
BOUNDS OF ADVOCACY GOALS FOR FAMILY LAWYERS

TO PROVIDE LEADERSHIP THAT PROMOTES THE
HIGHEST DEGREE OF PROFESSIONALISM
AND EXCELLENCE IN THE PRACTICE OF FAMILY LAW

**BOUNDS OF ADVOCACY
AMERICAN ACADEMY OF
MATRIMONIAL LAWYERS
GOALS FOR FAMILY
LAWYERS**

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PREFACE

The idea for the *Bounds of Advocacy* was conceived in November, 1987 by James T. Friedman of Chicago, Illinois, then President of the American Academy of Matrimonial Lawyers. The original *Bounds of Advocacy* was then drafted, discussed, debated and approved during the terms of former Presidents Friedman, Leonard L. Loeb of Wisconsin, Donn C. Fullenweider of Texas and Sanford S. Dranoff of New York.

After ten years, new ethical issues arose. With the idea of addressing those new concerns and updating the original report, Presidents George S. Stern of Georgia and Miriam E. Mason of Florida jointly appointed a Committee. The Committee received encouragement and support from those pioneers who drafted the original *Bounds of Advocacy* in the production of a revision. The majority of that Committee consisted of the same Fellows who wrote the original version and continued with the assistance of the same Reporter. That revision was offered to ensure that the aspirational goals of the AAML continue to respond to changes in society and the various court systems and approaches to family law matters. In calendar year 2000, the Committee gave special dedication to Steve Sessums because of his uncanny ability to help the disparate group find consensus. The group also gave special acknowledgment to Rob Aronson, who was a representative from academia.

Another ten years has passed. Linda Lea Viken, President of the Academy in 2011 and Kenneth Altshuler, President in 2012, appointed a Committee to review the revised draft of the *Bounds of Advocacy* in an effort to determine whether another update was necessary. The Committee unanimously concluded the *Bounds of Advocacy* as revised in 2000 required little updating and changing because of how well written it was. Minimal changes have been made to the second draft. A provision dealing with electronic

communications and evidence has been added and the citations have been updated to coincide with the newly revised Rules of Professional Responsibility and current case law.

Special thanks is given to Robert Blevins for his commitment to update the various changes in the Rules of Professional Responsibility since the *Bounds of Advocacy* was last reviewed and Elizabeth Lindsey and Joslin Davis for their work on electronic communications and to Virginia A. Albers for her timeless attention to detail and proofreading.

The Committee thanks Linda Lea Viken and Kenneth Altshuler for their foresight in having the Academy again review and ponder the problems associated with our clients and our profession. This review was challenging, enlightening, and humbling.

March, 2012

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PRELIMINARY STATEMENT

The primary purpose of the Bounds of Advocacy: Goals for Family Lawyers is to guide matrimonial lawyers confronting moral and ethical problems. Existing codes often do not provide adequate guidance to the matrimonial lawyer. The ABA's Model Rules of Professional Conduct ("RPC") are addressed to all lawyers, regardless of the nature of their practices. This generally means that, with rare exceptions, issues relevant only to a specific area of practice cannot be dealt with in detail or cannot be addressed at all. Many Fellows of the American Academy of Matrimonial Lawyers have encountered instances where the RPC provided insufficient, or even undesirable, guidance. Most attorneys—and presumably all Academy Fellows—are able to distinguish "black" (unethical or illegal conduct) from "white" (ethical and proper practice). These Goals are therefore directed primarily to the "gray" zone where even experienced, knowledgeable matrimonial lawyers might have concerns, and constitute an effort to provide clear, specific guidelines in areas most important to matrimonial lawyers.

Conduct permitted by the RPC cannot form the basis for state bar or court discipline. Hence, the Goals here established for matrimonial lawyers use the terms "should" and "should not," rather than "must," "shall," "must not" and "shall not." **Because the Bounds of Advocacy aspires to a level of practice above the minimum established in the RPC, it is inappropriate to use the Goals to define the level of conduct required of lawyers for purposes of malpractice liability or state bar discipline.**

Some Goals elaborate upon RPC rules or relate those Rules to issues confronting matrimonial lawyers. Each Goal is followed by a Comment. The Comments are intended to explain, provide examples of conduct addressed and, in some instances, suggest limitations of the application of the Goal.

Few human problems are as emotional, complicated or seem so important as those problems people bring to matrimonial lawyers. The break-up of a marriage will be felt not only by the couple but also

by other family members and often by friends and others with personal or business relationships with the parties. The problems and expense of the divorce system can be daunting.¹

Family law disputes occur in a volatile and emotional atmosphere. It is difficult for matrimonial lawyers to represent the interests of their clients without addressing the interests of other family members. Unlike most other concluded disputes in which the parties may harbor substantial animosity without practical effect, the parties in matrimonial disputes may interact for years to come. In addition, many matrimonial lawyers believe themselves obligated to consider the best interests of children, regardless of which family member they represent. A 1988 survey of Academy Fellows indicated that the harm done to children in an acrimonious family dispute was seen as the most significant problem for which there is insufficient guidance in existing ethical codes.

The matrimonial lawyer serves many functions. Often the appropriate role is to be a skilled litigator, the person who can help clients achieve their goals in court or in arbitration. The lawyer has always had additional roles as well. The matrimonial lawyer's job includes discussing with the client the available personal and financial choices that must be made. Many lawyers now serve as mediators or represent clients in mediation. Others represent clients in arbitration or serve as neutral arbitrators.

¹ CONCERN FOR THE PROBLEMS AND EXPENSE OF THE DIVORCE SYSTEM HAS CAUSED AN INCREASING NUMBER OF PARTIES TO ATTEMPT TO NAVIGATE THE PROCESS WITHOUT THE ASSISTANCE OF A LAWYER. SEE, JUDITH McMULLEN & DEBRA OSWALD, WHY DO WE NEED A LAWYER? AN EMPIRICAL STUDY OF DIVORCE CASES, 12 J.L. & FAM. STUD. 57 (2010) (STUDY EXAMINING A SAMPLE OF 567 DIVORCE CASES INITIATED IN 2005 FROM WAUKESHA COUNTY, WISCONSIN FOUND THAT 43.9% OF HUSBANDS AND 37.7% OF WIVES CHOSE TO REPRESENT THEMSELVES. FACTORS SUCH AS THE LENGTH OF THE MARRIAGE, INCOME OF THE HUSBAND, AGE OF THE PARTIES, AND PRESENCE OF MINOR CHILDREN IMPACTED THE DECISION TO PROCEED PRO SE. PROCEEDINGS WERE LONGER AND MAINTENANCE AWARDS WERE MORE LIKELY TO BE AWARDED IN CASES WHERE LAWYERS WERE INVOLVED); AND MADELYNN HERMAN, SELF-REPRESENTATION: PRO-SE STATISTICS MEMORANDUM, NATIONAL CENTER FOR STATE COURTS (LAST MODIFIED MAY 8, 2009), AVAILABLE AT [HTTP://WWW.NCSCONLINE.ORG/WC/PUBLICATIONS/MEMOS/PROSESTATSMEMO.HTM](http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm) (COMPILING REPORTS FROM STATES ON PRO SE CASES: IN 2004, CALIFORNIA REPORTED THAT IN FAMILY LAW CASES, 67% OF PETITIONERS WERE SELF-REPRESENTED AT FILING AND 80% WERE SELF-REPRESENTED BY THE TIME THE CASE CLOSED; UTAH REPORTED THAT IN 2006, 49% OF PETITIONERS AND 81% OF RESPONDENTS IN DIVORCE CASES WERE SELF-REPRESENTED; NEW HAMPSHIRE REPORTED THAT IN 2004, IN SUPERIOR COURT DOMESTIC RELATIONS CASES, ALMOST 70% OF CASES HAD ONE PRO SE PARTY).

Litigation demands some of the lawyer's very highest skills, those traditionally associated with effective courtroom advocacy. These Bounds of Advocacy reflect the availability of additional ways to resolve disputes. When litigation is employed, the matrimonial lawyer should conduct it constructively because the parties to a matrimonial case will often find it necessary to interact with each other for years after they leave the courtroom. Advocacy skills may also be used to the client's advantage in arbitration or mediation. An effective advocate's stock in trade is the power to persuade.

The traditional view of the matrimonial lawyer (a view still held by many practitioners) is of the "zealous advocate" whose only job is to win.² However, the emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Public opinion (both within and outside the AAML) has increasingly supported other models of lawyering and goals of conflict resolution in appropriate cases. A counseling, problem-solving approach for people in need of help in resolving difficult issues and conflicts within the family is one model; this is sometimes referred to as "constructive advocacy." Mediation and arbitration offer alternative models. Mediation is a method of resolving disputes in which a trusted neutral attempts to facilitate a compromise between the parties. Arbitration involves the hiring of a respected neutral to hear both sides, then make a decision that will resolve the controversy

Matrimonial lawyers should recognize the effect that their words and actions have on their clients' attitudes about the justice system, not just on the "legal outcome" of their cases. As a counselor, a problem-solving lawyer encourages issue resolution with the client. Effective advocacy for a client means considering with the client what

² UNDER ABA CODE OF PROFESSIONAL RESPONSIBILITY (CPR) DR 7-101 (ORIGINALLY ENACTED IN 1969), AN ATTORNEY WAS INSTRUCTED TO REPRESENT A CLIENT "ZEALOUSLY." ALTHOUGH CANON 7 OF THE CPR REQUIRED ZEALOUS REPRESENTATION TO BE "WITHIN THE BOUNDS OF THE LAW," COMMENTATORS, SUPPORTED BY DISCIPLINARY CASES, NOTED THAT SOME ATTORNEYS APPEARED TO EQUATE "ZEALOUSNESS" WITH "OVERZEALOUSNESS." ALSO NOTED WAS THE LACK OF FIT BETWEEN 'ZEALOUSNESS' AND THE PROPER QUALITY OF REPRESENTATION IN NON-ADVERSARIAL SITUATIONS, SUCH AS OFFICE COUNSELING. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 19-20 (2010). THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (RPC) (1983) ELIMINATED THE TERM "ZEALOUSLY," REFERRING INSTEAD TO "COMPETENCE" (RPC 1.1) AND "REASONABLE DILIGENCE AND PROMPTNESS" (RPC 1.3).

is in the client's best interests and determining the most effective means to achieve that result. The client's best interests include the well being of children, family peace, and economic stability. Clients look to attorneys' words and deeds for how they should behave while involved with the legal system. Even when involved in a highly contested matter, divorce attorneys should strive to promote civility and good behavior by the client towards the parties, other lawyers and the court.

In recent years, an increasing number of individual lawyers and associations have observed a widening gap between the minimum level of ethical conduct mandated by the RPC and the much greater level of professionalism to which all attorneys should aspire. Some attorneys have ignored the caveat that the Rules do not "exhaust the moral and ethical considerations" that characterize the practice of law at the highest level.³ Local and state bar associations, along with a number of state and federal courts, have adopted codes of professionalism attempting to raise the level of practice above the ethical minimum necessary to avoid discipline.

These Bounds reaffirm the attorney's obligation to competently represent individual clients. These Bounds also promote a problem-solving approach that considers the client's children and family as well. In addition, they encourage efforts to reduce the cost, delay and emotional trauma and urge interaction between parties and attorneys on a more reasoned, cooperative level.

In drafting these Bounds of Advocacy, the Committee observed a number of conventions:

- (1) Whenever the Goals or comments refer to "an attorney," "lawyer" or "matrimonial lawyer," the reference is to an attorney practicing family law, exclusively or in an individual case. This area of practice is described in many ways, including "divorce," "domestic relations" and "family law." In the absence of a universally accepted designation, the choice was the term used by the AAML — "matrimonial law."

³ RPC, PREAMBLE AND SCOPE ¶ 16.

(2) The conduct of attorneys, in general, is covered in the RPC or CPR. Therefore, an effort was made to avoid repetition of rules and principles already addressed in the CPR and RPC. For example, the basic conflicts of interest requirements are addressed in the CPR and RPC. These Bounds address only those conflicts where additional guidance was deemed desirable, or where the RPC and CPR do not adequately address the unique requirements of family law practice. For that reason these Bounds do not address the matrimonial lawyer's obligation of honesty and candor in dealing with the Court since that obligation is adequately covered by other bodies of law.

(3) Citation to legal authority has been kept to a minimum. However, to indicate the basis and provide some support for the Goals and Comments, some footnotes have been added to this version of the Bounds of Advocacy. Where it is appropriate to cite an official code, references are to the ABA Model Rules of Professional Conduct. It is recognized that some jurisdictions retained the Code of Professional Responsibility and others significantly amended the ABA Model RPC. Other states retained the CPR format with amendments to comport with the substance of the RPC. And the ABA may soon adopt amendments to the Model RPC. In all situations, attorneys should consult the applicable code in their jurisdictions, along with relevant statutory and case law.

(4) The fact that some clients, lawyers and judges are women and some are men is reflected in these Bounds. References to gender have been eliminated where possible. In those instances where elimination of gender-specific pronouns would be unduly awkward, sometimes the masculine and sometimes the feminine are used.

A person comes to a matrimonial lawyer with human problems that have legal aspects. Problems arising from the breakup of a family are particularly emotional and affect the family. The matrimonial lawyer's role spans a spectrum of services, from counseling to litigation. Choices include mediation, arbitration and other problem-solving methods. The matrimonial lawyer's approach to resolving problems is crucial to the future health of the family. The matrimonial lawyer has a critical, demanding counseling role in addressing these problems. Just as a physician diagnoses the causes of the patient's pain and counsels the patient about a variety of treatments before undertaking surgery, the matrimonial lawyer serves an analogous role.

These AAML Bounds of Advocacy reflect a shift toward the role of constructive advocacy, counseling, and a problem solving approach for a family member in need of assistance in resolving difficult issues and conflicts within the family.

1. Competence and Advice

1.1 An attorney is responsible for the competent handling of all aspects of a representation, no matter how complex.

Comment

Matrimonial matters almost always involve issues beyond questions of divorce, custody and support, such as property, tax, corporations, trusts and estates, bankruptcy, and pensions. All matrimonial lawyers should possess enough knowledge to recognize the existence of potential issues in the myriad legal areas relevant to the representation.⁴ That knowledge is not limited to legal information. For example, custody and visitation cases require knowledge of child development and, at times, understanding of mental and emotional disorders.

An attorney may properly undertake a matter for which he lacks the necessary experience or expertise...“where the requisite level of competence can be achieved by reasonable preparation.”⁵ Proper handling might include engaging (with the client’s consent) persons knowledgeable in other fields to assist in gathering the knowledge and information necessary to represent the client effectively.⁶ An attorney who cannot obtain competence through reasonable study and preparation should seek to withdraw or, with the client’s consent, associate with or recommend a more expert lawyer.⁷

1.2 An attorney should advise the client of the emotional and economic impact of divorce and explore the feasibility of reconciliation.

Comment

The divorce process can exact a heavy economic and emotional toll. The decision to divorce should never be made casually. An attorney should discuss reconciliation and whether the client has considered marriage counseling or therapy. If the client exhibits uncertainty or ambivalence, the lawyer should assist in obtaining help.

4 SEE, E.G., IN RE DISCIPLINARY PROCEEDINGS AGAINST GAMINO, 753 N.W.2D 521 (Wis. 2008) (FINDING ATTORNEY FAILED TO PROVIDE COMPETENT REPRESENTATION TO WIFE IN DIVORCE BECAUSE ATTORNEY DID NOT MAKE ADEQUATE INQUIRY INTO HUSBAND’S RETIREMENT ASSETS OR WIFE’S HEALTH CONDITION AND DISABILITY STATUS; THE FACT THAT WIFE RECEIVED SOCIAL SECURITY DISABILITY INCOME SHOULD HAVE ALERTED ATTORNEY TO MAKE FURTHER INQUIRY INTO WIFE’S MEDICAL WORK AND HISTORY).

5 RPC 1.1. SEE ALSO RPC 1.1 CMT. 4: “A LAWYER MAY ACCEPT REPRESENTATION WHERE THE REQUISITE LEVEL OF COMPETENCE MAY BE ACHIEVED BY REASONABLE PREPARATION.”

6 SEE, E.G., FIELDING V KUPFERMAN, 885 N.Y.S.2D 24 (N.Y. APP. DIV. 2009) (DETERMINING A CLIENT SUFFICIENTLY STATED A CAUSE OF ACTION FOR LEGAL MALPRACTICE AGAINST HIS ATTORNEY AND LAW FIRM ARISING FROM A DIVORCE ACTION BECAUSE THE ATTORNEY ADVISED THE CLIENT TO SIGN A STIPULATION OF SETTLEMENT WITHOUT PROPERLY ADVISING THE CLIENT OF THE TAX CONSEQUENCES OF WITHDRAWING MONEY FROM RETIREMENT ACCOUNTS AND DID NOT ADVISE HIM TO OBTAIN TAX ADVICE FROM ANOTHER SOURCE).

7 SEE GOALS 2.4 AND 4.6 AS TO THE ISSUE OF THE CLIENT’S REFUSAL TO GIVE CONSENT OR INABILITY TO PAY FOR COSTS. NOTHING IN THIS COMMENT SHOULD BE CONSTRUED TO REQUIRE THE ATTORNEY TO ADVANCE COSTS.

A lawyer's role in family matters is to act as a counselor and advisor as well as an advocate. The RPC specifically permit the lawyer to address moral, economic, social and political factors, which may be relevant to the client's situation.⁸ "Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."⁹ Although few attorneys are qualified to do psychological counseling, a discussion of the emotional and monetary repercussions of divorce is appropriate.

If the client wishes to reconcile, the matrimonial lawyer should attempt to mitigate litigation-related activities that might prejudice the effectiveness of counseling and marital harmony. It is important, however, for the attorney to be mindful that a "breathing spell" afforded by counseling could harm the client's interests. The other spouse may take advantage of the delay for financial or other advantage. The lawyer should warn the client of these risks and recommend precautions to protect the client in the interim.

