is also alleged that the mother is using drugs. At the initial meeting before the first hearing, the mother admits to her lawyer that the allegations, including the drug use, are true. The agency is awarded temporary care and custody, and the children are placed in foster care pending the adjudication.

On the day of adjudication, Ms. Sands’ lawyer receives a copy of her court-ordered substance abuse evaluation indicating she’s clean. When her lawyer asks her about this, she says she faked the test by using someone else’s urine. What use, if any, can the lawyer make of this document at trial? Ms. Sands tells her lawyer she would like to testify that she is not currently using drugs. Can her lawyer allow her to testify that she’s clean? What if she tells her lawyer she won’t lie about the drug use, but then during her testimony, she does?

**MR 3.3: Candor Towards the Tribunal**

MR 3.3 prohibits lawyers from knowingly making false statements (factual or legal) to the court. The lawyer cannot lie, nor can the lawyer introduce evidence, including testimony, that the lawyer knows to be false. Under the Model Rules, the duty of candor to the tribunal is superior to the duty to keep information confidential. In very few states, the duty to keep the information confidential is superior to the duty of candor to the tribunal. In the Sands case, the lawyer cannot put his client on the stand to testify that she is clean, nor can he introduce the drug evaluation into evidence. (See sidebar #1.)

A more difficult question arises when the lawyer is either surprised by a client’s false testimony, or the lawyer finds out after the fact that the client lied. Different actions are necessary depending on whether the lawyer knows the testimony is false while the client is testifying, or the lawyer doesn’t realize until after the testimony that the client lied. When the lawyer calls a witness other than a client, and the witness lies, the lawyer must call a recess, counsel the witness to tell the truth, and if the witness refuses, the lawyer must disclose the false testimony to the court. The following discussion applies only when the lawyer has called
the client as a witness because the lawyer owes the client special duties of confidentiality and loyalty.

Timing of the False Testimony

Before the witness takes the stand. If the lawyer knows that the client (or any witness) will lie under oath, the lawyer cannot call the client (or witness) to the stand.1 If only a portion of the client’s testimony will be false, the lawyer may call the client, but not elicit or permit the client to testify falsely.

There is an exception that applies to criminal defendants only. It is important for parents’ lawyers to understand this exception because some public defenders believe it applies in dependency cases but it does not. However, if the parent has also been criminally charged, the parent will be permitted more leeway to testify in the criminal case. Also, this provision has been in place in some jurisdictions (e.g., Washington, DC) for several years, but was not in the Model Rules until the August 2002 changes. The amended Model Rules now allow a criminal defendant to testify (presumably falsely) in a narrative fashion, where the lawyer cannot ask any questions, or use anything the defendant says in his closing argument. This provision balances two competing values: a criminal defendant’s right to testify in her own behalf, and the lawyer’s duty as an officer of the court to avoid assisting a client’s fraud or introducing false evidence.

Under oath. If the lawyer calls a witness to the stand, not expecting the witness to lie, but the witness does, the lawyer must take remedial measures.2 The lawyer must first call a recess and counsel the witness to take the stand again and correct the lie. If the witness is the lawyer’s client, and

When Does a Lawyer “Know” Something?
The Model Rules clarify that “knowingly” denotes actual knowledge of the fact in question, but a person’s knowledge may be inferred from the circumstances. (MR 1.0(f).) Some parents’ lawyers avoid this problem by deliberately not asking their clients what happened. Whether this approach is ethical is widely debated, since the spirit and intent of the Model Rules is to discourage a lawyer from “turning a blind eye” to criminal or fraudulent activity, including perjurous testimony from one’s client.

Also, if a lawyer does not know something to be false, but “reasonably believes” that it is, then the lawyer may refuse to offer the evidence (see MR 3.3(a)(3)). In other words, even if the client wants the testimony to come in (either the client’s own testimony, or another witness’s testimony), the lawyer does not violate MR 1.2 to follow the client’s directive by refusing to offer the evidence even though the lawyer does not know it to be false.
the client refuses this advice, the lawyer must make a motion to withdraw under MR 1.16. Mandatory withdrawal is required by MR 1.16(a), which does not allow the lawyer to continue representation if it will result in a violation of the rules or the law. In this instance, continued representation will violate MR 3.3, which prohibits lawyers from presenting false evidence.

If the court denies the lawyer's motion to withdraw, or if withdrawal will not undo the effect of the false evidence, the lawyer must disclose the false information to the court to remedy the situation. Note that not all jurisdictions have adopted the Model Rules' perspective on this. In some states, the confidentiality rule is superior to the duty to disclose.

After testimony was given. Under MR 3.3, the duration of the duty to disclose that false evidence has been introduced is “the conclusion of the proceeding.”3 There is some question in a dependency case as to whether this means the end of that particular hearing, or the end of the entire case.

Guidance for Children’s and Parents’ Lawyers

The Sands case illustrates the dilemma for a parent’s lawyer. Similar analysis applies when these questions are presented to lawyers for children and agencies. For example, if a child’s lawyer suspects the child is recanting allegations of sexual abuse by her mother’s partner because she is being influenced by her mother, the lawyer faces an ethical dilemma. The Model Rules say that the lawyer is prohibited from introducing the testimony if the lawyer knows the witness is lying. In this case, the lawyer may only believe the child is now lying and therefore can still elicit the testimony, but may refuse to offer it.4 Child clients often change their stories, and many children’s lawyers will respect the current position of the client and advocate for that position. Children’s lawyers must be careful not to submit evidence they know to be false, however. A lawyer has discretion to refuse to offer testimony even if the “knowledge” standard can’t be met.

Guidance for Agency Lawyers

Agency lawyers also cannot submit false evidence. MR 1.13 applies a duty on government lawyers to submit accurate, truthful evidence because public business is involved. When the lawyer knows the caseworker is lying about or exaggerating her reunification efforts, the amended Model Rules now permit permit the lawyer to disclose this information even outside the context of trial testimony.5 (This applies to all lawyers for organizations, not just government lawyers). After the 2002 Model Rule Amendments, MR 1.13 was amended again to permit agency lawyers to disclose such information. Also, based on a recommendation from the ABA Task Force on Corporate Responsibility, MR 1.13 was amended to require lawyers for all organizations to report serious violations to higher officials within their organizations.6

Revealing Adverse Information

MR 1.2 prohibits lawyers from presenting evidence that is adverse to their client’s position. In two circumstances, however, they are required to reveal such adverse information:

(1) Duty to disclose adverse legal authority

Lawyers cannot fail to reveal legal authority in the controlling jurisdiction
that is directly adverse to the position of the client (and not disclosed by opposing counsel). This can come up in trial, or in arguing a case on appeal. For example, consider a case where the child’s lawyer is aware that a specific ruling was issued on the admissibility of a child’s hearsay statement where a hearsay statement is wrongly admitted at trial. On appeal, the parent’s lawyer fails to point this out, and the child’s lawyer is asked a direct question about the admissibility of the statement. The child’s lawyer must reveal the adverse opinion to the appellate court.

(2) Ex parte proceedings
In an ex parte proceeding, a lawyer must inform the court of all material facts, whether or not the facts are adverse. This is another exception to MR 1.2 prohibiting lawyers from disclosing information adverse to the client’s position. The theory is that since the other side is unrepresented in an ex parte proceeding, the court needs to be informed of all relevant facts before issuing a decision. For child welfare lawyers, this issue can come up for:

• a parent’s lawyer when seeking a protective order for a mother against an abusive partner,
• a child’s lawyer in a special education proceeding at which no other counsel is present, or
• an agency lawyer in an ex parte removal hearing.

A Connecticut lawyer was reprimanded for providing false, misleading information to the court in an ex parte proceeding when the judge asked the lawyer his reasons for filing an emergency custody petition in Connecticut as opposed to New Jersey where there were pending custody proceedings. In finding that the lawyer violated Rule 3.3(a)(1) and 3.3(d) (regarding ex parte proceedings), the court found that in ex parte proceedings, lawyers not only have a duty to be truthful, but further have a duty to correct a misstatement made by another attorney. In an ex parte removal hearing, an agency lawyer must present all relevant evidence to the judge for review.

