6th Annual CHINS Law and Procedures Seminar
November 18, 2004
Ethics Vignettes & Answers

On September 30, 2004, the Indiana Supreme Court issued amendments to the Indiana Rules of Professional Conduct, to be effective January 1, 2005. In the following discussions, the relevant Rules generally will be cited and discussed as they currently stand (current rule) and as they will stand with the soon-to-be-effective amendments (amended rule).

Question 1

> *You have been appointed to serve as Guardian ad Litem for a 14 year old girl who is an adjudicated Child in Need of Services residing in her third foster home. A petition for termination of the parent-child relationship is pending. The girl is very responsive to you as her GAL and telephones you every afternoon when she is released from school. The current foster parents want to adopt the girl, but she is ambivalent about being adopted by them. The girl begs to be able to spend weekends at your house to remove herself from the emotional atmosphere at the foster home and give herself time to make her decision about the adoption. You ask for and receive the foster parents' and case manager's permission to allow the girl to spend weekends at your home. The girl has spent 3 weekends at your house. At the Ind. Trial Rule 16 preconference, counsel for the parents challenges your ability to serve as GAL because the child has been spending weekends with you at your home.*
>
> > *What legal and ethical issues are raised by the girl's weekend visits at your home?*

Responding to the issue posed by this scenario requires examining the intended role of the guardian ad litem. The statutory definition of guardian ad litem appears at IC 31-9-2-50 which states:

> **"Guardian ad litem"**
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> Sec. 50. "Guardian ad litem", for purposes of IC 31-15-6, IC 31-16-3, IC 31-19-16, IC 31-19-16.5, and the juvenile law, means an attorney, a volunteer, or an employee of a county program designated under IC 33-24-6-4 who is appointed by a court to:
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> (1) represent and protect the best interests of a child; and

(2) provide the child with services requested by the court, including:

(A) researching;

(B) examining;

(C) advocating;

(D) facilitating; and

(E) monitoring;

the child's situation.

A guardian ad litem who is not an attorney must complete the same court approved training program that is required for a court appointed special advocate under section 28 of this chapter.

Thus, it is the GAL's role to represent and protect the best interests of the child and provide the services requested by the court. This includes researching, examining, advocating, facilitating, and monitoring the child's situation. In other words, to be the eyes and ears of the court and represent and protect the child's best interests. This does not include being a "big sis," "big brother," or a surrogate mother/father or aunt/uncle.

The GAL is not intended to be a permanent fixture in the child's life. It is questionable whether the scenario GAL is doing the child a service by allowing the child to become so emotionally dependent on the GAL. There will be a time when the GAL will have to move on. What happens to the child's emotional dependency then?

It appears the scenario GAL has become emotionally involved with the child also. This can harm objectivity in evaluating the child's best interests. It can also make the GAL vulnerable to the child's exercise of manipulative behavior the child may well have learned in order to survive in the child's insecure environment.

Bringing the child into the GAL's home for weekend visits does not appear to fit into the intended GAL role described above. It is intended that the GAL perform the researching, examining, advocating, facilitating and monitoring in the child's environment rather than in the GAL's. For the child and the child's future, the GAL's home is an artificial environment. Further, the scenario indicates that the objective of the weekend visits essentially was to provide an environment for the child which was conducive to facilitating the child's making the decision regarding the potential adoption. It would appear, however, that this objective might have been better served through means such as individual counseling by a professional, individual/child mediation, or group counseling. It is likely that the weekend visits served more as a treat for the child and a distraction from the issues, rather than providing an environment conducive to resolving the issues. Indeed, the child is perhaps entitled to a treat and/or distraction from the issues of the child's less than ideal life; but, it is not within the GAL's role to provide them by involving the child in the GAL's personal life.

These weekend visits also raise the issue of the GAL's potential liability. Civil immunity for GALs is addressed at IC-31-32-3-10:

> **Civil immunity**
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> Sec. 10. Except for gross misconduct, if
>
> (1) the guardian ad litem;
>
> (2) a court appointed special advocate;
>
> (3) an employee of a county guardian ad litem or court appointed special advocate program; or
>
> (4) a volunteer for a county guardian ad litem or court appointed special advocate program;
>
> performs duties in good faith, the guardian ad litem or court appointed special advocate is immune from any civil liability that may occur as a result of that person's performance during the time that the person is acting within the duties of the guardian ad litem or court appointed special advocate program.