1.3 An attorney should refuse to assist in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect.

Comment

Some clients expect and want the matrimonial lawyer to reflect the highly emotional, vengeful personal relationship between spouses. The attorney should counsel the client that discourteous and retaliatory conduct is inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise.

⁸ RPC 2.1.

⁹ RPC 2.1 CMT. 4.

Although the client has the right to determine the “objectives of representation,” after consulting with the client the attorney may limit the objectives and the means by which the objectives are to be pursued.¹⁰ The matrimonial lawyer should make every effort to lower the emotional level of the interaction among parties and counsel. Some dissension and bad feelings can be avoided by a frank discussion with the client at the outset of how the attorney handles cases, including what the attorney will and will not do regarding vindictive conduct or actions likely to adversely affect the children’s interests. If the client is unwilling to accept the attorney’s limitations on objectives or means, the attorney should decline the representation.

1.4 An attorney should be knowledgeable about different ways to resolve marital disputes, including negotiation, mediation, arbitration, and litigation.

Comment

Many clients favor a problem-solving model over litigation. It is essential that matrimonial lawyers have sufficient knowledge about alternative dispute resolution to understand the advantages and disadvantages for a particular client and to counsel the client appropriately concerning the particular dispute resolution mechanism selected.¹¹ For example, an attorney who represents a client in mediation should understand the differences between the traditional litigation role and the role of the consulting attorney in mediation.

¹⁰ RPC 1.16(B)(4). “A LAWYER MAY WITHDRAW IF: (4) THE CLIENT INSISTS UPON TAKING ACTION THE LAWYER CONSIDERS REPUGNANT OR WITH WHICH THE LAWYER HAS A FUNDAMENTAL DISAGREEMENT.”

Effective litigation skills are essential to the problem-solving process, regardless of whether a particular dispute is finally resolved through litigation, mediation, or arbitration.

1.5 An attorney should attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution.

Comment

The litigation process is expensive and emotionally draining. Settlement may not be appropriate or workable in some cases due to the nature of the dispute or the animosity of the parties. Litigation is the best course in those cases.

In matrimonial matters, a cooperative resolution of disputes is highly desirable. Matrimonial law is not a matter of winning or losing. At its best, matrimonial law should result in disputes being resolved fairly for all parties, including children. Major tasks of the matrimonial lawyer include helping the client develop realistic objectives and attempting to attain them with the least injury to the family. The vast majority of cases should be resolved by lawyers assisting their clients in reaching settlements.

Parties are more likely to abide by their own promises than by an outcome imposed on them by a court.¹² When resolution requires complex trade-offs, the parties may be better able than the court to forge a resolution that addresses their individual values and needs. An agreement that meets the reasonable objectives of the parties

¹¹ SEE RPC 2.1 CMT. 4: "MATTERS THAT GO BEYOND STRICTLY LEGAL QUESTIONS MAY ALSO BE IN THE DOMAIN OF ANOTHER PROFESSION. FAMILY MATTERS CAN INVOLVE PROBLEMS WITHIN THE PROFESSIONAL COMPETENCE OF PSYCHIATRY, CLINICAL PSYCHOLOGY OR SOCIAL WORK; . . . WHERE CONSULTATION WITH A PROFESSIONAL IN ANOTHER FIELD IS ITSELF SOMETHING A COMPETENT LAWYER WOULD RECOMMEND, THE LAWYER SHOULD MAKE SUCH A RECOMMENDATION." FOR EXAMPLE, IT MAY BE APPROPRIATE FOR A PROFESSIONAL WITH COUNSELING TRAINING TO DEAL WITH CUSTODY OR VISITATION ISSUES, WHEREAS A FINANCIAL EXPERT MIGHT BE NEEDED TO DEAL WITH DIVISION OF PROPERTY QUESTIONS.

maximizes their autonomy and their own priorities. A court-imposed resolution may, instead, maximize legal principles that may seem arbitrary or unfair within the context of the parties' family. An agreement may establish a positive tone for continuing post-divorce family relations by avoiding the animosity and pain of court battles.¹³ It may also be less costly financially than a litigated outcome. Parents who litigate their custody disputes are much more likely to believe that the process had a detrimental effect on relations with the divorcing spouse than parents whose custody or support disputes are settled.¹⁴ These issues should be discussed with the client.

A settlement may be achieved by negotiation between the lawyers (either with or without the parties being present), by mediation, or by the parties themselves with advice and information from their lawyers. The matrimonial lawyer's task includes informing the client about the availability and nature of alternatives to traditional negotiation or litigation.

12 SEE, ELIZABETH KRUSE, ADR, TECHNOLOGY, AND NEW COURT RULES—FAMILY LAW TRENDS FOR THE TWENTY-FIRST CENTURY, 21 J. AM. ACAD. MATRIMONIAL LAWYERS 207 (2008) (RECOGNIZING MEDIATION AGREEMENTS TEND TO BE MORE SATISFACTORY TO PARTICIPANTS THAN COURT-IMPOSED RESOLUTIONS BECAUSE THE PROCESS PRESERVES RELATIONSHIPS, AVOIDS WIN-LOSE SITUATIONS, AND HELPS PARTIES FOCUS ON THEIR MUTUAL INTERESTS WHILE LEARNING TOOLS FOR EFFECTIVE COMMUNICATION IN THE FUTURE); AND NANCY VER STEEGH, FAMILY COURT REFORM AND ADR: SHIFTING VALUES AND EXPECTATIONS TRANSFORM THE DIVORCE PROCESS, 42 FAM. L.Q. 659 (2008) (NOTING THAT A SIZEABLE NUMBER OF FAMILIES HAVE TURNED TO MODELS EMPHASIZING SELF-DETERMINATION AND PROBLEM SOLVING APPROACHES BECAUSE OF THE BELIEF THAT THE TRADITIONAL DIVORCE PROCESS IS TOO LENGTHY, COSTLY, AND INEFFICIENT).

13 THERE IS SUBSTANTIAL EVIDENCE OF THE DESTRUCTIVE EFFECT OF DIVORCE CONFLICT ON THE CHILDREN. SEE, E.G., JOAN B. KELLY & MARY KAY KISTHARDT, HELPING PARENTS TELL THEIR CHILDREN ABOUT SEPARATION AND DIVORCE: SOCIAL SCIENCE FRAMEWORKS AND THE LAWYER'S COUNSELING RESPONSIBILITY, 22 J. AM. ACAD. MATRIMONIAL LAWYERS 315 (2009) (NOTING THAT STRESS ON CHILDREN FROM PARENTAL SEPARATION TAKES A TOLL ON CHILDREN'S EMOTIONAL, SOCIAL, AND ACADEMIC FUNCTIONING); CASSANDRA BROWN, AMELIORATING THE EFFECTS OF DIVORCE ON CHILDREN, 22 J. AM. ACAD. MATRIMONIAL LAWYERS 461 (2009) (REMARKING THAT THE MOST DOMINANT FACTOR IN A CHILD'S PSYCHOLOGICAL AND SOCIAL ADJUSTMENT FOLLOWING DIVORCE IS THE LEVEL AND INTENSITY OF PARENTAL CONFLICT OCCURRING PRIOR TO, DURING, AND AFTER DIVORCE); AND LINDA D. ELROD, REFORMING THE SYSTEM TO PROTECT CHILDREN IN HIGH CONFLICT CUSTODY CASES, 28 WM. MITCHELL L. REV. 495 (2001) (EXPLAINING COMPREHENSIVE RESEARCH WHICH DEMONSTRATES THAT HIGHLY CONFLICTED CUSTODY CASES ARE DETRIMENTAL TO THE DEVELOPMENT OF CHILDREN, RESULTING IN PERPETUAL EMOTIONAL TURMOIL, DEPRESSION, LOWER LEVELS OF FINANCIAL SUPPORT, AND A HIGHER RISK OF MENTAL ILLNESS, SUBSTANCE ABUSE, EDUCATIONAL FAILURE, AND PARENTAL ALIENATION).

14 SEE, ROBIN H. BALLARD, ET AL., FACTORS AFFECTING THE OUTCOME OF DIVORCE AND PATERNITY MEDIATIONS, 49 FAM. CT. REV. 16 (2011) (REMARKING THAT INITIAL EVIDENCE INDICATES PARENTS PARTICIPATING IN DIVORCE MEDIATION, RELATIVE TO THOSE PARTICIPATING IN LITIGATION, ARE MORE SATISFIED, MORE FLEXIBLE IN ADAPTING TO THEIR CHILDREN'S CHANGING NEEDS, AND MAY CONTINUE TO BE MORE INVOLVED WITH THEIR CHILDREN FOLLOWING DIVORCE).

2. Communication and Decision Making Responsibility

In no area of law is the relationship of trust between attorney and client more important than in matrimonial law. Clients come to matrimonial lawyers when there is a significant problem in the family relationship. Emotions often render rational decision-making difficult. Clients seek the advice and judgment of their matrimonial attorneys even about non-legal matters. Therefore, issues of communication and decision-making in the attorney-client relationship arise frequently.

2.1 An attorney should accord clients respect.

Comment

One predicate to a successful attorney-client relationship is the attorney's treating the client with respect. This attitude should also be conveyed to the attorney's staff.

Courts sometimes seek meetings in chambers with counsel in the absence of the parties. If the proposed chambers conference relates to the substantive settlement of issues in the case, counsel should ask if the client may participate in the conference, but if the local rule, practice, custom or habit is to have such conferences without the client present, counsel may participate in such a conference and advocate the client's interests.

2.2 An attorney should provide sufficient information to permit the client to make informed decisions.

Comment

The client should have sufficient information to participate intelligently in deciding the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Clients vary in their ability and willingness

to participate in decision-making. Regardless of the extent of participation, they are entitled to be fully informed. Failure of the attorney to provide complete information may result in criticism, disciplinary action, or a lawsuit.¹⁵ Although relevant information should be conveyed promptly, in some circumstances, “a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.”¹⁶

A difficult question is whether the matrimonial lawyer should provide, either voluntarily or upon request, a negative opinion of opposing counsel, the judge, or the law. For example, should the client be told that a case is assigned to a judge who has demonstrated prejudice against men or women or who has difficulty with complex tax or financial issues, or that the other lawyer seems incapable of settlement and invariably ends up in difficult trials? Although lawyers must use their best judgment in individual cases, some general guidelines are: (1) do not lie or in any way tell the client less than the whole truth; (2) answer specific questions (“If we go to court, how is the judge likely to rule?” or “What are the risks?”) as diplomatically but as completely as possible; (3) do not criticize the court, opposing counsel, or the system unless necessary for the client to make informed decisions or to understand delays or the necessity of responding to conduct of the court or opposing counsel. Unnecessary criticism of the court, the legal system or opposing counsel undermines the effectiveness and enforceability of judgments and harms the reputation of all lawyers and judges.

15 SEE, E.G., *STEPHEN V. SALLAZ & GATEWOOD, CHTD.*, 248 P.3D 1256 (IDAHO 2011) (FINDING AN ATTORNEY VIOLATED HIS DUTY TO KEEP HIS CLIENT FULLY INFORMED BY FAILING TO TELL CLIENT THAT HER HUSBAND INITIALLY VALUED THE COUPLE’S REAL PROPERTY OVER ONE-HUNDRED-THOUSAND DOLLARS MORE THAN THE OLD APPRAISAL RELIED ON BY CLIENT).

16 RPC 1.4 CMT. 7.

Lawyers who are unwilling to give a client bad news or a realistic assessment of the case may create other problems. It is important to maintain a proper balance between accurately advising the client and avoiding unnecessary criticism of other participants in the process.

2.3 An attorney should keep the client informed of developments in the representation and promptly respond to communications from the client.

Comment

The duty of keeping the client reasonably informed and promptly complying with reasonable requests for information includes the attorney or a staff member promptly responding to telephone calls, normally by the end of the next business day.¹⁷ The attorney should routinely: send the client a copy of all pleadings and correspondence, except in unusual circumstances; provide notice before incurring any major costs; provide notice of any calendar changes, scheduled court appearances, and discovery proceedings; communicate all settlement offers, no matter how trivial or facetious; advise of major changes in the law affecting the proceedings; and provide reports of major changes in case strategy.

Frequent communication with the client on important matters (1) empowers the client, (2) satisfies the client's need for information about the progress of the case, (3) helps build a positive attorney-client relationship, and (4) helps the client understand the amount and nature of the work the attorney is performing, thereby reducing concern that nothing is happening and that the attorney's fees are not being earned. While the attorney should understand that a pending divorce is usually the most important matter in the life of the client, the client should understand that a successful lawyer has many clients, all of whom believe their case to be the most important.

¹⁷ RPC 1.4(A).

2.4 An attorney should share decision-making responsibility with the client, but should not abdicate responsibility for the propriety of the objectives sought or the means employed to achieve those objectives.

Comment

The conduct and resolution of a divorce case may require making many decisions, from the most mundane (which word to use in a letter) to the most significant (whether to litigate or accept a proposed settlement). During the course of the representation, decision-making authority may reside with the client, the attorney, or both.

It is appropriate as part of the lawyer's counseling function to assist the client in reframing the client's objectives when to do so would be in the client's best interests. A lawyer may counsel a client not only as to the law, but also as to "other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."¹⁸

Thus, although the lawyer is entitled to make "decisions not affecting the merits of the cause or substantially prejudicing the rights of a client,"¹⁹ the attorney and client should jointly make significant choices, such as whether to file a costly motion of uncertain success, or whether to retain certain experts. Even when the client has ultimate decision-making authority, the attorney should provide counsel and advice.

18 RPC 2.1. SEE ALSO LARRY O. NATT GANTT, II, MORE THAN LAWYERS: THE LEGAL AND ETHICAL IMPLICATIONS OF COUNSELING CLIENTS ON NONLEGAL CONSIDERATIONS, 18 GEO. J. LEG. ETHICS 365 (2005) (CONCLUDING THAT ATTORNEYS ENGAGING IN COUNSELING OF CONSIDERATIONS OTHER THAN LAW SHOULD BE ESPECIALLY MINDFUL OF SPECIFIC PROFESSIONAL STANDARDS TO ENSURE THEIR NONLEGAL COUNSELING DOES NOT CONFLICT WITH OTHER PROFESSIONAL DUTIES ATTORNEYS OWE TO CLIENTS).

19 CPR, EC 7-7.

The attorney must abide by the client's decisions as to the objectives of the representation, subject to the rules of ethics or other law.²⁰ Further, the lawyer should consult with the client as to the means by which those objectives are to be accomplished.²¹

Examples:

1. The client insists that the real problem in the marriage was his mother-in-law and asks the matrimonial lawyer to bring that to the court's attention during the trial. The lawyer knows that the facts, which seem so important to the client, are irrelevant under the rules of the forum and counter-productive at trial. The lawyer must rely on her judgment and explain to the client why this is not an appropriate, let alone persuasive, argument. The risk is that the client, unhappy with the ultimate result, may claim that if the lawyer used the argument the client wished, the case would have been won. That is a risk inherent in the practice of law.

2. In a jurisdiction where the wife has a claim for maintenance which the lawyer believes will succeed, the husband offers to pay a larger share of the assets if the wife will waive the right to maintenance, which, under local law, will terminate at the death of either party or at the wife's remarriage. If the client stays unmarried, she will benefit far more from maintenance than the additional assets. Which should she accept? The matrimonial lawyer's role is to educate the client and allow her to make the choice.

3. The guilt-ridden husband offers the wife virtually all of the assets and a support order that will leave him all but penniless. The wife tells her attorney to draft the appropriate documents to finalize his offer. The wife's attorney should fully inform her of the risks of

²⁰ RPC 1.2(A).

²¹ RPC 1.4(A)(2). "A LAWYER SHALL . . . REASONABLY CONSULT WITH THE CLIENT ABOUT THE MEANS BY WHICH THE CLIENT'S OBJECTIVES ARE TO BE ACCOMPLISHED."

such a one-sided settlement (continual post-judgment litigation, practical unenforceability). If the client insists on a settlement posture that the attorney believes clearly unrealistic, she should put her advice in writing and may, if she chooses, then carry out the client's instructions. The lawyer representing the husband should try to persuade his client to offer less. If the husband insists, the lawyer should consider: (1) putting in writing all of the reasons why the husband's offer is very detrimental to him and that the attorney strongly advises against it; (2) advising that the client obtain the advice of another lawyer, a counselor, or a responsible friend or family member; and (3) withdrawing.

2.5 When the client's decision-making ability appears to be impaired, the attorney should try to protect the client from the harmful effects of the impairment.

Comment

The economic and emotional turmoil caused by marital disputes often affects a client's ability to make rational decisions in his own best interest. The lawyer who reasonably believes the client to be incompetent should seek appointment of a guardian.²² A client who is not incompetent, but whose ability to make reasonable decisions is impaired, creates difficult problems for the lawyer.

22 SEE RPC 1.14 AND ABA COMMENTS. UNDER RPC 1.14(B), WHEN THE LAWYER REASONABLY BELIEVES THAT THE CLIENT HAS DIMINISHED CAPACITY, IS AT RISK OF SUBSTANTIAL PHYSICAL FINANCIAL OR OTHER HARM UNLESS ACTION IS TAKEN, THE LAWYER MAY TAKE REASONABLY NECESSARY PROTECTIVE ACTION, INCLUDING CONSULTATION WITH INDIVIDUALS OR ENTITIES THAT HAVE THE ABILITY TO TAKE ACTION TO PROTECT THE CLIENT AND, IN APPROPRIATE CASES, SEEKING THE APPOINTMENT OF A GUARDIAN AD LITEM, CONSERVATOR, OR GUARDIAN. BUT, CF. RPC 1.14(A) PROVIDING THAT "THE LAWYER SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT." SEE, ALSO RPC 1.14 CMT. 7: "IN MANY CIRCUMSTANCES HOWEVER, APPOINTMENT OF A LEGAL REPRESENTATIVE MAY BE MORE EXPENSIVE OR TRAUMATIC FOR THE CLIENT THAN CIRCUMSTANCES IN FACT REQUIRE. EVALUATION OF SUCH CIRCUMSTANCES IS A MATTER ENTRUSTED TO THE PROFESSIONAL JUDGMENT OF THE LAWYER." THE MATRIMONIAL LAWYER MUST ALSO BE CERTAIN THAT THE CLIENT'S BEST INTEREST, RATHER THAN THE LAWYER'S PERSONAL, MORAL OR RELIGIOUS VIEWS, MOTIVATE THE LAWYER'S CONDUCT.