MR 4.1: Truthfulness in Statements to Others
Back to the Sands case: Clearly, the lawyer cannot call Ms. Sands to testify that she is not using drugs. He also may not introduce the drug evaluation indicating she’s clean. But what about pretrial? Can the lawyer discuss these “negative” results when negotiating with opposing counsel?

MR 4.1 applies to out-of-court statements, statements to opposing counsel, parties, nonparties, and so forth. This rule prohibits lawyers from making a false statement of material fact to anyone. So the lawyer cannot say to opposing counsel, “You know my client is not using drugs.”

However, in determining whether the lawyer has a duty to correct the client’s lie, MR 4.1(b) says that the lawyer must correct a criminal or fraudulent act by the client, unless such disclosure is prohibited by the confidentiality rules. So while the lawyer cannot lie to opposing counsel about the faked drug evaluation, he also cannot disclose this to opposing counsel. In other words, while a lawyer’s duty to be honest with the court is superior to the lawyer’s duty to maintain confidentiality, in dealing with all others (but the judge), the lawyer’s duty of confidentiality to the client is superior to the duty to correct a lie.
The lawyer must also consider MR 1.2(d) which prohibits a lawyer from counseling or helping a client engage in criminal or fraudulent conduct. The lawyer, however, should discuss the legal consequences of any proposed conduct with a client. In the Sands case, the lawyer should advise Ms. Sands of the consequences of her faking the drug screen, and advise her to correct the fraud. The lawyer cannot use the drug screen, but also may not reveal the confidence from Ms. Sands that she faked the screen.

A more difficult question is whether the lawyer may say to opposing counsel, “Do you have any evidence that my client is using drugs?” (The lawyer is not, in fact, lying, but the lawyer also is taking advantage of the report, which has come back with a false negative.) This example shows the tension between protecting client confidences and the duty as an officer of the court to be truthful. Lawyers interpret MR 4.1 differently. Some lawyers feel that this question is permitted because it is not a per se lie, but others believe it is impermissible because it is using the client’s fraud to their advantage in negotiations. (See sidebar #2.)

Other Litigation Issues

Discovery
Child welfare lawyers may face the following ethical issues during discovery.

**MR 3.4: Fairness to Opposing Party and Counsel**

MR 3.4 states that in pretrial procedure, a lawyer cannot “…make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.” In preparing for termination of parental rights, for example, parents’ lawyers must answer interrogatories promptly, and agency lawyers must comply with document requests. MR 3.4 also states that a lawyer cannot “…request a person other than a client to refrain from giving information to another party unless: (1) the person is a relative or an employee or other agent of the client; and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”

**MR 4.4: Respect for Rights of Third Persons**

MR 4.4 prohibits a lawyer from using means that have no purpose other than to embarrass, delay, or burden a third person. For example, parties should not subpoena unnecessary witnesses only to have them wait around all day in court without testifying. Parties also should not seek to delay a case for no other reason than to disadvantage the other side. Not only are lawyers mandated under the Adoption and Safe Families Act (ASFA) to move cases along swiftly, but the Model Rules support this as well.

MR 4.4 requires a lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent to promptly notify the sender. This is an unusual circumstance,
but lawyers often do not know what to do when they receive a document or an e-mail from the other side that was not meant for them. Lawyers have a duty in that circumstance to notify the sender.

**MR 3.1: Meritorious Claims and Contentions**

MR 3.1 states that lawyers cannot bring a proceeding or assert an issue without a legal or factual basis; they cannot assert frivolous actions. This issue most often comes up for parents’ lawyers who routinely file appeals in termination of parental rights cases when there is no good faith basis for the appeal. The parent's desire for the appeal alone is an insufficient basis for filing the appeal as the lawyer's duty under MR 1.2 to pursue the client’s objectives is limited by MR 3.1, requiring that lawyers have a nonfrivolous factual or legal basis for filing the appeal. The lawyer needs to discuss this with the client, explaining that there must be a basis for the appeal before it can be filed. Similarly, an agency lawyer may not file a petition for removal of a child without a good faith basis, and must advise the caseworker against doing so.

**MR 3.7: Lawyer as Witness**

MR 3.7 prohibits a lawyer from acting as an advocate in a case where the lawyer is likely to be a witness. This will rarely be an issue for parents’ and agency lawyers, but is common for children’s lawyers, and especially guardians ad litem (GALs). Because children’s lawyers and GALs conduct extensive case investigation, often speaking directly with potential witnesses such as relatives and foster parents, they can put themselves in the position of becoming fact witnesses to the case. Some states use GALs as investigative arms of the court, and these states usually have case law or a statute regarding testimony by GALs.\(^{16}\)

**MR 3.6: Trial Publicity**

Sometimes high profile child abuse cases attract attention from the media. MR 3.6 prohibits lawyers involved in a case (or other lawyers in the same firm) from making an out-of-court statement that they know will be disseminated by the media and has a substantial likelihood of materially prejudicing the adjudicative proceeding.

Agency lawyers may discuss information contained in a public record, including the charges, and may state that an investigation is in progress. A parent’s lawyer is allowed to make statements to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. Such statements are limited to information that is necessary to mitigate the recent adverse publicity. In addition to MR 3.6, children's lawyers should be sensitive to confidentiality concerns, and should consider keeping their clients’ names and other identifying information out of the media where possible.

Children's and other lawyers can also ask the judge to issue a gag order on all parties to refrain them from giving any statements to the media.

**MR 3.5: Ex Parte Contact**

MR 3.5 prohibits lawyers from communicating ex parte with judges, and the Canons of Judicial Ethics prohibit judges from receiving such communication.\(^{17}\) Generally, ex parte communication to handle administrative matters such as
Obstructing Evidence and Misleading the Court: A Case Example

The South Dakota Supreme Court upheld a disciplinary action against a lawyer who altered a drug report, then provided misleading responses to the judge about the report. The judge had ordered the father to be tested for methamphetamine (meth). *In re Wilka*, 638 N.W.2d 245 (S.D. 2001).

When the father’s lawyer went to the drug lab to pick up the report, he noticed that his client had tested negative for meth, but positive for marijuana, not a substance that the court had ordered testing on. When the lab technician refused to run the tests again, for a meth-only screen, or issue a new report, at the lawyer’s direction, the technician cut off the bottom portion of the drug screen results, omitting the positive result for marijuana. The father’s lawyer then introduced the partial report as evidence at trial that the father was not using meth.

This case raised two issues:

(1) **MR 3.4 prohibition against lawyers obstructing access to evidence, or altering, destroying, or concealing a document.** The disciplinary board and South Dakota Supreme Court considered whether the father violated MR 3.4 when he had the lab technician tear off the portion of the evaluation showing his client was positive for marijuana, and submitted it to opposing counsel, then to the court. The lawyer’s justification was that the court only ordered a screen for meth, not marijuana, and that the partial report was, in fact, true and valid. In finding this action violated MR 3.4, the court found the lawyer had materially altered the document.

---

**MR 8.3 Reporting Professional Misconduct**

Under MR 8.3, a lawyer is required to report another lawyer’s or judge’s violation of the rules when the violation raises a substantial question as to that lawyer’s or judge’s honesty, trustworthiness, or fitness. Misconduct is defined as when a lawyer:

- violates or attempts to violate the Rules of Professional Conduct, knowingly assists or induces another to do so, or does so through the acts of another;
• commits a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
• engages in conduct involving dishonesty, fraud, deceit or misrepresentation;
• engages in conduct that is prejudicial to the administration of justice.