It is possible that allowing the child's weekend visits might be construed not to be within the immunity statute. Providing such hospitality might be deemed not to be "performance during the time that the [GAL] is <u>acting within the duties</u> of the guardian ad litem." (emphasis added.) But, even if the immunity is ultimately found to apply, by allowing the weekend visits, the GAL is unnecessarily opening the door to possible litigation. These visits make the GAL and the GAL's family vulnerable to allegations of abuse and neglect with regard to the child. Further, the family dog might respond badly to the child's behavior and react in an unpredicted manner, such as biting the child. Transporting the child to and from, or during the weekend visits also raises potential liability issues in case of an accident.

Question 2

You have been appointed to file an appellate brief for the incarcerated father in a termination of the parent-child relationship case. Your client's parental rights have been terminated. Your search of the record discloses that your client did not receive proper legal service of the petition to terminate the parent-child relationship nor was he transported to the CHINS and termination hearings. Your client had sent a letter to the judge requesting that he be transported from Putnamville for the hearings, but his request was denied. Your client writes a letter to the Court requesting your name and sends three letters directly to you requesting that you visit him in Putnamvulle to discuss his appeal. You don't have time to respond to his letters or drive to Putnamville to see him. You do prepare an appellant brief regarding the procedural due process issues which you have identified and file it timely.

Have you engaged in any conduct which violates the Indiana Rules of Professional Conduct?

Yes, you have engaged in conduct that violates the Indiana Rules of Professional Conduct, both as they currently stand and as amended.

The facts of this vignette are patterned after those of Matter of Kiefer, 814 N.E.2d 250 (Ind. 2004). In that case, the Indiana Supreme Court approved and ordered the agreed discipline of a public reprimand. Chief Justice Shepard dissented finding the agreed sanction inadequate. Justice Dickson dissented "believing the failure of a lawyer to communicate with his client requires a more robust penalty." The parties agreed submission stated in aggravation that the "respondent's client, being incarcerated, was particularly vulnerable and reliant on the respondent for information about [the] case." The lawyer was found to have violated Indiana Professional Conduct Rule 1.4(a) and (b). Currently, Prof. Cond. R. states:

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The amended Rule 1.4(b) does not change, but the amended Rule 1.4(a) states as follows:

(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 or assistance limited under Rule 1.2(c).

It appears that amended Rule 1.4(a), paragraphs (3) and (4) and possibly (2) apply to our fact situation. The Comments to the current and amended Rule 1.4 provide the following relevant statements:

The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.

A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.

The Comment to amended Rule 1.4 includes additional relevant guidance:

[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.

Thus, you should have kept your client informed regularly, as well as promptly responded to his inquiries of you. It does not appear that you were obligated to drive to Putnamville to visit him, however. Telephone and/or written communication, from as well as to you, regarding the case and the potential issues for appeal probably would have sufficed. Perhaps to provide a structure for his input, you could have sent a questionnaire to him regarding the appealable issues.

Question 3

You are the court appointed public defender who is representing a mother in a CHINS case. At the fact-finding hearing, counsel for the Office of Family and Children files a motion for Trial Rule 52 Findings of Fact, Conclusions of Law and Proposed Order. After the fact-finding evidence has been heard, the Court orders the O.F.C. attorney, the GAL attorney and you to each prepare Trial Rule 52 Findings, Conclusions and proposed Orders and submit them within the next 30 days. After the trial you become busy with a murder trial for which you are also the public defender and fail to submit the Findings within the scheduled time. You file for an extension of time and are given an additional thirty days' time to submit the Findings, but fail to meet the second deadline because your notes have been misplaced.

Your client has become angry with you because the CHINS petition has become an issue in her pending dissolution of marriage case where she is represented by Legal Aid Society.

> *Could your conduct in failing to submit the T.R. 52 Findings in a timely manner subject you to any disciplinary procedures? What rules of professional conduct are involved in your failure to submit the T.R. 52 Findings within the court's deadline?*

Yes, your conduct in failing to submit the Trial Rule 52 Findings in a timely manner could subject you to disciplinary procedures.

