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

- **Agency attorneys** must act in the best interest of the agency while helping the agency act in the child’s best interest. What are an agency attorney’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 attorney reveal confidential information? When, if ever, must an attorney reveal such information? What are the ethical duties for a parent’s attorney 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 attorney should keep a client’s secrets? What if the child tells her attorney 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 attorneys. 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 attorneys 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. Attorneys schooled in the adversarial model of justice must first understand the attorney/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.

This article looks at attorney/client confidentiality as an ethical issue for attorneys 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’ Attorneys

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

**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 fairly 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 attorney she faked the court-ordered substance abuse evaluation by using someone else’s urine. She instructs her attorney not to reveal this information because she’s desperate to have her kids home.

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’ attorneys to disclose information are controversial. The ethical rules give attorneys discretion, and seek to strike a balance between nondisclosure to protect the attorney/client relationship, and disclosure to protect society (in this case, children).

On one hand, strengthening the confidentiality rules protects the attorney/client relationship by encouraging open communication. Preserving client confidences helps develop the facts fully, which allows attorneys 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 attorney/client relationship, and protects the client’s privacy.

On the other hand, loosening the restrictions on the confidentiality rules holds attorneys more accountable as “officers of the court,” to better protect society. Some argue that allowing or requiring attorneys to keep their clients’ secrets is inconsistent with public policy, reduces public confidence in the legal profession, and contributes to diminishing respect for attorneys. Sometimes the attorney 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**

The Model Rule addressing confidentiality is MR 1.6, amended in 2002. (see sidebar #1) Most states have based their rules of professional conduct on the Model Rules. Since the amendments to the Model Rules are so recent, no states have adopted the changes yet. This article 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, attorneys may not reveal information about the representation. The Model Rules provide six circumstances under which an attorney 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 amendments further expanded the grounds for permissive disclosure by changing “imminent death” to “reasonable certain death,” and adding other circumstances under which an attorney 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.
There are some state variations on this rule that impact primarily parents' and children's attorneys. In 11 states the lawyer shall or must reveal otherwise confidential information in certain circumstances (usually involving cases of substantial bodily harm or death). Therefore, under the Model Rules, the mother's attorney in the Sands case must keep the information confidential unless the attorney 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 attorney 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. This distinguishes attorney/client confidentiality from information subject to attorney/client privilege. (See Sidebar #2). In the Sands case, if the attorney 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 (a future article will address 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. 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, an attorney must disclose to the court when the attorney 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 attorney to refer to her "clean" drug evaluation, MR 3.3 does not come into play. A later article 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) regarding assisting a client in criminal or fraudulent activity.

**Deciding whether to reveal**

Under the Model Rules, the attorney may choose to reveal confidential information only if one of the MR 1.6(b) exceptions applies. In deciding what to do, an attorney 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 (TPR). Therefore, attorneys for parents need to strike a balance between protecting their clients from state action (losing custody of a child, TPR, criminal prosecution), and 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. Attorneys also need to balance the risks of not revealing, such as civil liability, discussed in Sidebar #3.

**Children’s Attorneys**

Consider the Sands case from the view of the child’s attorney (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 attorney 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 attorney may try to escape the ethical dilemma by saying he does not have to reveal them because the mother's drug use would become known through

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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 attorney must keep this information confidential unless one of the relevant circumstances under MR 1.6(b) applies. In other words, only (1) if the attorney ”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 attorney 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 attorney his whereabouts. The court orders the attorney to reveal the child’s location. The attorney 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 attorney 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 attorney 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 attorney’s relationship with the judge. The attorney, 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' attorneys 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 attorney 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 an attorney’s duty to advise her client. The rule explicitly encourages attorneys to provide advice to clients that goes beyond purely legal advice. It encourages attorneys to advise on moral, social, economic, or other factors relating to the client’s situation. In the Sands case, the attorney 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 attorney 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 attorney thinks she could get this case dismissed based upon the weak evidence presented by the agency, the attorney might advise Ms. Sands to admit the allegations, especially if the attorney is concerned for the safety of the children, or believes Ms. Sands may be in danger. Opening a child protection case may also give Ms. Sands greater access to community resources, including drug treatment.

When appropriate, the attorney 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 the previous article) 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 an attorney may give such advice when doing so appears to be in the client's interest.9

**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. The next article in this series will address representing clients with diminished capacity, including the confidentiality provisions.

