

Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums

by
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I. Introduction

Relocation cases raise both general issues which pertain to any custody representation and specific issues that relate only to the relocation context. This article will discuss “ethical issues” — i.e., issues concerning whether applicable rules of professional responsibility mandate, prohibit, or permit certain conduct — which pertain to an attorney who represents a parent in a custody case, with an emphasis on relocation cases.¹ Thus, this arti-

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¹ This article will not discuss the rights and responsibilities of the legal representative for the child in a custody case. For a sampling of the considerable amount of literature discussing that topic, see Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the “Legal Ethics” Perspective*, 73 *IND. L. J.* 665 (1998); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 *LOY. U. CHI. L.J.* 299 (1998); Frances Gall Hill, *Clinical Education and the “Best Interest” Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 *IND. L.J.* 605 (1998); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 *GEO. MASON L. REV.* 255 (1998). See also Symposium, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1281-2074 (1996) (special issue on ethical issues in the legal representation of children, including child protection cases as well as custody cases); *Representing Children Issue*, 13 *J. AMER. ACAD. MAT. LAW.* 1-355 (1995) (entire issue on “Representing Children”, including the Academy’s *Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*).

The literature often focuses on the two different types of legal representatives (essentially, the “guardian ad litem” model and the “lawyer for the child”

cle discusses the obligations and rights of a lawyer for a parent with respect to furthering the interests of the client's child (Part II), ethical issues regarding the lawyer's interviewing the client's child (Part III), the duty of the lawyer to avoid assisting a client in a criminal or fraudulent act (Part IV), the lawyer's duty to reveal information, including, among other things, the fact of child abuse (Part V), and whether a lawyer can use custody as a bargaining chip when negotiating on behalf of a client (Part VI). I have previously explored ethics issues in a different family law context but in somewhat more detail regarding generally applicable ethical rules.²

In general, this article will assume that the American Bar Association's Model Rules of Professional Conduct (hereinafter, the "Model Rules"), are the governing ethical system.³ In addition, however, this article will consider the "Standards of Conduct" adopted in 1991 by the American Academy of Matrimonial Lawyers.⁴ The Standards, designed to "raise the level of ethical practice above the minimum necessary to avoid discipline,"⁵ are aspirational only; almost every Standard is phrased in terms of "should" or "should not" rather than using mandatory language. The Standards are thus intended for guidance only. They do not mandate any particular conduct.

model), and the characteristics and desirability of each type. Some of the literature discusses specific ethical issues facing the legal representative for a child. See, e.g., Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AMER. ACAD. MAT. LAW. 45 (1993); Frances Gall Hill, *supra*, at 626-630. Many of the issues that arise concerning the legal representative of a child in a custody case apply equally to the legal representative of the child in a child protection proceeding; there is also a considerable amount of literature on that topic.

² See Lewis Becker, *Ethical Concerns in Negotiating Family Law Agreements*, 30 FAM. L. Q. 587 (1996).

³ The Model Rules have been adopted, although not in their entirety, by approximately 41 states. Other states either follow the American Bar Association's Model Code of Professional Responsibility (which preceded and was replaced by the Model Rules) or their own amalgam of rules. For the text of the Model Rules and state variations, see Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers, Statutes and Standards* 1998. A handy one volume treatise containing both the Model Rules and annotations is *Annotated Model Rules of Professional Conduct, Third Edition* (A.B.A. 1996).

⁴ The Standards may be found at 9 J. AMER. ACAD. MAT. LAW. 1 (1992).

⁵ Preliminary Statement to Standards of Conduct, 9 J. AMER. ACAD. MAT. LAW. 4 (1991).



This article will also consider, and lawyers should be aware of, significant recent efforts to revise existing ethics systems. The American Law Institute is in the process of developing the *Restatement of the Law, The Law Governing Lawyers* (“the *Restatement*”).⁶ The *Restatement* is not intended to replace the Model Rules but instead is intended as a statement of the law applicable in malpractice actions, disqualification proceedings, and other contexts. However, the *Restatement*, once concluded and adopted, will undoubtedly have a significant impact on the development, reform, and interpretation of state ethical codes. Its effect is already being felt; for example, provisions of the proposed *Restatement* are commonly discussed in scholarly commentary.⁷ The Reporter’s Notes to each proposed section of the *Restatement* contain comprehensive and useful discussions of existing judicial and other authority. These Notes are thus a fertile resource for one who is researching current questions arising under existing authority.

In addition to the work being done on the proposed *Restatement*, a reexamination of the Model Rules is underway. The American Bar Association has created a special commission, the “Ethics 2000 Commission”, to evaluate and consider changes to the Model Rules. Information regarding the work and the progress of the Commission may be found at its world wide web home page.⁸

II. Obligations and Rights with Respect to Furthering the Interests of the Child

A. Under Existing Systems

In relocation cases, as in custody cases generally, a lawyer who represents a parent may well be faced with a situation where the lawyer believes that the interests of the child are inconsistent with the wishes of the client. For example, the custodial parent

⁶ As of the date this article was written, the most current formulation of the work done on the *Restatement* is contained in *Proposed Final Draft No. 2* (Apr. 6, 1998), *Proposed Final Draft No. 1* (Mar. 29, 1996), and *Tentative Draft No. 8* (Mar. 21, 1997).

⁷ See, e.g., Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541 (1997).

⁸ See Ethics 2000 Home Page, <http://www.abanet.org/cpr/ethics2k.html>.

may wish to relocate in a situation where the parent's lawyer believes that relocation is not in the interests of the child. Conversely, the lawyer may represent the parent who opposes relocation when the lawyer believes that relocation is in the interests of the child. What rights and responsibilities does the lawyer have in such a case?

It seems clear that a lawyer who represents a parent in custody litigation does not have a general duty under applicable ethical codes to further the interests of a child, even where the lawyer believes that the client's wishes are inconsistent with the child's best interests. Neither the Model Rules nor the Model Code explicitly impose such a duty and no such general obligation has been found to exist under prevailing ethical codes. Moreover, malpractice law has so far imposed no general duty of care to the child of a client in a custody case,⁹ and hence no general obligation to further the interests of a child. The conclusion that no general duty of care exists is sound under current law. Although a trend is developing of expanding a lawyer's duty to non-clients in malpractice cases, its rationale does not support the existence of an obligation to the child because the developing trend does not impose a duty of care to a non-client where the non-client's interest is adverse to that of the client or where the existence of such a duty would significantly interfere with the performance of the lawyer's obligation to the client.¹⁰ In the cus-

⁹ For decisions refusing to find such a duty of care in a custody case, see *McGee v. Hyatt Legal Serv.*, 813 P.2d 754, 757 (Colo. Ct. App. 1990); *Pelham v. Griesheimer*, 440 N.E.2d 96, 101 (Ill. 1982); *Person v. Behnke*, 611 N.E.2d 1350, 1355 (Ill. App. Ct. 1993); *Lamar v. Basbanes*, 636 N.E.2d 218, 219-20 (Mass. 1994); *Rhode v. Adams*, 957 P.2d 1124, 1128 (Mont. 1998). See also *G.S. v. T.S.*, 582 A.2d 467, 471 (Conn. App. Ct. 1990) (stating that counsel for a parent in a custody case owes no obligation to act in the best interest of the children); *Offenhartz v. Cohen*, 562 N.Y.S.2d 500, 501 (N.Y. App. Div. 1990) (holding that child who was allegedly abducted by a parent had no action in negligence against the parent's attorney). *But cf.* *Rushing v. Bosse*, 652 So.2d 869, 873 (Fla. Dist. Ct. App. 1995) (holding that lawyer in an adoption proceeding has a duty of care to act in the best interests of the child).

¹⁰ For example, the *Restatement* imposes a duty of care to non-clients where: the non-client relies on the lawyer's legal services after having been invited to do so; the lawyer knows that the client intends as a primary objective that the lawyer's services benefit the non-client; and the lawyer's client is a trustee, guardian, executor, or fiduciary for the non-client. In the latter two instances, however, a duty of care to a non-client does not arise if such a duty

tody context a duty of care to a child would arise only when the client's wishes and the child's interests seem to the lawyer to be at odds with each other. The imposition of a duty of care to the child in such circumstances would be inconsistent with the obligation the lawyer owes to the client.