In <u>Matter of Bunner</u>, 814 N.E.2d 251 (Ind. 2004), the lawyer-respondent had represented a client in a dissolution of marriage action and had failed three times to file an entry as directed by the court in that matter. Finally, nine months after the Court initially directed its filing, the respondent filed the entry just three days before a hearing which was scheduled to occur unless the lawyer filed the entry. The Indiana Supreme Court approved and ordered the agreed discipline:

> One hundred eighty (180) day suspension, effective October 16, 2004, without automatic reinstatement thereafter, with the entire suspension stayed upon successful completion of twenty-four (24) months of probation. In the event it is established…that the respondent has violated any terms of his probation, then the entire period of the stayed suspension shall become executed or active and the respondent shall be suspended for the entire one hundred eighty (180) days without automatic reinstatement.

The Court found that the respondent had violated Prof. Cond. R. 3.2, which provides that lawyers shall make reasonable efforts to expedite litigation consistent with the interests of their clients; and Prof. Cond. R. 8.4(b), which prohibits lawyers from engaging in conduct prejudicial to the administration of justice.

The current Rule 3.2, which is unchanged by the amendments, follows:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

A relevant portion of the Comment to current Rule 3.2 states:

> Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.

The Comment to amended Rule 3.2 states in relevant part:

> Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates.

Rule 8.4(d), which also is unchanged by the amendments, follows:

> It is professional misconduct for a lawyer to:
>
> (d) engage in conduct that is prejudicial to the administration of justice;

The Comments to the current and the amended Rule 8.4(d) do not provide guidance as to what conduct is "prejudicial to the administration of justice" or what the phrase means.

Prof. Cond. R. 1.3 regarding diligence is also relevant. See Matter of Roche, 678 N.E.2d 797 (Ind. 1997) (holding that lawyer, employed to enforce a visitation order and/or petition for modification of custody, who accepted initial fee payment but never took formal action on behalf of his client violated R. 1.3). Rule 1.3, current and amended, states:

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

The Comment to amended Rule 1.3 provides two relevant statements:

> A lawyer's workload must be controlled so that each matter can be handled competently.
>
> A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances,…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.

Question 4

> *You are a public defender appointed to represent the mother in a CHINS proceeding. You learn from the caseworker and the maternal grandmother that the mother was previously diagnosed with schizo-affective disorder and was previously under an outpatient commitment, which she completed, and from which she was discharged. During your interview with the mother, she speaks very slowly, has a blank expression, answers only direct questions, and seems to have difficulty understanding your advice to her.*
>
> > *(a) Are there any ethical rules which are applicable to your representation of the mother?*
> >
> > *(b) If the mother in the above fact situation is pro se, are there any ethical rules or trial rules which apply if you are serving as attorney for the county office of family and children?*

4(a) The scenario in question 4(a) sets up a situation in which your client, mother, is presumed capable to make adequately considered decisions in connection with her representation. Although she was previously under an outpatient commitment, she completed it and was discharged. You, however, have observed behavior on her part which makes you question this presumption. No absolute answer can be provided to this scenario, especially in view of the limited facts provided. The following discussion, however, highlights parameters for analyzing the issue to reach a resolution.

Diminished Capacity

Prof. Cond. R. 1.14 appears to be applicable to the issue raised by mother's behavior. The current Rule 1.14 follows:

> Rule 1.14. Client Under a Disability
>
> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The amended Rule 1.14 changes the title of the Rule and a few words of (a). It also eliminates the current (b) and adds a new (b), (c), and (d) which provide more specific guidance. It states:

> 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.

(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

Paragraph (a) of Rule 1.14, both current and amended, mandates you to "as far as reasonably possible, maintain a normal client-lawyer relationship with [mother]." Paragraph (b) of Rule 1.14, both current and amended, allows, rather than mandates, you to take "protective action" with respect to mother. The current (b) allows you to take such protective action only if you reasonably believe that mother cannot adequately act in her own interest. The amended (b) adds the requirements that you reasonably believe that mother has diminished capacity and that she "is at risk of substantial physical, financial or other harm unless action is taken."

