

Ethical Issues in the Practice of Child Welfare Law

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The Evolving Role for Child Advocates: Ethical Issues for Guardians *ad Litem* Representing Children in Dependency Cases

As the legal community continues to evaluate the effectiveness of various models of representation for children in abuse and neglect (dependency) cases, the debate over whether guardians *ad litem* (GAL'S) can uphold their ethical obligations under the rules of professional conduct has intensified.ⁱ Many states are transitioning from a GAL (substitute judgment) model to a model where children in dependency cases are appointed an attorney who will advocate for them under a traditional attorney/client model. Some states have adopted a hybrid approach where factors such as age and desires of the child determine which model of advocacy is used. When an attorney is advocating under the GAL / substitute judgment model, *at issue* is whether and, if so, how, the attorney will uphold their ethical obligations under the rules of professional conduct.ⁱⁱ

GAL Versus Traditional Role of Lawyer

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

Case Scenario:

Assume you are appointed as the GAL to represent three children: Jason (age 15), David (age 7), and Angela (10 months). The allegations are that their mother is abusing drugs, and has left David and Angela home alone on several occasions. Sometimes Jason is home, but more often than not he is out with friends. Jason has not really gotten into a lot of trouble, but he has begun skipping school frequently, and his grades have recently dropped. During your interviews with the children,

Jason and David consistently tell you they would like to go home and live with their mother. Further, Jason tells you that he has seen his mother use drugs, but he asks you not to tell anyone because he knows if this information comes out, he might be sent to a foster home.

This case raises several ethical issues that routinely confront the GAL appointed in dependency cases. Because the GAL's role differs from that in the traditional lawyer/client relationship, the GAL is often uncertain how to handle ethical situations under the applicable ethical rules. In raising the inherent conflict between the GAL's role and certain ethical obligations, the article also suggests how a GAL can analyze common ethical problems—loyalty, confidentiality, and conflicts of interest—to represent what they determine are the child's best interests while fulfilling ethical responsibilities.^{iv}

Role of the GAL in Dependency Cases

In 1996, the American Bar Association passed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (“ABA Standards”).^v The ABA Standards advocate a traditional lawyer/client approach to representing children where the lawyer represents the child's “expressed wishes.” However, the drafters of the ABA Standards recognized that in some states, a GAL is appointed to advocate the “best interests” of the child as opposed to the child's “expressed wishes.” The ABA Standards define a GAL as an “officer of the court appointed to protect the child's best interests without being bound by the child's expressed preferences.”^{vi} In those states, the GAL is usually statutorily charged with representing the child's best interests. To fulfill that duty, the GAL is entitled to receive relevant reports and to be advised of significant developments in the case. The GAL must investigate matters she deems necessary and should talk with or observe the child client. In exercising those responsibilities, the child's GAL draws a conclusion about what they feel is in the best interest of the child, and advocates that position to the court.

Representing the child simultaneous with representing her assessment of the child's best interests can create a conflict for the GAL in terms of compliance with the ethics rules. Some jurisdictions have separated these roles by statute or declared the role of a GAL a “hybrid,” excusing strict adherence to *some* Rules of Professional Conduct.^{vii} Some states provide for the appointment of a lawyer for the child when what the child wants diverges from what the GAL thinks is best. However, even in states where the law provides a separate lawyer for the child, this often does not happen either because of the prohibitive cost of appointing a lawyer and a GAL for one child, or the GAL simply does not ask the court to appoint a lawyer for the child.

Model Rule 1.2: Scope of Representation

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

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

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

Model Rule 1.6: Confidentiality

Applying the confidentiality rules to GALs under the Model Rules can be confusing. The difficult issue is *whether and to what degree to keep confidential certain communications between the GAL and the child*. Confidentiality normally required in the lawyer/client relationship and by MR 1.6 might prevent a GAL from carrying out the statutory responsibilities of her appointment. This is because MR 1.6 prevents the lawyer from disclosing confidential information that may be an important component of the GAL's position. Consequently, a GAL generally must disregard the restrictions of MR 1.6 in order to disclose to the court and others relevant and necessary information provided by the child. There is no satisfactory way to resolve this ethical dilemma.^x It is always best to seek the child's consent before divulging information about the representation to the court. In some states, a GAL is prohibited from disclosing client communications to the court absent client consent.