A client may be impaired although not incompetent as a result of substance abuse or another physical or psychological condition. A lawyer with reasonable cause to believe that the client's impairment will interfere with the representation should send the client for evaluation to determine whether the client is legally competent. The attorney may withdraw from the representation of a client who will not undergo the evaluation.

The lawyer is not compelled to follow irrational or potentially harmful directives of a client, particularly one who is distraught or impaired, even if the client is legally competent. The lawyer should oppose any client's illegal or improper decision ("I don't care what the judge says, I won't pay her a cent"). The attorney should attempt to dissuade the client before accepting any clearly detrimental decision. The attorney should consider consulting others who might have a stabilizing influence on the client such as the client's therapist, doctor or clergy. It would normally be improper for the attorney to seek appointment of a guardian in such a situation because to do so may be expensive, traumatic and adversely affect the client's interest.²³

When rejection of the attorney's advice is likely to adversely affect the client's interests, the attorney should document both the advice and the client's refusal to follow it. Such documentation emphasizes the risk to the client and protects the attorney from subsequent allegations of complicity in the conduct or failure to properly advise the client of the risks involved. In appropriate cases, the attorney may withdraw from representation.

2.6 An attorney should not permit a client's relatives, friends, lovers, employers, or other third persons to interfere with the representation, affect the attorney's independent professional judgment, or, except with the client's express consent, make decisions affecting the representation.

²³ RPC 1.14 CMT. 7.

Comment

Third persons often try to play a part in matrimonial cases. Frequently, the client asks that one or more of these people be present at conferences and consulted about major decisions. The potential conflicts are exacerbated when the third person is paying expenses or the attorney's fee. Neither payment of litigation expenses nor sincere concern about the welfare of the client makes those third persons clients. To the extent specifically authorized by the client, the lawyer may discuss choices with third parties, provided all concerned are aware that such discussions may waive any attorney-client privilege.²⁴ While it is important for persons going through a divorce to receive advice and support from those they trust, the client, with the advice of the attorney, should make the decisions by which the client must ultimately live.

Both the client and the person paying for the representation must be informed at the outset that nothing related by the client in confidence will be disclosed without the client's consent. The duty to protect confidential information also requires that the attorney raise the issue of the effect on confidentiality of the parents, friends, lovers, children or employers' being present. Usually, the presence of a third person not necessary to the rendition of legal services waives the attorney-client privilege.²⁵ For this and other reasons, an

24 SEE, E.G., *LYNCH V. HAMRICK*, 968 So.2D 11 (ALA. 2007) (ATTORNEY-CLIENT PRIVILEGE DOES NOT EXIST WHEN CLIENT TO ATTORNEY COMMUNICATIONS ARE MADE IN THE PRESENCE OF A THIRD PARTY WHOSE PRESENCE IS NOT NECESSARY FOR SUCCESSFUL COMMUNICATION BETWEEN THE ATTORNEY AND THE CLIENT).

25 SEE, E.G., *IN RE TELEGLOBE COMMUNICATIONS CORP.*, 493 F.3D 345 (3D CIR. 2007) (ONLY COMMUNICATIONS MADE IN CONFIDENCE ARE PRIVILEGED, SO IF PERSONS OTHER THAN THE CLIENT, HIS ATTORNEY, OR THEIR AGENTS ARE PRESENT, THE COMMUNICATION IS NOT MADE IN CONFIDENCE AND THE PRIVILEGE DOES NOT ATTACH).

attorney should discourage family members and other third persons from participating in client conferences. In addition to the potential loss of confidentiality, a more accurate account of the client's desires and best interests can usually be obtained when no third persons are present.

Examples:

1. An attorney represents an elderly woman. The son of the client, who is paying the attorney's fee, instructs the attorney to establish a trust to manage the client's assets. The attorney must ignore the son's request and explain the attorney's obligation to act only as requested by the client. In addition to acting only after consultation with and consent by the client, the attorney may not accept payment from the son unless he can avoid interference with the client-lawyer relationship and preserve the confidentiality of communications with the client.²⁶ Even if the son's wishes are not necessarily adverse to the client's interests, the attorney must assure that he has independently determined the best course for the client. The client should be directed to make her own decisions regarding the representation whenever possible.

2. The minor daughter of an old friend asks the lawyer to find a jurisdiction that will allow her to marry without parental consent. The lawyer is personally convinced that the marriage will be disastrous for the daughter and feels strong obligations to her parents to prevent her from doing something foolish. Under current ethical rules, as well as under these Bounds, the lawyer may not inform the parents or act in any way contrary to the client's stated desires. However, it is appropriate for the lawyer to point out practical, moral, and other non-legal considerations and to attempt to convince the child that

²⁶ RPC 1.8(F). ACCORD, DR 5-107(A)(1).

the proposed course of action is not in her best interests.²⁷ It is also appropriate for the lawyer to decline to represent the child or provide the information.

2.7 An attorney should not allow personal, moral or religious beliefs to diminish loyalty to the client or usurp the client's right to make decisions concerning the objectives of representation.

Comment

Attorneys would not be human without personal beliefs about issues affecting family law practice. No lawyer should be expected to ignore strongly held beliefs. But the matrimonial lawyer must abide by a client's decisions concerning the objections of the representation.²⁸ The client even has the right to be consulted about the means by which the objectives are to be pursued, matters normally within the lawyer's discretion.²⁹ Therefore, the lawyer should withdraw from representation if personal, moral or religious beliefs are likely to cause the attorney to take actions that are not in the client's best interest. If

27 SEE RPC 2.1 AND COMMENTS. SEE ALSO ADITI D. KOTHEKAR, REFOCUSING THE LENS OF CHILD ADVOCACY REFORM ON THE CHILD, 86 WASH. U. L. REV. 481 (2008) (ADVOCATING AGAINST A LAWYER-CENTERED FRAMEWORK OF REPRESENTATION OF CHILDREN IN DEPENDENCY PROCEEDINGS, AND URGING REFORMS THAT ENCOURAGE CLIENT-DIRECTED ADVOCACY TO OPTIMIZE CHILDREN'S PARTICIPATION); ANNETTE R. APPELL, CHILDREN'S VOICE AND JUSTICE: LAWYERING FOR CHILDREN IN THE TWENTY-FIRST CENTURY, 6 NEV. L.J. 692 (2006) (STATING, "BECAUSE CHILDREN ARE NOT ABLE TO DIRECT THEIR LAWYERS AS FORCEFULLY OR COHERENTLY AS ADULTS, LAWYERS FOR CHILDREN SHOULD EXERCISE EXTRA CARE AND SPECIAL STRATEGIES TO ASCERTAIN CHILDREN'S NEEDS AND WISHES, SUCH AS VIEWING CHILDREN IN MULTIPLE LENSES (NOT JUST 'DEVELOPMENTAL' AND LEGAL) AND ENGAGING CHILDREN'S FAMILIES AND COMMUNITIES IN OUR WORK."); AND BARBARA ANN ATWOOD, REPRESENTING CHILDREN: THE ONGOING SEARCH FOR CLEAR AND WORKABLE STANDARDS, 19 J. AM. ACAD. MATRIMONIAL LAWYERS 183, 186 (2005) (DISCUSSING THE TENSION BETWEEN ADVOCATING THE CHILD'S EXPRESSED WISHES AND THE CHILD'S TRUE BEST INTERESTS).

28 RPC 1.2(A) CMT. 1: "PARAGRAPH (A) CONFERS UPON THE CLIENT THE ULTIMATE AUTHORITY TO DETERMINE THE PURPOSES TO BE SERVED BY THE LEGAL REPRESENTATION, WITHIN THE LIMITS IMPOSED BY LAW AND THE LAWYER'S PROFESSIONAL OBLIGATIONS. THE DECISION SPECIFIED IN PARAGRAPH (A), SUCH AS WHETHER TO SETTLE A CIVIL MATTER, MUST ALSO BE MADE BY THE CLIENT."

29 RPC 1.2(A). SEE CMT. 2: "CLIENTS NORMALLY DEFER TO THE SPECIAL KNOWLEDGE AND SKILL OF THEIR LAWYER WITH RESPECT TO THE MEANS TO BE USED TO ACCOMPLISH THEIR OBJECTIVES, PARTICULARLY WITH RESPECT TO TECHNICAL, LEGAL AND TACTICAL MATTERS. CONVERSELY, LAWYERS USUALLY DEFER TO THE CLIENT REGARDING SUCH QUESTIONS AS IS THE EXPENSE TO BE INCURRED AND CONCERN FOR THIRD PERSONS WHO MIGHT BE ADVERSELY AFFECTED."

there is any question as to the possible effect of those beliefs on the representation, the client should be consulted and consent obtained. See 2.4 & Comment.

2.8 An attorney should discourage the client from interfering in the client's spouse's effort to obtain effective representation.

Comment

Clients who file or anticipate the filing of a divorce proceeding occasionally telephone or interview numerous attorneys as a means of denying their spouse access to effective representation. The attorney should discourage such practices, and should not assist the client, for example, by responding to the client's request for a list of matrimonial lawyers, if improper motives are suspected. When the client has already contacted other lawyers for the purpose of disqualifying them, the client's attorney should attempt to persuade the client to waive any conflict so created.

2.9 An attorney should not communicate with the media about an active case under most circumstances.

Comment

An attorney should not communicate with the media about a case, a client or a former client without the client's prior knowledge and consent, except in exigent circumstances when client consent is not obtainable. An attorney should not communicate by electronic means, such as social networking mediums, about a case, a client or former client without the client's prior knowledge and consent. Statements to the media by an attorney representing a party in a family law matter may be inappropriate because family law matters tend to be private and intimate. They are not the business of anyone but the parties and their family. Public discussion of a case tends to obstruct settlement, cause embarrassment, diminish the opportunity for reconciliation and harm the family, especially

the children. Statements to the media by an attorney representing a party in a matrimonial matter are also potentially improper because they tend to prejudice an adjudicative proceeding.³⁰

An attorney's desire to obtain publicity conflicts with the duty to the client. If contacted by the media, the attorney should respond by saying: "I cannot give you information on that matter because it deals with the personal life of my client." The attorney, as an officer of the court, has duties to both the courts and the client. The parties, subject to order of the court, have a right to discuss their case if they so desire, despite the advice of their counsel. However, a lawyer's statements may have the effect of influencing an adjudicative body presently sitting or to be convened in the future. An attorney may withdraw if the client disobeys instructions not to speak publicly about the case.

It is no excuse that the opposing party, his counsel or agents, first discussed the matter with the media. However, if necessary to mitigate recent adverse publicity, the attorney may make a statement required to protect the client's legitimate interests. Any such statement should be limited to information essential to mitigate the recent adverse publicity.³¹

An attorney should never attempt to gain an advantage for the client by providing information to the media to embarrass or humiliate the opposing party or counsel.

³⁰ SEE RPC 3.6(A) AND COMMENTS.

³¹ RPC 3.6(C) PROVIDES THAT A LAWYER "MAY MAKE A STATEMENT A REASONABLE LAWYER WOULD BELIEVE IS REQUIRED TO PROTECT A CLIENT FROM THE SUBSTANTIAL UNDUE PREJUDICIAL EFFECT OF RECENT PUBLICITY NOT INITIATED BY THE LAWYER OR THE LAWYER'S CLIENT. A STATEMENT MADE PURSUANT TO THIS PARAGRAPH SHALL BE LIMITED TO SUCH INFORMATION AS IS NECESSARY TO MITIGATE THE RECENT ADVERSE PUBLICITY." SEE ALSO HARRIS V. KELLOGG, BROWN & ROOT SERVICES, INC., 2009 WL 700162 (W.D.PA. 2009) (FINDING THAT MEDIA REPORTS CLAIMING THE DEFENDANT'S CONTRACT WORK FOR THE ARMY WAS LINKED TO A NUMBER OF ELECTRO-CUTION DEATHS IN IRAQ MAY BE SUFFICIENT BASIS FOR DEFENSE COUNSEL TO MAKE EXTRAJUDICIAL STATEMENTS ABOUT THE REPORTS' FALSITY TO MITIGATE THE ADVERSE PUBLICITY AS SET FORTH UNDER RPC 3.6(C)).

3. *Conflict of Interest*

Conflict of interest dilutes a lawyer's loyalty to the client.³² A lawyer's loyalty may be diluted by personal interests (financial security, prestige, and self-esteem) and interests of third persons (family, friends, business associates, employer, legal profession, and society as a whole). A conflict exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.³³ The key to preventing unintentional violations of the conflict of interest rules lies in anticipating the possibility that a conflict situation will develop.

The influences that might dilute a matrimonial lawyer's loyalty to a client are unlimited.³⁴ The interests of children, relatives, friends, lovers, employers and the opposing party, along with a perceived obligation to the court and the interest of society, may be compelling in a given case. In family law matters, where "winning" and "losing" in the traditional sense often lose their meaning, determination of the appropriate ethical conduct can be extremely difficult.

3.1 An attorney should not represent both husband and wife even if they do not wish to obtain independent representation.

Comment

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney

32 SEE RPC 1.7(A) AND CMT. 1: "LOYALTY AND INDEPENDENT JUDGMENT ARE ESSENTIAL ELEMENTS IN THE LAWYER'S RELATIONSHIP TO A CLIENT."

33 RPC 1.7(A)(2).

34 SEE GENERALLY, BARBARA GLESNER FINES, *ETHICAL ISSUES IN FAMILY REPRESENTATION* (CAROLINA ACADEMIC PRESS 2010).

is the “family lawyer” and previously represented husband, wife, family corporations, and even the children.³⁵ Representing husband and wife as an intermediary is not totally prohibited by the RPC.³⁶ However, it is impossible for the attorney to provide impartial advice to both parties. Even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or custody. A matrimonial lawyer should not attempt to represent both husband and wife, even with the consent of both.³⁷

The attorney may be asked to represent family members in a non-litigation setting. If separation or divorce is foreseeable or if one of the parents desires defense to a charge of battery, the lawyer may see her role as counselor or negotiator for all concerned. This temptation should be resisted.³⁸

Representation of both spouses should be distinguished, however, from mediation of a dispute where the attorney represents neither of the spouses.³⁹ See 8.1–8.4. While 8.4 permits the attorney-mediator to give advice “that would enable the parties to make reasonably informed decisions,” the mediator must remain impartial, indicate that the participants are free to reject the advice, and advise the

35 RPC 1.9 CMT. 3. FOR EXAMPLE, AN ATTORNEY REPRESENTING A HUSBAND WITH RESPECT TO HIS CORPORATION WOULD BE PRECLUDED FROM REPRESENTING HIS WIFE AGAINST HIM IN AN UNRELATED DISSOLUTION OF MARRIAGE OR CUSTODY PROCEEDING.

36 RULE 1.7 CMT. 29 STATES:

IN CONSIDERING WHETHER TO ACT AS INTERMEDIARY BETWEEN CLIENTS, A LAWYER SHOULD BE MINDFUL THAT IF THE INTERMEDIATION FAILS THE RESULT CAN BE ADDITIONAL COST, EMBARRASSMENT AND RECRIMINATION. IN SOME SITUATIONS THE RISK OF FAILURE IS SO GREAT THAT INTERMEDIATION IS PLAINLY IMPOSSIBLE. FOR EXAMPLE, A LAWYER CANNOT UNDERTAKE COMMON REPRESENTATION OF CLIENTS BETWEEN WHOM CONTENTIOUS LITIGATION IS IMMINENT OR WHO CONTEMPLATE CONTENTIOUS NEGOTIATIONS. MORE GENERALLY, IF THE RELATIONSHIP BETWEEN THE PARTIES HAS ALREADY ASSUMED DEFINITE ANTAGONISM, THE POSSIBILITY THAT THE CLIENTS’ INTERESTS CAN BE ADJUSTED BY INTERMEDIATION ORDINARILY IS NOT VERY GOOD. RULE 1.7 DOES NOT APPLY TO A LAWYER ACTING AS ARBITRATOR OR MEDIATOR BETWEEN OR AMONG PARTIES WHO ARE NOT CLIENTS OF THE LAWYER, EVEN WHERE THE LAWYER HAS BEEN APPOINTED WITH THE CONCURRENCE OF BOTH PARTIES. SEE RPC 2.4(A).

37 SEE, E.G., *WARE V. WARE*, 687 S.E.2D 382 (W. VA. 2009) (AFFIRMING THAT IT IS IMPROPER FOR A LAWYER TO REPRESENT BOTH THE HUSBAND AND THE WIFE AT ANY STAGE OF THE SEPARATION AND DIVORCE PROCEEDING, EVEN WITH FULL DISCLOSURE).

38 THIS GOAL DOES NOT APPLY IN ADOPTION PROCEEDINGS OR OTHER MATTERS WHERE THE SPOUSES’ POSITIONS ARE NOT ADVERSE.

39 SEE RPC 2.4(A).

participants that the mediator represents neither of them, so they should seek independent legal advice.

Because the attorney-mediator represents neither party, the attorney-mediator may not appear in court on behalf of either. It is the consensus of Academy members, however, that an attorney-mediator who has assisted the participants in reaching a mutually determined agreement, may appear in court “on behalf of the agreement,” solely for the purpose of filing it. Any of the parties may be represented by counsel of their choice at such a proceeding.

3.2 An attorney should not advise an unrepresented party.

Comment

Once it becomes apparent that another party intends to proceed without a lawyer, the attorney should, at the earliest opportunity, inform the other party in writing as follows:⁴⁰

1. I am your spouse’s lawyer.
2. I do not and will not represent you.
3. I will at all times look out for your spouse’s interests, not yours.
4. Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of your spouse and not as advice to you as to your best interest.
5. I urge you to obtain your own lawyer.⁴¹

3.3 An attorney should not simultaneously represent both a client and a person with whom the client is sexually involved.