The following excerpts from the Comment to amended Rule 1.14 provide guidance in resolving the issues raised by question 4(a). Paragraphs [1] and [2] below are essentially the same as text in the Comment to the current Rule 1.14. The remainder of the below-quoted text from the amended Comment is substantially reworded or rearranged from the current Comment, or new with the amendments.

> [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….
>
> [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.
>
> [3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

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 voluntary surrogate decision making 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 clients' decision making 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….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.

Initially, paragraphs [5], [6] and [7], quoted above, seem most specifically instructive in answering the question. Of particular importance to your issue is the indication in paragraph [5] that the lack of sufficient capacity to communicate can be cause to take protective action. Paragraph [5] also suggests various protective measures that might be appropriate. It also implicitly advises you to tread lightly by providing the factors that should guide you in taking protective measures:

(1) Your client's wishes and values to the extent you know them;

(2) Your client's best interests; and

(3) The goals of:

(a) intruding into your client's decision making autonomy to the least extent feasible;

(b) maximizing client capabilities; and

(c) respecting your client's family and social connections.

Discussion

Paragraph [6] provides guidance in factors you should consider and balance in determining the extent of your client's diminished capacity. It also suggests that you may want to seek guidance from an "appropriate diagnostician."

Paragraph [7] urges that you consider the appointment of a guardian ad litem, conservator or guardian, based on your client's best interests. It also warns, however, that you should consider the impact of the potential resulting trauma and expense in evaluating what the circumstances require. It entrusts evaluation of "such circumstances" to your professional judgment, with the caveat that you should be aware of any law that requires you to advocate the least restrictive action on behalf your client.

Worthy of note also is the following admonition: "R.P.C. Rule 1.14 provides that a lawyer may take protective action for a client where the client's ability to make adequately considered decisions is impaired. A lawyer should take the protective action that is least restrictive under the circumstances." "Legal Ethics Committee of the Indiana State Bar Association, Informal Opinion No. 2 of 2001," RES GESTAE, Nov. 2001, at 28 (citing ABA Ethics Committee Opinion 96-404 (1996)). The author was unable to find any Indiana case law regarding Rule 1.14.

It appears that at least your client's capacity to communicate with you is diminished to the point where she will not be able to act in her own interest by providing needed information to enable you to competently represent her in the CHINS proceeding. This arguably puts her at risk of harm in that it could result in her child being adjudicated CHINS, unnecessarily. Accordingly, you are permitted, but not required, by Rule 1.14 to take action to protect your client from this harm.

Given your client's mental health history, perhaps your first step toward protective action should be to consult her mental health professional and, if necessary, obtain a continuance to allow for her evaluation and possible treatment. This protective action, or any likely to be effective, however, will probably require your disclosing mother's condition which could substantially compromise her position in the CHINS proceeding. Thus, your obligation to maintain the confidentiality of information relating to the representation of your client is also very relevant to resolving the issue presented by question 4(a).

Confidentiality

Amended Rule 1.14 addresses this obligation directly in paragraph (c) by stating that information relating to the representation of a client with diminished capacity is protected by Rule 1.6. It also specifically states that, in taking the protective action authorized by Rule 1.14(b), you are impliedly authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests. Paragraph [8] of the Comment to amended Rule 1.14 addresses this obligation. It follows:

> **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.

For your information, the texts of current Rule 1.6 and amended Rule 1.6 are quoted below. The current Rule 1.6 follows:

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing any criminal act; or

(2) 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.

In the event of an attorney's physical or mental disability, or appointment of a Lawyers Assistance Committee as guardian or conservator of an attorney's client files, disclosure of the client names and files to the Program are deemed impliedly authorized in order to carry out the representation, pursuant to subsection (a).

The amended Rule 1.6 contains important changes. It follows:

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to 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 from committing 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.

(c) In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's name and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files.

Discussion

Paragraph [8] of the Comment to amended Rule 1.14, (as quoted above) provides guidance regarding permitted disclosure. It warns of potential adverse affects to your client's interests which might result from disclosure of her diminished capacity and states that, accordingly, your client must authorize any disclosure regarding her condition. But, it also points out that amended Rule 1.14(c) provides implicit authorization under Rule 1.6(a) to disclose the information necessary when taking protective action under Rule 1.14(b). Comment paragraph [8] also explicitly states that the necessary disclosure may be made even when your client directs you to the contrary.