An example of behavior that may rise to the level of reportable misconduct for child welfare lawyers is when a child’s lawyer consistently fails to visit clients, and states a position to the court without having any contact with the child. Usually the legal system relies on clients to report misconduct by their lawyers. Some children, however, are too young to understand their lawyer’s duties, or are unaware of the lawyer’s misconduct. Therefore, the system cannot rely on child-clients to report misconduct. Similarly, many parents in child welfare cases cannot read, or lack the resources to file a complaint. Because many lawyers in this field are overworked, and deal with high caseloads, multiple parties, and difficult family issues, this form of misconduct is common and should be reported. Lawyers should take steps to prevent working conditions from reaching the level of misconduct. For example, a New York ethics opinion found that an agency lawyer must not accept more cases than he is competently able to handle, regardless of chronic conditions of high workloads, despite being directed by his supervisor to do so.18

(2) MR 3.3 candor issue, regarding the lawyer’s responses to the judge’s questioning. After the lawyer asked that the partial report be admitted into evidence, the court asked “Is this cut off or is this the entire…” The lawyer interrupted and responded, “That’s what I was provided by the hospital, Your Honor.” Again, the court inquired “Is this the entire thing?” The lawyer replied, “That’s what I have Judge. That’s what I asked them to screen for.” The South Dakota Supreme Court confirmed the disciplinary board’s recommendation for public censure on the basis of a MR 3.3 violation. The court found that the requirement of candor towards the tribunal “goes beyond simply telling a portion of the truth. It requires every attorney to be fully honest and forthright.” In re Wilka, 638 N.W. 2d. 245, at 249 (S.D. 2001). Acknowledging the attorney’s desire to represent the client without betraying confidentiality, the court nevertheless found that the lawyer’s response to the judge’s questioning was deceitful, misleading, and intentional in nature, and “clearly crosses the line into improper and unprofessional conduct.” Thus while the lawyer’s response may have been technically true, it was so misleading as to be considered making a false statement to the court, In re Wilka, at 249.
Conclusion
Many ethical issues arise during litigation that require child welfare lawyers to understand their state’s ethics rules, particularly regarding false information. In addition to understanding what the rules require, it helps to discuss these delicate situations with colleagues because of the competing interests at stake. These include duties to protect and effectively represent clients, and duties as officers of the court to be truthful and honest with the court and other parties. Other issues come up less often, but are important to understand. Ethical practice during the litigation phase ensures clients are represented competently and fairly, while respecting the rights of other parties and nonparties. This contributes to a more honest, better functioning legal system.

Endnotes
1 MR 3.3(a)(3).
2 MR 3.3(a)(3); MR 3.3, cmt. 10.
3 MR 3.3(c).
4 MR 3.3(a)(3).
5 MR 1.13; MR 1.6.
6 MR 1.13(b).
7 MR 3.3(a)(2).
8 MR 3.3(d).
9 Daniels v. Alander, 844 A.2d 182 (Conn. 2004).
10 MR 4.1(a).
11 MR 1.2.
12 MR 3.4(d).
13 MR 3.4(f).
14 MR 4.4(a).
15 MR 4.4(b).
16 Chapter 7 on "Special Issues for GALs" analyzes this issue in greater depth.
Assume you are appointed as the guardian *ad litem* (GAL) to represent three children: Jason (age 15), David (age 7), and Angela (10 months). The allegations are that their mother is abusing drugs, and has left David and Angela home alone on several occasions. Sometimes Jason is home, but more often than not he is out with friends. Jason has not really gotten into a lot of trouble, but he has begun skipping school frequently, and his grades have recently dropped. During your interviews with the children, Jason and David consistently tell you they would like to go home and live with their mother. Further, Jason tells you that he has seen his mother use drugs, but he asks you not to tell anyone because he knows if this information comes out, he might be sent to a foster home.¹
This case raises several ethical issues that routinely confront the lawyer-GAL appointed in dependency cases. Because the GAL’s role differs from that in the traditional lawyer/client relationship, the GAL is often uncertain how to handle ethical situations under the Model Rules of Professional Conduct. This chapter addresses how the GAL’s unique role complicates resolving traditional ethics conflicts. It also suggests how a GAL can analyze and resolve common ethical problems—loyalty, confidentiality, and conflicts of interest—to represent the child’s best interests while fulfilling ethical responsibilities.

Role of the GAL in Dependency Cases

In 1996, the American Bar Association (“ABA”) passed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (“ABA Standards”). The ABA Standards advocate a traditional lawyer/client approach to representing children where the lawyer represents the child’s “expressed wishes.” However, the drafters of the ABA Standards recognized that in some states, a GAL is appointed to advocate the “best interests” of the child as opposed to the child’s “expressed wishes.”

However, the GAL often faces ethical dilemmas that the Model Rules do not resolve since the rules do not consider the GAL’s unique role in the litigation. The dual role of the GAL as lawyer for the child and, in general, with or observe the child client. In exercising those responsibilities, the child’s health and safety—that is, the child’s “best interests”—must be the paramount concerns.

Representing the child and the child’s best interests can create conflict for the GAL when attempting to comply strictly with the ethics rules and carry out his dual responsibilities to the court and to the child. Some jurisdictions have separated these roles by statute or declared the role of a GAL a “hybrid,” excusing strict adherence to some Rules of Professional Conduct. Some states provide for the appointment of a lawyer for the child when what the child wants diverges from what the GAL thinks is best. However, even in states where the law provides a separate lawyer for the child, this often does not happen either because of the prohibitive cost of appointing a lawyer and a GAL for one child, or the GAL simply does not ask the court to appoint a lawyer for the child.

GAL Versus Traditional Role of Lawyer

The traditional role of a lawyer is that of advisor, advocate, negotiator, and intermediary. The lawyer is bound by the rules of ethics to “abide by a client’s decisions concerning the objectives of representation. . . .” Thus, the role of traditional counsel in representing a child, in contrast to the role of GAL, prohibits the lawyer from independently determining and advocating the child’s “best interests” if contrary to the child’s preferences. The GAL often faces ethical dilemmas that the Model Rules do not resolve since the rules do not consider the GAL’s unique role in the litigation. The dual role of the GAL as lawyer for the child and, in general,
lawyer for the child's best interests makes applying some of the ethics rules to traditional ethics problems difficult, if not impossible. Some of these rules and the dilemmas they create for the GAL are discussed below.

Model Rule 1.2: Scope of Representation
As discussed above, the GAL is not bound by the child client’s expressed wishes, but by the child’s best interests. That fundamental duty of the GAL conflicts with the traditional role of the lawyer as advocate for the client. It is also inconsistent with the lawyer’s fundamental responsibility under MR 1.2 to abide by a client’s decisions about the objectives of the case. GALs are required by statute to present to the court what they think is in the child’s best interests, as well as the reasoning and facts that support this conclusion, regardless of the client’s expressed wishes.

This is further complicated because a GAL must consider the child’s position when assessing the child’s best interests. In the case above, Jason (age 15) and David (age 7) have told their GAL that they want to return home. The GAL may determine that it is in Jason’s best interest to return home because a change in school may be too disruptive, especially given Jason’s recent school problems. Also, since Jason is 15 years old, the mother’s drug use may not place him at as much risk as it does the younger two children. The GAL may feel that David’s best interests are served by remaining out of the home. Advocating “best interests” thus may be at odds with MR 1.2, which says the client determines the objectives of the case.

Because the GAL’s duty of loyalty as the lawyer for the child under MR 1.2 is contrary to the GAL’s statutory duty to the court, some states confronted with a similar conflict have amended their versions of the rule to exclude GALs from complying with MR 1.2. In the absence of an express exception to MR 1.2 for the GAL, when the child’s view and the GAL’s view conflict, the GAL should inform the court of the child’s view and the GAL’s assessment of best interest. The GAL may also ask the court to appoint a lawyer to represent the child.