Comment

A matrimonial lawyer is often asked to represent a client and the client’s lover. Joint representation may make it difficult to advise the client of the need to recover from the emotional trauma of divorce,

⁴⁰ SEE *FERNANDEZ V. FERNANDEZ*, 624 S.E.2D 777 (W.Va. 2005) (REAFFIRMING THAT “A PLAINTIFF’S LAWYER SHOULD NOT PREPARE AN ANSWER FOR THE DEFENDANT IN ANY DIVORCE, REGARDLESS OF WHETHER THE DIVORCE IS UNCONTESTED AND SIMPLE.”). SEE RPC 4.3.

⁴¹ SEE RPC 4.3 (“THE LAWYER SHALL NOT GIVE ADVICE TO AN UNREPRESENTED PERSON, OTHER THAN THE ADVICE TO SECURE COUNSEL.”). ACCORD, DR 7-104(A)(2).

the desirability of a prenuptial agreement, or the dangers of early remarriage. The testimony of either might be adverse to the other at deposition or trial. In addition, the client may desire to waive support payments because she believes she is going to marry her lover. The inherent conflicts in attempting to represent both the client and her lover render such representation improper. Even when the client's new partner is not represented by the attorney, but wishes to participate in consultations and other aspects of the representation, the attorney must be alert to the danger of the client's undermining her own best interests in an effort to accommodate her new partner.

3.4 An attorney should not have a sexual relationship with a client, opposing counsel, or a judicial officer in the case during the time of the representation.

Comment

Persons in need of a matrimonial lawyer are often in a highly vulnerable emotional state. Some degree of social contact (particularly if a social relationship existed prior to the events that occasioned the present representation) may be desirable, but a more intimate relationship may endanger both the client's welfare and the lawyer's objectivity.⁴²

Attorneys are expected to maintain personal relationships with other attorneys, but must be sensitive to the threat to independent judgment and the appearance of impropriety when an intimate relationship exists with opposing counsel or other persons involved in the proceedings.

42 See RPC 1.8(j). As of late 2006, according to reports obtained by the ABA from state committees, twenty-seven states had proposed or adopted an ethical rule identical to or more prohibitive than the ABA Model Rule's ban on attorney-client sexual relationships. Fourteen states still had no specific rule or other prohibition, including California, Florida, Louisiana, Maine, Maryland, Michigan, Mississippi, New Jersey, New York, Rhode Island, South Carolina, and Virginia. Many states had rules only partially banning or warning of attorney-client sexual relationships. See generally, Craig D. Feiser, *Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations*, 33 J. LEGAL PROF. 56 (2008) (discussing the debate over how strict prohibitions of attorney-client sexual relationships should be, and proposing more self-reporting by attorneys and education of consumers by state bar associations).

3.5 Limited Scope of Representation.

Comment

Instead of engaging in a traditional attorney/client relationship, an attorney may elect to enter into an agreement limiting the scope of the legal representation to certain specific acts or tasks. If a attorney enters into an agreement for limited scope of representation, the attorney must be cognizant of and comply with the individual State Bar Rules, Regulations and Ethics Opinions.

4. Fees

Many divorce clients have never before hired an attorney and are vulnerable because of fear and insecurity. Matrimonial lawyers and their clients may not have the long-standing relationship out of which business lawyers and their clients often evolve an understanding about fees.

It is not unusual for a party to a divorce to lack sufficient funds to pay an attorney. This lack of resources, various strictures against contingent fee contracts, the unwillingness of some courts to redress the economic imbalance between the parties with fee awards, and the tendency of overwrought clients to misunderstand the fee agreement or to blame their attorneys for undesirable results, can make payment extremely difficult.

These factors help to explain why the records of fee dispute committees indicate that the number of disputes arising from family law cases is several times greater than those from any other category. Thus, financial arrangements with clients should be clearly explained, agreed upon and documented.

4.1 Fee agreements should be in writing.⁴³

Comment

At the outset the matrimonial lawyer should tell the client the basis on which fees will be charged⁴⁴ and when and how the attorney expects to be paid.⁴⁵ In some jurisdictions, fee agreements must be in writing.⁴⁶ Written fee agreements should delineate the obligations of the attorney and the client. Agreements should specify the scope of the representation. Fee agreements should be presented in a manner that allows the client an opportunity to consider the terms, consult another attorney before signing and obtain answers to any questions to fully understand the agreement before entering into it. The written fee agreement should be entered into when the representation is initiated or as soon as possible thereafter.

Example of Limited Scope Provisions

1. Our representation will include advising, counseling, drafting, negotiating, investigating, analyzing and handling this family law

43 MATRIMONIAL LAWYERS AND CLIENTS WOULD NORMALLY ENTER INTO A MUTUALLY EXECUTED FEE AGREEMENT. HOWEVER, SOME ATTORNEY-CLIENT RELATIONSHIPS WOULD JUSTIFY THE ATTORNEY'S DRAFTING A LETTER CONFIRMING AN ORAL AGREEMENT. SUCH A CONFIRMING LETTER WOULD BE PERMISSIBLE UNDER THIS GOAL, PROVIDED THAT THE CLIENT INDICATES APPROVAL IN WRITING.

44 WHEN APPROPRIATE, THIS INFORMATION MIGHT INCLUDE THE FACT THAT TOTAL FEES AND COSTS CANNOT BE PREDICTED. RPC 1.5(A) PROVIDES THAT THE FACTORS IN DETERMINING A REASONABLE FEE INCLUDE:

- (1) THE TIME AND LABOR REQUIRED, THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED, AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY;
- (2) THE LIKELIHOOD, IF APPARENT TO THE CLIENT, THAT THE ACCEPTANCE OF THE PARTICULAR EMPLOYMENT WILL PRECLUDE OTHER EMPLOYMENT BY THE LAWYER;
- (3) THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR LEGAL SERVICES;
- (4) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED;
- (5) THE TIME LIMITATIONS IMPOSED BY THE CLIENT OR BY THE CIRCUMSTANCES;
- (6) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT;
- (7) THE EXPERIENCE, REPUTATION, AND ABILITY OF THE LAWYER OR LAWYERS PERFORMING THE SERVICES; AND
- (8) WHETHER THE FEE IS FIXED OR CONTINGENT.

45 SEE RPC 1.5(B). ACCORDING TO THE COMMENTS TO RPC 1.5: IT IS NOT NECESSARY TO RECITE ALL THE FACTORS THAT UNDERLIE THE BASIS OF THE FEE, BUT ONLY THOSE THAT ARE DIRECTLY INVOLVED IN ITS COMPUTATION. IT IS SUFFICIENT, FOR EXAMPLE, TO STATE THAT THE BASIC RATE IS AN HOURLY CHARGE OR A FIXED AMOUNT OR AN ESTIMATED AMOUNT, OR TO IDENTIFY THE FACTORS THAT MAY BE TAKEN INTO ACCOUNT IN FINALLY FIXING THE FEE. WHEN DEVELOPMENTS OCCUR DURING THE REPRESENTATION THAT RENDERS AN EARLIER ESTIMATE SUBSTANTIALLY INACCURATE, A REVISED ESTIMATE SHOULD BE PROVIDED TO THE CLIENT. A WRITTEN STATEMENT CONCERNING THE FEE REDUCES THE POSSIBILITY OF MISUNDERSTANDING.

46 SEE, E.G., PENN. R. OF PROF. CONDUCT 1.5 (2011) (WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT, THE BASIS OR RATE OF THE FEE SHALL BE COMMUNICATED TO THE CLIENT, IN WRITING, BEFORE OR WITHIN A REASONABLE TIME AFTER COMMENCING THE REPRESENTATION); AND WIS. R. OF PROF. CONDUCT, S.C.R. 20:1.5 (2011) (THE SCOPE OF THE

matter to a final resolution, whether by negotiated settlement or, if necessary, by trial and adjudication by a court. Depending on the specifics of your case, its resolution may include: custody, visitation, and support of your children; classification of assets as “marital” or “non-marital;” the valuation and division of marital property; the determination of maintenance for you or for your spouse; and determining whether the attorney’s fees and costs incurred may be shifted from you to your spouse, or vice versa.

2. Our representation will be limited to settlement or trial of the issue of _____. “NOTE: insert specific limited provision of representation.” We have not agreed to undertake any appeal of any order entered.

3. Our representation will be limited to assisting in settlement through negotiation and mediation. If attempts at settlement are unsuccessful and litigation is instituted, our representation will cease. You agree to then retain trial counsel to represent you thereafter.

4.2 An attorney should provide periodic statements of fees and costs.

Comment

When the fee arrangement is based on an hourly rate or similar arrangement, this information can be part of the necessary communications concerning the case addressed in 2.3 and Comment. The statement should be sufficiently detailed to apprise the client of the time and charges incurred.⁴⁷ In addition, the matrimonial lawyer should comply with fee regulations in the lawyer’s jurisdiction that may be more detailed or restrictive in requiring information about fees and costs.

⁴⁷ SEE, E.G., CUYAHOGA CTY. BAR ASSN. V. JACKSON, 897 N.E.2D 151 (OHIO 2008) (DISCIPLINING AN ATTORNEY WHO WAS UNABLE TO PRODUCE CONTEMPORANEOUS RECORDS ACCOUNTING OF HIS FEES CHARGED DURING TEN MONTHS OF REPRESENTATION OF A CLIENT DURING A DIVORCE).

4.3 All transactions in which an attorney obtains security for fees should be properly documented.⁴⁸

Comment

All security agreements should be arms-length transactions. When taking mortgages on real property from a client, the client should be independently represented. If an attorney takes personal property as security, it must be appraised, photographed and identified by a qualified appraiser to establish concretely its precise identity and value. The attorney should then secure it in a safe place (usually a safe deposit box) where there is no danger that it can be removed, substituted or lost.⁴⁹

4.4 An attorney's fee should be reasonable, based on appropriate factors, including those listed in RPC 1.5(a).

Comment

Lawyers should charge reasonable fees for services performed pursuant to a valid fee agreement. Although the starting point in determining a reasonable fee is often the lawyer's hourly rate multiplied by the hours spent on the case, a number of other factors may be relevant in determining an appropriate fee in a particular representation. RPC 1.5(a) lists many of those factors.

48 AS STATED IN RPC 1.5 CMT 4: "A LAWYER MAY ACCEPT PROPERTY IN PAYMENT FOR SERVICES, SUCH AS AN OWNERSHIP INTEREST IN AN ENTERPRISE, PROVIDING THIS DOES NOT INVOLVE ACQUISITION OF A PROPRIETARY INTEREST IN THE CAUSE OF ACTION OR SUBJECT MATTER OF THE LITIGATION CONTRARY TO RULE 1.8(i). HOWEVER, A FEE PAID IN PROPERTY INSTEAD OF MONEY MAY BE SUBJECT TO THE REQUIREMENTS OF RULE 1.8(A) BECAUSE SUCH FEES OFTEN HAVE THE ESSENTIAL QUALITIES OF A BUSINESS TRANSACTION WITH THE CLIENT." SOME JURISDICTIONS DO NOT PERMIT AN ATTORNEY TO TAKE A SECURITY INTEREST IN A CLIENT'S PROPERTY. IN THOSE JURISDICTIONS THAT DO PERMIT SUCH A SECURITY INTEREST, THE ATTORNEY SHOULD BE SENSITIVE TO THE NEED OF THE CLIENT FOR USE OF THE PROPERTY INVOLVED. IN MATRIMONIAL LAW MATTERS WHERE MARITAL PROPERTY IS THE SUBJECT OF LITIGATION, THE POTENTIAL FOR CONFLICT IS INCREASED.

49 SEE RPC 1.15.

Clients, as consumers, should be able to negotiate fee agreements that best suit their needs and circumstances. In addition to fees based solely on hourly rate, a fee agreement may provide for a contingent fee, or one based on “value,” a specified result, or some combination of factors. No single factor is appropriate in all family law cases since both clients and the nature of the representations vary greatly. Therefore, it is important at the outset for the attorney to explain the factors to be used in determining the fee, provide the fee agreement in writing (see 4.1), and, particularly when factors in addition to the attorney’s hourly rate will be considered, to afford the client an opportunity to obtain independent advice about the proposed fee arrangement.

Some jurisdictions have prohibited fees in domestic relations cases that were in any way based on the results obtained in the case, holding that such fees constituted contingent fees. Courts in other jurisdictions have held that the fact that an hourly fee is enhanced on the basis of results obtained does not necessarily make it a contingent fee.⁵⁰ This Goal would permit “results” fees. Under RPC 1.5(a), the factors to be considered in determining the reasonableness of a fee include “the amount involved and the results obtained.” A fee that is based on an hourly rate, but may be enhanced by a specified result is not the same as a traditional contingent fee, which provides that the attorney will receive a specified percentage of any recovery. If the client loses, the attorney receives no fee at all.

A fee based on the attorney’s usual hourly rate, but enhanced by achieving a specified result, may be justified in a given case by any combination of the following circumstances: the complexity of

50 SEE, E.G., CHIEF DISCIPLINARY COUNSEL V. COHEN, 2010 WL 5158379 (CONN. SUPER. CT. DEC. 2, 2010) (FINDING AN ATTORNEY’S RETAINER AGREEMENTS BONUS CLAUSE WAS NOT A CONTINGENT FEE IN A DOMESTIC RELATIONS MATTER BECAUSE THE AGREEMENTS DID NOT MENTION RULE 1.5(D)(1)’S CONTINGENCIES AND INSTEAD REFERRED TO FACTORS DETERMINING A FEE’S REASONABLENESS). SEE GENERALLY, DENISE FIELDS, RISKY BUSINESS OR CLEVER THINKING? AN EXAMINATION OF ETHICAL CONSIDERATIONS OF DISGUISED CONTINGENT FEE ARRANGEMENTS IN DOMESTIC RELATIONS MATTERS, 75 UMKC L. REV. 1065 (2007) (DISCUSSING CASES IN WHICH COURTS PERMITTED FEES BASED ON RESULTS OBTAINED IN DOMESTIC RELATIONS CASES).

the case; the shortness of the time between the attorney's retention and impending proceedings; the difficult, aggressive nature of the opposing party and counsel; a particular attorney's unique ability to settle a case quickly and avoid lengthy and acrimonious trial proceedings; and a substantial risk that the representation will be unsuccessful due to unfavorable factual or legal context. A fee based in part on results obtained is permissible under this Goal so long as the specified "result" does not include obtaining a divorce, custody or visitation provisions, or the amount of alimony or child support awarded (see 4.5), and if the fee is: (1) reasonable under the circumstances; (2) in addition to the attorney's usual hourly rate; (3) based on factors clearly stated in writing and provided to the client at the outset of the agreement; and (4) agreed to in writing by the client at the outset of the representation after full consultation and an opportunity to seek independent legal advice.

4.5 An attorney should not charge a fee the payment or amount of which is contingent upon: (i) obtaining a divorce; (ii) custody or visitation provisions; or (iii) the amount of alimony or child support awarded.

Comment

An attorney may charge a contingent fee for all other matters, provided that:

- (a) the client is informed of the right to have the fee based on an hourly rate; and
- (b) the client is afforded an opportunity to seek independent legal advice concerning the desirability of the contingent fee arrangement.

This Goal continues the absolute prohibition of fees contingent upon securing a divorce or a specified amount of alimony or child

support, and makes clear that the prohibition includes custody or visitation proceedings. In other matters relating to a divorce, however, the policy bases for the prohibition do not apply. Therefore, this Goal provides that an attorney should be able to enter into a contingent fee agreement with an informed client who reasonably believes such an arrangement is in the client's best interests.

Although attorneys and informed clients are generally able to determine that a contingent fee arrangement is more beneficial to the client than one based, for example, on an hourly rate, there has long been a total ban on contingent fees in domestic relations cases. The primary basis for the prohibition in divorce cases is that the arrangement would “put strong economic pressure on the lawyer to assure that reconciliation did not occur.”⁵¹ In addition, the rationale that contingent fee arrangements are necessary in other civil cases to enable indigent litigants to obtain counsel is believed not to be applicable in divorce cases.⁵² The spouse in possession of marital assets will usually have little difficulty in obtaining representation, while the other spouse is assumed to be protected by the court's authority to compel the spouse with the greater assets to pay attorney's fees.⁵³

51 ALEX B. WONG, ATTORNEY-CLIENT FEE AGREEMENTS THAT OFFEND PUBLIC POLICY, 61 S. C. L. REV. 287, 306 (2009); SEE ALSO ADAM SHAJNFELD, A CRITICAL SURVEY OF THE LAW, ETHICS, AND ECONOMICS OF ATTORNEY CONTINGENT FEE ARRANGEMENTS, 54 N.Y.L. SCH. L. REV. 773, 783 (2010).

52 CHARLES WOLFRAM, MODERN LEGAL ETHICS 540-41 (WEST 1986) .

53 SEE, E.G., CONLAN V. CONLAN, 43 So. 3D 931 (FLA. 4TH DIST. APP. 2010) (FINDING TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED WIFE'S REQUEST FOR ATTORNEY'S FEES BECAUSE THERE WAS A LARGE DISPARITY BETWEEN HUSBAND AND WIFE'S INCOMES, HUSBAND HAD THE ABILITY TO PAY, AND WIFE COULD NOT PAY HER FEES AND COSTS WITHOUT SUBSTANTIALLY DEPLETING HER OVERALL EQUITABLE DISTRIBUTION); COHEN V. COHEN, 178 S.W.3D 656 (MO. APP. W. DIST. 2005) (AFFIRMING AWARD OF ATTORNEY'S FEES TO WIFE BECAUSE HUSBAND HAD SUBSTANTIALLY GREATER INCOME THAN WIFE, NOTWITHSTANDING THE EQUAL DIVISION OF THE MARITAL ESTATE BECAUSE “THE FACT THAT A SPOUSE HAS THE MEANS TO PAY HIS OR HER ATTORNEY'S FEES DOES NOT PRECLUDE AN AWARD FOR PAYMENT OF THE SAME”); BLAINE V. BLAINE, 869 So.2D 716, 718 (FLA. 4TH DIST. APP. 2004) (“... IN SOME CASES WHERE THERE HAS BEEN A SUBSTANTIAL DISPARITY IN THE INCOME AND EARNING CAPACITY OF THE PARTIES, AND ONE SPOUSE WOULD HAVE TO INVADE MODEST CAPITAL ASSETS OR USE INVESTMENT INCOME IN ORDER TO PAY ATTORNEY'S FEES, COURTS HAVE HELD THAT IT IS AN ABUSE OF DISCRETION NOT TO REQUIRE THE SPOUSE WITH THE LARGER EARNING CAPACITY TO PAY ATTORNEY'S FEES.”).