The concern that a duty of care would be inconsistent with the obligation a lawyer owes to her client has provided the rationale for many of the malpractice decisions holding that a lawyer has no duty of care to the client's child(ren). For example, in *Lamare v. Brasbanes*,¹¹ the court held that the attorney for a parent owed no duty of care to children who were represented by a guardian ad litem. The court held that a duty of reasonable care could not be imposed where it would potentially conflict with the duty which a lawyer owes his client, that the existence of sexual abuse allegations were alone sufficient to create a potential conflict, and that the fact that the parent sought different visitation rights from those recommended by the guardian ad litem put the parent at further odds with the children.¹² In *Rhode v. Adams*,¹³ the lawyer for the mother of three children had obtained a court order granting the mother custody, but the order was subsequently reversed on the ground that the father had not been given notice and an opportunity to be heard. However, in the meantime the mother took the children out of state. The father then sought to bring a malpractice action on behalf of the children against the mother's lawyer on the theory that the lawyer was negligent in obtaining the order because she failed to follow procedures intended to prevent the harm that was caused to the children (father alleged that one of the children was physically and sexually abused while with the mother both before and after the order that was ultimately reversed). The court held that the lawyer had no duty of care to the children, stating:

We agree that an attorney must be able to vigorously advocate his or her client's interests in litigation without being compromised by obligations to non-clients. Such vigorous representation of a client is an essential part of the adversary system***[W]e conclude that if an at-

would significantly impair performance of the lawyer's obligations to the client. See §§73(3)(b) and (4)(d), *Tentative Draft No. 8*.

¹¹ 636 N.E.2d 218 (Mass. 1994).

¹² *Id.* at 219-20.

¹³ 957 P.2d 1124 (Mont. 1998).

torney owes the same duty of care to both the parent and the children, he or she will be able to serve neither effectively.¹⁴

Notwithstanding the lack of a general duty of care to a child or a duty to further the interests of a child, existing ethical codes do not permit a lawyer for a parent to completely disregard the interests of a child. First, as is discussed in Parts IV and V, if the client wishes to lie about information relevant to the interest of the child or if the lawyer knows of past or continuing child abuse by the client or a third party associated with the client (such as a romantic partner), a different analysis applies.¹⁵ Second, for a lawyer to have a reasonable basis for making recommendations and explaining matters to a parent/client in a custody case pursuant to Model Rule 1.4(b),¹⁶ the lawyer must always consider how the client's conduct or objectives will impact on a child and therefore must consider the child's interests. The obligation imposed by Rule 1.4(b) to explain matters to the client can have broad applicability in the custody context. For example, where a lawyer believes that the court is likely to conclude that the best interests of the child will not be served by the position advocated by the client, Rule 1.4(b) imposes a duty on the lawyer to advise the client of that fact. The client may in fact be in ignorance of the best interests of the child because the client is blinded by dislike of the other parent, self interest, or other reasons. The client therefore may not perceive the risk of losing the litigation and the desirability of at least attempting to negotiate a result that is likely to produce more benefits than litigation. In such a situation, Rule 1.4(b) requires that the lawyer advise the client regarding the best interests of the child and the likely outcome of

¹⁴ *Id.* at 1128. To this general effect, *see also* McGee v. Hyatt Legal Serv., 813 P.2d 754, 757 (Colo. Ct. App. 1990); Pelham v. Griesheimer, 440 N.E.2d 96, 101 (Ill. 1982). For an interesting application of this policy concern in a different context, *see* Burger v. Pond, 273 Cal. Rptr. 709, 716 (Cal. Ct. App. 1990) (holding that a lawyer who represented a client in obtaining a divorce which was set aside after the client had both remarried and had a child owed no duty of care to the client's fiancée even though the lawyer allegedly knew that the client and his fiancée planned to marry after the divorce was obtained).

¹⁵ *See infra* text at notes 45 to 76.

¹⁶ Model Rules, Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

the litigation.¹⁷ Rule 2.1, which requires a lawyer to exercise independent professional judgment and render candid advice, may also be read to require that the lawyer apprise the client of the realities of the legal situation.

Even where the lawyer does not necessarily believe that the client is likely to lose on the custody issue but does believe that the client's objective is contrary to the child's interests (for example, where the lawyer's belief rests on facts not required to be revealed to the court), Rule 1.4(b), in my view, requires that the lawyer tell the client why the lawyer believes that the client's objective is not in the child's interests. The client may not have seen the custody issue from the lawyer's perspective and may be genuinely concerned about the best interests of the child. The client may change his position or his objectives in the light of the lawyer's input.¹⁸

Thus, although the Model Rules do not impose upon a lawyer for a parent a general duty to further the interests of the child, they do impose upon a lawyer a duty to advise a client who is proceeding in a custody litigation in a way that is contrary to the interests of the child about the effect of the client's actions or objectives upon the child. Moreover, although no general duty of care is owed to a child under the Model Rules or malpractice principles, an attorney may be civilly liable to a non-client, including children, for conduct that constitutes a tort other than negligent breach of a duty of care.¹⁹

Although the rules do not require that a lawyer for a parent generally act in the interests of a child, they do permit a lawyer who is concerned about the interests of a child to avoid acting

¹⁷ The court in *Rhode v. Adams*, after holding that a lawyer for a parent in a custody case owes no duty of care to a child, stated: "This is not to say that an attorney who represents a parent in a contested child custody case should not advise his or her client to consider what is best for the children, and to work within the proper legal and ethical parameters when litigating custody and visitation." 957 P.2d at 1128.

¹⁸ The Comment to Model Rule 1.4(b) supports this conclusion, providing in part: "In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others."

¹⁹ See *id.* (stating that attorney may be liable to a non-client if attorney's conduct rises to the level of deceit, collusion, or intentionally reckless conduct, or for malicious prosecution or abuse of process).

inconsistently with the child's interests. Thus, Rule 2.1 clearly permits the lawyer to advise the client as to the lawyer's perception of the child's interests.²⁰ If the client wishes to persist in the conduct or litigation posture in question, the lawyer may consider withdrawal from the representation. Rule 1.16(b) provides that a lawyer may withdraw from a representation if withdrawal can be accomplished without material adverse effect on the interests of the client. Whether a withdrawal can be accomplished without a material adverse effect on the interests of a client is essentially a factual issue. It is also an issue that seems inevitably to be influenced by hindsight; i.e., what happened to the client following withdrawal will be significant in evaluating the propriety of the lawyer's withdrawal under this prong of Rule 1.16(b). A lawyer who wants to rely on this prong undertakes the risk that withdrawal would later be seen as having harmed the interest of the client.

However, even if withdrawal will materially harm the client's interests, it is permitted under Rule 1.16(b)(3) if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." The words "repugnant" and "imprudent" are interesting contrasts. "Imprudent" suggests a wholly objective standard: is the objective a wise one. Imprudence is presumably measured by the likelihood of the particular objective's being achieved or possibly by whether the cost of the objective is excessive. "Repugnant" on the other hand suggests a test that is at least partially subjective. The Comment gives no assistance in determining the meaning of these terms. Interestingly, the *Restatement*, in § 44(3)(b)(f), continues this basis of withdrawal. Comment j states:

"An action is imprudent***only if it is likely to be so detrimental to the client that a reasonable lawyer could not in good conscience assist it***A client's intended action is not imprudent simply because the lawyer disagrees with it."