Model Rule 1.6: Confidentiality
Applying the confidentiality rules to GALs under the Model Rules can be confusing. The difficult issue is whether and to what degree to keep confidential certain communications between the GAL and the child. Confidentiality normally required in the lawyer/client relationship and by MR 1.6 might prevent a GAL from carrying out the statutory responsibilities of her appointment. This is because MR 1.6 prevents the lawyer from disclosing confidential information that may be critical to the court when adjudicating the child’s best interests. Consequently, a GAL generally must bend the restrictions of MR 1.6 to permit disclosing to the court relevant and necessary information provided by the child. There is no satisfactory way to resolve this ethical dilemma. It is always best to seek the child’s consent before divulging information about the representation to the court. In some states, a GAL is not prohibited from disclosing client communications to the court absent client consent.

As legal counsel for the child’s best interests, the GAL must explain to the
child, if possible, that the GAL is charged with advocating the child’s best interests and that otherwise confidential information may be provided to the court. What should the GAL do if the child informs the GAL of relevant facts that the child does not want to be divulged? This occurs in the case scenario where Jason reveals that he’s seen his mother use drugs, but asks his GAL not to tell anyone.

Jurisdictions have come up with a variety of approaches to guide the GAL to ethically discharge her duty to the client and the court. In some states where a GAL is appointed to represent the child’s best interests, lawyer/client confidentiality still applies because state statute or case law prohibits disclosure. Other states make clear that confidentiality does not apply. Even within a state, there may be a wide range of views as to how the confidentiality issue plays out. A recent ABA survey in Michigan revealed several ways GALs handle disclosing information the child does not want divulged. Some GALs felt the confidentiality rules strictly applied to their representation of children, and would not reveal certain information even if they felt revealing it would be in the child’s best interest. Others felt their duty to present the client’s best interest to the court overrode a strict application of the ethics rules on confidentiality.

In the case at the beginning of this article, the GAL must decide whether to reveal Jason’s disclosure that he has seen his mother use drugs. When confronted with such a situation, a GAL may attempt to escape the ethical dilemma by saying that disclosing Jason’s mother’s drug use is unnecessary because that fact would become known through other channels. However, what if this is not the case? Drug screens can be inconclusive, and the agency may have no other eyewitnesses or mechanisms to prove the mother’s drug use. Suppose, as well, that Jason confides in the GAL because one thing he knows about lawyers is that “they keep their clients’ secrets.”

Considering these same facts, the Michigan study revealed that some GALs would not reveal information because they felt disclosure was ethically prohibited. Other GALs interpreted their role as requiring them to present to the court all relevant information, including statements made by the child, and believed that disclosure was not prohibited.

Perhaps the only solution to the GAL’s dilemma is to prevent the possibility that the issue will arise. Consequently, if a GAL plans to reveal client communications, including those the child does not want to be revealed, the GAL should advise the child, before soliciting information, that the information will not be confidential. The child then can make informed decisions about what to disclose.

This advisement is especially important when representing older children who often have a sophisticated understanding of what characterizes a lawyer/client relationship. Many young people see lawyers in movies, television, and other media. They, or someone they know, often have personal experience with the legal system. They may assume their lawyer will keep information confidential. To make sure the GAL does not violate the trust of these young people, it is critical to let child clients know that the GAL’s role is to tell the judge what the GAL thinks is best for the child and why. The GAL also
should let the child know that she might have to reveal matters they will discuss to the judge, the social worker, or someone else.

Some states require the GAL to alert the child, before any interview, of the GAL’s role and responsibility. This includes telling the child that the GAL may provide information to the court or other parties, including communications that otherwise would be protected by the ethical rules governing the lawyer/client relationship. This advisement helps maintain the child’s sense of trust and confidence that the system will protect her.

Model Rule 1.7: Conflicts of Interest

MR 1.7(a) prohibits advocacy on behalf of one client that will be “directly adverse” to another client. An example of such a conflict of interest for a GAL occurs when an agency brings a petition to obtain custody of an infant whose underage teenage mother is in foster care and under the legal custody of the agency. This is a conflict for the GAL because what is in the best interests of the young mother may be inconsistent with what the GAL thinks is best for the baby. Most conflicts typically arise for GALs when representing sibling groups.14

In the case above, the GAL’s representation of Jason, the 15 year old, may conflict with the representation of David, the 7 year old, or of Angela, the 10 month old. Suppose, for example, Jason is bonded to his mother and although he’s experiencing some behavioral problems at school, educational stability is recommended. Removing him from his mother’s home would mean a change in schools. Suppose further that because of his age, his mother’s occasional drug use does not impact his safety and well-being to the same degree as it does the younger children. Given these and other considerations, the GAL might conclude that Jason’s best interests are met by his remaining at home, but that removal from the home would be in Angela’s and, possibly, David’s best interests.

In this situation the lawyer, having assumed the traditional role of counsel, would have to withdraw from representing Angela and David and, perhaps, Jason as well. The conflicts analysis for the lawyer under the traditional model would require evaluating whether pursuing Jason’s objectives would be adverse to pursuing Angela’s and David’s best interests, either directly or indirectly. Moreover, a lawyer in the traditional role would need to assess whether representing the younger children would compromise the duties of loyalty and confidentiality the lawyer owes Jason.

These conflicts, however, are viewed differently by the GAL whose duty is to protect the interests of the children, even if contrary to the children’s wishes. From the GAL’s perspective, there may be no conflict of interest because the arguments for placing the children, although seemingly contradictory, ultimately serve their best interests. Thus, the GAL would have no need to withdraw from representing one, or all, of the children. Nevertheless, representing the best interests of multiple clients by a GAL is not without potential conflicts. Suppose it is in Jason’s best interests to continue to be placed with his younger siblings. Jason’s therapist says that his sibling bonds are his strongest familial ties; therefore, he should remain with them. However, what if the younger

Special Issues for Guardians ad Litem
children’s treatment providers think otherwise? They say Jason is a negative influence on the younger children, especially David. The GAL faces a quandary. Advocating for the best interests of one sibling may compromise the best interests of another sibling. In this case, the GAL should ask the court to appoint a different GAL for the younger children.

**Model Rule 3.7: Lawyer as Witness**

Whether a GAL should be a witness in the proceeding to which he is appointed confuses many lawyers and judges. MR 3.7 addresses whether a lawyer may testify on behalf of (or against) her client. The rule generally requires withdrawal if the testimony is on substantive issues. The rationale is that (1) combining the roles of advocate and witness can prejudice the opposing party, and (2) testifying for or against one’s client potentially creates a conflict of interest between the lawyer and client. When applying this prohibition to GALs, however, it must be applied with an eye toward the purpose of the legal representation. Because the purpose of the GAL’s representation is to advocate for the best interests of the child, rather than the traditional expressed wishes of the child, it may not be unethical for the GAL to provide substantive evidence on behalf of the best interests of the child.

To avoid this dilemma, the GAL should understand the difference between advocating and testifying for a child client. The comment to MR 3.7 provides some guidance. “A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.” It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. A Colorado court clarified the role of a GAL as a witness:

> Insofar as the guardian ad litem chooses to present his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence, the guardian functions as a witness in the proceedings and, thus, should be subject to examination and cross-examination as to the bases of his or her opinion and recommendation. If, on the other hand, the guardian ad litem’s recommendations are based upon the evidence received by the court from other sources, then they are analogous to arguments made by counsel as to how the evidence should be viewed by the trier of fact. Opinions and recommendations so based and presented are not those of a witness, but are merely arguments of counsel and examination and cross-examination concerning these should not be permitted.

The critical issue is whether the GAL is providing evidence (which should be subject to cross-examination and testimony may be appropriate) or whether the GAL is analyzing evidence. Some states have resolved this complex issue by way of an advisory ethics opinion. Some states have statutes which address this issue. Some states allow the GAL to testify under the theory that the GAL acts as an investigative arm of the court, and the content of the GAL’s investigation, as well as the basis for their recommendations should be subject to cross-examination by agency and parents’ lawyers.
Conclusion
The GAL’s unique role in helping the court reach the best result for the child raises ethical considerations that are not easily reconciled under the Model Rules. The GAL’s ethical obligations to the child, court, and opposing parties often conflict because the GAL serves as an advocate for the child and the best interests of the child. Several important ethical issues impacting the role of the GAL should be addressed through legislation, case law, court rules, or ethics opinions:
• the relationship of the GAL to the client;
• the extent that confidentiality and privilege attach in that relationship and what disclosures are required if there is no confidentiality or privilege;
• when a conflict of interest analysis applies; and
• whether a GAL can be called as a witness.