As legal counsel for the child's best interests, the GAL must explain to the child, if possible, that the GAL is charged with advocating the child's best interests and that otherwise confidential information may be provided to the court. What should the GAL do if the child informs the GAL of relevant facts that the child does not want to be divulged? This occurs in the case scenario where Jason reveals that he's seen his mother use drugs, but asks his GAL not to tell anyone. Jurisdictions have come up with a variety of approaches to guide the GAL to ethically discharge her duty to the client and the court. In some states where a GAL is appointed to represent the child's best interests, lawyer/client confidentiality still applies because state statute or case law prohibits disclosure.^{xi} Other states make clear that confidentiality does *not* apply.^{xii}

Even within a state, there may be a wide range of views as to how the confidentiality issue plays out. A recent ABA survey in Michigan revealed several ways GALs handle disclosing information the child does not want divulged.^{xiii} Some GALs felt the confidentiality rules strictly applied to their representation of children, and would not reveal certain information even if they felt revealing it would be in the child's best interest. Others felt their duty to present the client's best interest to the court overrode a

strict application of the ethics rules on confidentiality.^{xiv}

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

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

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

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

Some states *require* the GAL to alert the child, before any interview, of the GAL's role and responsibility. This includes telling the child that the GAL may provide information to the court or other parties, including communications that otherwise would be protected by the ethical rules governing the lawyer/client relationship. Although this advisement may lead to the child withholding information from the GAL, the alternative is that the child's trust is betrayed. Being clear with the child about the GAL's role, and to what degree information will or will not remain confidential helps maintain the child's sense of trust and confidence that the system will protect her.

Model Rule 1.7: Conflicts of Interest

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

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

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

These conflicts, however, are viewed differently by the GAL whose duty is to protect the interests of the children, even if contrary to the children's wishes. From the GAL's perspective, there may be no conflict of interest because the arguments for placing the children, although seemingly contradictory, ultimately serve their best interests. Thus, the GAL would have no need to withdraw from representing one, or all, of the children. Nevertheless, representing the best interests of multiple clients by a GAL is not without potential conflicts. Suppose it is in Jason's best interests to continue to be placed with his younger siblings. Jason's therapist says that his sibling bonds are his strongest familial ties; therefore, he should remain with them. However, what if the younger children's treatment providers think otherwise? They say Jason is a negative influence on the younger children, especially David. The GAL faces a quandary. Advocating for the best interests of one sibling may compromise the best interests of another sibling. In this case, the GAL should ask the court to appoint a different GAL for the younger children.

Model Rule 3.7: Lawyer as Witness

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

To avoid this dilemma, the GAL should understand the difference between *advocating* and *testifying* for a child client. The comment to MR 3.7 provides some guidance. "A witness is required to testify on the basis of personal knowledge, while an

advocate is expected to explain and comment on evidence given by others.”^{xviii} It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. A Colorado court clarified the role of a GAL as a witness:

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

The critical issue is whether the GAL is providing evidence (which should be subject to cross-examination and testimony may be appropriate) or whether the GAL is analyzing evidence. Some states have resolved this complex issue by way of an advisory ethics opinion.^{xx} Some states have statutes which address this issue. Some states allow the GAL to testify under the theory that the GAL acts as an investigative arm of the court, and the content of the GAL's investigation, as well as the basis for their recommendations should be subject to cross-examination by agency and parents' lawyers.

Conclusion

The GAL's unique role in helping the court reach the best result for the child raises ethical considerations that are not easily reconciled under the Model Rules. The GAL's ethical obligations to the child, court, and opposing parties often conflict because the GAL serves as an advocate for the child and as someone who assesses what they believe to be the best interests of the child. Several important ethical issues impacting the role of the GAL should be addressed through legislation, case law, court rules, or ethics opinions:

- the relationship of the GAL to the client;
- whether and if so, how, the child's preferences impact the position that the GAL advocates;
- the extent that confidentiality and privilege attach in that relationship and what disclosures are required if there is no confidentiality or privilege;
- when a conflict of interest analysis applies; and
- whether a GAL can be called as a witness.

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

ⁱ Most states require GAL's to be attorneys. Some states permit laypeople to serve as GAL's. This article is about ethical obligations of attorneys, so applies only to lawyer-GAL's.

