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CHAPTER SIXTEEN

ETHICS AND STANDARDS

I. INDIANA RULES OF PROFESSIONAL CONDUCT

Available at https://www.in.gov/courts/rules/prof_conduct/index.html

A. JUVENILES ARE A CLIENT WITH DIMINISHED CAPACITY

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. Indiana Professional Conduct Rule 1.14(a).

1. Normal Client-Lawyer Relationship

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. Indiana Professional Conduct Rule 1.14, Comment 1. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. Indiana Professional Conduct Rule 1.14, Comment 2.

2. Determining Extent of Diminished Capacity

See also *Competency and Mental Health Chapter 5*

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. Indiana Professional Conduct Rule 1.14, Comment 6.

3. Family Members or Other Persons May Participate in Discussions

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons

generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under Indiana Professional Conduct Rule 1.14(b), must look to the client, and not family members, to make decisions on the client's behalf. Indiana Professional Conduct Rule 1.14, Comment 3.

PRACTICE POINTER: Remember that there is no parent-child privilege. A parent can be called to testify against the child about information the child divulged to the parent.

PRACTICE POINTER: The amount of involvement of any family members in the client's representation may vary from client to client. In some cases, it may be helpful to heavily involve the family members in the process to gather necessary information and provide other assistance. In other cases, especially when the family member has an adverse interest in the case, it may be in the best interest of the representation to limit the amount of involvement of the parent in discussions. There is no legal duty to explain the legal process and other information about the case to the parent, as the parent has the right to retain representation if necessary.

B. APPOINTMENT OF GUARDIAN AD LITEM OR OTHER LEGAL REPRESENTATIVE

1. Lawyer May Consider Seeking Appointment of Legal Representative

If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests.... In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering any alternative, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client. Indiana Professional Conduct Rule 1.14, Comment 7.

PRACTICE POINTER: It is not the attorney's role to act in the child's best interest, but to represent the client's stated interests. The attorney is the only voice in the courtroom for the child's wishes, which may not be in the child's best interest. If the attorney feels that the child's stated interests are not in the client's best interest, the attorney may seek to have a guardian ad litem appointed pursuant to Ind.Code 31-32-3-1.

2. If Client Has a Legal Representative Appointed (Guardian)

Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. Indiana Professional Conduct Rule 1.14, Comment 2.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. Indiana Professional Conduct Rule 1.14, Comment 4.

C. JUVENILE HAS DECISION-MAKING POWER ABOUT PLEA TO BE ENTERED AND WHETHER TO TESTIFY

Subject to Rule 1.2 (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. Indiana Professional Conduct Rule 1.2(a).

D. LAWYER HAS DUTY TO EXPLAIN MATTER TO EXTENT REASONABLY NECESSARY

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation. Indiana Professional Conduct Rule 1.4(b).

1. Child Should Be Given Sufficient Information to Participate in Representation

The client should have sufficient information to participate intelligently in decisions concerning 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. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, ...[i]n litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e). Indiana Professional Conduct Rule 1.4, Comment 5.

PRACTICE POINTER: Depending on the amount of the child's previous contact with the system, the attorney may need to explain the hearing procedures, as well as the specific factors in the current case. Written resources for a system overview specifically for children are available at: [http://youthlawteam.org/files/PLAY_\(English\).pdf](http://youthlawteam.org/files/PLAY_(English).pdf)

2. Information Provided Should Be Appropriate for the Client

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Indiana Professional Conduct Rule 1.4, Comment 6.

PRACTICE POINTER: Be creative when communicating case information and discussing the child's interests with the child. Consider using visual aids, such as a pro/con chart, drawings of the courtroom, and providing the child with written material she can review after the client meeting to reinforce the contents of the client meeting. The grade-level of the language used may need to be adjusted depending on the client's specific limitations. If the child has an Individual Education Plan, consider contacting the school for advice on communication styles and vocabulary level, if the client authorizes the contact. There may be situations where it may be necessary to enlist a school worker who has extensive experience with the child to meet with the child to assist with the communication.

