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SECTION 2 BEFORE FILING SUIT

ETHICAL ISSUES IN LITIGATION

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- What should a **parent's lawyer** do when a client indicates she's lied to the social worker or the court?
- What should a **child's lawyer** do when he suspects the child's recent recanting of sexual abuse allegations is due to pressure from the mother?
- What should an **agency lawyer** do when the caseworker lies about the extent of her efforts to provide reunification efforts to the mother?
- A **child's lawyer** is called as a witness in one of her cases. What do the ethics rules say about her testifying?
- Between hearings, outside the presence of other counsel, a judge asks an **agency lawyer** how a parent in a case is doing. How should the lawyer respond?
- What can lawyers say to the press about a high profile child abuse case?

This article offers child welfare lawyers guidance on handling ethical issues that arise during litigation. Part I deals with handling false information. Part II addresses the less common, more easily resolved issues such as discovery, lawyers as witnesses, meritorious claims, trial publicity, *ex parte* contact, and reporting misconduct of other attorneys.

HANDLING FALSE INFORMATION

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

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

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

clean? What if she tells her lawyer she won't lie about the drug use, but then during her testimony, she does?

MR 3.3: Candor Towards the Tribunal

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

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

When Does a Lawyer "Know" Something?

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

Also, if a lawyer does not know something to be false, but "reasonably believes" that it is, then the lawyer *may refuse* to offer the evidence (see MR 3.3(a)(3)). In other words, even if the client wants the testimony to come in (either the client's own testimony, or another witness's testimony), the lawyer does not violate MR 1.2 to follow the client's directive by refusing to offer the evidence even though the lawyer does not know it to be false.

Timing of the False Testimony Before the witness takes the stand.

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

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

Under oath.

If the lawyer calls a witness to the stand, not expecting the witness to lie, but the witness does, the lawyer must take remedial measures.¹ The lawyer must first call a recess and counsel the witness to take the stand again and correct the lie. If the witness is the lawyer's client, and the client refuses this advice, the lawyer must make a motion to withdraw under MR 1.16. Mandatory withdrawal is required by MR 1.16(a), which does not allow the lawyer to continue representation if it *will result in a violation of the rules or the law*. In this instance, continued representation will violate MR 3.3, which prohibits lawyers from presenting false evidence.

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

After testimony was given.

Under MR 3.3, the duration of the duty to disclose that false evidence has been introduced is "the conclusion of the proceedings."² There is some question in a dependency case as to whether this means the end of that particular hearing, or the entire case.

¹ MR 3.3(a)(3); MR 3.3, cmt. 10

² MR 3.3(c).

Guidance for Children’s and Parents’ Lawyers

The Sands case illustrates the dilemma for a parent’s lawyer. Similar analysis applies when these questions are presented to lawyers for children and agencies. For example, if a child’s lawyer suspects the child is recanting allegations of sexual abuse by her mother’s partner because she is being influenced by her mother, the lawyer faces an ethical dilemma. The Model Rules say that the lawyer is prohibited from introducing the testimony if the lawyer *knows* the witness is lying. In this case, the lawyer may only *believe* the child now lying and therefore can still elicit the testimony, but may refuse to offer it.³ Child clients often change their stories, and many children’s lawyers will respect the current position of the client and advocate for that position. Children’s lawyers must be careful not to submit evidence they know to be false, however. A lawyer has discretion to refuse to offer testimony even if the “knowledge” standard can’t be met.

Guidance for Agency Lawyers

Agency lawyers also cannot submit false evidence. MR 1.13 applies a duty on government lawyers to submit accurate, truthful evidence because public business is involved. When the lawyer knows the caseworker is lying about or exaggerating her reunification efforts, the amended Model Rules now *permit* the lawyer to disclose this information even outside the context of trial testimony.⁴ (This applies to all lawyers for organizations, not just government lawyers). After the 2002 Model Rule Amendments, MR 1.13 was amended again to *permit* agency lawyers to disclose such information. Also, based on a recommendation from the ABA Task Force on Corporate Responsibility, MR 1.13 was amended to require lawyers for all organizations to report serious violations to higher officials within their organizations.⁵

Revealing Adverse Information

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

(1) Duty to disclose adverse legal authority

Lawyers cannot fail to reveal legal authority in the controlling jurisdiction that is directly adverse to the position of the client (and not disclosed by opposing counsel).⁶ This can come up in trial, or in arguing a case on

³ MR 3.3(a)(3).

⁴ MR 1.13; MR 1.6.

⁵ MR 1.13(b).