Clarifying these ethical issues helps the GAL more concretely define her role as counsel. It also provides children with a clearer understanding of what to expect from the GAL, including what, if any, information will remain confidential. Finally, resolving these issues provides uniformity in the practice of law, and much-needed guidance to GALs.

Endnotes
1 This case scenario uses the case presented in chapter 2 to analyze ethics issues facing GALs.
2 Some states have resolved these ethical problems by clarifying that the GAL does not represent the child, but represents the child’s “best interests.”

5 In re J.P.B., 419 N.W.2d 387, 391-92 (Iowa 1988); In re Rolfe, 699 P.2d 79, 86-87 (Mont. 1985), aff’d 766 P.2d 223 (Mont. 1988).
6 MR 1.2.
7 E.g., in Wyoming, a recent proposed amendment to MR 1.2 reads, “[c]ontrary to the ethical rules, the lawyer/guardian is not bound by the client’s expressed preferences, but by the client’s best interests. . . .” In Iowa, the Supreme Court has modified the Rules of Professional Conduct so that GALs “give priority to the paramount goal of discerning the child’s best interest while enabling the lawyer to advocate an opposing viewpoint without fear of ethical violation.”
8 A dichotomy exists between the lawyer as guardian and the lawyer as advocate, and the lines become very easily blurred. “Courts and legislatures have not provided much assistance and have often required attorneys to assume dual and potentially inconsistent roles.” Haralambie, Ann. “The Role of the Child’s Lawyer in Protecting the Child Throughout the Litigation Process.” North Dakota Law Review 71, 1995, 939, 941.

9 See Stuckey, Roy T. “Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality,” Fordham Law Review 64, 1996, 1785, 1786. (“Role definition and confidentiality issues can arise whenever attorneys are appointed to serve as guardians ad litem; however, they become even more complex when an attorney is appointed to serve as both the attorney and the guardian ad litem for a child”).
11 To determine whether confidentiality applies, it first must be decided what or who is being represented. Representing the “best interests” of the child is distinct from representing the child. A loose analogy is made to the corporate arena where, under MR 1.13, the corporate lawyer represents the organization, not the individuals within the organization. Although some communications by corporate officers are protected, in performing his or her fiduciary duty to protect the best interests of the corporation, the corporate lawyer may have to reveal certain communications.
12 The Michigan report is available from the ABA Center on Children and the Law by calling 202/662-1746.


14 See Moore, Nancy J. “Conflicts of Interest in the Representation of Children.” Fordham Law Review 64, 1996, 1819, 1842. (“[A] more common example of a possible conflict arising from duties . . . is the lawyer in a child custody . . . case who serves both as the child’s lawyer and as guardian ad litem.”) (emphasis in original)

15 MR 3.7.

16 MR 3.7, cmt. 1.

17 MR 3.7, cmt. 2.


Appendices

A: Resources

B: Select Model Rules and Comments

C: Status of State Review of Professional Conduct Rules
Appendix A: Resources

Organizations

American Bar Association Center for Professional Responsibility
Since 1978, the Center has provided national leadership and vision in developing and interpreting standards and scholarly resources in legal ethics, professional regulation, professionalism and client protection mechanisms.
American Bar Association
Center for Professional Responsibility
15th Floor
321 N. Clark Street
Chicago, IL 60610-4714
312/988-5304
e-mail: cpr@abanet.org.

Useful links to ABA Ethics information:
Current edition of the ABA Model Rules:
http://www.abanet.org/cpr/mrpc/mrpc_toc.html

Full text of the Model Rules with the E2k amendments and the official Reporter’s comments on each Rule: http://www.abanet.org/cpr/ethics2k.html

http://www.abanet.org/cpr/e2k-summary_2002.html

Overview of the Ethics 2000 Commission and Report:
http://www.abanet.org/cpr/e2k-ov_mar02.doc

Publications

http://www.abanet.org/child/childrep.html


Appendix B: Select Model Rules and Comments

Rule 1.1 Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment
Legal Knowledge and Skill
[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

Maintaining Competence
[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences
of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**Rule 1.3 Diligence**
A lawyer shall act with reasonable diligence and promptness in representing a client.

**Comment**
[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer’s work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. A lawyer’s duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer’s client.

**Rule 1.4 Communication**
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Comment**

**Communicating with Client**

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

**Withholding Information**

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

**Rule 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
4. to secure legal advice about the lawyer's compliance with these Rules;
5. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to
respond to allegations in any proceeding concerning the lawyer’s representation of
the client; or
(6) to comply with other law or a court order.

Comment
[2] A fundamental principle in the client-lawyer relationship is that, in the absence of
the client's informed consent, the lawyer must not reveal information relating to the rep-
resentation. See Rule 1.0(e) for the definition of informed consent. This contributes to
the trust that is the hallmark of the client-lawyer relationship. The client is thereby
encouraged to seek legal assistance and to communicate fully and frankly with the lawyer
even as to embarrassing or legally damaging subject matter. The lawyer needs this infor-
mation to represent the client effectively and, if necessary, to advise the client to refrain
from wrongful conduct. Almost without exception, clients come to lawyers in order to
determine their rights and what is, in the complex of laws and regulations, deemed to be
legal and correct. Based upon experience, lawyers know that almost all clients follow the
advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law:
the attorney-client privilege, the work product doctrine and the rule of confidentiality
established in professional ethics. The attorney-client privilege and work-product doc-
trine apply in judicial and other proceedings in which a lawyer may be called as a wit-
ness or otherwise required to produce evidence concerning a client. The rule of
client-lawyer confidentiality applies in situations other than those where evidence is
sought from the lawyer through compulsion of law. The confidentiality rule, for exam-
ple, applies not only to matters communicated in confidence by the client but also to all
information relating to the representation, whatever its source. A lawyer may not disclose
such information except as authorized or required by the Rules of Professional Conduct
or other law. See also Scope.

Disclosure Adverse to Client
[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
the disclosure is necessary to accomplish one of the purposes specified. Where practica-
ble, the lawyer should first seek to persuade the client to take suitable action to obviate
the need for disclosure. In any case, a disclosure adverse to the client’s interest should be
no greater than the lawyer reasonably believes necessary to accomplish the purpose. If
the disclosure will be made in connection with a judicial proceeding, the disclosure
should be made in a manner that limits access to the information to the tribunal or
other persons having a need to know it and appropriate protective orders or other
arrangements should be sought by the lawyer to the fullest extent practicable.
Rule 1.7 Conflict of Interest: Current Clients
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Comment
General Principles
[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9. See also Comments [5] and [29].
Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

**Identifying Conflicts of Interest: Directly Adverse**

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

**Identifying Conflicts of Interest: Material Limitation**

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
Revoking Consent
[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
   (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
   (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
   (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
   (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
   (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
   (1) the client gives informed consent;
   (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
   (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:
   (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
   (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
   (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
   (2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

**Rule 1.9 Duties to Former Clients**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
   (1) whose interests are materially adverse to that person; and
   (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
   (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
   (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation of Conflicts of Interest: General Rule
(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
   (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
   (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.
Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
   (1) is subject to Rule 1.9(c); and
   (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
   (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
   (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
   (1) is subject to Rules 1.7 and 1.9; and
   (2) shall not:
      (i) participate in a matter in which the lawyer participated personally and sub-
          stantially while in private practice or nongovernmental employment, unless
          the appropriate government agency gives its informed consent, confirmed in
          writing; or
      (ii) negotiate for private employment with any person who is involved as a party
          or as lawyer for a party in a matter in which the lawyer is participating per-
          sonally and substantially, except that a lawyer serving as a law clerk to a judge,
          other adjudicative officer or arbitrator may negotiate for private employment
          as permitted by Rule 1.12(b) and subject to the conditions stated in Rule
          1.12(b).