Thus, it appears that you are allowed to reveal the mother's diminished capacity, if necessary, to refer her for mental health evaluation and/or treatment, or for any other protective measure you decide is appropriate given the circumstances.

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Question 4(b)

(b) If the mother in the above fact situation is pro se, are there any ethical rules or trial rules which apply if you are serving as attorney for the county office of family and children?

Ind. Trial Rule 17(C), provides with regard to parties to civil suits: "If an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him." In Matter of RR, 587 N.E.2d 1341 (Ind. Ct. App. 1992), the Court reversed the trial court's finding in a CHINS proceeding based partially on the trial court's failure to appoint counsel for the mother who had diminished mental capacity. In Crayne v. M.K.R.L., 413 N.E2d 311 (Ind. Ct. App. 1980), the Court reversed the trial court in a paternity action, finding that the trial court did not give the appointment of a guardian ad litem for the minor, alleged father the kind of active consideration necessary under T.R. 17(C). The Court found that the trial court had failed to consider whether the minor, who was represented only by his mother, was adequately represented.

Thus, here, it would appear that you, as the OFC attorney, would want to bring mother's possible diminished capacity to the attention of the Court, and encourage that counsel or a guardian ad litem be appointed to represent her. If she proceeds without adequate representation, the trial court's decision may be vulnerable to reversal on appeal.

Question 5

You are the attorney appointed to represent the father in a contested termination of the parent-child relationship proceeding. Father's lack of sobriety has been a documented problem throughout the CHINS proceeding. When you met with him at your office, you observed that his speech was slurred, his eyes were red, and his breath smelled of liquor. During your meeting with the father, you urged him to be sober at the termination hearing. When the father comes to the scheduled all day termination hearing, you smell alcohol on his breath and observe that he has stumbled when going upstairs to the courtroom. The O.F.C. and CASA will be presenting their cases in chief, so your client may not be testifying on this date. It's likely that only you will know that he is under the influence of alcohol.

(a) Do you have a duty to inform the Court and parties of your client's condition? What ethical rules govern your decision?

(b) If you are the attorney for the CASA, speak to the father, and smell the liquor on his breath, what ethical considerations should govern your actions?

5(a) Several Rules of Professional Conduct should be considered in determining your ethical duties as father's lawyer with regard to your potentially informing the court and parties of his apparent intoxication and/or possible substance abuse problem. They include Rules 1.6, 3.3 and 1.14. At the outset, it should be recognized that revealing such information would tend to substantially compromise the father's position in the termination proceeding. This is especially true in view of the problem his lack of sobriety has posed throughout the CHINS proceeding.

Rule 1.6 – A Question of Confidentiality

Prof. Cond. R. 1.6 addresses the threshold question of your obligation with regard to not revealing information relating to your representation of him. Rule 1.6, current and amended, is quoted above under question 4(a). The Comment to amended Rule 1.6 is more comprehensive than the Comment to current Rule 1.6. Potentially relevant excerpts from the Comment to amended Rule 1.6 are stated below.

> [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 representation….
>
> [3] ….The confidentiality rule, for example, 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.
>
> **Authorized Disclosure**
>
> [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot

properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions….

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[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 practicable, 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….

> [15] ….A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Discussion

These Rule 1.6 Comment excerpts emphasize the importance of maintaining confidentiality regarding matters relating to your representation of father. They also indicate that your potential decision not to disclose information as permitted by Rule 1.6 would not violate the Rule. (See Comment paragraph [15], above.) Thus, Rule 1.6 addresses when disclosure is permitted, but does not require disclosure.

As to the applicability of Rule 1.6 to our scenario, father's intoxication and/or substance abuse certainly relates to the representation; otherwise there would be no reason to consider revealing it. Of course, as provided for in Rule 1.6(a), if father should give his informed consent to revealing the information, no further inquiry with regard to your Rule 1.6 obligations would be necessary. This is highly unlikely, however.