⁶ MR 3.3(a)(2).

appeal. For example, consider a case where the child’s lawyer is aware that a specific ruling was issued on the admissibility of a child’s hearsay statement where a hearsay statement is wrongly admitted at trial. On appeal, the parent’s lawyer fails to point this out, and the child’s lawyer is asked a direct question about the admissibility of the statement. The child’s lawyer must reveal the adverse opinion to the appellate court.

(2) *Ex parte* proceedings

In an *ex parte* proceeding, a lawyer must inform the court of all material facts, whether or not the facts are adverse.⁷ This is another exception to MR 1.2 prohibiting lawyers from disclosing information adverse to the client’s position. The theory is that since the other side is unrepresented in an *ex parte* proceeding, the court needs to be informed of all relevant facts before issuing a decision. For child welfare lawyers, this issue can come up for:

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

A Connecticut lawyer was reprimanded for providing false, misleading information to the court in an *ex parte* proceeding when the judge asked the lawyer his reasons for filing an emergency custody petition in Connecticut as opposed to New Jersey where there were pending custody proceedings. In finding that the lawyer violated Rule 3.3(a)(1) and 3.3(d) (regarding *ex parte* proceedings), the court found that in *ex parte* proceedings, lawyers not only have a duty to be truthful, but further have a duty to correct a misstatement *made by another attorney*.⁸ In an *ex parte* removal hearing, an agency lawyer must present all relevant evidence to the judge for review.

MR 4.1: Truthfulness in Statements to Others

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

MR 4.1 applies to out-of-court statements, statements to opposing counsel, parties, nonparties, and so forth. This rule prohibits lawyers from making a false statement of material fact to *anyone*. So the lawyer cannot say to opposing counsel, “You know my client is not using drugs.”⁹

However, in determining whether the lawyer has a duty to correct the *client’s* lie, MR 4.1(b) says that the lawyer must correct a criminal or fraudulent act by the client,

⁷ MR 3.3(d).

⁸ Daniels v. Alander, 844 A.2d 182 (Conn. 2004).

⁹ MR 4.1(a).

unless such disclosure is prohibited by the confidentiality rules. So while the lawyer cannot lie to opposing counsel about the faked drug evaluation, he also cannot disclose this to opposing counsel. In other words, while a lawyer's duty to be honest with the court is superior to the lawyer's duty to maintain confidentiality, in dealing with all others (but the judge), the *lawyer's duty of confidentiality to the client is superior to the duty to correct a lie*.

The lawyer must also consider MR 1.2(d) which prohibits a lawyer from counseling or helping a client engage in criminal or fraudulent conduct.¹⁰ The lawyer, however, should discuss the legal consequences of any proposed conduct with a client. In the Sands case, the lawyer should advise Ms. Sands of the consequences of her faking the drug screen, and advise her to correct the fraud. The lawyer cannot use the drug screen, but also may not reveal the confidence from Ms. Sands that she faked the screen.

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

OTHER LITIGATION ISSUES

Discovery

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

MR 3.1: Fairness to Opposing Party and Counsel

MR 3.1 states that in pretrial procedure, a lawyer cannot "...make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party."¹¹ In preparing for termination of parental rights, for example, parents' lawyers must answer interrogatories promptly, and agency lawyers must comply with document requests. MR 3.4 also states that a lawyer cannot "...request a person other than a client to refrain from giving information to another party unless: (1) the person is a relative or an employee or other agent of the client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."¹² This can be important for agency lawyers in advising caseworkers because if the caseworker is not considered the agency lawyer's client, the lawyer cannot advise.

¹⁰ MR 1.2.

¹¹ MR 3.4(d).

¹² MR 3.4(f).

MR 4.4: Respect for Rights of Third Persons

MR 4.4 prohibits a lawyer from using means that have no purpose other than to embarrass, delay, or burden a third person.¹³ For example, parties should not subpoena unnecessary witnesses only to have them wait around all day in court without testifying. Parties also should not seek to delay a case for no other reason than to disadvantage the other side. Not only are lawyers mandated under the Adoption and Safe Families Act (ASFA) to move cases along swiftly, but the Model Rules support this as well.

MR 4.4 requires a lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent to promptly notify the sender.¹⁴

This is an unusual circumstance, but lawyers often do not know what to do when they receive a document or an e-mail from the other side that was not meant for them. Lawyers have a duty in that circumstance to notify the sender.

MR 3.1: Meritorious Claims and Contentions

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

MR 3.7: Lawyer as Witness

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

¹³ MR 4.4(a).

¹⁴ MR 4.4(b).