A third basis for the ban on contingent fees is that it may “disrupt the pattern of wealth distribution that the court intended in making the award,” unless the existence of the contingent fee is made known to the court in advance.⁵⁴ And, to the extent that the contingent fee applies to the amount of a property settlement and not to support or alimony, the attorney may be tempted to advocate more for the former, even if not in the best interests of the client and any children.⁵⁵

At the same time, however, the complete ban on contingent fees at all stages of domestic relations cases,⁵⁶ particularly when interpreted strictly,⁵⁷ and coupled with decisions holding that fees based in any way on the results obtained in the case are prohibited contingent fees,⁵⁸ is unsupported by the above policies. Such a ban also undermines the freedom of attorneys and informed clients to enter into fee arrangements that best suit the nature of particular cases and the interests of both.

A contingent fee arrangement might be preferable to an hourly rate for some divorce clients. For example, although courts may have the power to compel the spouse with the greatest assets to pay attorney’s fees, they often do not do so. Therefore, if the client is unlikely to pay the attorney’s fee unless the client receives a substantial

54 WOLFRAM, SUPRA NOTE 54, AT 540.

55 ID

56 SEE RPC 1.5(D)(1).

57 SEE, E.G., MARQUIS & AURBACH V. EIGHTH JUD. DIST. CT., 146 P.3D 1130 (NEV. 2006) (ACTION BROUGHT BY CLIENT’S FORMER SPOUSE SEEKING TO VOID AGREEMENT ENTERED IN DIVORCE ACTION SETTLING COMMUNITY PROPERTY AND ALIMONY ISSUES WAS A “DOMESTIC RELATIONS MATTER” FOR WHICH A CONTINGENT FEE AGREEMENT WAS NOT APPROPRIATE); ROSS V. DeLORENZO, 813 N.Y.S.2D 756 (N.Y. APP. DIV. 2D DEPT. 2006) (ATTORNEY MAY NOT ENTER INTO A CONTINGENCY FEE AGREEMENT IN THE CONTEXT OF A SUIT WHICH INCLUDES BOTH MATRIMONIAL AND NONMATRIMONIAL CAUSES OF ACTION).

58 SEE, E.G., LAW OFFICE OF HOWARD M. FILE, ESQ., P.C. V. OSTASHKO, 875 N.Y.S.2D 502 (N.Y. APP. DIV. 2D DEPT. 2009) (RETAINER AGREEMENT WAS UNENFORCEABLE AS VIOLATIVE OF PUBLIC POLICY BECAUSE IT CONSTITUTED AN ARRANGEMENT FOR A FEE IN A DOMESTIC RELATIONS MATTER, THE PAYMENT OR AMOUNT OF WHICH WAS CONTINGENT UPON SECURING A DIVORCE OR DETERMINED BY REFERENCE TO AMOUNT OF MAINTENANCE, SUPPORT, EQUITABLE DISTRIBUTION OR PROPERTY SETTLEMENT).

award, the client's ability to obtain quality legal representation may be dependent upon the availability of a contingent fee agreement.

In addition, the amount of effort involved in a difficult case might result in an hourly fee that the client could only afford if he or she won. And yet, it is in just such a case that the client would need an experienced attorney, who would be unlikely to undertake a risky case, solely on the basis of the attorney's hourly rate. At the same time, the client might be reluctant to commit to the attorney's hourly rate in a complex and costly case, without a way of assuring there will be adequate funds from which to pay the fee.

Due to the prohibition on contingent fees (and cases holding a "results" fee to constitute a contingent fee), a lawyer may feel compelled to enter into an hourly fee arrangement with a client who subsequently loses the case after a substantial effort. The result in the case and the client's inability to pay may cause the lawyer to feel compelled ethically to reduce the fee. Such a result would seem to be both ethical and desirable. It would also be indistinguishable as a matter of policy from a contingent fee agreed to at the outset of the attorney-client relationship.

For these reasons, this Goal limits the prohibition of contingent fees to those aspects of divorce cases supported by the historic policy bases. In other matters, informed clients should have the same ability to choose a contingent fee arrangement as clients in other civil matters. Jurisdictions that completely ban all contingent fees should be urged to adopt a rule similar to this Goal.

4.6 An attorney may withdraw from a case when the client fails to honor the fee agreement.

Comment

The fee agreement should set forth the circumstances under

which the matrimonial lawyer will be permitted to withdraw for non-payment. Before withdrawing, the attorney must take reasonable steps to avoid foreseeable prejudice to the rights of the client, allowing time for employment of other counsel, and delivering to the client papers and property to which the client is entitled.⁵⁹ However, the attorney should not seek to withdraw from a case on the eve of trial unless there was a clear prior understanding that withdrawal would result from non-payment.⁶⁰

4.7 An attorney may properly take all steps necessary to effect collection, including mediation, arbitration or suit, from a client who fails to honor the fee agreement.⁶¹

Comment

Lawyers are entitled to be paid reasonable fees for services performed pursuant to a valid fee agreement. Alternatives to litigation should be used unless they are unlikely to be effective.

5. *Client Conduct*

A client is entitled to know what laws govern divorce and the consequences of those laws on dissolution of marriage. A matrimonial lawyer should advise a client about the repercussions of any matrimonial litigation, including factors that are likely to

⁵⁹ SEE RPC 1.16(D).

⁶⁰ RPC 1.16(B) PROVIDES THAT A LAWYER MAY WITHDRAW IF SHE CAN DO SO “WITHOUT MATERIAL ADVERSE EFFECT ON THE INTERESTS OF THE CLIENT, OR IF . . . (4) THE CLIENT FAILS SUBSTANTIALLY TO FULFILL AN OBLIGATION TO THE LAWYER REGARDING THE LAWYER’S SERVICES AND HAS BEEN GIVEN REASONABLE WARNING THAT THE LAWYER WILL WITHDRAW UNLESS THE OBLIGATION IS FULFILLED.”

⁶¹ IT SHOULD BE NOTED THAT STATES VARY CONCERNING THE CIRCUMSTANCES IN WHICH A LAWSUIT WILL BE PERMITTED. THUS, FOR EXAMPLE, A LAWSUIT TO OBTAIN FEES WOULD BE INVALID IN CALIFORNIA UNLESS THE CLIENT FIRST HAD AN OPPORTUNITY TO ARBITRATE.

be considered in economic and custody determinations. However, the lawyer should avoid assisting the client in using the counseling process to engage in fraudulent conduct.

5.1 An attorney should not condone, assist, or encourage a client to transfer, hide, dissipate, or move assets to improperly defeat a spouse's claim.

Comment

It is improper for an attorney to “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . .”⁶² Whether the client proposes opening a secret out-of-state bank account, moving assets to an offshore trust, or having a family member hold sums of cash for the purpose of concealment, the advice to the client must be the same: “Don’t do it.” A client’s efforts, outside the presence of his or her spouse, to transfer assets beyond the reach of the court may indicate an improper motive. The attorney should suggest including the spouse in the discussions. Refusal by the client may well indicate an improper purpose, which the attorney should refuse to assist.

Hiding assets to defeat a spouse’s claim is a fraud upon the client’s spouse and likely to result in a fraud upon the court.⁶³ The client must also be advised not to conceal data about property, fail to furnish relevant documents, insist on placing unrealistic values on properties in, or omit assets from, sworn financial statements.

⁶² RPC 1.2(D).

⁶³ *BOYO V. BOYO*, 196 S.W.3D 409, 420 (TEX. APP. 2006).

On the other hand, “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”⁶⁴ It may sometimes be difficult to determine whether a client’s questions concerning legal aspects of predivorce planning are asked to facilitate an improper purpose. Although the attorney should initially give the client the benefit of any doubt, later discovery of improper conduct mandates that the attorney cease such assistance and may require withdrawal from representation.⁶⁵

5.2 An attorney should advise the client of the potential effect of the client’s conduct on a child custody dispute.

Comment

Pre-divorce conduct of the parents may significantly affect custody decisions, as well as the children’s adjustment to the divorce itself. The client is entitled to advice where there is a custody issue. Conduct conforming to such advice often will benefit both the children and the client’s spouse, independent of any custody dispute. Suggesting that the client spend more time with the child and consult, from time to time with the child’s doctor, teacher, and babysitter, is appropriate. It is also proper to describe the potential harmful consequences to the children (and to the client legally) of prematurely introducing the children to a new romantic partner, substance abuse, abusive or derogatory behavior toward the other parent, or other inappropriate behavior.

64 RPC 1.2 CMT 9. THE COMMENT ALSO PROVIDES THAT “THIS PROHIBITION, HOWEVER, DOES NOT PRECLUDE THE LAWYER FROM GIVING AN HONEST OPINION ABOUT THE ACTUAL CONSEQUENCES THAT APPEAR LIKELY TO RESULT FROM A CLIENT’S CONDUCT. NOR DOES THE FACT THAT A CLIENT USES ADVICE IN A COURSE OF ACTION THAT IS CRIMINAL OR FRAUDULENT, OF ITSELF, MAKE A LAWYER A PARTY TO THE COURSE OF ACTION.”

65 SEE RPC 1.16(A) & (B); RPC 1.2 CMT. 10.

Pre-divorce planning is an ideal opportunity to advise the client on ways to make the divorce transition easier for the children. For example, the lawyer might describe ways for the parents in concert to inform the children of the divorce and to reassure the children that both parents will always be there for them. The lawyer might describe programs available in the client's community to aid both parents and children in adjusting to divorce. Most important, predivorce planning is an opportunity to orient the client toward consideration of the children's needs first and toward the desirability of working out a cooperative parenting plan.

The lawyer should describe how mediation of child custody disputes might assist in effecting a cooperative parenting plan. It is appropriate to tell the client that children suffer from parental conflict and that a child custody dispute involving the searching inquiry of a custody evaluation and rigors of a trial is likely to be harmful to every member of the family.

The lawyer should consider whether the custody claim will be made in good faith. If not, the lawyer should advise the client of the harmful consequences of a meritless custody claim to the client, the child, and the client's spouse.⁶⁶ If the client persists in demanding advice to build a spurious custody case or to use a custody claim as a bargaining chip or as a means of inflicting revenge (see 6.2 and Comment), the lawyer should withdraw.⁶⁷

5.3 An attorney should advise a client to take reasonable and good faith efforts to preserve electronic information that may be

⁶⁶ SEE RPC 1.16(A) & (B); RPC 1.2 CMT. 10.

⁶⁷ SEE RPC 2.1 AND NOTE 19, SUPRA, FOR A DISCUSSION INDICATING THAT IT IS PROPER FOR AN ATTORNEY TO REFER TO MORAL, ECONOMIC AND SOCIAL, AS WELL AS LEGAL, FACTORS RELEVANT TO THE CLIENT'S SITUATION.

relevant to current or threatened litigation.

6. Children

One of the most troubling issues in family law is determining a lawyer's obligations to children. The lawyer must competently represent the interests of the client, but not at the expense of the children. The parents' fiduciary obligations for the well being of a child provide a basis for the attorney's consideration of the child's best interests consistent with traditional advocacy and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries to whom the fiduciary's obligations run.⁶⁸ Statutory and decisional law in most jurisdictions imposes a fiduciary duty on parents to act in their child's best interests.⁶⁹ For this analysis to be of benefit to practitioners, however, a clearer mandate must be adopted as part of the ethical code or its official interpretations.

6.1 An attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.

Comment

Although the substantive law in most jurisdictions concerning custody, abuse and termination of parental rights is premised upon the "best interests of the child," the ethical codes provide little (or contradictory) guidance for an attorney whose client's expressed

68 SEE, E.G., FULLER FAMILY HOLDINGS, LLC V. NORTHERN TRUST CO., 863 N.E.2D 743 (ILL. APP. 1ST DIST. 2007) (THE FIDUCIARY OBLIGATION OF LOYALTY FLOWS NOT FROM THE TRUST INSTRUMENT BUT FROM THE RELATIONSHIP OF TRUSTEE AND BENEFICIARY, AND THE ESSENCE OF THIS RELATIONSHIP IS THAT THE TRUSTEE IS CHARGED WITH EQUITABLE DUTIES TOWARD THE BENEFICIARY).

69 RPC 1.2 CMT. 11 (WHERE THE CLIENT IS A FIDUCIARY, THE LAWYER MAY BE CHARGED WITH SPECIAL OBLIGATIONS IN DEALING WITH A BENEFICIARY).

wishes, interests or conduct are in direct conflict with the well-being of children. This Goal emphasizes that the welfare of each family member is interrelated.

Matrimonial lawyers should counsel parties to examine their wishes in light of the needs and interests of the children and the relationship to other family members. In so doing, the matrimonial lawyer is not only advising the client to adhere to applicable substantive law, but is also reminding the client that the family relationship continues.

Parents owe a continuing fiduciary duty toward each other,⁷⁰ as well as toward their children, to serve their children's best interests. In many instances, parents should subordinate their own interests to those of their children. Matrimonial lawyers and parents alike should collaboratively seek parenting arrangements that eliminate fractious contact between parents, minimize transition or transportation difficulties and preserve stability for the children.

Children do not benefit from involvement in their parents' divorce. The attorney should warn the client against leaving papers from the attorney out where children can read them and to avoid talking about the case when children can overhear.

If the parents are in conflict and disagree about custody and other

⁷⁰ SEE, E.G., CAL. FAM. CODE ANN. § 721(B) (2011):

... IN TRANSACTIONS BETWEEN THEMSELVES, A HUSBAND AND WIFE ARE SUBJECT TO THE GENERAL RULES GOVERNING FIDUCIARY RELATIONSHIPS WHICH CONTROL THE ACTIONS OF PERSONS OCCUPYING CONFIDENTIAL RELATIONS WITH EACH OTHER. THIS CONFIDENTIAL RELATIONSHIP IMPOSES A DUTY OF THE HIGHEST GOOD FAITH AND FAIR DEALING ON EACH SPOUSE, AND NEITHER SHALL TAKE ANY UNFAIR ADVANTAGE OF THE OTHER. THIS CONFIDENTIAL RELATIONSHIP IS A FIDUCIARY RELATIONSHIP SUBJECT TO THE SAME RIGHTS AND DUTIES OF NONMARITAL BUSINESS PARTNERS . . . SEE ALSO, IN RE MARRIAGE OF PIERCE, 138 P.3D 889 (OR. APP. 2006) (THE INTERSPOUSAL FIDUCIARY DUTY CONTINUES WHILE THE PARTIES CONTEMPLATE DISSOLUTION OF THEIR MARRIAGE, AS LONG AS THE CONFIDENTIAL RELATIONSHIP REMAINS INTACT AND THE PARTIES ARE NOT DEALING AT ARMS' LENGTH THROUGH SEPARATE AGENTS OR ATTORNEYS).

parenting issues, the attorney should consider, with the cooperation of the other parent's attorney, sending the parties to a neutral mental health professional who is a family therapist. The goal of this referral is to resolve their disputes through counseling with the help of that mental health professional. The referring agreement should include confidentiality for all contacts with the therapist and exclusion of that therapist as a witness in the divorce case.

The attorney should discourage the client and refuse to participate in multiple psychological evaluations of children for the purpose of finding an expert who will testify in their favor. Repeated psychological evaluations of children are contrary to the children's best interest.⁷¹

6.2 An attorney should not permit a client to contest child custody, contact or access for either financial leverage or vindictiveness.

Comment

Tactics oriented toward asserting custody rights as leverage toward attaining some other, usually financial, goal are destructive. The matrimonial lawyer should counsel against, and refuse to assist, such conduct. Proper consideration for the welfare of the children requires that they not be used as pawns in the divorce process. Thus, for example, in states where child support is determined partly on the basis of the amount of time a parent spends with the

71 WHILE THE LAWYER MUST ABIDE BY THE CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF THE REPRESENTATION, RPC 1.2(A), THE LAWYER SHALL CONSULT WITH THE CLIENT ABOUT THE MEANS BY WHICH THOSE OBJECTIVES ARE TO BE ACCOMPLISHED, RPC 1.4(A)(2). ACCORDING TO RPC 1.2(A) CMT.2, HOWEVER: "CLIENTS NORMALLY DEFER TO THE SPECIAL KNOWLEDGE AND SKILL OF THEIR LAWYER WITH RESPECT TO THE MEANS TO BE USED TO ACCOMPLISH THEIR OBJECTIVES, PARTICULARLY WITH RESPECT TO TECHNICAL, LEGAL AND TACTICAL MATTERS. CONVERSELY, LAWYERS USUALLY DEFER TO THE CLIENT REGARDING SUCH QUESTIONS AS THE EXPENSE TO BE INCURRED AND CONCERN FOR THIRD PERSONS WHO MIGHT BE ADVERSELY AFFECTED." IN MOST CASES, THE LAWYER'S EXPLANATION OF THE BENEFITS OF THERAPY AND THE HARM IN INVOLVING THE CHILD UNNECESSARILY IN THE DIVORCE AND OBTAINING REPEATED EVALUATIONS, COUPLED WITH THE PARENT'S CONCERN FOR THE CHILD'S WELFARE, SHOULD BE SUFFICIENT TO OBTAIN THE CLIENT'S CONSENT TO THE LAWYER'S ADHERENCE TO THIS GOAL.

child, the lawyers should negotiate parenting issues based solely on considerations related to the child, and then negotiate child support based on financial considerations. If despite the attorney's advice the client persists, the attorney should seek to withdraw.