The Comment contains no definition of the term "repugnant." One might argue that the term "repugnant" must be construed to be wholly subjective. However, a completely subjective test confers too much power on the lawyer. Under such a test,

²⁰ Rule 2.1 provides: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."

the lawyer's determination of repugnance confers upon the lawyer the absolute right to withdraw even if the client's interests are materially harmed thereby. The term "repugnant" therefore can not be understood to be wholly subjective. But as a matter of construing language, the term "repugnant" must be given some effect and a substantial amount of subjectivity seems necessarily implicit in the term. I suggest that the question should be whether a reasonable person in the position of the lawyer would find the client's objectives or conduct repugnant. Such a test combines both subjective and objective components. Objectivity is required by the "reasonable person" part of the test. Subjectivity is permitted by looking at the circumstances of a person *in the position of the lawyer*.²¹ As applied to custody cases, if a client wishes to pursue an objective that the lawyer considers contrary to the interests of the child, then a determination by the lawyer that pursuit of that objective is repugnant would justify withdrawal under Rule 1.16(b)(3) so long as the determination of repugnance is reasonable to a person in the position of the lawyer. In the normal instance, the necessary synchronization would exist.²²

²¹ The law of Sales provides a useful analogy. Article 2-608(1)(a) of the Uniform Commercial Code provides that a buyer may revoke his acceptance where a defect in accepted goods substantially impairs its value to him. In determining the meaning of "to him," courts tend to hold that the test is not a wholly subjective one but instead that the viewpoint is that of a reasonable person in the position of the purchaser. *See, e.g.,* Hemmert Agric. Aviation, Inc. v. Mid-Continent Aircraft Corp., 663 F. Supp. 1546, 1551-52 (D. Kan. 1987).

²² *But cf.* Tenn. Bd. Prof. Resp., Formal Op. 96-F-140, 1996 WL 340719, dealing with an inquiry under the Model Code as to whether a lawyer who was a devout Catholic might decline an appointment to represent a minor who wanted an abortion. The opinion held that the juvenile court should be allowed as a matter of law to determine the propriety of counsel's withdrawal, but stated that the Code's Ethical Considerations (EC 2-29) exhorted appointed counsel not to withdraw where a person is unable to retain counsel, except for compelling reasons which did not include the lawyer's repugnance. This Opinion was widely criticized. *See, e.g.,* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 640-44 (1997). If "repugnance" were a proper issue in this fact situation, I would look at a reasonable person in the position of a lawyer who is a devout Catholic in determining what is repugnant within the meaning of Model Rule 1.16(b)(3).

A lawyer who feels strongly about refusing to assist a client in actions that the lawyer considers inconsistent with the interests of a child might wish to consider having her retainer agreement provide that the lawyer will consider withdrawal if the lawyer feels that the client's actions or goals are deleterious to the child's interests or are otherwise inconsistent with the child's interests, but it is not recommended. Such a provision may be marginally helpful in the event that the lawyer seeks withdrawal. The lawyer's determination that the action is inconsistent with the interests of the child then might furnish an independent basis for permissive withdrawal under Rule 1.16(b)(6) ("other good cause for withdrawal"). The Comment to Rule 1.16 states that a lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement limiting the objectives of the representation. But whether or not such a statement in the agreement affords a basis for a possible subsequent withdrawal under Rule 1.6(b)(6), it serves an immediate purpose in letting the client know what the lawyer is thinking. The downside of such a provision is that it may frighten off clients, who are often terribly worried and anxious about custody, by raising concerns that the lawyer will withdraw unduly and at a time which will severely prejudice the client. Such a provision seems unnecessary and undesirable in light of the other permissive withdrawal provisions discussed above.

The foregoing analysis applies where litigation has not commenced. Where litigation has commenced, approval of the court may be necessary for withdrawal to be effectuated. Rule 1.16(c) provides that when ordered to do so by a tribunal, a lawyer must continue representation notwithstanding good cause for terminating the representation. Thus, if a judge refuses to permit withdrawal, the lawyer must continue the representation. But what must be communicated to a judge concerning the reasons for withdrawal? The lawyer does not want to be in the position of telling the judge that the lawyer believes that the client's position is inconsistent with the interests of the child. A court may or may not be willing to accept a lawyer's statement, without more, that the case is one in which the lawyer is entitled to withdraw

under Rule 1.16(b).²³ The danger with a court's accepting such a conclusory statement is that it effectively deprives the court of reviewing power and makes the lawyer the sole judge of the applicability of the Rule. The difficulty may be resolved if a judge other than the one who will hear the custody matter hears the withdrawal petition and if the petition is under seal or otherwise appropriately protected from public scrutiny.

B. *The Academy's Standards*

The Academy's Standards of Conduct suggest that a lawyer for a parent should have a general obligation to act in accordance with the best interests of the parent's child, but they do not adopt such an obligation. Standard 2.23, the most relevant of the Standards, provides merely that an attorney for a parent "should consider the welfare of the children." This injunction is perfectly consistent with the Model Rules in that, as has been developed above, a lawyer must always consider the interests of the children in order to effectively advise a client and explain matters to a client pursuant to Rule 1.4(b).²⁴

However, the prefatory discussion to those Standards which relate to children more strongly suggests an obligation to further the best interests of a child. The discussion states:

The lawyer must represent the client zealously 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 adversary 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. To the extent that statutory and decisional law imposes a duty on the parent to act in the child's best interests, the attorney for the parent might be considered to have an

²³ Rule 1.16(b) permits withdrawal under various circumstances, some of which have already been discussed. *See supra* text at notes 20 to 22. Rule 1.16(a) mandates withdrawal if the representation will result in violation of the rules of professional conduct or other law. The Comment to Model Rule 1.16 states, regarding mandatory withdrawal under Rule 1.16(a)(1), that the lawyer's statement that professional considerations require withdrawal ordinarily should be accepted as sufficient. Even if one agrees with the Comment's observation — and at least some commentators regard it as poor policy — the applicability of the Comment to withdrawal under Rule 1.16(b) is dubious.

²⁴ *See supra* discussion in text at notes 16 to 18.

obligation to the child that would, in some instances, justify subordinating the express wishes of the parent.²⁵

This analogy between a lawyer for a fiduciary and a lawyer for a parent is far from compelling. A fiduciary's duties are often clearly recognizable and legally mandated. It may, therefore, be perfectly appropriate in some cases to make a lawyer liable to a beneficiary of a fiduciary.²⁶ However, a parent does not have a general comparable duty. Although a parent may have a strong moral obligation to act in the best interests of children, there is no general enforceable legal obligation that the parent do so. For example, the law will not compel a parent to provide support that might be in the best interests of a child — such as music lessons or private school — even where the parent clearly can afford such an expenditure, unless the family is no longer intact. In the custody context, a parent is not legally obliged to act only in accordance with the child's best interests in seeking a custody or visitation order. A parent who initiates a custody motion or proceeding that has little chance of success but will emotionally disturb a child may lose, but parents have no obligation to desist from initiating such a proceeding and no sanction is automatically applied for doing so. Thus, absent a general duty on the part of a parent to act in accordance with the child's best interests, there can be no basis for a derivative duty on the part of a lawyer for the parent.²⁷ (I, of course, do not assert that a parent

²⁵ *Standards of Conduct*, *supra* note 4, at 27.

²⁶ See, e.g., *Leyba v. Whitley*, 907 P.2d 172, 178-80 (N.M. 1995) (holding that lawyers for personal representative of deceased son's estate who allegedly failed to advise personal representative of her fiduciary status regarding the proceeds of a settlement of a wrongful death action brought on behalf of the estate could be liable in malpractice to a statutory beneficiary of the decedent who was injured when the personal representative dissipated the proceeds).

²⁷ Section 73 of the *Restatement of the Law Governing Lawyers*, which imposes civil liability on a lawyer based on knowledge of breach of fiduciary duty by a client, is, according to Comment h, "limited to lawyers representing only a limited category of the persons described as fiduciaries — trustees, executors, guardians, and fiduciaries acting primarily to fulfill similar functions." Cf. *Harrington v. Pailthorp*, 841 P.2d 1258, 1262 (Wash. Ct. App. 1992), rev. den. 854 P.2d 41 (Wash. 1993), rejecting a malpractice claim by a noncustodial parent based in part on the theory that the custodial parent was a "trustee" for the children and the lawyer for the custodial parent had failed to advise her of her "trustee" status. Elizabeth S. Scott and Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401 (1995) is not inconsistent with my view that parents are not

owes no legal obligation toward a child. Parental neglect or abuse of a child may result in criminal proceedings against the parent or in civil protective proceedings. But the standard being applied in such proceedings requires compliance with only the most basic levels of acceptable conduct. The obligation being enforced is very far from constituting a general duty to act in the best interest of a child.)