ⁱⁱ This article analyzes the ethical issues under the ABA Model Rules of Professional Conduct (Model Rules). Forty-one states have modeled their state rules of professional conduct on the Model Rules. Most of the remaining states have based their rules on earlier versions of the ABA Model Code.

ⁱⁱⁱ Model Rule 1.2.

^{iv} Some states have resolved these ethical problems by clarifying that the GAL does not represent the child, but represents the child's "best interests."

^v *ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases, A-2*, Lawyer Appointed as Guardian Ad Litem. See <http://www.abanet.org/child/rep-define.html>.

^{vi} *Ibid*; See also *ABA/NACC Revised Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, NACC Revised Version (NACC Children's Law Manual Series, adopted Oct. 13, 1996): <http://www.naccchildlaw.org/documents/abastandardsnaccrevised.doc> or <http://www.naccchildlaw.org/training/standards.html>.

^{vii} *In re J.P.B.*, 419 N.W.2d 387, 391-92 (Iowa 1988); *In re Rolfe*, 699 P.2d 79, 86-87 (Mont. 1985), *aff'd* 766 P.2d 223 (Mont. 1988).

^{viii} *E.g.*, in Wyoming, a recent proposed amendment to MR 1.2 reads, "[c]ontrary to the ethical rules, the lawyer/guardian is not bound by the client's expressed preferences, but by the client's best interests. . . ." In Iowa, the Supreme Court has modified the Rules of Professional Conduct so that GALs "give priority to the paramount goal of discerning the child's best interest while enabling the lawyer to advocate an opposing viewpoint without fear of ethical violation."

^{ix} A dichotomy exists between the lawyer as guardian and the lawyer as advocate, and the lines become very easily blurred. Courts and legislatures have not provided much assistance and have often required attorneys to assume dual and potentially inconsistent roles." Haralambie, Ann "The Role of the Child's Lawyer in Protecting the Child Throughout the Litigation Process." *North Dakota Law Review* 71, 1995, 939, 941 1995.

^x See Stuckey, Roy T. "Guardians *Ad Litem* as Surrogate Parents: Implications for Role Definition and Confidentiality," *Fordham Law Review* 64, 1996, 1785, 1786. ("Role definition and confidentiality issues can arise whenever attorneys are appointed to serve as guardians *ad litem*; however, they become even more complex when an attorney is appointed to serve as both the attorney and the guardian *ad litem* for a child").

^{xi} *E.g.*, New Hampshire enacted a statute creating lawyer-client confidentiality between GAL and child. See N.H. Rev.Stat. § 458.127-a-110 (1992).

^{xii} To determine whether confidentiality applies, it first must be decided what or who is being represented. Representing the "best interests" of the child is distinct from representing the child. A loose analogy is made to the corporate arena where, under MR 1.13, the corporate lawyer represents the organization, not the individuals within the organization. Although some communications by corporate officers are protected, in performing his or her fiduciary duty to protect the best interests of the corporation, the corporate lawyer may have to reveal certain communications.

^{xiii} The Michigan report is available from the ABA Center on Children and the Law, available by calling 202/662-1746.

^{xiv} See generally NACC Recommendations for Representation of Children in Abuse and Neglect Cases, NACC Program Committee, 2001, at <http://www.naccchildlaw.org/training/standards.html>.

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

^{xvi} Model Rule 3.7

^{xvii} MR 3.7, cmt. 1.

^{xviii} MR 3.7, cmt. 2.

^{xix} *In re J.E.B.*, 854 P.2d 1372 (Colo. Ct. App. 1993).

^{xx} See, *e.g.*, North Carolina Ethics Advisory Op. 2251 (Feb. 2000).

Quality Counts: Representation in Child Welfare Cases

“Poor quality legal representation results from a variety of factors ranging from the pressure of high caseloads to poor customs and low expectations of representation in the jurisdiction. The old reputation of juvenile and family courts as a lesser "kiddie court" persists in some places, despite the increased sophistication and complexity of both the law and the underlying interdisciplinary perspective required to handle these cases effectively. Child welfare is a unique and highly specialized area of practice, yet many advocates have not received training in handling such cases. In many States, neither ethical requirements nor practice standards for lawyers in child abuse and neglect cases have been developed.”^{xx}

How do we define “quality of representation?” What is the court’s role in enforcing basic ethical duties? How can lawyers protect themselves against a malpractice claim, and what can they do when they see representation so poor that the client suffers? Concerns about quality of legal representation, including a lack of experience, skills, and training, and high caseloads are widely documented.^{xx} Court Improvement Project self-assessments identify legal representation or the need for improved legal training as a crucial element of reform.