6.3 When issues in a representation affect the welfare of a minor child, an attorney should not initiate communication with the child, except in the presence of the child's lawyer or guardian ad litem, with court permission, or as necessary to verify facts in motions and pleadings.

Comment

Issues affecting a child's welfare may arise before, during, and after legal proceedings. There is a risk of harm to the child from an attorney's contacts and attempts to involve the child in the proceedings. Advice to or manipulation of the child by a parent's lawyer has no place in the lawyer's efforts on behalf of the parent. Information properly to be obtained from a child regarding the parents and the parents' disputes should be obtained under circumstances that protect the child's best interests.⁷²

6.4 An attorney should not bring a child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interests of the child.⁷³

72 SEE JONATHAN W. GOULD & DAVID A MARTINDALE, INCLUDING CHILDREN IN DECISION MAKING ABOUT CUSTODIAL PLACEMENT, 22 J. AM. ACAD. MATRIMONIAL LAWYERS. 303 (2009) (TAKING THE POSITION THAT EVALUATORS, ATTORNEYS, AND JUDGES NEED TO CONSIDER PROVIDING AGE APPROPRIATE OPPORTUNITIES TO CHILDREN FOR PARTICIPATION IN LEGAL DISPUTES THAT AFFECT THEIR RESIDENTIAL PLACEMENT, AND DISCUSSING THE LONG-HELD MYTH THAT HARM WILL COME TO CHILDREN WHO PARTICIPATE IN THE LEGAL SYSTEM BY SHARING THEIR THOUGHTS AND FEELINGS ABOUT CUSTODIAL PLACEMENT).

73 IN SOME JURISDICTIONS, THE CHILD MAY BE REQUIRED, HAVE THE RIGHT, OR BE PERMITTED TO TESTIFY OR APPEAR IN COURT PROCEEDINGS. IN SUCH JURISDICTIONS, THIS GOAL WOULD NOT APPLY. SEE JOE PICKARD, THE CHILD'S WISHES IN APR PROCEEDINGS: AN EVIDENTIARY CONUNDRUM, 36 COLO. LAW 33 (2007) (DISCUSSING WAYS TO ADDRESS CHALLENGES OF OFFERING EVIDENCE OF CHILDREN'S WISHES IN ALLOCATION OF PARENTAL RIGHTS PROCEEDINGS WHEN IT IS NOT NECESSARY OR APPROPRIATE FOR THE CHILD TO APPEAR AND TESTIFY IN COURT); AND 22 AM. JUR. TRIALS, CHILD CUSTODY LITIGATION § 347 (2011) (NOTING THAT MOST COMMONLY, STATUTORY PROVISIONS MAKE THE CHILD'S PREFERENCE AN IMPORTANT, BUT NOT CONTROLLING, FACTOR IN CHILD CUSTODY CASES; DISCUSSES FACTORS COUNSEL SHOULD STRESS AND THE COURT SHOULD CONSIDER WHEN VALUING THE CHILD'S OPINION).

Comment

Taking sides against either parent in a legal proceeding imposes a large emotional burden on a child. Some children do not want to express a preference in child custody disputes; they want their parents to resolve the issue without calling them. Other children want their views expressed, and their views may be highly relevant to the outcome of the dispute. All participants in a family law proceeding (including attorneys for all parties, any party's therapist, child custody evaluator, and the judge) should strive to permit a child's views and information to be expressed in a manner that least exposes the child to the rigors of the courtroom. The attorney should weigh carefully the risks and benefits to the child of testifying, including consulting with appropriate experts as to the potential for harm.

Where a child's information is material on an issue other than custody, counsel should explore whether the same information can be introduced from another source, rendering the child's testimony cumulative and unnecessary.

6.5 An attorney should disclose information relating to a client or former client to the extent the lawyer reasonably believes necessary to prevent substantial physical or sexual abuse of a child.

Comment

Under current RPC 1.6(b)(1), an attorney may reveal information reasonably believed necessary "to prevent reasonably certain death or substantial bodily harm."⁷⁴ Many states permit the attorney to reveal the intention of the client to commit any crime and the information necessary to prevent it. The rules do not appear to address, however,

⁷⁴ RPC 1.6(b)(1). WHERE PRACTICAL, THE LAWYER SHOULD SEEK TO PERSUADE THE CLIENT TO TAKE SUITABLE ACTION. IN ANY CASE, A DISCLOSURE ADVERSE TO THE CLIENT'S INTEREST SHOULD BE NO GREATER THAN THE LAWYER REASONABLY BELIEVES NECESSARY TO THE PURPOSE.

revelation of conduct that may be severely detrimental to the well being of the child, but is not criminal. Also, while engaged in efforts on the client's behalf, the matrimonial lawyer may become convinced that the client or a person with whom the client has a relationship has abused one of the children. Under traditional analysis in most jurisdictions, the attorney should refuse to assist the client. The attorney may withdraw if the client will not be adversely affected and the court grants any required permission. Disclosure of risk to a child based on past abuse would not be permitted under this analysis, however.

Notwithstanding the importance of the attorney-client privilege, the obligation of the matrimonial lawyer to consider the welfare of children, coupled with the client's lack of any legitimate interest in preventing his attorney from revealing information to protect the children from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it. If the client insists on seeking custody or unsupervised visitation, even without the attorney's assistance, the attorney should report specific knowledge of child abuse to the authorities for the protection of the child.⁷⁵

75 SEE KATHARYN I. CHRISTIAN, PUTTING LEGAL DOCTRINES TO THE TEST: THE INCLUSION OF ATTORNEYS AS MANDATORY REPORTERS OF CHILD ABUSE, 32 J. LEGAL PROF. 215 (2008) (DISCUSSING THE IMPLICATIONS OF INCLUDING ATTORNEYS AS MANDATORY REPORTERS IN CHILD ABUSE REPORTING LAWS, RECOGNIZING THAT IT FORCES ATTORNEYS TO BREACH THEIR CLIENTS' TRUST AND CONFIDENCE, BUT ULTIMATELY CONCLUDING THAT THE SAFETY AND PROTECTION OF CHILDREN REQUIRES THE INCLUSION OF ATTORNEYS AS MANDATORY CHILD ABUSE REPORTERS); AND STEPHANIE CONTI, LAWYERS AND MENTAL HEALTH PROFESSIONALS WORKING TOGETHER: RECONCILING THE DUTIES OF CONFIDENTIALITY AND MANDATORY CHILD ABUSE REPORTING, 49 FAM. CT. REV. 388 (2011) (NOTING THAT ONLY A SELECT FEW STATES, INCLUDING MISSISSIPPI, NEVADA, AND OHIO, EXPLICITLY INCLUDE ATTORNEYS AS MANDATED REPORTERS OF CHILD ABUSE, AND OPINING THAT STATES SEEM TO PLACE A GREATER VALUE UPON THE NEED TO UPHOLD AND PROTECT THE ATTORNEY-CLIENT PRIVILEGE BECAUSE MANY STATE LAWS DO NOT PROVIDE FOR THE DUTY OF REPORTING TO TRUMP THE ATTORNEY-CLIENT PRIVILEGE, WHEREAS COMMON LAW PRIVILEGES SUCH AS THE DOCTOR-PATIENT PRIVILEGE OR MARITAL PRIVILEGE ARE EXPLICITLY ADDRESSED BY STATUTE). GOAL 6.5 AND THE COMMENT REFLECT THE COLLECTIVE JUDGMENT OF THE FELLOWS OF THE ACADEMY AND SHOULD BE FOLLOWED TO THE EXTENT POSSIBLE UNDER THE LAW OF THE JURISDICTION. IF THE LAW OF THE JURISDICTION PROHIBITS SUCH DISCLOSURE, THIS GOAL DOES NOT APPLY.

As stated in the Comment to the ABA Ethics 2000 Commission's proposed revision of RPC 1.6(b)(1):

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life-threatening or debilitating injuries and illnesses and the consequences of child sexual abuse. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.⁷⁶

It may also be appropriate to seek the appointment of a guardian ad litem or attorney for the child or children.⁷⁷ The entire thrust of the family law system is intended to make the child's well-being the highest priority. The vindictiveness of a parent, the ineffective legal representation of the spouse, or the failure of the court to perceive on its own the need to protect the child's interests does not justify an

⁷⁶ SEE RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (2011).

⁷⁷ IN SOME JURISDICTIONS, HOWEVER, SUCH AN EFFORT MIGHT BE PROHIBITED AS CONDUCT ADVERSE TO THE CLIENT AND BASED ON CONFIDENTIAL INFORMATION.

attorney's failure to act. However, even the appointment of a guardian or lawyer for the child is insufficient if the matrimonial lawyer is aware of physical abuse or similarly extreme parental deficiency. Nor would withdrawal (even if permitted) solve the problem if the attorney is convinced that the child will suffer adverse treatment by the client.

6.6 An attorney should not make or assist a client in making an allegation of child abuse unless there is a reasonable basis and evidence to believe it is true.

Comment

An attorney who is made aware of abuse by a party (or someone closely associated with a party) is permitted, if not obligated, to provide that information during divorce or custody proceedings (see 6.5). While reporting the existence of child abuse is crucial, however, a claim that a parent has abused a child is ugly and leads to the most unpleasant and harmful litigation in the field of family law. Such claims draw the child into testing or some other form of examination, which itself may be traumatic. The harm to both the accusing and accused parent will almost always be very great.

Desperate or angry spouses sometimes cannot resist the temptation to use such a strong weapon as an abuse charge. Use of such charges to obtain an unfair advantage in the dispute is inexcusable. If a client insists on making such a claim that the lawyer believes unjustified, the lawyer should withdraw from further representation. The lawyer should use all available information and resources — including evaluation by a doctor, therapist, or other health professional — to be sure there is a reasonable basis and substantial supporting evidence for such a charge. Even when the

allegation is believed to be justified, it should be made in a manner least harmful to any children and least likely to inflame the dispute.

7. Professional Cooperation and the Administration of Justice

Candor, courtesy and cooperation are especially important in matrimonial matters where a high emotional level can engulf the attorneys, the court and the parties. Allowing the adverse emotional climate to infect the relations between the attorneys and parties inevitably harms everyone, including the clients, their children and other family members. Although lawyers cannot ensure that justice is achieved, they can help facilitate the administration of justice.

Combative, discourteous, abrasive, “hard ball” conduct by matrimonial lawyers is inconsistent with both their obligation to effectively represent their clients and their role as problem-solvers. Good matrimonial lawyers can be cordial and friendly without diminishing effective advocacy on behalf of their clients. In fact, candor, courtesy and cooperation: (1) facilitate faster, less costly and mutually-accepted resolution of disputes; (2) reduce stress for lawyers, staff and clients; (3) reduce waste of judicial time; and (4) generate respect for the court system, the individual attorney and the profession as a whole.

7.1 An attorney should strive to lower the emotional level of marital disputes by treating counsel and the parties with respect.

Comment

Some clients expect and want the matrimonial lawyer to reflect the highly emotional, vengeful relationship between the spouses. The attorney should explain to the client that discourteous or uncivil conduct is inappropriate and counterproductive, that measures of

respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise.

Ideally, the relationship between counsel is that of colleagues using constructive problem-solving techniques to settle their respective clients' disputes consistent with the realistic objectives of each client. Examples of appropriate measures of respect include: cooperating with voluntary or court-mandated mediation; meeting with opposing counsel to reduce issues and facilitate settlement; promptly answering phone calls and correspondence; advising opposing counsel at the earliest possible time of any perceived conflict of interest; and refraining from attacking, demeaning or disparaging other counsel, the court or other parties.

The attorney should make sure that no long-standing adversarial relationship with or a personal feeling toward another attorney interferes with negotiations, the level of professionalism maintained, or effective representation of the client. Although it may be difficult to be courteous and cooperative when opposed by an overzealous lawyer, an attorney should not react in kind to unprofessional conduct. Pointing out the unprofessional conduct and requesting that it cease is appropriate.

7.2 An attorney should stipulate to undisputed relevant matters, unless inconsistent with the client's legitimate interests.

Comment

If the client's permission is required, the attorney should encourage the client to stipulate to undisputed matters. The attorneys' stipulation to undisputed matters avoids unnecessary

inconvenience and wasted court time. The attorney seeking a stipulation should do so in writing, attempting to state the true agreement of the parties. Other counsel should promptly indicate whether or not the stipulation is acceptable.

7.3 An attorney should not deceive or intentionally mislead other counsel.

Comment

Attorneys should be able to rely on statements by other counsel. They should be able to assume that the matrimonial lawyer will correct any misimpression caused by an inaccurate or misleading prior statement by counsel or her client. Although an attorney must maintain the client's confidences, the duty of confidentiality does not require the attorney to deceive, or permit the client to deceive, other counsel.⁷⁸ When another party or counsel specifically requests information which the attorney is not required to provide and which the attorney has been instructed to withhold or which may be detrimental to the client's interests, the attorney should refuse to provide the information, rather than mislead opposing counsel.

Examples:

1. The matrimonial lawyer is approached by opposing counsel, who asks: "Although my client realizes there is no hope for reconciliation, he is desperate to know whether his wife is seeing another man. Is she?" The attorney knows that the wife has been having an affair. It would be proper for the attorney to indicate an

⁷⁸ RPC 4.1 PROVIDES THAT A LAWYER SHALL NOT KNOWINGLY: "(A) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON; OR (B) FAIL TO DISCLOSE A MATERIAL FACT WHEN DISCLOSURE IS NECESSARY TO AVOID ASSISTING A CRIMINAL OR FRAUDULENT ACT BY A CLIENT, UNLESS DISCLOSURE IS PROHIBITED BY RULE 1.6." AS NOTED IN THE COMMENT TO GOAL 6.5, JURISDICTIONS DIFFER CONCERNING THE SCOPE OF THE EXCEPTION TO THE DUTY OF CONFIDENTIALITY FOR CLIENT CRIMINAL CONDUCT OR FRAUD. AN ATTORNEY MAY BE PERMITTED TO REVEAL CONFIDENCES NECESSARY TO AVOID A FUTURE CRIME OR FRAUD, AND, IN SOME JURISDICTIONS, A PAST FRAUD COMMITTED DURING THE COURSE OF THE REPRESENTATION OR WITH THE LAWYER'S ASSISTANCE. SEE ALSO RPC 1.2 CMT.10: "A LAWYER MAY NOT CONTINUE ASSISTING A CLIENT IN CONDUCT THAT THE LAWYER ORIGINALLY SUPPOSED WAS LEGALLY PROPER BUT THEN DISCOVERS IS CRIMINAL OR FRAUDULENT. THE LAWYER MUST, THEREFORE, WITHDRAW FROM THE REPRESENTATION OF THE CLIENT IN THE MATTER."

unwillingness or inability to answer that question, but it would be improper either to suggest that the client has not had an affair, or to tell opposing counsel lurid details on the condition that they not be disclosed.⁷⁹

2. The attorney believes that the opposing party has engaged in activity that the party would not want made public. It is improper to bluff the other side into settlement by hinting that the matrimonial lawyer will use damaging evidence of the conduct if that evidence does not exist. It is also improper to threaten public disclosure if the evidence exists, but would likely be inadmissible or irrelevant at trial.

7.4 An attorney should neither overstate the authority to settle nor represent that the attorney has authority that the client has not granted.

Comment

In either case presented in the Goal, the attorney has improperly induced reliance by other counsel that could damage the attorney-client relationship. A matrimonial lawyer who is uncertain of his authority — or simply does not believe that other counsel is entitled to know such information — should either truthfully disclose his uncertainty, or state that he is unwilling or unable to respond at all.

7.5 An attorney should not induce or rely on a mistake by counsel as to agreed upon matters to obtain an unfair benefit for the client.

Comment

The need for trust between attorneys, even those representing opposing sides in a dispute, requires more than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings

⁷⁹ SEE RPC 1.6.

should be corrected and not relied upon in the hope that they will benefit the client. Thus, for example, the attorney reducing an oral agreement to writing not only should avoid misstating the understanding, but should correct inadvertent errors by other counsel that are inconsistent with prior understandings or agreements. Whether or not conduct or statements by counsel that are not necessarily in her client's best interests should be corrected may not always be clear and will depend on the particular facts of a case. The crucial consideration should be whether the attorney induced the misunderstanding or is aware that other counsel's statements do not accurately reflect any prior agreement. It is thus unlikely that tactical, evidentiary or legal errors made by opposing counsel at trial require correction.⁸⁰

Examples:

1. In an effort to compromise a dispute over maintenance (alimony), the parties agree that payments be made that are deductible by the husband and taxable to the wife. While reviewing the agreement, the attorney for the wife realizes that the language will not create the tax consequences both sides had assumed and will, in fact, benefit his client because the payments will be treated neither as deductible alimony to the husband nor taxable to the wife. The matrimonial lawyer should disclose this discovery to opposing counsel.

If, however, counsel's mistake goes to a matter not discussed and agreed upon — either explicitly or implicitly, the obligation to the client precludes disclosure of the mistake without the client's permission. Thus, if alimony was agreed upon without any discussion of tax consequences, the wife's lawyer would not be obligated to

80 BUT *CF.* RPC 3.3(A)(3) (DUTY TO DISCLOSE TO THE COURT "LEGAL AUTHORITY IN THE CONTROLLING JURISDICTION KNOWN TO THE LAWYER TO BE DIRECTLY ADVERSE TO THE POSITION OF THE CLIENT AND NOT DISCLOSED BY OPPOSING COUNSEL").

provide the language necessary to make payments tax deductible by the husband and includable by the wife.