Because of the lack of any precise correlation between the duties of a fiduciary and the duties of a parent, it is not surprising that the actual Standards themselves (as opposed to the prefatory discussion to the Standards relating to children) do not impose on lawyers a general duty to act in the best interests of a child. Instead, as has already been noted, Standard 2.23 provides merely that an attorney for a parent should consider the welfare of the children. Indeed, the prefatory discussion to the Standards relating to children seems to recognize the difficulty in applying the law relating to fiduciaries to custody issues in that it concludes: "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."

C. *What Should The Rule Be?*

Whether ethical codes should impose on lawyers a general obligation toward children that transcends the wishes of their clients is a different and intriguing question. To resolve this issue,

fiduciaries within the meaning of prevailing ethical systems. That article discusses the "growing criticism that legal policy regulating the parent child relationship is driven excessively by the objective of protecting parents' rights," develops an "informal model of the parent as fiduciary," applies that model, and concludes that the criticism of contemporary family law as being unduly rights centered is misplaced in that legal outcomes can be explained and justified by the fiduciary model. *See id.* at 2403-2405. The article uses fiduciary status as an "informal model" and a "metaphor." It could not be used to support an argument that parents owe clearly defined fiduciary duties that in any way impose an obligation on the respective lawyers. *See also* Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2484 (1995) (concluding as to the discussion of fiduciary principles in the Scotts' article: "Ultimately, then, *Parents as Fiduciaries* may not be so much a demonstration that the fiduciary principle should be borrowed for family law, but an argument that the parents' rights principle has come to be misunderstood and that properly understood it incorporates a concern for children's welfare.").

one must determine whether a lawyer should be held responsible for recognizing a divergence between the interests of a child and the wishes of a client and, assuming that a lawyer should be so responsible, what the scope of the lawyer's duty should be.

To hold a lawyer for a parent responsible, under penalty of professional sanction, to recognize at any point in time that a child's interest diverges from the wishes of the client seems to go too far. The imposition of such a duty on a lawyer for a parent could be construed to require the lawyer, during the course of the representation, to continually investigate and re-evaluate the facts regarding the child's interests and to make the correct judgment as to what course of conduct would best serve those interests. Since a lawyer charged with such a responsibility would presumably not be entitled to simply rely on information related by the client, such an obligation would tend to undermine a client's confidence in his lawyer and hinder the development of a trusting and effective client-lawyer relationship. Given the existence of other structures in a custody context that exist to determine and serve the child's interest (i.e., a judge, and possibly a lawyer for the child), the imposition of such a duty is unwise.

However, the foregoing problem does not exist where the lawyer has in fact made a determination that the interests of the child are inconsistent with the client's wishes. To some extent the Model Rules already impose an obligation on a lawyer who has made such a determination in that Model Rule 1.4(b) requires that the lawyer advise the client appropriately regarding the child's interests so that the client has an adequate basis for making informed decisions regarding the representation.²⁸ Thus I can see no objection to imposing on a lawyer an appropriate duty where the lawyer has become aware that the interests of the child are in conflict with the wishes of the client. The key question is, what should be the scope of the duty. What type of action can appropriately be mandated?

Requiring merely that a lawyer "consider" the interests of a child would seem to accomplish little, especially since Rule 1.4(b) seems to require that the lawyer advise the client appropriately regarding a child's interests. More should be required. At the minimum, a lawyer for a parent in a contested custody case

²⁸ See *supra* text at notes 16 to 18.

should be charged with an obligation to refrain from assisting the parent in conduct which the lawyer knows is clearly inconsistent with the child's interests. Such a rule would in general follow the model of Rule 1.2(d), which prohibits a lawyer from assisting a client in conduct which the lawyer knows is criminal or fraudulent. However, unlike Rule 1.2(d), the rule I propose would prohibit lawyers from engaging in conduct in which their clients are permitted to engage — i.e., a client can lawfully act in disregard of a child's best interests, but a lawyer could not assist the parent in doing so. This departure from the Rule 1.2(d) model seems warranted by the societal concern for the protection of children and the vulnerability of children as a class. Although parents are not fiduciaries so as to make their lawyers liable for their breach of fiduciary duties, ethical rules should not permit lawyers knowingly to assist parents in conduct that is inconsistent with the interests of their children. Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that is not criminal in that it prohibits assisting a client in non-criminal fraudulent conduct. The policy basis for this is presumably the recognition that lawyers should not be permitted to assist socially undesirable conduct even if that conduct is not criminal. The rule proposed herein is simply an extension of that policy decision.²⁹

If the proposed rule were in force and a parent were to insist on proceeding with conduct which the lawyer knew to be clearly inconsistent with the interests of a child, the lawyer would be forced to withdraw since Rule 1.16(a) mandates that a lawyer withdraw where the representation will result in a violation of the rules of professional conduct.

The proposed rule is on balance, only a moderate advance on existing rules. First, the rule applies only when the lawyer knows the client's conduct is clearly inconsistent with the interests of the child. The purpose of the "clearly inconsistent" formulation is to prevent a lawyer's being subject to professional sanction where the issue of the child's interests is a close one.

²⁹ I recognize that non-criminal fraudulent conduct is nevertheless a wrong concerning which the victim can seek civil redress (e.g., a tort action or an action to set aside a contract), unlike a parental failure to act in the best interests of a child. Hence the proposed rule is a distinct departure from Rule 1.2(d). Nonetheless, the public interest in the welfare of children is well recognized and substantial.

The rule could be even more protective of lawyers in that it could apply only when the lawyer knows that the client's conduct will significantly harm the child. I believe such a rule to be insufficiently protective of children.

Second, the rule could go farther. An obligation could appropriately be imposed not only when a lawyer "knows" that the client's conduct is clearly inconsistent with the interests of a child, but also when a lawyer recklessly disregards facts establishing that the client's conduct is clearly inconsistent with the interests of a child. Rule 1.2(d), the model for my proposed rule, only applies when the lawyer "knows" that the client's conduct is criminal or fraudulent. The Model Rules provide that the term "knows" is "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."³⁰ The application of this definition is unclear in a situation where a lawyer denies knowledge of the fact at issue but where surrounding facts and circumstances raise a question as to whether the lawyer is being truthful. In this situation a finder of fact could disbelieve the lawyer's testimony that the lawyer was not aware of the fact at issue and thus find knowledge on the part of the lawyer. On the other hand, the definition does not seem to permit knowledge to be found if the fact finder believes that the lawyer did not have actual knowledge, even if the lawyer was reckless in disregarding the facts. The *Restatement* seems to follow the Model Rules in this respect. Section 151 of the *Restatement* continues the "knowledge" requirement. The Reporter's Notes state:

The matter of a lawyer's deliberate attempt not to learn additional information despite awareness of facts sufficiently indicating the illegal nature of a client's conduct has been discussed in various decisions. . . . In the Reporter's view, the preferable rule is that proof of a lawyer's conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may warrant a finding of actual knowledge.³¹

The proper construction of the term "knows" is beyond the scope of this article. However, the point is that a rule based on Rule 1.2(d) — and indeed, a future change in either Rule 1.2(d) or the definition in the Terminology section — could appropriately en-

³⁰ Model Rules, Terminology.

³¹ *Tentative Draft No. 8*, at 156-57.

compass reckless disregard of the facts rather than requiring actual knowledge.³²

A further, and much more radical, provision could be to permit the lawyer to appropriately disclose facts to prevent client conduct inconsistent with the interests of a child, basically following the model of permissive disclosure that is in effect in Rule 1.6. Such an addition, however, would be quite controversial and its discussion will have to be delayed until a further article.