This chapter looks at the ethical requirements relating to quality of representation, by examining three key ethical responsibilities that make up quality representation: (1) competence, which includes training and case investigation; (2) diligence, which includes caseload management and trial activities; and (3) communicating with the client.

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

Sidebar:

The Difference Between Ethical Rules, Ethics Opinions, and Standards of Practice

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

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

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

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

State legislation could commit the state to a set of practice standards for lawyers in child welfare proceedings either by direct legislative provisions or by delegation to the state bar association, court system, or regulatory agency. Sanctions and penalties could be applied for not adhering to standards. Gross or repeat violations of the standards could be evidence of ethical violations. Standards are currently in place in several states, some modeled after the ABA Standards.

CONSEQUENCES FOR ETHICS VIOLATIONS

Disciplinary Action

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

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

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

Malpractice

Another consequence of unethical conduct is the lawyer may be liable to a client for professional misconduct or negligence. The forum for a malpractice action is a court, and the purpose is to obtain compensation for the injured party. The three required elements to prove malpractice are: (1) a lawyer/client relationship, which creates a duty to use reasonable skill, prudence, and diligence, (2) a breach of duty either by negligence or breach of contract, and (3) injury to the client resulting from the lawyer's actions or nonactions. Merely violating an ethical rule is not a basis for civil liability. However, violating a rule may be evidence used to support a civil claim because the lawyer has breached an applicable standard of conduct.^{xx} Conversely, a lawyer can commit malpractice without violating an ethical rule, although such violation is relevant evidence when considering the breach of duty issue.

Ineffective Assistance of Counsel

Certain cases give rise to a constitutional right to counsel as guaranteed by the Sixth Amendment, notably criminal cases. Courts have consistently held that where the client has a constitutional (or statutory) right to court-appointed counsel, that right must include the right to *effective* assistance by the appointed lawyer; otherwise the right to counsel would be an empty formality.^{xx} Based upon state law or judicial interpretation of the state's constitution, most states require that parents have court-appointed counsel in a termination of parental rights (TPR) case. In *Lassiter v. DSS of Durham County*,^{xx} the Supreme Court said that while the Constitution does not *require* court-appointed counsel in every TPR case, in some cases due process requires the appointment of counsel, based upon a test established in *Mathews v. Eldridge*.^{xx} In other words, even in the few states

that do not guarantee a right to counsel, there *may* be such a right after the court considers: (1) the private interest at stake, (2) the government interest, and (3) the risk of error.

Some states extend this right to counsel to dependency proceedings, and some states provide a right to counsel when dependency proceedings may lead to criminal child abuse charges.^{xx} Children have a right to counsel in delinquency cases.^{xx} Also, the Child Abuse Prevention and Treatment Act (CAPTA) assures each child is appointed an advocate.^{xx}

To establish a violation of the Sixth Amendment right to counsel, a client has to show: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced the client.^{xx} Therefore, another possible consequence of failing to provide competent representation is that the lawyer may be deemed to have rendered ineffective assistance of counsel. Several cases discussed below involve such claims.

KEY ETHICS ISSUES

Competence (MR 1.1)

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

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

- legal knowledge
- legal skill
- thoroughness
- preparation

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

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

- the relative complexity and specialized nature of the matter;
- the lawyer's general experience, training and experience in the field;
- the preparation and study the lawyer is able to give the matter; and

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- whether it is feasible to refer the matter to, or consult a lawyer of established competence in the field.^{xx}

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

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

Training

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

States without statutory or court rule-imposed minimum requirements and qualifications for court-appointed lawyers cite that as problematic. To promote uniformity among states, the National Association of Counsel for Children (NACC) is developing a certification process for lawyers handling dependency cases, including minimum training requirements.^{xx}

To *maintain* the required knowledge and skill, the Model Rules advise lawyers to stay current on changes in the law and practice, attend trainings and educational programs, and comply with all continuing legal education requirements.^{xx}