**Agency Attorneys**

**Model Rule 1.13: Organization as Client**

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

MR 1.13 says "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."10 Therefore, an attorney 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 attorney 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 1.6.11

If the actions of the social workers threaten substantial injury to the child welfare agency, the attorney 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 attorney 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.12

For example, in the case scenario above, the attorney may not have to reveal the social worker’s wrongdoing to anyone outside the agency (although the attorney might choose to reveal, based on Comment [6] to MR 1.13, detailed below.) The attorney, however, should reveal the wrongdoing to a supervisor or higher authority within the organization because the attorney's primary ethical responsibility is to protect the best interest of the organization. The attorney 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:

- 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.13

The lawyer should also try to minimize disruption to the child welfare agency.14

**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 attorney 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 the mother had, in fact, made several attempts to reach her. (Chapter 6 on litigation issues addresses the MR 3.3 perjury issue; this chapter focuses on confidentiality).

The attorney’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 attorney “should advise [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 that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.”

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 attorney, therefore, must explicitly warn the social worker that the attorney represents the agency, and does not represent her, and that she may want to seek outside legal representation.

**Additional Considerations**

Agency attorneys 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.

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 attorneys because the agency has the prodigious task of protecting children, including keeping them safe from harm, and speeding permanency. Therefore, the agency attorney 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 attorney,” but instead by the Office of the Attorney General, the District Attorney’s Office, or by private contractors. These varying models of agency representation are addressed in Sidebar #3 and will be explored in future articles.

Agency lawyers should also be aware that after the 2002 amendments to the MR’s, the ABA Task Force on Corporate Responsibility recommended additional changes to MR 1.6 and 1.13, which went into effect in 2003. MR 1.6 now provides an additional exception 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,” or “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 alert a higher authority within the organization, and to permit disclosure outside the organization if the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, and disclosure will prevent such harm.
These changes were implemented in light of recent corporate scandals where lawyers were criticized for not revealing their client's 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 attorneys in this situation, including agency attorneys. A future article dealing with litigation issues will explore permissive and mandatory withdrawal as well as 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 attorney/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 attorney GALs because nonattorney 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 an attorney, but by a GAL.

Different jurisdictions have devised a variety of approaches to help attorney 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, attorney/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 an attorney may breach confidentiality.

- Other states make clear that attorney/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 an attorney/client relationship. Many young people see attorneys in movies, television, and other media. They, or someone they know, often have personal experience with the legal system. They may assume their attorney 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 that 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 attorney/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.22

Conclusion

Attorneys 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 attorney must do. In fact, most exceptions to the confidentiality rule are permissive rules, leaving the decision to the attorney. Even if the rules permit disclosure, an attorney needs to think through the decision, and weigh the consequences when faced with revealing or keeping the information confidential.

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Sidebar #1:

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 rules in light of developments in ethics, technology, and the legal culture. Client matters have become increasingly complex, and the Commission sought to amend the Model Rules to provide guidance for attorneys, and to enhance public confidence in the legal system. Another purpose for reviewing the rules was to promote national uniformity and consistency.23

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, and after extensive hearings and review, the ABA House of Delegates adopted the recommendations on February 5, 2002. MR 1.6 was amended again. Several states have adopted the Ethics 2000 amendments, and a number of other states are in the process of committee meetings to consider amending their state’s codes in light of the changes to the Model Rules.
Sidebar #2:

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<thead>
<tr>
<th>Legal Authority</th>
<th>Confidentiality</th>
<th>Privilege</th>
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<tbody>
<tr>
<td>Purpose</td>
<td>Prohibits attorneys from disclosing client confidences</td>
<td>Prevents government and adversaries from compelling attorneys and clients to reveal communications between them</td>
</tr>
<tr>
<td>What it protects</td>
<td>Any information relating to the representation of a client, regardless of its source</td>
<td>Any communication between lawyer and client</td>
</tr>
<tr>
<td>When it applies</td>
<td>Applies generally</td>
<td>Applies usually in judicial proceedings in which an attorney can be called as a witness</td>
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<tr>
<td>Remedies</td>
<td>Disciplinary action against attorney</td>
<td>Motion to quash subpoena for records or testimony</td>
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Sidebar #3:

Parents’ Attorneys: Other Considerations when Deciding to Disclose Civil Liability

An attorney may choose not to reveal even when disclosure could prevent reasonable certain death or substantial bodily harm. Under the amended MR 1.6, an attorney 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 an attorney fails to warn a third party of a threat that the attorney’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 an attorney who fails to warn based on a client’s threat, or based on the attorney’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 attorneys, especially in light of recent cases where attorneys 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.” 36 Idaho L. Rev. 479 (2000).)