III. Ethical Issues Regarding Interviewing the Client's Child

Counsel for a parent may sometimes desire to interview a child who is the subject of a custody proceeding, whether to determine the child's preference or obtain other information. Such an interview presents serious ethical concerns. If the child is represented by a lawyer, then an interview would not be permitted under Model Rule 4.2, which provides that a lawyer may not communicate about the representation with a person the lawyer knows is represented by another lawyer unless the other lawyer consents. Some ethical codes may only prohibit communication with a "party" who is represented by another lawyer, rather than a "person" who is represented by another lawyer.³³ Although a child is not technically a "party" in a custody action, any such provision of an ethical code would no doubt be interpreted to prohibit any communication with a child who is represented by a lawyer if such communication is made without the consent of the child's lawyer.³⁴

Where the child's representative is a guardian ad litem, the issue becomes a little murkier. A guardian ad litem is a legal representative of the child but not necessarily a lawyer for the child. If the guardian ad litem is a lawyer and if the duties of the

³² Cf. *Office of Disciplinary Counsel v. Anonymous Attorney A*, 714 A.2d 402, 407 (Pa. 1998) (holding that a prima facie violation of Rule 8.4(c) — which prohibits, inter alia, conduct by a lawyer involving dishonesty, fraud, deceit, or misrepresentation — is shown where a misrepresentation is made knowingly or with reckless ignorance of its truth or falsity).

³³ Model Rule 4.2 so provided prior to its amendment in 1995. The Model Code also so provided; see DR 7-104(A)(1).

³⁴ To this effect, see N.Y. State Bar Ass'n Comm. On Professional Ethics, Op. 656 (1993), 1993 WL 555956.

guardian ad litem include duties normally performed by a lawyer (even if the duties include some additional functions normally not performed by lawyers), then communication should be prohibited unless the guardian consents.³⁵ A recent Pennsylvania ethics opinion states:

“Because the terms guardian ad litem, child advocate, and attorney are often used interchangeably and with imprecision, it would appear that Rule 4.2 permits an interview with a child so represented only if the requirements of the Rule are met, regardless of the title of the child’s representative.”³⁶

If the guardian is not a lawyer, Rule 4.2 does not seem to be implicated since it speaks only in terms of a person “represented by another lawyer.” One could argue that the child should be treated as an unrepresented person in that instance. Nonetheless, the existence of a person appointed to protect the child’s interest in litigation (i.e., the guardian ad litem) militates against such an interpretation.³⁷

Where a child has no legal representative, can a lawyer for a parent communicate directly with the child? Since Rule 4.2 is not applicable in this situation, no general prohibition exists. But there are substantial ethical constraints. Model Rule 4.3 provides that in dealing with an unrepresented person a lawyer must not state or imply that the lawyer is disinterested and that when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role, the lawyer must

³⁵ See *id.* Cf. S. C. Bar Ethics Advisory Comm. Op. 97-15 (1997), 1997 WL 861961 (holding that lawyer for parent in a child abuse proceeding may not communicate with the child, even though the child contacted the lawyer and wanted to give a statement, unless the lawyer at the minimum obtains the consent of the guardian ad litem and guardian’s counsel). *But cf.* Op. 1553, Standing Comm. Legal Ethics Va. State Bar (1993), ABA/BNA Lawyers Manual on Professional Conduct, Ethics Opinions 1991-95, 1001:8724 (1993) (holding that lawyer may meet with children without obtaining permission of guardian ad litem).

³⁶ Pennsylvania Bar Ass’n Comm. Legal Ethics and Professional Responsibility, Informal Op. 95-134 (Revised July 31, 1996), 1996 WL 928109 [hereinafter, Opinion 95-134].

³⁷ Cf. N.C. State Bar Op. RPC 249 (1997), 1997 WL 201623 at *2 (ruling that child may not be interviewed in neglect and abuse proceeding or in a civil proceeding where the child is a party without consent of the child’s guardian ad litem, even where neither the child nor the guardian ad litem was represented by an attorney).

make reasonable efforts to correct the misunderstanding. This rule is particularly apt in the context under discussion. The effect of this rule is to prohibit any contact with a child who is too young to realistically understand the nature of the proceedings, the nature of a lawyer, or the distinction between a lawyer for a parent and some other more disinterested legal official (for example, a lawyer for the child or even a judge). Although the rule thus poses a danger for lawyers who interview a young child, it does not absolutely bar interviews with all minors. If a minor is mature enough to understand the nature of a lawyer and comprehend the proceedings, Rule 4.3 should pose no bar.

The Comment to Rule 4.3 states that a lawyer “should not give advice to an unrepresented person other than the advice to obtain counsel.” Although this requirement may sometimes pose difficulty when a lawyer is dealing with an unrepresented spouse in divorce proceedings or in a negotiation context, it should not pose a problem in the normal context where a child is interviewed.

Model Rule 4.1(a) prohibits a lawyer from making a false statement of material fact or law to a third person. This rule, of course, applies to statements made to a child. Thus, communications from a lawyer for a parent to a child have to be approached carefully. The lawyer must thoroughly consider the maturity level of the child and what the child can be expected to understand. Since any statement of fact has the potential for being less readily understood by a minor than by an adult, the lawyer must be careful.

The lawyer must be careful to avoid misrepresenting to the child of a client either the confidentiality status of the child’s communications or the lawyer’s intentions regarding disclosure of statements made by the child. Although Model Rule 1.6(a) requires that the lawyer hold confidential “information related to the representation of a client,” that requirement can not absolutely shield from disclosure information garnered from the child. True, the lawyer may not freely disclose such information because the information relates to the representation of the client. However, the lawyer can properly disclose the information to the client and in at least some circumstances must do so (for example, if it is necessary that the client have the information in

order to make an informed decision about the representation).³⁸ Moreover, Rule 1.6(a) permits disclosure of this information to others if the client consents after consultation. Thus the lawyer can not assure the child that information communicated by the child will be held as absolutely confidential and should advise the child of the restrictions on confidentiality. Indeed, Rule 4.3 may well require such advice to the child.³⁹

In addition to the ethical constraints in interviewing children, another concern is the pragmatic possibility that if the lawyer interviews a child, opposing counsel might attack the subsequent testimony of the child as being coached or manipulated. For the same reason, a judge may be inclined to discount the opinion of the child or statements by the child relating to facts in dispute. Some lawyers follow the policy of rarely if ever interviewing a child because of these concerns and because the lawyer's credibility may come into issue if a question is raised concerning what was said during the interview with the child. A less likely possibility is a lawsuit alleging intentional infliction of emotional distress growing out of an interview of the child.⁴⁰ Pennsylvania Opinion 95-134 offers helpful advice to a lawyer who interviews a child:

Depending upon the circumstances, including the competency of the child, the lawyer might omit discussing any substantive matters with the child, including facts to which the child is expected to testify or the child's custody preference and utilize the interview to observe the child to form an impression as to the kind of witness the child might make or to explain the procedure used by the court in question, for the purpose of alleviating the child's anxiety and generally making him or her more comfortable about the upcoming court appearance. The lawyer must always be sensitive to the potential argument that the

³⁸ As has been noted above, a lawyer is required to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation; *see* text at notes 16 to 18, *supra*.

³⁹ Rule 4.3 provides when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding.

⁴⁰ *See* *Preis v. Durio*, 649 So.2d 600, 602 (La. Ct. App. 1994) (holding that parent's complaint against other parent's lawyer for intentional infliction of emotional distress growing out of the lawyer's actions in interviewing children and discussing the divorce, their parents' relationship, and their relationship with their father, did not state a cause of action because lawyer's actions were not extreme and outrageous; one judge (of three) dissented).

child was unduly influenced by the attorney interviewing the child***[T]he attorney could consider whether the presence of a third party to confirm what was said during the interview would be helpful.⁴¹

In a case where child abuse is alleged, the lawyer should be very wary of interviewing the child/victim because of the danger of distorting the evidence, especially given the suggestibility of young children.

But the effect of the foregoing is not to say that a lawyer for a parent should never interview an unrepresented child. Indeed, some practitioners believe that it can be malpractice not to interview a child in some circumstances. One rule of thumb may be that if the minor is unrepresented but mature enough to fully understand what a lawyer is and that the lawyer is representing the parent and not the minor, then the lawyer may proceed as long as the lawyer is careful to observe relevant ethical constraints, including those discussed above.

The Academy's Standards are more restrictive than the Model Rules regarding a lawyer's ability to interview a child. Where a represented child is concerned, Standard 2.24 requires the presence of the child's lawyer or guardian ad litem.⁴² The Model Rules require only the permission, not the presence, of the lawyer and are silent regarding a guardian ad litem. Where the child is not represented, Standard 2.24, by its silence, seems to prohibit communication unless, *inter alia*, court permission is obtained. The Comment to Standard 2.24 reinforces this conclusion, stating:

There is a significant risk of injury 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.