(e) As used in this Rule, the term “matter” includes:
   (1) any judicial or other proceeding, application, request for a ruling or other
determination, contract, claim, controversy, investigation, charge, accusation,
arrest or other particular matter involving a specific party or parties, and
   (2) any other matter covered by the conflict of interest rules of the appropriate
government agency.

**Rule 1.13 Organization as Client**

(a) A lawyer employed or retained by an organization represents the organization acting
through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person asso-
ciated with the organization is engaged in action, intends to act or refuses to act in a
matter related to the representation that is a violation of a legal obligation to the organi-
zation, or a violation of law that reasonably might be imputed to the organization, and
that is likely to result in substantial injury to the organization, then the lawyer shall pro-
ceed as is reasonably necessary in the best interest of the organization. Unless the lawyer
reasonably believes that it is not necessary in the best interest of the organization to do
so, the lawyer shall refer the matter to higher authority in the organization, including, if
warranted by the circumstances to the highest authority that can act on behalf of the
organization as determined by applicable law.
(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

**Comment**

**The Entity as the Client**

[2] When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are
covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Relation to Other Rules
[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify,
restrict, or limit the provisions of Rule 1.6(b)(1)—(6). Under paragraph (c) the lawyer may reveal such information only when the organization’s highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer’s services be used in furtherance of the violation, but it is required that the matter be related to the lawyer’s representation of the organization. If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

Government Agency
[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer’s Role
[10] There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.
Rule 1.14 Client with Diminished Capacity

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(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.

(c) 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.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s 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. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using volun-
tary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. 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 decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.

[6] In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client’s interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client’s benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

**Disclosure of the Client’s Condition**

[8] Disclosure of the client’s diminished capacity could adversely affect the client’s interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client’s interests before discussing matters related to the client. The lawyer’s position in such cases is an unavoidably difficult one.
Rule 1.16 Declining or Terminating Representation
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
   (1) the representation will result in violation of the rules of professional conduct or
       other law;
   (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to
       represent the client; or
   (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
   (1) withdrawal can be accomplished without material adverse effect on the interests
       of the client;
   (2) the client persists in a course of action involving the lawyer's services that the
       lawyer reasonably believes is criminal or fraudulent;
   (3) the client has used the lawyer's services to perpetrate a crime or fraud;
   (4) the client insists upon taking action that the lawyer considers repugnant or with
       which the lawyer has a fundamental disagreement;
   (5) the client fails substantially to fulfill an obligation to the lawyer regarding the
       lawyer's services and has been given reasonable warning that the lawyer will with- 
       draw unless the obligation is fulfilled;
   (6) the representation will result in an unreasonable financial burden on the lawyer
       or has been rendered unreasonably difficult by the client; or
   (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a 
tribunal when terminating a representation. When ordered to do so by a tribunal, a 
lawyer shall continue representation notwithstanding good cause for terminating the 
representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably 
practicable to protect a client's interests, such as giving reasonable notice to the client, 
allowing time for employment of other counsel, surrendering papers and property to 
which the client is entitled and refunding any advance payment of fee or expense that 
has not been earned or incurred. The lawyer may retain papers relating to the client to 
the extent permitted by other law.

Rule 2.1 Advisor
In representing a client, a lawyer shall exercise independent professional judgment and 
render candid advice. In rendering advice, a lawyer may refer not only to law but to 
other considerations such as moral, economic, social and political factors, that may be 
relevant to the client's situation.
Comment
Scope of Advice
[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice
[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.

Rule 3.1 Meritorious Claims and Contentions
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2 Expediting Litigation
A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment
Remedial Measures
[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer’s client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Rule 3.4 Fairness to Opposing Party and Counsel
A lawyer shall not:
(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

Rule 4.1 Truthfulness in Statements to Others
In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment
Misrepresentation
[1] A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact
[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a
party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from
communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

**Rule 4.3 Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
## Appendix C: Status of State Review of Professional Conduct Rules