E. LAWYER'S COMMUNICATION DUTIES

Pursuant to Indiana Professional Conduct Rule 1.4(a), a lawyer shall:

- (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined by Rule 1.0(e), is required by these Rules;
- (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) Keep the client reasonably informed about the status of the matter;
- (4) Promptly comply with the reasonable requests for information; and
- (5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited by Rule 1.2(c).

PRACTICE POINTER: The child – not just the parent, guardian, or custodian – should be given the attorney's contact information. If the child is detained, the child should also be provided with an explanation on the detention center rules for communication with attorneys. The attorney should maintain regular contact with the child.

1. Duty to Inform Client Concerning Plea Bargains

If these Rules require that a particular decision about the representation be made by the client, Rule 1.4(a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel... a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a). Indiana Professional Conduct Rule 1.4(a), Comment 2.

2. Compliance with Requests for Information

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. Indiana Professional Conduct Rule 1.4(a), Comment 4.

PRACTICE POINTER: The child has a right to their client file, as would any other client. Due to client confidentiality pursuant to Rule 1.6, the parent, guardian, or custodian -- because they are not the client -- does not have a right to the client file and requests for information should be dealt with appropriately. If the child authorizes release of the information to the family, the authorization should be written and kept in the client file. Court documents are provided to the parent, guardian, or custodian as a party.

3. Withholding Information from Child

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. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders. Indiana Professional Conduct Rule 1.4, Comment 7.

II. INSTITUTE OF JUDICIAL ADMINISTRATION AND THE AMERICAN BAR ASSOCIATION (IJA-ABA) JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (VOLUME 6)

Available at:

http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Counsel_for_Private_Parties.authcheckdam.pdf

III. NATIONAL JUVENILE DEFENDER CENTER GUIDANCE

A. Ten Core Principles for Providing Quality Delinquency Representation Through Public Defender Delivery Systems

Available at: <https://www.in.gov/publicdefender/files/10-principles-NACDL-and-NJDC.pdf>

B. National Juvenile Defense Standards

Available at:

<http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>

IV. MANDATORY REPORTING REQUIREMENTS

A. Duty to Report Child Abuse or Neglect

Pursuant to Ind. Code 31-33-5-1, an individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by Ind. Code 31-33-5.

B. Immediate Oral Report to Department or Law Enforcement Agency

Pursuant to Ind. Code 31-33-5-4, a person who has a duty under Ind. Code 31-33-5 to report that a child may be a victim of child abuse or neglect shall immediately make an oral or written report to:

- (1) the department of child services; or

(2) the local law enforcement agency.

C. Failure to Report is a Crime

A person who knowingly fails to make a report required by Ind. Code 31-33-5-1 commits a Class B misdemeanor. Ind. Code 31-33-22-1.

D. Timeliness of Report

A report of suspected child abuse or neglect must be made immediately. Ind. Code 31-33-5-4.

C.S. v. State, 8 N.E.3d 668 (Ind. 2014) (high school principal's conviction under Ind. Code 31-33-22-1 upheld where principal learned of alleged rape of student at 12:30 p.m. and did not contact DCS until 4:30 p.m. During the intervening hours, principal and other personnel attempted to investigate the alleged rape on their own and attended to unrelated administrative tasks.)

C.S. v. State, 8 N.E.3d 668 (Ind. 2014) (immediacy element is a case-specific, fact-specific question. Length of delay is not the only relevant issue—urgency with which person files the report and absence of intervening cause for delay are relevant inquiries).

E. Conflict Between Duty to Report and Attorney's Ethical Obligations

1. When Attorney Learns of Suspected Abuse or Neglect During Course of Representation

- (a) When an attorney learns of suspected child abuse or neglect during the course of her representation of a client, there exists a tension between the statutory duty to report under Ind. Code 31-33-5-1 and the confidentiality provisions of Professional Conduct Rule 1.6.

In Re Matter of Blickman, 164 N.E.3d 708 (Ind. 2020) (declining to “resolve today whether attorneys are subject to the Indiana Code’s mandatory reporting requirements in connection with information obtained during the course of a representation.”).

ISBA Legal Ethics Comm. Op. No. 2 (2015) (concluding that an attorney’s duty of confidentiality is generally paramount over the general duty to report, except where attorney believes reporting is necessary to prevent reasonably certain death or substantial bodily harm.