In thus prohibiting interviews of an unrepresented child unless judicial consent is obtained, the Standard goes well beyond pres-

⁴¹ Opinion 95-134, *supra* note 36, at 1996 WL 928109 at 3-4.

⁴² The Standard provides: "When issues in a representation affect the welfare of a 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."

ent rules since the Model Rules contain no such flat prohibition.⁴³ The Standard, although motivated by the commendable desire to protect children, seems ill advised in two respects. First, the Standard makes no exception for a mature minor (i.e., one with the same ability as a reasonably intelligent adult to understand the lawyer's role and the nature of the interview). An exception which would permit a lawyer to interview a child whom the lawyer reasonably believes to be a mature minor would seem to have little potential for harm and would permit interviews to take place without the delay and expense attendant on securing judicial permission. Second, the Standard gives no direction to a court as to the circumstances under which consent to an interview should be granted. In thus leaving the lawyers and the court at sea concerning the relevant criteria and conditions, the Standard promotes uncertainty, the risk of inconsistent judicial decisions, delay, and expense.

IV. Duty to Avoid Assisting Client in a Criminal or Fraudulent Act

Rule 1.2(d) provides that a lawyer may not counsel a client to engage, or assist a client, in conduct which the lawyer knows is criminal or fraudulent. The rule is a generally phrased one which can be applicable in a wide variety of situations. For example, in the relocation or custody context, application of the rule could arise in the negotiation of an agreement. The prohibition of the Rule is clearly implicated when a client asks a lawyer to put in an agreement a statement of fact that the lawyer knows to be false (for example, a false statement about the residence of one parent made for the purpose of misleading the other parent). If the lawyer were to do so, the lawyer's conduct would constitute assisting the client in a fraudulent act.

Or suppose that in the course of negotiating a separation agreement the lawyer for the noncustodial parent insists upon a

⁴³ See Opinion 95-134, *supra* note 36, 1996 WL 928109 at 6 (stating that if Standard 2.24 prohibits interviews, it conflicts with Pennsylvania law). *Cf.* *Preis v. Durio*, 649 So.2d at 602 (holding that attorney for parent does not owe duty to other spouse-joint custodian to avoid discussing the case with the children against the will of the other spouse when the lawyer has the consent of the client-spouse).

clause that requires the custodial parent to obtain judicial approval before relocating with the child a distance in excess of three hundred miles. The custodial parent tells her lawyer: "Give him the agreement because if I relocate I'm not going to honor it any way." Here the client is not insisting that the agreement contain a false statement of fact (i.e., the agreement will simply state that judicial approval must be obtained before a relocation). Still, the client's intention is not to honor a provision that the other party wants as a protection. This is "fraudulent" as defined in the Terminology section of the Model Rules.⁴⁴ If the lawyer were to assist the client in procuring a signed agreement under these circumstances, he would be assisting the client in a fraudulent act in violation of Rule 1.2(d). The lawyer can — and should — remonstrate with the client, but if the client insists on proceeding with the clause in question, the lawyer must withdraw.

Or suppose that a client comes to see a lawyer who has previously represented the client in custody litigation which resulted in a decree giving the client primary custody with reasonable visitation to the other parent. The client states that the parents have not been able to peacefully implement the visitation ordered in the decree and that the client wants to end the visitation privileges by moving with the child to a distant state. The lawyer tells the client that state law requires that the client obtain judicial permission to move out of state with the child, that some satisfactory reason for the relocation must be advanced to the court, and that a motivation to impede the other parent's visitation is an improper motive and will result in a denial of permission. The client then states that there is no problem since the client can get a better job in another state or can get her sister in another state to ask the client to live with her because of the sister's health problems. The client intends to testify as to the "proper" motivation in support of the motion for permission to relocate and to ignore or if necessary deny the "improper" motivation. Can the lawyer continue to represent the client? What should or must the lawyer say to the client?

If it is clear that the client intends to make a representation that is not true, Rule 1.2(d) prohibits the lawyer from assisting

⁴⁴ The Terminology section defines "fraudulent" as "conduct having a purpose to deceive."

the client. And if the client intends to lie in court, Model 3.3(a) also becomes operative.⁴⁵ Of course, the lawyer can not know that the client intends to go ahead with the plan until the lawyer tells the client that he can not and would not assist her in a plan to lie to the court. Suppose that in the course of the lawyer's discussion with the client the client says, "I was angry with my ex-spouse when I made the first statement. The real reason is that in fact I want to move because I am stuck in a dead end job." If the lawyer believes that the client is lying and that the first statement is the truth, Rule 1.2(d) precludes the lawyer from continuing with the representation. If the lawyer does believe the client, or perhaps if the lawyer is only unsure,⁴⁶ proceeding in the representation is not prohibited.

If the question came up at an earlier stage — for example if the client simply says, "I want to relocate. May I?" — then, of course, the lawyer may advise the client. Rule 1.2(d) explicitly provides that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." The line, however, is between discussing the legal consequences, which is permitted, and assisting a client in criminal or fraudulent conduct, which is not permitted. A hypothetical which points out the difficulty of the line is this: the client tells the lawyer that the client wants to relocate because the client has a job out of state (which is a good reason under state law) and because the client has been having problems with the noncustodial parent about visitation and would like to eliminate the visitation (a bad reason). The lawyer is not precluded from telling the client that one is a good reason and the other is not. However, the lawyer is precluded from telling the client to lie either about the visitation problems or the client's motivation. That does not mean that the client must af-

⁴⁵ Model Rule 3.3(a)(2) provides that a lawyer may not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Model Rule 3.3(a)(4) provides that a lawyer may not knowingly "offer evidence that the lawyer knows to be false."

⁴⁶ As has been previously discussed, Rule 1.2(d) applies only when the lawyer "knows" of the criminal or fraudulent plan, but the meaning and application of the term "knows" is not free from doubt; *see supra*, discussion in text at notes 30 to 31.

firmatively volunteer the negative reason in her testimony, but the lawyer may not assist the client in perjury.⁴⁷

Another set of questions arises from the situation where a client is determined to relocate with or otherwise keep or regain a child, notwithstanding the existence of a contrary court order or statute. A plethora of ethical rules may be violated if the lawyer actively assists the client in this endeavor. For example, in *People v. Chappell*,⁴⁸ a lawyer who told her client that as her lawyer she advised her to stay but as a mother she advised her to run and then provided assistance to client in leaving the state, notwithstanding the existence of a restraining order, was found to have violated Rules 1.2(d), 3.3(a)(2), 8.4 (b) and (c), and ordered disbarred. Assisting a client in such circumstances can also result in civil liability to the other parent.⁴⁹ Failure to advise a client concerning the consequences of noncompliance with a court order (as opposed to more active assistance) can also constitute an ethical violation⁵⁰ as well as lead to possible malpractice liability. If the client leaves the jurisdiction without the lawyer's assistance and in violation of a court order or statute, the lawyer should not thereafter continue to represent the client in a way that will assist the client's continued absence from the

⁴⁷ One might argue that the lawyer, in discussions with the client, could properly seek to determine whether the client's statement about the negative reason really went to motivation or was simply "blowing off steam." However, if the lawyer does try to covertly encourage the client to change the facts, Rule 1.2(d) is violated. For an interesting discussion of ethical issues in preparing a witness, see Richard C. Wydick, *The Ethics of Witness Coaching*, 17 *Cardozo L. Rev.* 1 (1995).

⁴⁸ 927 P.2d 829 (Colo. 1996).

⁴⁹ Cf. *McEvoy v. Helikson*, 562 P.2d 540, 543-44 (Or. 1977) (holding mother's attorney civilly liable to father for negligence where attorney received possession of mother's passport under a stipulation and later, contrary to the stipulation, delivered the passport to the mother who then fled the country with the child in violation of a court order; exception to privity requirement found in that attorney had assumed a duty).