<table>
<thead>
<tr>
<th>State</th>
<th>Committee Reviewing Rules</th>
<th>Committee Issued Report</th>
<th>Supreme Court Approved Rule Amendments</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>X</td>
<td></td>
<td></td>
<td>State Bar Committee on Disciplinary Rules and Enforcement conducting review.</td>
</tr>
<tr>
<td>Alaska</td>
<td>X</td>
<td></td>
<td></td>
<td>Bar Association Rules of Professional Conduct Committee conducting review.</td>
</tr>
<tr>
<td>Arizona</td>
<td></td>
<td>X</td>
<td>Effective 12/1/03</td>
<td><a href="http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf">http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf</a></td>
</tr>
<tr>
<td>California</td>
<td>X</td>
<td></td>
<td>State Bar Commission for the Revision of the Rules of Professional Conduct has issued drafts for comment.</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>X</td>
<td></td>
<td></td>
<td>State Bar Ethics Committee conducting review.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>X</td>
<td></td>
<td></td>
<td>Bar Association Committee on Professional Ethics conducting review.</td>
</tr>
<tr>
<td>Delaware</td>
<td></td>
<td>X</td>
<td>Effective 7/1/03</td>
<td><a href="http://courts.state.de.us/Rules/?FinalDLRPCclean.pdf">http://courts.state.de.us/Rules/?FinalDLRPCclean.pdf</a></td>
</tr>
<tr>
<td>D.C.</td>
<td>X</td>
<td></td>
<td></td>
<td>Rules of Professional Conduct Review Committee conducting review.</td>
</tr>
<tr>
<td>Florida</td>
<td>X</td>
<td></td>
<td>State Bar Special Committee to review the ABA Model Rules has submitted its final report to the Board of Governors. <a href="http://www.flabar.org/tfb/TFBComm.nsf/840090c16edaf0085256b610/00928dc/b0869c0754b9f6c85256cf700577362?OpenDocument">http://www.flabar.org/tfb/TFBComm.nsf/840090c16edaf0085256b610/00928dc/b0869c0754b9f6c85256cf700577362?OpenDocument</a></td>
<td>Amendments to several rules, including those regarding advertising, fees and sex with clients, were made independently of rules review committee. <a href="http://www.flcourts.org/sct/scdocs/bin/sc03-705.pdf">http://www.flcourts.org/sct/scdocs/bin/sc03-705.pdf</a></td>
</tr>
<tr>
<td>Georgia</td>
<td></td>
<td></td>
<td></td>
<td>No review</td>
</tr>
<tr>
<td>State</td>
<td>Committee Reviewing Rules</td>
<td>Committee Issued Report</td>
<td>Supreme Court Approved Rule Amendments</td>
<td>Notes</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------</td>
<td>-------------------------</td>
<td>----------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Hawaii</td>
<td>X</td>
<td></td>
<td></td>
<td>Disciplinary Board of Supreme Court Ethics 2000 Committee conducting review.</td>
</tr>
<tr>
<td>Idaho</td>
<td>X</td>
<td></td>
<td></td>
<td>Revised rules effective 7/1/04. <a href="http://www2.state.id.us/isb/bc/rpc_review.htm">http://www2.state.id.us/isb/bc/rpc_review.htm</a></td>
</tr>
<tr>
<td>Illinois</td>
<td>X</td>
<td></td>
<td></td>
<td>Joint Chicago Bar Association/Illinois State Bar Association Committee on Ethics 2000 has issued report. It has been approved by both Associations’ Boards of Governors and will be considered by the State Bar Assembly. <a href="http://www.isba.org/eth2000.html">http://www.isba.org/eth2000.html</a></td>
</tr>
<tr>
<td>Iowa</td>
<td>X</td>
<td></td>
<td></td>
<td>Supreme Court is considering report of Rules of Professional Conduct Drafting Committee. <a href="http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesDrafting.html">http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesDrafting.html</a></td>
</tr>
<tr>
<td>Kentucky</td>
<td>X</td>
<td></td>
<td></td>
<td>State Bar Ethics Committee conducting review.</td>
</tr>
<tr>
<td>Maine</td>
<td>X</td>
<td></td>
<td></td>
<td>Supreme Court Advisory Committee on the Rules of Professional Responsibility conducting review.</td>
</tr>
<tr>
<td>Maryland</td>
<td>X</td>
<td></td>
<td></td>
<td>Court of Appeals Ethics 2002 Committee has issued its final report. <a href="http://www.courts.state.md.us/lawyersropc.html">http://www.courts.state.md.us/lawyersropc.html</a></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>X</td>
<td></td>
<td></td>
<td>Supreme Court Standing Committee on Rules of Professional Conduct conducting review.</td>
</tr>
<tr>
<td>Michigan</td>
<td>X</td>
<td></td>
<td></td>
<td>State Bar has forwarded proposal to Supreme Court. <a href="http://www.michbar.org">http://www.michbar.org</a></td>
</tr>
<tr>
<td>State</td>
<td>Committee Reviewing Rules</td>
<td>Committee Issued Report</td>
<td>Supreme Court Approved Rule Amendments</td>
<td>Notes</td>
</tr>
<tr>
<td>---------------</td>
<td>---------------------------</td>
<td>-------------------------</td>
<td>----------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Missouri</td>
<td>X</td>
<td></td>
<td>Bar has submitted proposal to Supreme Court.</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>X</td>
<td></td>
<td>Effective 4/1/04 <a href="http://www.montanabar.org">http://www.montanabar.org</a></td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>X</td>
<td></td>
<td>Report of Subcommittee to study the Model Rules has been forwarded to Supreme Court. <a href="http://court.nol.org/rules/amendments/AttyProfConduct.htm">http://court.nol.org/rules/amendments/AttyProfConduct.htm</a></td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>X</td>
<td></td>
<td>State Bar has filed recommendations with Supreme Court. <a href="http://www.nvbar.org/Ethics/e2k.htm">http://www.nvbar.org/Ethics/e2k.htm</a></td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>X</td>
<td></td>
<td>Bar Association Ethics Committee has drafted some rules for public comment. <a href="http://www.nhbar.org/NHRules.asp">http://www.nhbar.org/NHRules.asp</a></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>X</td>
<td></td>
<td>Effective 1/1/04 <a href="http://www.judiciary.state.nj.us/rules/apprpc.htm">http://www.judiciary.state.nj.us/rules/apprpc.htm</a></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>X</td>
<td></td>
<td>Supreme Court Code of Professional Conduct Committee conducting review.</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>X</td>
<td></td>
<td>State Bar Association Committee on Standards of Attorney Conduct conducting review. Circulating drafts of 1.6, 1.13, 3.3 and 3.4 <a href="http://www.nysba.org/Template.cfm?Section=Homepage_Notices&amp;template=/ContentManagement/ContentDisplay.cfm&amp;ContentID=38766">http://www.nysba.org/Template.cfm?Section=Homepage_Notices&amp;template=/ContentManagement/ContentDisplay.cfm&amp;ContentID=38766</a></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>X</td>
<td></td>
<td>Supreme Court and State Bar Association Joint Committee on Attorney Standards conducting review.</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Committee Reviewing Rules</td>
<td>Committee Issued Report</td>
<td>Supreme Court Approved Rule Amendments</td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>---------------------------</td>
<td>-------------------------</td>
<td>--------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>X</td>
<td></td>
<td>Supreme Court Task Force conducting review. Drafts of Rules 1.1—1.6 have been prepared. <a href="http://www.sconet.state.oh.us/Attysvc/ProfConduct/default.asp">http://www.sconet.state.oh.us/Attysvc/ProfConduct/default.asp</a></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>X</td>
<td></td>
<td>Rules of Professional Conduct Committee conducting review.</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>X</td>
<td></td>
<td>Bar Board of Governors has approved new proposal based on Supreme Court comments. Will be submitted to House of Delegates in October. <a href="http://www.osbar.org/barnews/bogresponse.html">http://www.osbar.org/barnews/bogresponse.html</a></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>X</td>
<td></td>
<td>Bar Association House of Delegates has approved amendments to be considered by the Supreme Court. <a href="http://www.pardisciplinaryboard.org/ethics_2000.htm">http://www.pardisciplinaryboard.org/ethics_2000.htm</a></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>X</td>
<td></td>
<td>Supreme Court Committee conducting review.</td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>X</td>
<td></td>
<td>State Bar Disciplinary Rules of Professional Conduct Committee conducting review.</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>X</td>
<td></td>
<td>Supreme Court Advisory Committee on Rules of Professional Conduct conducting review.</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>X</td>
<td></td>
<td>Subcommittee of the Vermont Supreme Court’s Advisory Committee on Rules of Civil Procedure is conducting review.</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Committee Reviewing Rules</td>
<td>Committee Issued Report</td>
<td>Supreme Court Approved Rule Amendments</td>
<td>Notes</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------</td>
<td>-------------------------</td>
<td>-----------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>West Virginia</td>
<td></td>
<td>X</td>
<td>State Bar Committee conducting review.</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td></td>
<td>X</td>
<td>State Supreme Court Ethics 2000 Committee conducting review.</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td></td>
<td>X</td>
<td>State Bar Select Committee for Review of Disciplinary Functions conducting review.</td>
<td></td>
</tr>
</tbody>
</table>
About the Author

Jennifer Renne is an Assistant Director of Child Welfare for the American Bar Association, Center on Children and the Law. She conducts trainings for state court systems on issues of child abuse and neglect, and researches and writes on issues pertaining to child welfare. Jennifer co-authored Making it Permanent: Reasonable Efforts to Finalize Permanency Plans for Foster Children. Jennifer represented children in child abuse and neglect cases for eight years at Maryland's Legal Aid Bureau, where she was supervising attorney of the child advocacy unit. She received her J.D. from Georgetown University Law Center and her B.A. from the University of Pennsylvania. She is an adjunct professor at Georgetown University Law Center, teaching Professional Responsibility to students interested in pursuing public interest law careers.
Index

A
ABA Ethics 2000: 19
ABA Model Rules of Professional Conduct: (see individual rules under “M”) 3, 18
ability to appreciate consequences: 37, 105
ability to articulate reasoning: 37, 105
ability to communicate: 37
ability to understand consequences: 37
adoption: 5, 7, 10, 40, 54, 57, 74
Adoption and Safe Families Act (ASFA): 7, 8, 57, 74
advisory opinions: 3, 64
advocating in court: 42
age: 13, 14, 18, 31, 34, 35, 36, 37, 48, 54, 70, 79, 81, 83, 104
altering, destroying, or concealing a document: 76
appointing a guardian: 41
assessing children’s decision-making abilities: 40
attorney general: 26, 27, 29, 58, 60