Mandatory Reporting Laws

All states have statutes that mandate certain professionals to report suspected or known cases of child abuse. Typically, these mandated reporters include health professionals, school officials, and social workers. Further, 21 states have mandatory reporting laws for all citizens, and most do not specifically exclude attorneys by abrogating the attorney-client privilege. In other words, because the law applies to all citizens, attorneys could be subject to a mandatory reporting law, and have a conflicting ethical duty to keep client confidences. Of the 21 states with the general duty for citizens to report, only three -Mississippi, Nevada, and Ohio- have statutes which explicitly include attorneys as mandated reporters. Ohio, however, exempts attorneys from the reporting requirement if the information is received in the attorney/client relationship. Nevada also excludes attorneys as mandated reporters when the attorney knows of abuse or neglect from a client who is or may be

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accused of the abuse or neglect. Mississippi, therefore, is the only state where an attorney in a child protection case, as in the Sands case, would be required to report under state law. Remember, though, that even in Mississippi, this does not apply to knowledge of past abuse, but is limited to "to prevent the client from committing a criminal act." (relating to contemplated future, not past, abuse).24

(See Beyea, Allison. "Competing Liabilities: Responding to Evidence of Child Abuse that Surfaces During the Attorney-Client Relationship." 51 Me. L. Rev. 269 (1999).

Sidebar #4:
Agency Attorneys: Who’s Your Client?

Several models of agency representation exist. Sometimes the agency is 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. Usually when the child welfare agency is represented by the prosecutor's office, the model is more 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.”

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. In most states the agency is the client, not the individual social worker, not the public, and not the child’s best interest. 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.

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.

Endnotes

1 Model Rule 1.6, cmt. 2.
2 Model Rule 1.6.

(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;

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(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.

3 MR 1.6(b)(4).

4 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.

5 MR 1.6, cmt. 3.

6 The rule simply permits disclosure under these circumstances.


8 Model Rule 2.1, cmt. 4.

9 Model Rule 2.1, cmt. 5.

10 Model Rule 1.13(a).

11 Model Rule 1.13, cmt. 2.

12 Model Rule 1.13 (b).

13 Model Rule 1.13 (b).

14 Model Rule 1.13 (b).

15 Model Rule 1.13(d), Model Rule 1.13, cmt. 7.

16 Model Rule 1.13, cmt. 6, 9.

17 Model Rule 1.6(b)(2).

18 Model Rule 1.6(b)(3).

19 Model Rule 1.13(c).

20 Model Rule 1.13 (c).

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 attorney/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 child’s position. 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.”

23 To view the changes in the Model Rules, and an explanation of the changes, please see http://www.abanet.org/cpr/e2k-report_home.html.

24 Mississippi Rules of Professional Conduct 1.6
Representing a Client With Diminished Capacity

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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 interests 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 dramatically 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;

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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 diagnostician.

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 so she can experience her childhood, 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 caseworker) 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.

(See sidebar 2)

**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
representative action" meant. Therefore, the only form of protective action 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 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.

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• 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 nonverbal expressions and communications from the client. For example, in visiting Candace in
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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. Through creative problem solving and 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 seek to 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;
- 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 your client’s 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.

**Sidebar #1:**

**Model Rule 1.14**

For a thorough analysis of changes to MR 1.14, see the web links to the following:


Text of the commentary to the current MR 1.14: [http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html](http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html)

Redlined version of MR 1.14 to show changes: [http://www.abanet.org/cpr/e2k-rule114.html](http://www.abanet.org/cpr/e2k-rule114.html)

Reporter’s explanation of changes to MR 1.14: [http://www.abanet.org/cpr/e2k-rule114rem.html](http://www.abanet.org/cpr/e2k-rule114rem.html)

**Sidebar #2:**

**The Difference Between Capacity and Competence**

American Bar Association
Capacity refers to a client’s ability to understand information relevant to the case and the ability to appreciate the consequences of decisions. Does the client really know what the case is about, what is happening, and what consequences might result from certain actions or inactions? Capacity refers to ability and comes in various degrees. MR 1.14 refers to diminished capacity and is the focus of this article.

**Competence is a legal standard, and denotes a specific level of skill, knowledge, or ability.** The most critical distinction between the two concepts is that competence is a characteristic that someone either possesses or doesn’t. It is an all or nothing principle. Usually competence is associated with a legal standard, used to answer a legal question. For example, in asking whether an individual is “competent to stand trial,” the court considers evidence and issues a ruling that the individual either is or is not competent.

**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?

**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?
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: 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.

3 MR 1.14(a)

4 MR 1.2

5 MR 1.14, cmt. 1

6 MR 1.14, cmt. 6

7 MR 1.14, cmt. 5

8 MR 1.14, cmt. 1

9 In re Eugene W., 641 N.W.2d 467 (Wis. App., 2002)

10 MR 1.14(b)

11 MR 1.14, cmt. 5

12 MR 1.14, cmt. 5

13 MR 1.14(b)

14 MR 1.14, cmt. 7

15 MR 1.14(c)

16 MR 1.14, cmt. 8

17 MR 1.14, cmt. 8

18 State v. Meeks, 666 N.W.2d 859 (Wis. 2003)
Prior to the MR 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 Professional Responsibility, Informal Op. 89-1530, (1989).

MR 1.14(c)