Absent father's informed consent, if you are considering informing the parties and Court, you must consider whether this situation fits one of the exceptions listed under Rule 1.6(b), current or amended. Only (b)(4) or (b)(6) of the amended Rule seem at all likely to apply. The exception at (b)(4) anticipates securing "confidential legal advice about the lawyer's personal responsibility to comply with these Rules." (See Comment paragraph [9], above.) Thus, it does not apply to revealing information to the parties and Court in the termination proceeding.

Rule 1.6(b)(6), "to comply with other law or a court order," is addressed at Comment paragraphs [12] and [13], quoted above. No law comes to mind that would compel disclosure of the father's intoxication and/or possible substance abuse.

Paragraph [13] discusses measures you are to take if ordered to reveal information which you are otherwise obligated to keep confidential by Rule 1.6.

If we eliminate the Rule 1.6(b) exceptions, the only phrase that would allow disclosure under Rule 1.6 is in (a): "the disclosure is impliedly authorized in order to carry out the representation." Comment paragraph [5], quoted above, addresses the meaning of this phrase. The disclosure examples given in paragraph [5] do not involve information adverse to the client as our issue does. Further, the whole tenor of Rule 1.6 and its explanatory Comment appears to exhibit an attempt to limit allowed disclosures to those which avoid dire consequences and those that are innocuous disclosures made to further the procedural aspects of justice administration. The disclosure contemplated in this scenario is neither.

Rule 3.3 – Your Obligation of Candor Toward the Tribunal

Rule 3.3, Candor Toward the Tribunal, also merits consideration in resolving your disclosure obligation regarding the father's intoxication and/or possible substance abuse. The current Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act against a tribunal by the client;
>
> (3) 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
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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

The amended Rule 3.3 follows:

(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 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 which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Relevant excerpts from the Comment to amended Rule 3.3 follow:

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be

misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] ….[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry….

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify….

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.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Decision

A review of the provisions of Rule 3.3, current and amended, reveals no requirement that you reveal your client's condition under the facts of the scenario. Only paragraph (d) contains an obligation to inform the tribunal of all material facts; however, its application is limited to ex parte proceedings.

Should you be asked about your client's condition, or should your client testify, provisions of Rule 3.3 might apply. The above-quoted excerpts from the Comment to amended Rule 3.3 should be considered under those circumstances.

Under Rule 3.3, you can make an assertion purporting to be on your own knowledge only when you know the assertion is true or believe it to be true on the basis of a reasonably diligent inquiry. (See paragraph [3], above.) Thus, under the facts of the scenario, you cannot assert that you know that the father has not been drinking or that he does not have a substance abuse problem.

Whether Rule 3.3 would prohibit your presenting evidence that the father has not been drinking or does not have a substance abuse problem, however, turns on whether you know the evidence to be false. Your reasonable belief that the evidence is false does not preclude you from presenting it. Your knowledge that the evidence is false, however, can be inferred from the circumstances, according to Rule 1.0(f). What the circumstances here would indicate regarding your knowledge of the falsity of the evidence appears to be arguable. Comment paragraph [8], quoted above, indicates in this regard that, "although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of [your] client, [you] cannot ignore an obvious falsehood."

You are permitted by Rule 3.3 to refuse to offer testimony or other proof that you reasonably believe is false. (See Comment paragraph [9], above.).

If you know, or would be deemed under Rule 1.0(f) to know, that your client has been drinking or has a substance abuse problem, and your client or another of your witnesses testifies to the contrary, you "must take reasonable remedial measures." According to Comment paragraph [10], quoted above, your proper course is to remonstrate with your client confidentially and seek his cooperation in correcting the false statement(s). If that fails, and your permitted withdrawal from the representation will not undo the effect of the false evidence, you "must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires [you] to reveal information that otherwise would be protected by Rule 1.6."

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The Father and Diminished Capacity – Rule 1.14.

Rule 1.14 regarding clients with diminished capacity was discussed in depth above in the answer to question 4(a). Your client's drinking and his apparent current intoxicated condition may render him unable to communicate or to make adequately considered decisions in connection with the representation and preclude the maintenance of a normal client-lawyer relationship with him. If so, it could put him at risk of the substantial harm of having his parental relationship with his child terminated, unnecessarily. Under these circumstances, Rule 1.14 may permit you to take protective measures.