2. The lawyer for the wife prepares a stipulation erroneously providing for the termination of maintenance upon the remarriage of either party. If the husband asks his attorney if it is really true that by his remarriage he can terminate his liability to pay any further maintenance, the attorney should correct the mistake in the stipulation or a judgment entered upon it. The lawyer should bring it to the attention of opposing counsel.⁸¹

7.6 An attorney who receives materials that appear to be confidential should refrain from reviewing the materials and return them to the sender, as soon as it becomes clear they were inadvertently sent to the receiving lawyer.⁸²

Comment

There are many circumstances in which an attorney receives materials that were inadvertently sent by another attorney or party. Such instances have been increasing due to the use of e-mail, the ability to send simultaneous faxes to multiple persons, and the sheer volume of materials provided through discovery in complex cases. If the materials are not harmful or confidential, no issue is raised. If, however, the materials were not intended to be provided and contain confidential information, the temptation to use them to the client's benefit is great.

⁸¹ SEE RPC 4.1; 8.4.

⁸² THE CURRENT VERSION OF RPC 4.4(B) ONLY REQUIRES LAWYERS WHO RECEIVE A DOCUMENT THAT THEY KNOW OR REASONABLY SHOULD KNOW WAS SENT INADVERTENTLY TO "PROMPTLY NOTIFY THE SENDER." RPC 4.4(B). "WHETHER THE LAWYER IS REQUIRED TO TAKE ADDITIONAL STEPS, SUCH AS RETURNING THE ORIGINAL DOCUMENT, IS A MATTER OF LAW BEYOND THE SCOPE OF THESE RULES, AS IS THE QUESTION OF WHETHER THE PRIVILEGED STATUS OF A DOCUMENT HAS BEEN WAIVED. SIMILARLY, THIS RULE DOES NOT ADDRESS THE LEGAL DUTIES OF A LAWYER WHO RECEIVES A DOCUMENT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW MAY HAVE BEEN WRONGFULLY OBTAINED BY THE SENDING PERSON." RPC 4.4 CMT. 2.

State bars, courts, and ethics committees have not uniformly treated inadvertent disclosure of confidential materials. Some states bars direct lawyers to return documents before reviewing them if the lawyer received them “under circumstances in which it is clear that they were not intended for the receiving lawyer.”⁸³ Other courts have taken the position that any unforced disclosure of attorney-client privileged communications destroys confidentiality and terminates the privilege, not only for the communications disclosed, but also for all related communications.⁸⁴

A number of courts have taken an intermediate approach, holding that the right of receiving counsel to make use of inadvertently sent materials depends on a number of factors. For example, one court indicated that it would look to five factors in determining whether a document had lost its privilege: “(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (3) any delay and measures taken to rectify the disclosures; (5) whether the overriding interests of justice would be served by relieving the party of its error.”⁸⁵

In ABA Formal Opinion 92-368 (November 10, 1992), the Standing Committee on Ethics and Professional Responsibility

83 THOMAS E. SPAHN, *THE ETHICS OF E-MAIL*, 15 *RICH. J.L. & TECH.* 12, 45-46 (2009).

84 *WILLIAMS v. DISTRICT OF COLUMBIA*, 2011 WL 3659308 (D.D.C. AUG. 17, 2011) (EXPLAINING THAT IN THE DISTRICT OF COLUMBIA, ANY DISCLOSURE OF A COMMUNICATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE, EVEN IF INADVERTENT, WORKED AS A WAIVER OF THE PRIVILEGE, ALTHOUGH CONGRESS HAS PARTIALLY ABROGATED THIS STRICT APPROACH TO WAIVER BY ENACTING RULE 502(B) OF THE FEDERAL RULES OF EVIDENCE, WHICH PROVIDES THAT INADVERTENT DISCLOSURE DOES NOT OPERATE AS A WAIVER IF DISCLOSURE IS INADVERTENT, THE HOLDER OF THE PRIVILEGE TOOK REASONABLE STEPS TO PREVENT DISCLOSURE, AND THE HOLDER PROMPTLY TOOK REASONABLE STEPS TO RECTIFY THE ERROR).

recommended that once a lawyer discovers documents were inadvertently sent to him, the receiving attorney should notify the sending lawyer of receipt of the documents and should abide by that lawyer's instructions as to their disposition.⁸⁶ However, in February 2002, the Model Rules of Professional Conduct were amended to narrow the ethical duty of a lawyer who receives inadvertently sent documents: the lawyer only must "promptly notify the sender." Additionally, the Comments to RPC 4.4 now explain that "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer." Thus, the Committee withdrew Formal Opinion 92-368, and concluded that Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."⁸⁷

85 DJ COLEMAN, INC. v. NUFARM AMERICAS, INC., 2010 WL 731110 (D.N.D. FEBRUARY 25, 2010) (QUOTING PARKWAY GALLERY FURNITURE, INC. v. KITTINGER/PENNSYLVANIA H. GROUP, INC., 116 F.R.D. 46 (M.D.N.C. 1987)).

86 ABA FORMAL OPINION 92-368 (NOVEMBER 10, 1992). THE COMMITTEE OPINED THAT THE RECEIVING LAWYER HAD THREE OBLIGATIONS: (1) TO REFRAIN FROM EXAMINING THE MATERIALS; (2) TO NOTIFY THE SENDING LAWYER OF THE RECEIPT OF THE MATERIALS; AND (3) TO ABIDE BY THE INSTRUCTIONS OF THE SENDING LAWYER.

87 ABA FORMAL OPINION 05-437, INADVERTENT DISCLOSURE OF CONFIDENTIAL MATERIALS: WITHDRAWAL OF FORMAL OPINION 92-368 (NOVEMBER 10, 1992) (OCTOBER 1, 2005). THE COMMITTEE'S RETREAT FROM ITS POSITION IN FORMAL OPINION IS ALSO SUPPORTED BY THE COMMENTS TO RPC 4.4. "SOME LAWYERS MAY CHOOSE TO RETURN A DOCUMENT UNREAD, FOR EXAMPLE, WHEN THE LAWYER LEARNS BEFORE RECEIVING THE DOCUMENT THAT IT WAS INADVERTENTLY SENT TO THE WRONG ADDRESS. WHERE A LAWYER IS NOT REQUIRED BY APPLICABLE LAW TO DO SO, THE DECISION TO VOLUNTARILY RETURN SUCH A DOCUMENT IS A MATTER OF PROFESSIONAL JUDGMENT ORDINARILY RESERVED TO THE LAWYER." RPC 4.4 CMT. 3.

Examples:

1. The wife's lawyer receives an e-mail addressed to the husband from the husband's lawyer. In many cases that would be sufficient to indicate that the wife's lawyer was an unintended recipient. If, however, the receiving lawyer has a reasonable basis to believe a copy was intended for him, he may read the message unless and until it becomes evident that the message was unintentionally sent to him.

2. The lawyer for the husband has sought discovery of numerous documents from the wife relating to issues in the case. In response to the document request, the wife's attorney sends over ten large boxes of materials. While reviewing the documents, the husband's lawyer discovers in a seemingly unrelated file, a letter from the wife's attorney to the wife that begins: "As to your question about your use of drugs prior to your marriage to Husband . . ." Unless the husband's lawyer has a reasonable basis to believe the letter was provided intentionally, was relevant, and was not otherwise confidential, the lawyer should stop reading and return the letter to the wife's attorney.

3. A lawyer who receives electronic communications from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.⁸⁸

88 THE ABA HAS TAKEN A CONTRARY POSITION, AND CONCLUDED THAT A LAWYER MAY ETHICALLY EXAMINE A DOCUMENT'S METADATA, AS LONG AS THE RECEIVING LAWYER DID NOT OBTAIN AN ELECTRONIC DOCUMENT IN AN IMPROPER MANNER. ABA FORMAL OPINION 06-442, REVIEW AND USE OF METADATA (AUGUST 5, 2006). SEE ALSO AMANDA SHOWALTER, WHAT'S YOURS IS MINE: INADVERTENT DISCLOSURE OF ELECTRONICALLY STORED PRIVILEGED INFORMATION IN DIVORCE LITIGATION, 23 J. AM. ACAD. MATRIMONIAL LAWS. 177 (2010).

7.7 An attorney may use materials intentionally sent from an unknown or unauthorized source unless the materials appear to be confidential.

Comment

Confidential materials should be deposited with the court and a ruling sought.

Attorneys occasionally receive papers from outside of the expected sources. Such materials may have been sent anonymously. The materials should be treated differently depending on both their source (if known) and apparent nature.

Clearly confidential or privileged material, regardless of the sender, should be returned to the other lawyer, preferably unread. If the materials are the subject of a proper discovery request but were improperly withheld, the receiving lawyer should deposit them with the court and seek a ruling as to their proper disposition.⁸⁹

Documents not clearly confidential may be used by the receiving attorney. For example, a lawyer receiving an unmarked envelope

89 ABA FORMAL OPINION 06-440, UNSOLICITED RECEIPT OF PRIVILEGED OR CONFIDENTIAL MATERIALS:

WITHDRAWAL OF FORMAL OPINION 94-382 (JULY 5, 1994) (MAY 13, 2006) EXPLAINS: RULE 4.4(B) REQUIRES ONLY THAT A LAWYER WHO RECEIVES A DOCUMENT RELATING TO THE REPRESENTATION OF THE LAWYER'S CLIENT AND WHO KNOWS OR REASONABLY SHOULD KNOW THAT THE DOCUMENT WAS INADVERTENTLY SENT SHALL PROMPTLY NOTIFY THE SENDER. THE RULE DOES NOT REQUIRE REFRAINING FROM REVIEWING THE MATERIALS OR ABIDING BY INSTRUCTIONS OF THE SENDER. THUS, EVEN ASSUMING THAT THE MATERIALS SENT INTENTIONALLY BUT WITHOUT AUTHORIZATION COULD BE DEEMED "INADVERTENTLY SENT", THE INSTRUCTIONS OF FORMAL OPINION 94-382 [CONCLUDING THAT A LAWYER WHO RECEIVES SUCH MATERIALS OF AN ADVERSE PARTY SHOULD REFRAIN FROM USING THEM IF SHE KNOWS THAT THEY ARE PRIVILEGED] ARE NOT SUPPORTED BY THE RULE. IT FURTHER IS OUR OPINION THAT IF THE PROVIDING OF THE MATERIALS IS NOT THE RESULT OF THE SENDER'S INADVERTENCE, RULE 4.4(B) DOES NOT APPLY TO THE FACTUAL SITUATION ADDRESSED IN FORMAL OPINION 94-382. A LAWYER RECEIVING MATERIALS UNDER SUCH CIRCUMSTANCES IS THEREFORE NOT REQUIRED TO NOTIFY ANOTHER PARTY OR THAT PARTY'S LAWYER OF RECEIPT AS A MATTER OF COMPLIANCE WITH THE MODEL RULES. WHETHER A LAWYER MAY BE REQUIRED TO TAKE ANY ACTION IN SUCH AN EVENT IS A MATTER OF LAW BEYOND THE SCOPE OF RULE 4.4(B). ACCORDINGLY, BECAUSE THE ADVICE PRESENTED IN FORMAL OPINION 94-382 IS NOT SUPPORTED BY THE RULES, THE OPINION IS WITHDRAWN IN ITS ENTIRETY.

containing statements of undisclosed accounts in the name of the other party may use the materials. A receiving lawyer who believes the materials were intentionally withheld from a response to a proper discovery request should report the fraud to the court.

7.8 An attorney should cooperate in the exchange of information and documents.

Comment

An attorney should not use the discovery process for delay or harassment, or engage in obstructionist tactics. As a basic rule of courtesy and cooperation, attorneys should try to conduct all discovery by agreement, never using the discovery process to harass other counsel or their clients. This principle applies both to attorneys attempting to obtain discovery and to those from whom discovery is sought.⁹⁰ The discovery rules are designed to eliminate or reduce unfair surprise, excessive delay and expense, unnecessary and futile litigation, and the emotional and financial cost of extended and overly adversarial litigation. In addition, pretrial discovery often results in settlements more beneficial than protracted litigation. In no area of the law are these benefits more important than in matrimonial law, where the necessity of future dealings between the parties and the interest in protecting the emotional and psychological stability of children necessitate avoiding unnecessary litigation and acrimony. It is in the interest of all parties (including the client) to assist, rather than resist, legitimate discovery.

Consistent with this view of discovery in family law cases as information gathering rather than as adversarial weapon, a number

90 Cf. RPC 3.4(d). PROTECTION OF THE CLIENT AND SOUND PRETRIAL PRACTICE OFTEN DICTATES THAT INFORMATION BE OBTAINED UNDER OATH. NOTHING IN THIS GOAL OR COMMENT IS INTENDED TO SUGGEST THAT COOPERATION IN THE EXCHANGE OF INFORMATION SHOULD BE INFORMAL WHEN THAT IS NOT APPROPRIATE.

of jurisdictions have now adopted codes of professional courtesy and have imposed mandatory disclosure requirements on all divorcing spouses.⁹¹ In many states the fiduciary responsibility for interspousal disclosure is confirmed explicitly by statute, rule, or in approved discovery request forms.⁹²

It is in the interest of all counsel and the parties to avoid improper tactics. In a misguided effort to advance the interests of their clients, attorneys may be tempted to wear down the opposing party or counsel by means of oppressive “hardball” discovery tactics. These tactics do not advance the legitimate interests of clients and are clearly improper. Improper discovery conduct under this Goal includes: avoidance of compliance with discovery through overly narrow construction of interrogatories or requests for production; objection to discovery without good faith basis; improper assertion of privilege; production of documents in a manner designed to hide or obscure the existence of particular documents; direction to parties and witnesses not to respond to deposition questions without adequate justification; requests for unnecessary information that does not bear on the issues in the case; and requests for sanctions before making a good faith effort to resolve legitimate discovery disputes.

Counsel’s behavior during depositions is as important as

91 SEE, E.G., W. VA. CODE ANN. § 48-7-201 (2011) (“IN ALL DIVORCE ACTIONS AND IN ANY OTHER ACTION INVOLVING CHILD SUPPORT, ALL PARTIES SHALL FULLY DISCLOSE THEIR ASSETS AND LIABILITIES WITHIN FORTY DAYS AFTER THE SERVICE OF SUMMONS OR AT SUCH EARLIER TIME AS ORDERED BY THE COURT.”); LOC. R. OF THE CT. OF COMMON PLEAS OF MEDINA COUNTY, DOMESTIC RELATIONS DIVISION, RULE 5.02 (2011) (OHIO) (REQUIRES MANDATORY DISCLOSURE OF ALL PENSIONS, COBRA BENEFITS, DOCUMENTS OR APPRAISAL RELATING TO REAL PROPERTY, DOCUMENTS RELATING TO VEHICLES, TAX RETURNS FROM THE PRIOR THREE YEARS, DOCUMENTS OF ALL INCOME, COPIES OF MOST RECENT BANK ACCOUNT STATEMENTS, AND INFORMATION ABOUT CLAIMS OF SEPARATE PROPERTY); FLA. FAM. L.R.P. RULE 12.285 (2011) (REQUIRING MANDATORY DISCLOSURE OF FINANCIAL DOCUMENTS AND TAX FORMS)..

92 SEE, E.G., FIDUCIARY RELATIONSHIP; LENGTH AND SCOPE OF DUTY; TERMINATION, CAL. FAM. CODE § 2102 (2011) (REQUIRING, FROM THE DATE OF SEPARATION TO THE DATE OF THE DISTRIBUTION OF THE COMMUNITY OR QUASI-COMMUNITY ASSET OR LIABILITY, COMPLETE DISCLOSURE OF ALL ASSETS AND LIABILITIES IN WHICH THE PARTY HAS OR MAY HAVE AN INTEREST OR OBLIGATION AND ALL CURRENT EARNINGS, ACCUMULATIONS, AND EXPENSES).

behavior before the court. Because most cases are settled rather than tried to a court, the deposition process may be a party's only measure of acceptable behavior when solving the problems of the parties, currently and in the future. Attorneys therefore should conduct themselves in deposition with the same courtesy and respect for the legal process as is expected in court. For example, they should not conduct examinations or engage in other behavior that is purposely offensive, demeaning, harassing, intimidating, or that unnecessarily invades the privacy of anyone. Attorneys should attempt to minimize arguments during deposition, and if sensitive or controversial matters are to be the subject of deposition questioning, when not contrary to the client's interests, the deposing attorney should consider discussing such matters in advance to reach any appropriate agreements.

With the focus of discovery being the legitimate pursuit of information rather than strategic confrontation, attorneys should not coach deponents by objecting, commenting, or otherwise acting in a manner that suggests a particular answer to a question, or object for the purpose of disrupting or distracting the questioner or witness. Objections should only be made in the manner and on grounds provided by applicable court rules. Attorneys should not intentionally misstate facts, prior statements or testimony. Such conduct increases the animosity without legitimate purpose.

Although not required under this Goal, the Fellows of the Academy believe that a mandatory disclosure provision would best promote the cooperative, problem-solving approach of the Bounds of Advocacy. Therefore, the Academy recommends adoption in each state of a mandatory discovery provision.⁹³

93 SEE NOTE 92, *INFRA*.

7.9 An attorney should grant to other counsel reasonable extensions of time that will not have a material, adverse effect on the legitimate interests of the client.

Comment

The attorney should attempt to accommodate counsel who, because of schedule, personal considerations, or heavy workload, requests additional time to prepare a response or comply with a legal requirement. Such accommodations save the time and expense of unnecessary motions and hearings. No lawyer should request an extension of time to obtain an unfair advantage.

7.10 An attorney should clear times with other counsel and cooperate in scheduling hearings and depositions.

Comment

Good faith attempts by attorneys to avoid scheduling conflicts tend to avoid unnecessary delays, expense to clients and stress to attorneys and their staff. In return, other counsel should confirm the availability of the suggested time within a reasonable period and should indicate conflicts or unavailability only when necessary. As prior consultation concerning scheduling is a courtesy measure, it is proper to schedule hearings or depositions without agreement if other counsel fails or refuses to respond promptly to the time offered, raises unreasonable calendar conflicts or objections, or persistently fails to comply with this Goal.