Sidebar: Key Training Areas

Before accepting a case, lawyers need specialized training. Failure to receive training in these areas coupled with an injury to a client may result in a malpractice claim. Such training should include working knowledge of:

- federal laws, including the Adoption and Safe Families Act (ASFA), Multi-Ethnic Placement Act (MEPA), Indian Child Welfare Act (ICWA), Child Abuse Prevention and Treatment Act (CAPTA), Foster Care Independence Act of 1999, Social Security entitlements, and disability laws
- state child abuse and neglect and termination of parental rights laws

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- evidence and trial procedure
 - negotiation strategies
 - appeals procedures
 - legal permanency options
 - adoption subsidies
 - child development—cognitive, emotional, physical
 - communication with clients in developmentally appropriate language
 - medical issues and medical evidence in child abuse and neglect cases
 - understanding of mental illnesses and mental retardation
 - substance abuse issues
 - family violence, including the impact of domestic violence on children
 - cultural, ethnic, and socioeconomic issues
 - available services and resources for families
 - immigration laws
 - education laws and resources
 - professional ethics

Case Investigation

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

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

Thorough, independent investigation of cases, at every stage of the proceedings, is key to providing competent representation. The lawyers in Cases 2 and 3 above failed to conduct much, if any, case investigation, and the court concluded that this failure damaged the clients’ interests. Although the appellate courts considered these cases illustrations of gross failures to prepare, such scenarios are common—lawyers conducting last minute “in the hallway” discussions 15 minutes before a fact finding hearing, or GALs failing to meet in advance with their clients, and relying solely upon the caseworker’s report in preparing for a hearing.

In a dependency proceeding, competent representation goes beyond interviewing witnesses. It requires understanding the client, family dynamics, family history,

availability and interest of relatives, and educational matters-- to name just a few issues. The more a lawyer knows about the strengths and weaknesses of the family, the more likely the lawyer will get results.

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

MR 1.3: Diligence^{xx}

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

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

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

Caseloads

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

"just do the best you can" without preparation, if the result would be to represent the department incompetently. Citing MR 1.1, the opinion explained that ethics rules and principles fully applied to lawyers employed by the government to represent government agencies. If a government lawyer were to neglect matters or to prepare inadequately, the lawyer might violate not only the duty of competence, but also the duty to seek justice and to develop a full and fair record.^{xx}

“A lawyer's work load must be controlled so that each matter can be handled competently.”^{xx} While organizations that represent parents, children, and agencies have been reluctant to impose caseload limits, case 5 illustrates that carrying an excessive caseload violates a lawyer’s duty to provide competent representation. This duty cannot be avoided by obtaining the client’s (agency’s) consent, because a client can’t consent to incompetent representation. Nor does the directive of a supervisor alter the individual lawyer’s obligation to adhere to ethical standards.

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

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

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

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

Sidebar: Excessive Caseloads: What Can Judges Do?

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

1. Expand, with the aid of the bar and children's advocacy groups, the size of the list from which appointments are made.
2. Alert relevant government or private agency administrators that their lawyers have an excessive caseload problem.
3. Recruit special child advocacy law programs to represent children.
4. Review any court contracts/agreements for child representation and amend them accordingly, so that additional lawyers can be compensated for case representation time.

Alert state judicial, executive, and legislative branch leaders that excessive caseloads prevent lawyers from competently representing children according to state-approved guidelines, and seek funds to increase the number of lawyers available to represent children.

Trial Activities

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

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

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

Ongoing monitoring of the court's orders ensures services are provided and the court's orders are implemented in a complete and timely fashion. Staying in touch with the child, caseworker, third party caretakers, and service providers between review

hearings is key to identifying implementation problems. When appropriate, lawyers should discuss options to appeal with clients.

Consider Case 6 above where, during the course of his representation, the mother's lawyer failed to follow the mother's request that the father's visits be supervised. The court found that a jury could find malpractice based upon (1) the lawyer's failure to provide a reasonable standard of care, and (2) the fact that the mother's injury (abduction of her child) directly resulted from the lawyer's failure to follow her request. A lawyer's failure to follow through on a client's request that results in damages or a loss for the client may subject the lawyer to civil liability in addition to disciplinary action.