⁵⁰ See *People v. Aron*, 962 P.2d 261, 263 (Colo. 1998) (holding that failure to tell client that violating court order by keeping children out of state beyond the visitation period violated Model Rules 1.1 (duty to provide competent representation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice)).

jurisdiction in violation of the order or statute.⁵¹ Whether the lawyer may be compelled to give location information concerning a client who has left the jurisdiction is discussed later.⁵²

V. Duty to Reveal Information

A. Child abuse

Allegations of child abuse are frequently made in custody cases, including relocation cases. Where child abuse is present or alleged, a lawyer for a parent has greater rights and greater responsibilities regarding the child.

1. The applicability of child abuse reporting statutes to lawyers and the ethics of compliance

Child abuse reporting statutes may or may not mandate that lawyers report instances of child abuse.⁵³ Some categories of statutes are fairly clear cut. Thus, statutes may specifically and unequivocally require lawyers to report,⁵⁴ specifically mandate reporting by lawyers but exclude from the reporting obligation information which results from communications from a client,⁵⁵ or mandate reporting by an exclusive designated category of persons (for example, persons engaged in health care) that does not

⁵¹ See Pennsylvania Bar Ass'n Comm. Legal Ethics and Professional Responsibility, Informal Op. 93-49 (1993), 1993 WL 851180, stating that where a client leaves a jurisdiction with a child contrary to the lawyer's advice (and presumably contrary to court order or statutory provision), the lawyer should not continue to assist the client by having monies sent to her or being a contact point between her and family members.

⁵² See *infra* text at notes 80 to 87.

⁵³ For a useful compilation and summary of statutes, see Laura W. Morgan, *Between a Rock and a Hard Place, An Attorney's Duty To Report Child Abuse*, 10 DIVORCE LITIGATION 105 (1998) (also accessible at <http://www.divorcenet.com/famlaw/famlaw-ethics05.html>). See also Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 216-21 (1992).

⁵⁴ For at least one provision falling into this category, see MISS. CODE ANN. § 43-21-353(1) (Supp. 1998).

⁵⁵ See, e.g., NEV. REV. STAT. ANN. § 432B.220(2)(i) (Michie 1996) (no obligation to report where attorney acquired knowledge of abuse from a client who is or may be accused of abuse or neglect); Or. Rev. Stat. § 419B.010(1) (1995) (attorney has no duty to report information communicated in a privileged communication).

include lawyers.⁵⁶ Other statutes are not as clear and their applicability to lawyers depends on judicial interpretation. Thus, some statutes require any person to report, but preserve the attorney-client privilege.⁵⁷ The preservation of the privilege arguably indicates the legislature's intention to exclude lawyers from the reporting obligation, but it can also be argued that the preservation of the privilege does not indicate an intent to except lawyers from the reporting obligation because preservation of the privilege merely pertains to in-court testimony and is not inconsistent with a reporting obligation on the part of lawyers.⁵⁸ Other statutes require reporting by any person and do not specifically preserve the attorney-client privilege.⁵⁹ Although it can be argued that such statutes require lawyers to report, it has also been argued that "where a reporting statute is entirely silent on the treatment of the attorney-client privilege, some ambiguity exists as to whether abrogation of the attorney-client privilege was intended by the legislature."⁶⁰

If a child abuse reporting statute does apply to lawyers, may a lawyer comply over the client's objection without thereby violating the state's ethical code? The Model Rules do not contain any provision analogous to the provisions of the Model Code, which specifically permitted a lawyer to disclose otherwise confidential information when required by law or court order.⁶¹ The next-to-last paragraph of the Comment to Model Rule 1.6 provides: "Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the Scope of these Rules, but a presumption should exist against such a supersession." Although the silence of the Model Rules would thus seem to make disclosure an ethical violation, the need for lawyer compliance with the law should outweigh the policy favoring the protection of confidential information, and therefore an implicit exception to the

⁵⁶ See, e.g., IOWA CODE ANN. § 232.69 (West Supp. 1998).

⁵⁷ See, e.g., DEL. CODE ANN. Tit.16, §§ 903, 908 (1995); Idaho Code §§ 16-1619(a), 16-1620 (Supp. 1998).

⁵⁸ For this latter point of view, see Robin A. Rosencrantz, *Rejecting "Hear No Evil Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting*, 8 GEO. J. LEG. ETH. 327, 347-48 (1995).

⁵⁹ See, e.g., IND. CODE ANN. § 31-33-5-1 (West Supp. 1998).

⁶⁰ See Mosteller, *supra* note 53, at 224.

⁶¹ See Model Code DR 4-101(C)(2).

confidentiality provisions of Rule 1.6(a) should be found.⁶² Section 115 of the Restatement (in *Proposed Final Draft No. 1*) explicitly provides for such an exception, and the Reporter's Note to that section states that the exception is generally recognized or assumed by courts.

If a child abuse reporting statute does apply to lawyers, does a lawyer who refuses to comply with the statute violate ethical rules? One would think that such a refusal would violate Model Rules 8.4(b) (lawyer may not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and 8.4(d) (lawyer may not engage in conduct prejudicial to the administration of justice). But a North Carolina ethics opinion⁶³ holds that even where a child abuse reporting statute mandates that lawyers report child abuse (the statute excepts information gained in the course of representing a client in an abuse case), a lawyer who refuses to comply with the statute does not violate North Carolina's ethics rules.⁶⁴ The Opinion reasons that since the ethics rules provide that a lawyer "may reveal" confidential information "when****required by law or court order," disclosure, even of information mandated by the statute, is only discretionary under the ethics rules. Thus, according to the Opinion, a lawyer may, consistent with the ethics rules, decline to report where he or she concludes in good faith that to report "would substantially undermine the purpose of the representation or substantially damage the interests of his or her client."⁶⁵ This construction seems wrongheaded in that it makes the lawyer's determination whether to obey the law inviolable from professional sanction. The public policy behind the statute is disregarded although the Opinion pays lip service to it by stating that the lawyer's discretion should not be exercised lightly "particularly in the face of a statute compelling disclosure." And what is the countervailing policy? It is *not* the protection of the client because the lawyer can ethically decide

⁶² To this effect, see GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING*, 2D EDITION, § 1.6:112.

⁶³ N.C. State Bar RPC 175, 1994 WL 899597.

⁶⁴ The Opinion states, however, that even though the lawyer does not violate the ethics rules, he or she is not thereby protected from criminal prosecution for noncompliance with the reporting statute.

⁶⁵ *Id.*, 1994 WL 899597 at *1.

either to report or not to report. The only value that is protected is the lawyer's discretion. One hopes that the opinion will not be followed anywhere.⁶⁶

The information required to be reported by child abuse reporting statutes is usually quite broad and generally includes past as well as ongoing abuse. Therefore, persons who have a reporting obligation need not make a judgment as to whether it is likely that the conduct will continue. The mere knowledge of information covered by the statute must be reported, regardless of whether the person in question believes that no further child abuse will take place.

2. *Absent an applicable reporting statute, may or must a lawyer for a parent, under prevailing ethical codes, report child abuse by a client?*

Even if a state's child abuse reporting statute does not apply to lawyers, the state's ethical code may permit or even compel a lawyer to disclose ongoing abuse by a client. Unfortunately, the extreme amount of variation in existing state law does not permit a more definitive statement.