²⁹ ABA STANDARDS, SUPRA NOTE 1, STANDARD II.B.2; NCCUSL ACT, SUPRA NOTE 2, § 2.3.

³⁰ ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

7.11 An attorney should provide notice of cancellation of depositions and hearings at the earliest possible time.

Comment

Adherence to this Goal will avoid unnecessary travel, expense and expenditure of time by other counsel, and will also free time for the court for other matters. The same principles apply to all scheduled meetings, conferences and production sessions with other counsel.

7.12 An attorney should submit proposed orders promptly to other counsel before submitting them to the court.

Comment

When submitted, other counsel should promptly communicate approval or objections.

7.13 An attorney should not seek an ex parte order without prior notice to other counsel except in exigent circumstances.

Comment

Proposed orders following a hearing should generally be submitted at the earliest practicable time. There are few things more damaging to a client's confidence in his lawyer, or to relationships between lawyers, than for a party to be served with an ex parte order about which his lawyer knows nothing.⁹⁴ Even where there are exigent circumstances (substantial physical or financial risk to the client), or where local rules permit ex parte proceedings, notice to, or the appearance of, other counsel usually will not be able to prevent appropriate relief from issuing.

⁹⁴ EVEN WHEN AUTHORIZED BY LAW, EX PARTE PROCEEDINGS PRESENT THE POTENTIAL FOR UNFAIRNESS SINCE "THERE IS NO BALANCE OF PRESENTATION BY OPPOSING ADVOCATES." RPC 3.3(D) CMT. 14. THE LAWYER FOR THE REPRESENTED PARTY HAS A DUTY TO MAKE DISCLOSURE OF "MATERIAL FACTS KNOWN TO THE LAWYER WHICH WILL ENABLE THE TRIBUNAL TO MAKE AN INFORMED DECISION, WHETHER OR NOT THE FACTS ARE ADVERSE." RPC 3.3(D). FAIRNESS AND PROFESSIONAL COURTESY CALL FOR NOTICE TO OTHER COUNSEL AS WELL.

7.14 An attorney should not attempt to gain advantage by delay in the service of filed pleadings or correspondence upon other counsel.

Comment

When pleadings or correspondence are mailed or delivered to the court, copies should normally be transmitted on the same day and in the same manner to all other counsel of record. An identical method need not be employed, so long as delivery on the same day will be achieved. For example, if the court is one block from counsel's office and opposing counsel's office is 50 miles away, it would be acceptable to hand deliver a document to the court and to fax it to counsel so that it arrived on the same day. Attorney as Mediator or Arbitrator

8. Mediator

8.1 An attorney should act as a mediator only if competent to do so.

Comment

No lawyer should act as the mediator of marital disputes without adequate education, training or experience.⁹⁵ There are many ways to acquire the necessary knowledge and skill, including law school training programs, AAML mediation training certification, continuing legal education, formal training programs, and informal

95 ASSN. FOR CONFLICT RES., MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, STANDARD II (2010). A FAMILY MEDIATOR SHALL BE QUALIFIED BY EDUCATION AND TRAINING TO UNDERTAKE THE MEDIATION.

A. TO PERFORM THE FAMILY MEDIATOR'S ROLE, A MEDIATOR SHOULD:

1. HAVE KNOWLEDGE OF FAMILY LAW;
2. HAVE KNOWLEDGE OF AND TRAINING IN THE IMPACT OF FAMILY CONFLICT ON PARENTS, CHILDREN AND OTHER PARTICIPANTS, INCLUDING KNOWLEDGE OF CHILD DEVELOPMENT, DOMESTIC ABUSE AND CHILD ABUSE AND NEGLECT;

3. HAVE EDUCATION AND TRAINING SPECIFIC TO THE PROCESS OF MEDIATION;

4. BE ABLE TO RECOGNIZE THE IMPACT OF CULTURE AND DIVERSITY.

B. FAMILY MEDIATORS SHOULD PROVIDE INFORMATION TO THE PARTICIPANTS ABOUT THE MEDIATOR'S RELEVANT TRAINING, EDUCATION AND EXPERTISE. ID.

training by peers. The neutral role as mediator involves different skills and orientation than the matrimonial lawyer's role in representing clients, and to act competently as mediator requires study and training.

A matrimonial lawyer may be a better mediator because the lawyer may be in the best position to understand the likely outcome of litigation and is best able to ensure the understanding and validity of a mediated agreement. Mediation involves skills that, like trial advocacy, require study and training.

8.2 An attorney acting as a mediator in a marital dispute should remain impartial.

Comment

The primary responsibility for resolution of a marital dispute rests with the participants. A neutral person trying to help people resolve disputes in an amicable way should help the parties reach an informed and voluntary settlement. At no time should a mediator coerce a participant into agreement or make a substantive decision for a participant. The mediator should remain completely impartial in assisting the participants in reaching agreement, permitting neither manipulative nor intimidating practices. If the mediator suspects that any of the participants are not capable of participating in informed negotiations, the mediator should postpone mediation and refer those participants to appropriate resources.

Although the mediator should not have a vested interest in any particular terms of a settlement, the mediator should “be satisfied that agreements in which he or she has participated will not impugn the integrity of the process”⁹⁶ and are fundamentally fair. If the mediator is “concerned about the possible consequences

96 SEE MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, SUPRA NOTE 95

of a proposed agreement, and the needs of the parties dictate, the [mediator] must inform the parties of that concern. In adhering to this Standard, the [mediator] may find it advisable to educate the parties, to refer one or more of the parties for specialized advice, or to withdraw from the case.”⁹⁷ The mediator should assist the clients not only in treating each other fairly, but also in considering the interests of unrepresented parties, and in particular the interests of their children. Thus, Standard VII.B. of the Academy of Family Mediators’ Standards of Practice for Divorce and Family Mediation provides: “The mediator has a responsibility to promote the participants’ consideration of the interests of children and other persons affected by the agreement. The mediator also has a duty to assist parents to examine, apart from their own desires, the separate and individual needs of such people.”

8.3 An attorney acting as a mediator in a marital dispute should urge each party to obtain independent legal advice.

Comment

At the outset, the mediator should encourage both parties to obtain independent legal advice. Doing so will help ensure that the participants have the opportunity to understand the implications and ramifications of available options. Parties in mediation who have consulting attorneys have the benefit of advice focused on their own interests and can participate with more confidence in the process. Review of a proposed mediated settlement agreement with a party’s consulting attorney affords that party the opportunity to reflect on the fairness of the agreement before signing it and helps ensure that the party understands the agreement and enters into it voluntarily.

⁹⁷ *Id.*

8.4 An attorney acting as a mediator in a marital dispute should only give advice that will enable the parties to make reasonably informed decisions.

Comment

The mediator should have the knowledge and experience necessary to provide relevant information and advice to help the participants make reasonable, informed decisions.⁹⁸ Participants informed about applicable legal principles are able to make thoughtful decisions to resolve their disputes. Some information, such as the tax consequences of certain transactions, legal principles about the characterization of assets, and the need for formal parenting plans, is neutral and beneficial to both parties. A mediator with sufficient experience and expertise may provide such information. Otherwise, the mediator should assist the participants in obtaining expert information when such information is necessary for an informed agreement.⁹⁹

The extent to which a mediator should provide advice (as opposed to information) is a controversial issue.¹⁰⁰ On the one hand, it is difficult for the mediator to maintain impartiality while providing advice to one of the participants. Also, in some circumstances providing advice might be seen as constituting legal representation, which is inappropriate for a mediator and might bring into play the

98 “A MEDIATOR SHALL CONDUCT A MEDIATION BASED ON THE PRINCIPLE OF PARTY SELF-DETERMINATION. SELF-DETERMINATION IS THE ACT OF COMING TO A VOLUNTARY, UNCOERCED DECISION IN WHICH EACH PARTY MAKES FREE AND INFORMED CHOICES AS TO PROCESS AND OUTCOME.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS, SUPRA NOTE 96, STANDARD 1.

99 “A MEDIATOR CANNOT PERSONALLY ENSURE THAT EACH PARTY HAS MADE FREE AND INFORMED CHOICES TO REACH PARTICULAR DECISIONS, BUT, WHERE APPROPRIATE, A MEDIATOR SHOULD MAKE THE PARTIES AWARE OF THE IMPORTANCE OF CONSULTING OTHER PROFESSIONALS TO HELP THEM MAKE INFORMED CHOICES.” *Id.*

100 SEE GENERALLY JANE KIDNER, SPECIAL TOPIC: PERSPECTIVES ON ADR/MEDIATION: THE LIMITS OF MEDIATOR “LABELS”: FALSE DEBATE BETWEEN “FACILITATIVE” VERSUS “EVALUATIVE” MEDIATOR STYLES, 30 W.R.L.S.I. 167 (2011).

conflict of interest rules.¹⁰¹ There is the danger that the participants will perceive advice from the mediator as a directive that they must follow. On the other hand, the participants may be unable to make informed decisions without some guidance. They may seek that guidance from a lawyer–mediator rather than obtain outside expert advice on every issue that arises. Such advice may be necessary to ensure that the rights and legitimate interests of the participants and their children have been dealt with in a fair and informed manner.

Guidelines attempting to distinguish between providing permissible information and impermissible advice appear largely semantic and virtually unenforceable. And, to the extent that they prohibit advice that would assist the participants in making informed, fair decisions, such rules are undesirable from a policy standpoint. Therefore, this Goal provides that it is permissible for a mediator to provide advice under the following guidelines.¹⁰²

A mediator choosing to provide advice or evaluation should tell the participants they are free to reject it.¹⁰³ “Evaluations, particularly of a predictive nature, generally should be resorted to only after other more facilitative measures have failed to break an impasse.”¹⁰⁴ The mediator should, if possible, offer suggestions in the guise of

101 SEE, E.G., RPC 2.2 (INTERMEDIATION).

102 “CONSISTENT WITH STANDARDS OF IMPARTIALITY AND PRESERVING PARTICIPANT SELF-DETERMINATION, A MEDIATOR MAY PROVIDE THE PARTICIPANTS WITH INFORMATION THAT THE MEDIATOR IS QUALIFIED BY TRAINING OR EXPERIENCE TO PROVIDE. THE MEDIATOR SHALL NOT PROVIDE THERAPY OR LEGAL ADVICE.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS, SUPRA NOTE 95, STANDARD VI.

103 SEE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (JUNE 1986) (CURRENTLY BEING REVIEWED BY THE ACR STANDARDS COMMITTEE FOR THE ASSOCIATION FOR CONFLICT RESOLUTION).

104 DONALD T. WECKSTEIN, IN PRAISE OF PARTY EMPOWERMENT-AND OF MEDIATOR ACTIVISM, 33 WILLAMETTE L. REV. 501, 552 (1997); SEE ALSO DANIEL B. PICKAR, JEFFREY J. KAHN, SETTLEMENT-FOCUSED PARENTING PLAN CONSULTATIONS: AN EVALUATIVE MEDIATION ALTERNATIVE TO CHILD CUSTODY EVALUATIONS, 49 FAM. CT. REV. 59, 61 (2011); AND ALLAN E. BARSKY, MEDIATIVE EVALUATIONS: THE PROS AND PERILS OF BLENDING ROLES, 45 FAM. CT. REV. 560 (2007).

questions, rather than definitive statements, because doing so is less coercive.¹⁰⁵

Whether a mediator should provide advice may depend on the information provided to the participants at the start of the mediation. At the outset, the mediator should explain to the parties the different roles of lawyers and mediators, the desirability of consulting independent legal advice, the risks of reaching an agreement without such advice, and the inapplicability of the lawyer-client privilege.¹⁰⁶ The mediator should provide in writing to all participants a statement such as the following:

1. Although I am a lawyer, I am not acting as a lawyer for either of you. You are not my clients. I do not represent either of you. I will help you reach a fair, informed agreement. I will give you advice about how the law might affect your decisions and aspects of your agreement, but I will not favor either of your interests, or provide advice that is beneficial to one of you but detrimental to other participants.

2. You should obtain independent advice from someone who is looking out only for your interests. You should consult your own attorney before signing any agreement reached during this mediation.

3. I cannot act as a lawyer for either of you during the course of the mediation, even for unrelated matters. After the mediation is completed, I will not be able to act as a lawyer for either of you as to any issues involved in the mediation.

¹⁰⁵ SUPRA NOTE 104.

¹⁰⁶ Cf. RPC 24.

9. Arbitrator

9.1 An attorney should act as an arbitrator only if competent to do so.

Comment

No lawyer should act as the arbitrator of marital disputes without adequate education and training.¹⁰⁷ There are many ways to acquire the necessary knowledge of arbitration and skill as an arbitrator, including law school training programs, AAML arbitration training workshops, continuing legal education, formal training programs, and experience as an arbitrator in other areas of the law. A matrimonial lawyer is likely to be a better arbitrator of matrimonial disputes than nonlawyers or lawyers who practice in different fields because of the matrimonial lawyers' understanding of the nuances of family law and experience with the likely outcome of matrimonial litigation.

9.2 An attorney acting as an arbitrator should comply with all relevant rules applicable to judges, including the Code of Judicial Conduct.

Comment

Because arbitrators act in a quasi-judicial role, they have been afforded immunity protection akin to that of judges. Judicial immunity protects judges to the extent that they "...are not liable to civil actions for the[ir] judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."¹⁰⁸ In fact, the Court in *Stump v. Sparkman* went on to hold: "A judge will not be deprived of immunity because the action

¹⁰⁷ SEE NOTE 95, SUPRA.

¹⁰⁸ *MOSS v. KOPP*, 559 F.3d 1155, 1163-1164 (10th Cir. 2009) (QUOTING *STUMP v. SPARKMAN*, 435 U.S. 349, 356, (1978)).

he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the ‘clear absence of all jurisdiction.’”¹⁰⁹

Arbitral immunity has its base in judicial immunity. The extension of judicial immunity to arbitrators began in the 1880’s, and remains firmly a part of our jurisprudence. In 1884, the principle of arbitral immunity was eloquently articulated: “an arbitrator is a quasijudicial officer under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence and freedom from undue influence, as in the case of a judge or juror.”¹¹⁰

Whereas mediators are treated more like attorneys for conflict of interest analysis, arbitrators are treated more like judges.¹¹¹ This distinction is important because judges are generally held to a higher ethical standard than attorneys. For example, the former CPR admonition to avoid even the appearance of impropriety (Canon 9) has been deleted from the RPC.¹¹² Under Canon 2 of the CJC, however, a judge “should avoid impropriety and the appearance of impropriety in all of the judge’s activities.”¹¹³

¹⁰⁹ STUMP, 435 U.S. AT 356-357.

¹¹⁰ HOOSAC TUNNEL DOCK & ELEVATOR CO. V. O’BRIEN, 137 MASS. 424 (1884). SEE ALSO LA SERENA PROPERTIES V. WEISBACH, 112 CAL. RPTR. 3D 597 (CAL. CT. APP. 2010) (NOTING THAT THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY HAS ITS ROOTS IN THE ENGLISH COMMON LAW, AND HAS BEEN EXTENDED TO PRIVATE AND PUBLIC ARBITRATORS). SEE GENERALLY, SARA ROITMAN, BEYOND REPROACH: HAS THE DOCTRINE OF ARBITRAL IMMUNITY BEEN EXTENDED TOO FAR FOR ARBITRATION SPONSORING FIRMS?, 51 B.C. L. REV. 557, 562 (2010).

¹¹¹ SEE, E.G., RPC 1.12 (“FORMER JUDGE OR ARBITRATOR”).

¹¹² SEE COMMENT TO RPC 1.10.

¹¹³ SEE CJC RULE 2.11 (“A JUDGE SHALL DISQUALIFY HIMSELF OR HERSELF IN A PROCEEDING IN WHICH THE JUDGE’S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED”) (2007); AND CPR FOR ARBITRATORS 2.B.3 (“MIGHT REASONABLY RAISE A QUESTION AS TO THE ARBITRATOR’S IMPARTIALITY”). FOR A DISCUSSION OF THE CJC AS APPLIED TO ARBITRATORS, SEE ROBERT A. HOLTZMAN, THE ROLE OF ARBITRATOR ETHICS, 7 DEPAUL BUS. & COM. L.J. 481 (2009).

Therefore, an attorney requested to serve as an arbitrator in a matrimonial proceeding may wish to consider some actions not necessarily routinely done in the role of an advocate. For example, disclosure of any prior relationship, social or professional, with any of the parties, attorneys or witnesses will increase the confidence of the participants in the objectivity of the arbitrator.¹¹⁴ Any conflict of interest that exists at the inception of the arbitration, or that comes into existence during the proceedings should also be disclosed. In addition, unless all parties consent after disclosure, a former arbitrator may not subsequently represent anyone in connection with the matter in which he or she “participated personally and substantially.”¹¹⁵ Care should be taken to decide only those matters included in the arbitration agreement or other document referring the matter to arbitration. Like judges, arbitrators should be cautious about participating in settlement discussions because the appearance of objectivity may be lost even if the arbitrator in fact remains uninfluenced by the positions taken by the parties in settlement discussions.

¹¹⁴ SEE CPR FOR ARBITRATORS § 2.B; CODE OF ETHICS FOR ARBITRATORS CANON II.A.(1)&(2). SEE ALSO *KAY V. KAISER FOUND. HEALTH PLAN, INC.*, 194 P.3D 1181 (HAW. APP. 2008) (HOLDING THAT UNDISCLOSED FACTS CONCERNING ONE ARBITRATOR’S PRIOR AND ONGOING RELATIONSHIP THROUGH FUNDRAISING ACTIVITIES FOR CHARITY WITH MEDICAL DEFENDANT CREATED AN IMPRESSION OF POSSIBLE BIAS OR PARTIALITY SUCH THAT ARBITRATOR’S FAILURE TO DISCLOSE HER DEALINGS PREJUDICIALLY TAINTED ARBITRATION AWARD).

¹¹⁵ RPC 1.12(A).