The potential applicability of Rule 1.14 is more tenuous here than under the circumstances of answer 4(a). If it does apply, the same or similar considerations would be relevant with regard to your taking protective measures. Thus, the analysis will not be repeated here.

Question 5(b)

(b) If you are the attorney for the CASA, speak to the father, and smell the liquor on his breath, what ethical considerations should govern your actions?

As attorney for the CASA, unlike father's attorney, you have no Rule 1.6 confidentiality obligation to the father. Further, it does not appear that you have any obligation under Rule 3.3, Candor to the Tribunal, to bring the father's condition to the judge's attention.

With regard to the best interests of the child, the father's condition would appear to be important to you for at least two reasons. It is relevant as evidence of the continuation of the father's lack of sobriety which has been a documented problem throughout the CHINS proceeding. Further, his condition could mar the integrity of the proceeding and, thus, render the judge's ultimate decision vulnerable to reversal on appeal. The resulting delay in providing permanency for the child likely would not promote the child's best interests.

Obtaining these two objectives may be mutually exclusive. If you wish to protect the integrity of the proceeding, perhaps you should request to approach the bench, advise the judge of your suspicions about the father's condition, as well as your concern, and let the judge decide how to deal with it. This, however, might preclude your ability to put the father's condition into evidence, at least immediately, because the judge might decide not to proceed given the father's condition.

If your major objective is to get the father's condition into evidence, you or the attorney for the county could do so through a witness. If the CASA has made the same observations you have, the CASA could provide testimony as to the father's apparent intoxication. See Mehidal v. State, 623 N.E.2d 428, 431 (Ind. Ct. App. 1993) (non-expert witnesses are permitted to give their opinion of another's intoxication and the admission of lay opinion rests with the sound discretion of the trial court). You or the attorney for the county could also call the father and ask him about his condition.

Question 6

You are the public defender for parents in CHINS and Termination of the Parent-Child Relationship proceedings. In 2002 you are appointed to represent a married father and mother in a contested CHINS case where physical abuse and neglect are alleged. The parents agree that the child's injuries were caused by the maternal grandmother.

(a) Can you represent both parents in the 2002 CHINS proceeding? What are the ethical considerations in your decision-making regarding joint representation?

After the CHINS adjudication and disposition, you withdraw from the case which is the usual legal practice in your county. You tell the parents, verbally and in writing, that they must comply with the Office of Family and Children case plan and all of the Court orders to avoid involuntary termination of the parent-child relationship. Unfortunately the parents have not complied with case plans and Court orders in the opinion of the Office of Family and Children case manager. The parents have also experienced a bitter dissolution of marriage with allegations of domestic violence. The court re-appoints you to represent both parents as a public defender in a 2004 involuntary Termination of the Parent-Child Relationship proceeding.

(b) May you ethically serve as counsel for both parents in the 2004 Termination of the Parent-Child Relationship proceeding?

Indiana Case Law

In Baker v. County Office of Family & Children, 810 N.E.2d 1035 (Ind. 2004), the Indiana Supreme Court considered the appeals, based on ineffectiveness of counsel, of a mother and father whose parental rights had been terminated. The Court found that "their joint representation did not result in a conflict of interest, which might well produce a procedurally unfair setting." The Court enunciated a standard for review of such claims:

> Where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest.

In applying this standard to the facts of the case, the Court held that there was "nothing to suggest that representation by a single lawyer led to a fundamentally unfair hearing." The Court observed in this regard that: (1) The mother and father shared the interests of maintaining parental rights over the child, and there was no solid evidence showing that their interests were adverse and hostile. (2) Their attorney questioned and cross-examined both the mother and the father when they testified. (3) At no time did the mother and father blame each other for the allegations made by OFC. (4) The record did not suggest that either parent stood to gain significantly by separate representation. (5) The record showed that both parents neglected to complete the treatments and services required of them and admitted that they could not be good parents at that time.