B
bar counsel: 3, 14
breach of contract: 4
breach of duty: 4

C
candor toward the tribunal: 21, 107
capacity: 12, 25, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 101, 104, 105
case investigation: 2, 6, 8, 75
case plan: 10, 18, 41, 57
caseload limits: 9
censure: 2, 77
certification process for lawyers: 6
Child Abuse Prevention and Treatment Act (CAPTA): 4, 7, 15
Child and Family Services Reviews (CFSRs): vii
civil liability: 4, 11, 15, 22, 24, 28
client autonomy: 33
client communications: 30, 31, 81, 82
client confidences: 17, 18, 20, 25, 41, 74
client consent: 20, 81
client contact: 11, 14
client objectives: 49
cognitive ability: 36
communicating with parents by opposing counsel: 64
communicating with represented parties: 62
communicating with unrepresented parties: 67
communication: 2, 7, 8, 11, 14, 20, 22, 35, 45, 62, 63, 64, 65, 66, 75, 91, 92, 101, 110, 111
communication about matters outside the representation: 63
compensation: 4, 9, 97
competence: 2, 5, 8, 9, 14, 15, 35, 39, 41, 90, 107
compliance strategies: 12
confidentiality: 18, 19, 20, 21, 22, 25, 28, 29, 30, 31, 33, 35, 41, 45, 49, 51, 53, 54, 55, 67, 71, 72, 73, 75, 77, 80, 81, 82, 83, 85, 92, 93, 103
conflicts for guardians ad litem: 54
conflicts for agencies: 58
conflicts between the caseworker and lawyer: 57
conflicts for agency lawyers: 57
conflicts for part-time contract lawyers: 59
conflicts of interest: 27, 33, 48, 49, 51, 53, 55, 57, 59, 80, 86, 95, 98, 99
consequences for ethics violations: 2
consistency of a decision: 37, 105
consulting family members: 38, 39
consulting with professionals: 38
contempt of court: 23
continuances: 10, 39
counseling or helping a client: 74
Court Appointed Special Advocates (CASAs): 7, 62
Court Improvement Project: 2
criminal prosecution: 22

d
deficient performance: 4
delay: 8, 9, 18, 67, 74, 91
diligence: 2, 4, 8, 14, 16, 35, 50, 91
diminished capacity: 12, 25, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 101, 104, 105
directly adverse: 49, 50, 56, 59, 73, 83, 94, 95, 107
disability: 7, 38, 41
disabled client: 38
disbarment: 2
disciplinary action: 2, 3, 5, 11, 15, 22, 76
disciplinary boards: 15
disciplinary enforcement: 12
disclosing a client’s condition: 41
discovery: 70, 74, 109
district attorney: 26, 29
due process: 2, 4
duties to former clients: 53, 97
duties to social worker: 28
duty to advise: 18, 23
duty to decline work: 9
duty to disclose adverse legal authority: 72
duty to seek justice: 8
effective assistance of counsel: 20, 62
eliciting client’s position: 41
emotional and mental development: 36
ethical standards: 2, 9
ethical violations: 3, 15, 64
ethics committees: 16
ethics opinions: 3, 16, 59, 63, 85
ethics rules: 2, 8, 14, 19, 31, 34, 35, 44, 54, 61, 67, 69, 78, 80, 81, 82
ethics violations: 2
ex parte contact: 65, 66, 70, 75
ex parte proceedings: 73
exceptions to the confidentiality provision: 29
experts: 5
failing to comply with the court order: 23
failure to communicate: 12
fair record: 8
fairness to opposing party and counsel: 21, 108
false information: 70, 72, 78
false testimony: 70, 71
Fifth Amendment: 20, 62
filing pleadings: 10
fraudulent conduct: 28, 29, 74, 108
G
GAL versus traditional role of lawyer: 80
government lawyer: 8, 28, 59, 60, 103, 111
guardians ad litem: 13, 29, 56, 68, 75, 79, 81, 83, 85
imputation of conflicts: 52, 98
inaccessibility: 11
incompetent representation: 5, 9
independent investigation: 6, 66, 84
independent judgment: 48, 49
independent recommendations: 6
independent report: 6
Indian Child Welfare Act (ICWA): 5
ineffective assistance of counsel: 2, 4, 11, 15
inexperience: 5
injury to the client: 4
interacting with other parties: 63, 65, 67
investigation: 2, 6, 8, 9, 26, 52, 66, 75, 84, 100, 101, 107
joint representation: 52
lawyer/client relationship: 4, 20, 25, 29, 30, 58, 80, 81, 82, 83
legal training: 2
litigation issues: 21, 28, 74
loyalty: v, 35, 48, 49, 51, 53, 54, 55, 56, 71, 80, 81, 83, 95
lying under oath: 70
malpractice: 2, 3, 4, 5, 6, 7, 9, 11, 14, 15, 97
materially limited: 49, 50, 59, 94, 95
Mathews v. Eldridge: 4, 15
mediation: 10
mental health: 11, 24, 34, 37, 39, 43, 44, 54
meritorious claims and contentions: 75, 107
misleading the court: 76
Model Rule Amendments: 72
moral and ethical considerations: 24
MR 1.0: 71, 91, 93, 102
MR 1.1: 5, 8, 14, 16
MR 1.2: 21, 45, 49, 57, 68, 71, 72, 73, 74, 75, 78, 81, 85, 90, 91, 103, 110
MR 1.3: 8, 9, 14, 16, 91
MR 1.4: 4, 11, 12, 14, 16, 24, 37, 68, 90, 107
MR 1.6: 19, 20, 21, 23, 24, 25, 26, 29, 30, 31, 45, 49, 60, 78, 81, 92, 97, 98, 101, 102, 104, 110
MR 1.7: 49, 50, 51, 53, 55, 58, 59, 60, 83, 94, 98, 100, 101
MR 1.9: 49, 53, 54, 59, 60
MR 1.10: 49, 52, 59, 60, 104
MR 1.11: 49, 59, 60, 98, 99
MR 1.13: 12, 19, 25, 27, 28, 29, 31, 49, 57, 60, 72, 78, 85, 100, 102
MR 1.14: 12, 25, 35, 36, 38, 39, 45, 104
MR 1.16: 29, 49, 51, 72, 94, 95, 102, 103, 106
MR 2.1: 22, 23, 31, 38
MR 3.1: 75, 107
MR 3.3: 21, 28, 70, 71, 72, 73, 77, 78
MR 3.4: 21, 74, 76, 78, 92, 108, 111
MR 3.5: 75
MR 3.6: 75
MR 3.7: 75, 84, 86
MR 4.1: 21, 73, 74, 78, 102, 109
MR 4.2: 62, 63, 64, 65, 67, 68, 110
MR 4.3: 67, 68, 111
MR 4.4: 67, 74, 78
MR 8.3: 14, 15, 16, 76
MR 8.4: 64, 109, 111

N
National Association of Counsel for Children: 6
neglect of client matters: 5
negligence: 4, 9
nonlegal training: 6
notice: 11, 99, 106, 110

O
obstructing evidence: 76
offering exhibits: 10
ongoing monitoring of the court's orders: 10
opinions of others: 37
organization as client: 100
out-of-court contact: 61, 67
out-of-court statements: 73

P
parties who obstruct access to evidence: 70
pattern of misconduct: 14
peer review agency: 15
perjury: 28
permissive disclosure: 20, 21
phone calls: 11, 12
preparation: 5, 6, 8, 14, 90
presenting and cross-examining witnesses: 10
privacy: 20
private contractors: 27, 29
private lawyers: 53, 67
privilege: 21, 22, 25, 41, 85, 93, 99
pro se parents: 67
procrastination: 5, 91
protective action: 38, 39, 41, 104, 105
psychiatric diagnosis: 12, 92
public defender: 16, 49, 53, 55, 59, 67

R
reconsideration period: 38, 104
regulatory agency: 3
relationships between parties: 18
reporting another lawyer: 14
reporting misconduct: 14, 70
representing older children: 30, 82
respect for rights of third persons: 74
revealing adverse information: 72
right to counsel: 4
role of the GAL in dependency cases: 80

S
sanctions: 2, 3, 38
screening for conflicts: 55
settlement negotiations: 10
siblings: 37, 47, 48, 54, 56, 83
Sixth Amendment: 4, 20, 62, 65
speeding permanency: 29
standard of care: 11
standards of practice: 3, 6, 8, 10, 13, 16, 80, 85, 89
Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases: 3, 6, 10, 13, 16, 85, 89
statement of material fact: 73, 107, 109
statements to opposing counsel: 73
strength of wishes: 37
substance abuse: 7, 18, 34, 38, 70
suspension: 2

T
third persons: 74
timing of the false testimony: 71
training: 2, 5, 6
trial publicity: 70, 75
truthfulness in negotiations: 70
truthfulness in statements to others: 21, 73, 109

U
U.S. Department of Health and Human Services: 9, 15
unethical conduct: 2, 4

W
well-being: 36, 38, 55, 83, 104
withdrawal: 29, 49, 51, 52, 72, 84, 101, 103, 106, 108, 110