Other Activities

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

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

MR 1.4: Client Contact^{xx}

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

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

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

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

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

Parents’ lawyers are discouraged from using “outside the courtroom” meetings as the sole contact with clients. Effective, quality representation depends largely on the lawyer’s relationship with the client. Developing a relationship of trust is key. This is especially true when representing parents and children in abuse and neglect cases since they involve deeply personal issues and much is at stake. Consider Case 7 above where the father was not even a party to the case because paternity had not been established, yet the court found that his lawyer’s (lack of) performance was ineffective assistance by the lawyer’s failure to communicate with his client, or to assert paternity.

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

In some circumstances, a lawyer may be justified in not immediately communicating certain information when the client would be likely to react poorly.^{xx} For

example, a lawyer might withhold a client's psychiatric diagnosis when the examining psychiatrist has indicated that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's or another person's interests or convenience.

Sidebar:

Establishing Relationships with Children: Tips for Children's Lawyers and Guardians *ad litem*

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

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

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

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

Location/Nature of contact: Meetings in the community, usually at the child's placement, are preferred because the child may be more comfortable, and the lawyer will have a chance to observe how the child interacts with caretakers and others. This role requires meaningful face-to-face contact and that, depending on the circumstances, contact might need to be more frequent. It will take a lawyer more than a couple of visits to establish a trusting relationship with a five year old who has been abused or to establish rapport with a teenager. The location of the meeting is an important, sensitive decision, and should be made with the child's best interest the top concern.

COMPLIANCE STRATEGIES

In some jurisdictions, lawyers habitually fail to properly prepare their cases or be accountable to their clients. Monitoring lawyers' ethical behavior can be challenging. Many problems described in this chapter persist because of insufficient disciplinary

enforcement.

Consider who is victimized by unethical practice. To sue for malpractice, the client must be aware of this right, and have the resources to bring the claim. Whether a client brings a malpractice claim, or files an ethical grievance depends on many factors, including experience, education level, and age.

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

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

Judge's Role

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

Other Lawyers' Roles

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

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

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

association or the appropriate lawyer disciplinary agency.

CONCLUSION

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

Protecting Client Confidences

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

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

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

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

How does a **guardian ad litem** (GAL) reconcile a statutory duty to present all facts to the court relating to the child's best interest when a child has disclosed something and asks the GAL "not to tell anyone?"

The unique nature of child protection cases can make these decisions difficult for lawyers. It is unusual that parties, who are adversaries in court, must work together for the case to succeed. The adversarial process can pit the parties against each other, especially if hearings are contested and witnesses testify. While a social worker may perceive her testimony as simply "recounting the facts," a parent may perceive the worker as testifying *against* the parent. This adversarial model sometimes leads parents' and children's lawyers to advise clients to withhold important information, and even not cooperate with the agency.

This tendency to protect certain information can delay reunification, and can damage relationships between the parties. Where else in law is there a hearing with three (or more) parties who, after a contested trial, must sit down and cooperatively draft a case plan? The parties must then work together closely, ideally in a relationship characterized by trust and confidence, as they implement the case plan. Lawyers schooled in the adversarial model of justice must first understand the lawyer/client confidentiality rules as well as other ethical rules that guide practice. They must also understand the consequences of certain choices and their impact on the client given the unique context of a child abuse and neglect case. Balancing their duties to clients, such as protecting confidences, with their duty to advise the parents to cooperate to achieve reunification, can be challenging.

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

PARENTS' LAWYERS

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

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

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

Before answering the hypothetical, first consider what the rules say, and the underlying rationale and policy reasons for the confidentiality rule. The circumstances requiring parents' lawyers to disclose information are controversial. The ethical rules give lawyers discretion, and seek to strike a balance between nondisclosure to protect the lawyer/client relationship, and disclosure to protect society (in this case, children).