Question 6(a)

Within the facts of the question 6(a) scenario, it appears joint representation at the 2002 CHINS hearing would meet the Baker acceptability standard. Here, mother and father share the interest of their children not being adjudicated CHINS and their interests do not appear to be adverse and hostile. The mother and father seem to be blaming the maternal grandmother and not each other for the alleged physical abuse. Further, there is no apparent basis to believe either parent would gain significantly by separate representation.

Question 6(b)

In the scenario of 6(b), the parents are no longer together. They do not appear to share the interests of jointly maintaining their parental rights over the children, and evidence indicates adversity and hostility between them. Allegations of domestic violence have arisen; thus, they may blame each other for the alleged abuse and neglect of the children. It is likely under these circumstances that both parents would likely gain by separate representation. Thus, it appears joint representation in the 2004 termination proceeding might well not meet the Baker acceptability standard.

Rule 1.7 – Conflict of Interest

The Indiana Professional Conduct Rule of primary concern in this scenario is Rule 1.7. The current version of Rule 1.7, states:

Rule 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

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Rule 1.7, as amended, states:

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.

As you can see, the amendments substantially reword Rule 1.7. The Comment to the amended Rule 1.7 is substantially expanded and reworded also. Paragraphs of the amended Comment relevant to the issues raised by the question 6 scenarios are quoted below. They subsume the relevant guidance provided by the Comment to the current Rule 1.7.

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[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)….

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is not 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….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.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law….

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent….

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client. In the alternative, the lawyer shall promptly transmit a writing to the client confirming the client's oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question ….[C]ommon representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common

representation of clients where contentious litigation or negotiations between them are imminent or contemplated….Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good….

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer may have to withdraw from representing one or more or all of the common clients if one client decides that some matter material to the representation should be kept from the others. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

Discussion

Paragraph [2] of the amended Comment provides a framework for analyzing a conflict of interest issue. We will use this framework in applying Rule 1.7 to the question 6 scenarios:

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) If so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include

both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

Question 6(a)

1.) The clients in question can clearly be identified as the mother and the father.

2.) Comment paragraph [8], quoted above, assists in identifying if there is a conflict of interest. Here, at this point in time, there is no evidence of direct adverseness. In a case such as this, according to paragraph [8], “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.” It is hard to project the probability of this occurring here, but it appears there is at least some likelihood. Whether this likelihood is sufficient to call it a current conflict of interest under Rule 1.7 is arguable.

Comment paragraph [23], quoted above, approaches the question somewhat differently. It provides that between coplaintiffs or codefendants a “conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.” The limited facts of the 6(a) scenario do not disclose these kinds of conflicts.

3.) If there is a conflict, is it consentable? That is, can you properly ask the consent of the mother and father to their joint representation? Rule 1.7(b)(1), (2), and (3) address consentability in specific terms. None of these provisions appear to preclude proper consent in this case. Comment paragraphs [29], [30], and [31], quoted above, discuss special considerations in common representation.

4.) If the conflict is consentable, the fourth step is to consult with the clients affected and obtain their informed consent, confirmed in writing. Informed consent is discussed in Comment paragraphs [18] and [19] and having it confirmed in writing is discussed in paragraph [20]. According to paragraph [18], informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. Paragraph [19] points out and discusses the fact that it may be impossible to make the disclosure necessary to obtain consent, particularly when one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision.

Question 6(b)

1.) The clients are still clearly identified as the mother and the father.

2.) It would appear that within the facts of the 6(b) scenario, a conflict of interest exists whether the approach of paragraph [8] or that of paragraph [23] is used for the analysis.

3.) Whether the conflict is consentable in this scenario would likely depend on whether "[you] reasonably believe that [you] will be able to provide competent and diligent representation to each affected client" as required by amended Rule 1.7(b)(1). Given the antagonism between the mother and the father, it would appear that doing so would be very difficult.

4) If you decide the conflict is consentable, the considerations in obtaining the informed consent, confirmed in writing, from both the mother and the father would not substantially differ from those in 6(a), described above. Of course the content of the consultations may be different given the changed circumstances.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

Rule 1.8(g) is also applicable to the scenarios of question 6. The amended Rule 1.8(g), which for our purposes is not significantly different from the current version, follows:

(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.

The following excerpt from the Comment to amended Rule 1.8 provides further guidance:

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent)….

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