MR 3.6: Trial Publicity

Sometimes high profile child abuse cases attract attention from the media. MR 3.6 prohibits lawyers involved in a case (or other lawyers in the same firm) from making an out-of-court statement that they know will be disseminated by the media and has a substantial likelihood of materially prejudicing the adjudicative proceeding. Agency lawyers may discuss information contained in a public record, including the charges, and may state that an investigation is in progress. A parent's lawyer is allowed to make statements to protect a client from the *substantial undue prejudicial effect of recent publicity not initiated by the lawyer* or the lawyer's client. Such statements are limited to information that is necessary to mitigate the recent adverse publicity. In addition to MR 3.6, children's lawyers should be sensitive to confidentiality concerns, and should consider keeping their clients' names and other identifying information out of the media where possible. Children's and other layers can also ask the judge to issue a gag order on all parties to refrain them from giving any statements to the media.

MR 3.5: Ex Parte Contact

MR 3.5 prohibits layers from communicating *ex parte* with judges, and the Canons of Judicial Ethics prohibit judges from receiving such communications. Generally, *ex parte* communication to handle administrative matters such as scheduling is permitted. Sometimes when a lawyer asks to withdraw from representing a party, a judge will conduct an *ex parte* voir dire as to the reasons, but this ca be a delicate matter because the *ex parte* rules are designed to prevent giving one side the advantage of having the judge hear information that is not subject to dispute, cross-examination, or rebuttal. So lawyers should refrain from discussing anything substantive, or any case-related details outside the presence of opposing counsel.

MR 8.3: Reporting Professional Misconduct

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

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

An example of behavior that may rise to the level of reportable misconduct for child welfare lawyers is when a child's lawyer consistently fails to visit clients, and states a position to the court without having any contact with the child. Usually the legal system relies on clients to report misconduct by their lawyers. Some children, however, are too young to understand their lawyer's duties, or are unaware of the lawyer's misconduct. Therefore, the system cannot rely on child-clients to report misconduct. Similarly, many parents in child welfare cases cannot read, or lack the resources to file a complaint. Because many lawyers in this field are overworked, and deal with high caseloads,

multiple parties, and difficult family issues, this form of misconduct is common and should be reported. Lawyers should take steps to prevent working conditions from reaching the level of misconduct. For example, a New York ethics opinion found that an agency lawyer must not accept more cases than he is competently able to handle, regardless of chronic conditions of high workloads, despite being directed by his supervisor to do so.¹⁵

Case Example: Obstructing Evidence/ Misleading the Court

The South Dakota Supreme Court upheld a disciplinary action against a lawyer who altered a drug report, then provided misleading responses to the judge about the report. The judge had ordered the father to be tested for methamphetamine (meth). *In re Wilka*, 638 N.W.2d 245 (S.D. 2001). When the father's lawyer went to the drug lab to pick up the report, he noticed that his client had tested negative for meth, but positive for marijuana, not a substance that the court had ordered testing on. When the lab technician refused to run the tests again, for a meth-only screen, or issue a new report, at the lawyer's direction, the technician cut off the bottom portion of the drug screen results, omitting the positive result for marijuana. The father's lawyer then introduced the partial report as evidence at trial that the father was not using meth.

This case raised two issues:

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

(2) MR 3.3 candor issues, regarding the lawyer's responses to the judge's questioning. After the lawyer asked that the partial report be admitted into evidence, the court asked "Is this cut off or is this the entire ...?" The lawyer interrupted and responded, "That's what I was provided by the hospital, Your Honor." Again, the court inquired "Is this the entire thing?" The lawyer replied, "That's what I have Judge. That's what I asked them to screen for." The South Dakota Supreme Court confirmed the disciplinary board's recommendation for public censure on the basis of a MR 3.3 violation. The court found that the requirement of candor towards the tribunal "goes beyond simply telling a portion of the truth. It requires every attorney to be fully honest and forthright." *In re Wilka*, 638.W. 2d. 245, at 249 (S.D. 2001). Acknowledging the attorney's desire to represent the client without betraying confidentiality, the court nevertheless found that the lawyer's response to the judge's questioning was deceitful, misleading, and intentional in nature, and "clearly crosses the line into improper and unprofessional conduct." Thus while the lawyer's response may have been technically true, it was so misleading as to be considered making a false statement to the court. *In re Wilka*, at 249.

¹⁵ New York Opinion 751 (2002).

CONCLUSION

Many ethical issues arise during litigation that requires child welfare lawyers to understand their state's ethics rules, particularly regarding false information. In addition to understanding what the rules require, it helps to discuss these delicate situations with colleagues because of the competing interests at stake. These include duties to protect and effectively represent clients, and duties as officers of the court to be truthful and honest with the court and other parties. Other issues come up less often, but are important to understand. Ethical practice during the litigation phase ensures clients are represented competently and fairly, while respecting the rights of other parties and nonparties. This contributes to a more honest, better functioning legal system.

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