On one hand, strengthening the confidentiality rules protects the lawyer/client relationship by encouraging open communication. Preserving client confidences helps develop the facts fully, which allows lawyers to effectively represent clients. The lawyer also needs this information to advise the client to refrain from wrongful conduct. The rule also protects the sanctity of the lawyer/client relationship, and protects the client's

privacy.^{xx}

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

Model Rule 1.6: Confidentiality of Information

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

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

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

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

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

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

Model Rule 3.3: Candor Toward the Tribunal

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

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

Deciding Whether to Reveal

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

CHILDREN'S LAWYERS

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

When deciding whether to reveal Jason's disclosures, a child's lawyer may try to escape the ethical dilemma by saying he does not have to reveal them because the mother's drug use would become known through other channels. However, what if this is not the case? Drug screens can be inconclusive, and the agency may have no other eyewitnesses or ways of

proving Ms. Sands' drug use. Suppose, as well, that Jason tells his lawyer that he thinks it's neat to have a lawyer, and that one thing he knows about lawyers is that "they keep their clients' secrets."

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

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

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

Model Rule 2.1: Advisor

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

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

The comments to MR 2.1 make clear that a client is entitled to straightforward advice expressing the lawyer's honest assessment, and that legal advice often involves unpleasant facts and alternatives that a client may not want to confront. In presenting advice, the lawyer should attempt to sustain the client's morale, for example, by referring her to a mental health professional, or another person who can help her work through her problems. Although a lawyer is not a moral advisor as such, moral and ethical considerations affect most legal questions and may decisively influence how the law will be applied. Even if the lawyer thinks she could get this case dismissed based upon the weak evidence presented by the agency, the lawyer might advise Ms. Sands to admit the allegations, especially if the lawyer

is concerned for the safety of the children and worries that if this petition is dismissed, another one will be filed in the future. The lawyer may also suspect that Ms. Sands is in danger. Opening a child protection case may also give Ms. Sands greater access to community resources, including drug treatment.

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

Model Rule 1.14: Client with Diminished Capacity

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

AGENCY LAWYERS

Model Rule 1.13: Organization as Client

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

MR 1.13 says "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."^{xxx} Therefore, a lawyer representing the child welfare agency represents the agency, not the individual social workers or employees. What does this mean in practice?

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

If the actions of the social workers threaten substantial injury to the child welfare agency, the lawyer could not be compelled to reveal communications to someone *outside* the organization (e.g., law enforcement or opposing counsel such as the GAL). However, the lawyer *must* reveal knowledge of the social worker's wrongdoing to *others within the agency*, including supervisors. This is because the lawyer has a duty to proceed as is reasonably necessary to promote the best interest of the organization.^{xx}

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

concerns.

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

- 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.^{xx}

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

Duties to the Social Worker

Sometimes the child welfare agency's interest may become adverse to an employee (in this case, the social worker). Developing the case scenario from above further, suppose the social worker not only admits that she altered dates in her case record, but that she also lied in the termination of parental rights trial. Assume she tells the agency lawyer that when she testified that she had no contact from the mother, this was untrue. She was too busy and overwhelmed at the time to respond to the mother, but that 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 lawyer's ethical duty is to proceed in the best interest of the organization. When the agency's interest and the caseworker's interest diverge, as in the above examples, additional duties arise with respect to the worker. MR 1.13 says that the lawyer should advise [the caseworker] that the lawyer cannot represent [the caseworker], and that [she] may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for [the caseworker], and that discussions between the lawyer for the organization and the individual may not be privileged.^{xx}

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

Additional Considerations

Agency lawyers should understand that the Model Rules suggest that confidentiality restrictions may be less for a government lawyer because public business is involved, and government agencies are held to a higher standard than private companies. The Model Rules explicitly allow a government lawyer to question fraudulent conduct more extensively than a

lawyer for a private organization in similar circumstances, and specific federal or state law may authorize this.^{xx}

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

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

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

“to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services”^{xx};

“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”^{xx};

The language of MR 1.13 was strengthened to require the lawyer to refer the matter to higher authority in the organization, and *permit* disclosure outside the organization if the highest authority that can act on behalf of the organization fails to address the caseworker’s violation of the law, and that such violation is reasonably certain to result in substantial injury to the organization.^{xx} 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 lawyers in this situation, including agency lawyers.^{xx} Chapter 6 explores permissive and mandatory withdrawal and other rules that prohibit a lawyer from assisting a client in criminal or fraudulent conduct.

GUARDIANS AD LITEM

Applying the confidentiality rules to GALs can be confusing. A difficult issue for a GAL is whether and to what degree to keep confidential certain communications between the GAL and child client. The confidentiality normally required in the lawyer/client relationship might prevent a GAL from carrying out the statutory duty to advocate what she thinks is in the best interest of the child. This is because MR 1.6 prevents the GAL from disclosing information

provided by the child that arguably *should* be disclosed to the court for an adjudication of the child's best interests under the statute. Consequently, a GAL generally must bend the restrictions of MR 1.6 to disclose to the court relevant and necessary information provided by the child. There is no satisfactory way to resolve this ethical dilemma.

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

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

In some states where a GAL is appointed to represent the child's best interests, lawyer/client confidentiality still applies because state statute or case law prohibits disclosure without the child client's consent.

Some states mandate a confidential relationship, *unless* nondisclosure would result in harm, in which case a lawyer may breach confidentiality.

Other states make clear that lawyer/client confidentiality does not apply. In one state, this is based on the theory that the GAL does not, in fact, represent the child, but instead represents the child's best interests.

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

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

To make sure the GAL does not violate the trust of these young people, it is critical to let child clients know the GAL's role is to tell the judge what the GAL thinks is best for the child and why. The GAL also should let the child client know 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 lawyer/client relationship. Absent such an advisement, the child's sense of trust may be violated and confidence in the system designed to protect the child could be undermined.^{xx}

CONCLUSION

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

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 Model Rules of Professional Conduct. The Rules had last been amended in 1983 and the purpose of the amendments was to:

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

This effort resulted in the first global set of amendments to the Rules since they were adopted in 1983. The Commission completed its work in 2001. After extensive hearings and review, the ABA House of Delegates adopted the recommendations on February 5, 2002. Subsequently, in large part due to recent corporate scandals, the Task Force on Corporate Responsibility recommended additional changes to MR 1.6 (Confidentiality) and MR 1.13 (Representing an Organization). These changes were ratified by the ABA House of Delegates in August, 2003.^{xx} Several states have adopted the Ethics 2000 amendments and a number of states are holding committee meetings to consider amending their state codes in light of the changes to the Model Rules.^{xx}

The significant changes to MR 1.6 are:

1. Paragraph (a): Replace "consents after consultation" with "informed consent"
2. Paragraph (b)(1): Modify to permit disclosure to "prevent reasonably certain death or substantial bodily harm"
3. Paragraph (b)(2): Add paragraph permitting disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer's services See also Comment [7].
4. Paragraph (b)(3): Add paragraph permitting disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer's services
5. Paragraph (b)(4): Add paragraph permitting disclosure to the extent necessary to secure legal advice regarding lawyer's compliance with Rules
6. Paragraph (b)(6): Add paragraph permitting disclosure to comply with law or court order

Sidebar #2:

	Confidentiality	Privilege
Legal Authority	Ethical rule	Rule of law/evidentiary rule
Purpose	Prohibits lawyers from disclosing client confidences	Prevents government and adversaries from compelling lawyers and clients to reveal communications between them
What it protects	Any information relating to the representation of a client, regardless of its source	Any communication between lawyer and client
When it applies	Applies generally	Applies usually in judicial proceedings in which a lawyer can be called as a witness
Remedies	Disciplinary action against lawyer	Motion to quash subpoena for records or testimony

Sidebar #3:**Parents' Lawyers: Other Considerations when Deciding to Disclose****Civil Liability**

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

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 lawyers by abrogating the lawyer-client privilege. In other words, because the law applies to all citizens, lawyers 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* lawyers as mandated reporters. Ohio, however, exempts lawyers from the reporting requirement if the information is received in the lawyer/client relationship. Nevada also excludes lawyers as mandated reporters when the lawyer knows of abuse or neglect from a client who is or may be accused of the abuse or neglect. Mississippi, therefore, is the only state where a lawyer 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 when a lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act.^{xx} (See Beyea, Allison. “Competing Liabilities: Responding to Evidence of Child Abuse that Surfaces During the Lawyer-Client Relationship.” *Maine Law Review*, 1999, 269.)

Sidebar #4:

Agency Lawyers: Who’s Your Client?

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

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

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

In most states the agency is the client, not the individual social worker, not the public, and not the child’s best interest. The ABA Center on Children and the Law and the U.S. Department of Health of Human Services have both recommended, in their “Practice Standards for Legal Representation of the Child Welfare Agency” (in child abuse and neglect cases) that the state define the agency lawyer role as the legal representative of the *agency*.^{xx}

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

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

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.