The Model Rules are very protective of confidentiality. Under Model Rule 1.6(b)(1), disclosure is permitted only where the lawyer reasonably believes it necessary to *prevent* the client from committing a criminal act likely to result in imminent death or substantial bodily harm. This rule poses considerable problems for a lawyer in a child abuse case. Since the rule only permits disclosure to prevent a crime, the lawyer must determine whether a basis exists for reasonable belief as to a future crime. If the client admits past abuse but denies the possibility of future abuse, a lawyer contemplating disclosure must discuss the issue forthrightly with the client to have a reasonable basis for believ-

⁶⁶ For a similar opinion, see Utah State Bar Op. No.97-12, 1998 WL 32435. This Opinion is even less satisfactory than the North Carolina opinion because of its lack of almost any meaningful discussion of the issue. For a directly opposite holding in a relocation context, see *In re Marriage of Decker*, 606 N.E.2d 1094, 1103-04 (Ill. 1992) (holding that ethical code provision that lawyer "may" disclose confidential information when required by law or court order does not give lawyers the discretionary power to comply or not; the rule simply instructs lawyers that they will not be disciplined for revealing confidential information pursuant to law or court order).

ing that disclosure is necessary to prevent the crime. If the lawyer reasonably doubts the client's word or the client's will, that may furnish a basis for a reasonable belief as to a future crime. But predicting future abuse from the fact of past abuse (especially if the past abuse occurred only once) is a difficult judgment. Determining that disclosure is necessary to stop future abuse, when the only supporting evidence is the fact of past abuse, is risky business indeed. And even if the lawyer believes that there is a reasonable likelihood of future child abuse by the client, the lawyer must determine whether the child abuse can be characterized as "substantial bodily harm." For example, is the term limited to bodily injury, and how does it apply to emotional abuse and the varieties of sexual abuse?⁶⁷

Most states have varied Model Rule 1.6 to permit more disclosure of confidential information.⁶⁸ Thus, some states permit the disclosure of a client's intent to commit a crime and the information necessary to prevent it, rather than, as under the Model Rules, a crime likely to result in imminent death or substantial bodily harm. Disclosure of intended child abuse is more generally available in such states because child abuse is likely to constitute a crime of some sort even if the abuse is not likely to result in death or substantial bodily harm. However, disclosure is still permissive under such systems. A few states mandate disclosure, some where it is necessary to prevent a crime likely to result in imminent death or substantial bodily harm (or some similar formulation), and some, more broadly, where disclosure is necessary to prevent a crime. In addition to the foregoing variations, which relate to disclosure made for the purpose of preventing a future crime, some states permit a lawyer to disclose confidential

⁶⁷ Comment c to § 117A of the *Restatement, Proposed Final Draft No. 2*, states that serious bodily harm "includes life threatening illness and injuries, and the consequences of events such as****child sexual abuse," and hence disclosure of confidential information is permitted. The *Restatement* permits disclosure to prevent reasonably certain death or substantial bodily harm without requiring that the conduct involved be criminal; see § 117A(1), *Proposed Final Draft No. 2*. This represents a change from the version of § 117A(1) in *Proposed Final Draft No. 1*.

⁶⁸ For a useful chart outlining state variations regarding confidentiality, see Reporter's Note, Comment b, § 117B of the *Restatement, Proposed Final Draft No. 2*. The categories of state law set forth in this paragraph are drawn, in general, from that chart. See also Gillers & Simon, *supra* note 3, at 74-78.

information to rectify the consequences of a criminal or fraudulent act, and a few states mandate such disclosure. Such provisions may not apply to a child abuse situation since they usually require that the lawyer's services have been used in some way in furtherance of the criminal or fraudulent act. This is unlikely in child abuse situations.

The AAML Standards of Conduct deal somewhat ambiguously with the case of disclosure to prevent child abuse by a client. Standard 2.26 provides: "An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client." The Comment states:

Many states permit the attorney to reveal the intention of the client to commit any crime****The rules do not appear to address, however, revelation of conduct that may be severely detrimental to the well-being of the child, but not criminal. ***[T]he obligation of the matrimonial lawyer to consider the welfare of children***requires disclosure of a risk of substantial abuse and the information necessary to prevent it.

A footnote to the Comment states that if the law of the jurisdiction prohibits disclosure, the Standard does not apply.

Some of this language seems to require disclosure, and some seems not to do so. The best reading of the Standard and Comment is as follows: A lawyer who is not mandated to report or disclose child abuse but who is permitted to do so by the state ethical code should always exercise her discretion in favor of making disclosure. However where the ethical code does not permit disclosure of confidential information without the consent of the client (for example, if present or future conduct is not or will not be criminal, or if, in states which follow Model Rule 1.6(b)(1), there is no risk of imminent death or substantial bodily harm), the Standard is inapplicable. The Standard and Comment, thus interpreted, would be an advancement over prevailing codes in that they would thus specify how a lawyer should exercise her discretion. This reading, however, would not encourage a lawyer to make a prohibited disclosure of confidential information.

Where a lawyer is permitted to disclose confidential information but not mandated to do so, what factors should the lawyer consider in determining whether to disclose or to remain silent? I have written elsewhere in somewhat more detail about factors that might generally be considered in determining

whether to make permissive disclosure,⁶⁹ but the bottom line is that neither the Model Rules nor the proposed *Restatement* mandate any factors or offer significant help with the decision. Some lawyers no doubt will be influenced by a risk/reward analysis. Unfortunately, the path to disclosure is thornier than the path to nondisclosure. In order to make disclosure, the lawyer must be able to show, if disclosure is questioned: that the lawyer had a reasonable belief that the client intended a crime (the Comment to Model Rule 1.6 states that it is very difficult to know when a heinous purpose will actually be carried out, for the client may have a change of mind); that the lawyer made an effective attempt to dissuade the client (if not, how could the lawyer assert that disclosure was necessary to prevent the crime); and that whatever disclosure the lawyer made was no broader than what was reasonably necessary to prevent the crime. Some lawyers contemplating disclosure might be deterred by the possibility of being unable to show one or more of these elements. Conversely, the lawyer who decides against disclosure does not have to make these judgments. The lawyer's exercise of her discretion not to disclose is essentially unassailable.

The *Restatement* addresses the issue of the reviewability of the lawyer's decision as to whether to make permissive disclosure. It provides that a lawyer who "takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline [or] liable for damages****"⁷⁰ While this provision seems to absolutely protect a lawyer who decides not to make permissive disclosure, it provides significantly less protection for a lawyer who decides to make disclosure. Such a lawyer can still be held to have violated this provision if the lawyer's belief that disclosure was necessary to prevent conduct was not reasonable or the disclosure was excessive. The *Restatement* clearly indicates the additional burdens involved in making disclosure. Sections 117A provides, regarding disclosure to prevent death or serious bodily harm:

Before using or disclosing information pursuant to this Section, the lawyer must, if feasible, make a good faith effort to persuade the client either not to act or, if the client***has already acted to warn the victim

⁶⁹ See Becker, *Ethical Concerns*, *supra* note 2 at 612-613.

⁷⁰ See § 117A(3) and §117 (B)(4), *Proposed Final Draft No.2*.

or take other action to prevent the harm and, if relevant, to advise the client of the lawyer's ability to use or disclose pursuant to this Section and the consequences thereof.⁷¹

Section 117B, which permits disclosure to prevent, rectify, or mitigate substantial financial loss is to the same effect.

If the lawyer decides to make disclosure, to whom should disclosure be made: the police? the other lawyer? the other parent? someone else? Greater disclosure than is necessary to prevent the crime could constitute an ethics violation by the lawyer. Comment f to section 117A, with reference to disclosure to prevent reasonably certain death or substantial bodily harm, states:

What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the degree to which it appears likely that the threatened death or serious bodily harm will actually result, the irreversibility of its consequences***, the time available, whether victims might be unaware of the threat or might rely on the lawyer to protect them, the lawyer's prior course of dealing with the client, and the extent of adverse effect on the client that may result from disclosure contemplated by the lawyer. The lawyer must reasonably believe that the measures are appropriate and that they will entail no more adverse consequences to the client than necessary.

3. Rights and responsibilities where the abuse was inflicted by someone other than the client

Sometimes a lawyer learns of child abuse by someone other than the client — for example, by the other parent or by a romantic partner of the client. Any such information is confidential information and can not be disclosed without the client's consent. It does not matter that the information does not relate to actions by the client, nor does it matter whether the client supplied the information or the lawyer learned it from some other source. Rule 1.6(a) protects "information relating to the representation" and the rule is not dependent on the source of the information. A client may not wish to disclose such information for various reasons, for example, to protect a romantic partner or to obtain bargaining leverage over an ex-spouse. If the client does not consent, Rule 1.6(a) applies and the lawyer may not

⁷¹ § 117A(2), *Proposed Final Draft No. 2.*

disclose the information.⁷² The permissive disclosure provisions of Rule 1.6(b)(1) and the more expansive variations of that rule in other states do not apply to permit disclosure to prevent a crime by a nonclient. This limitation is anomalous. The same policy considerations that permit disclosure to prevent a crime by a client apply to a crime by a non-client. This policy seems to be recognized by the latest version of the *Restatement's* confidentiality rule,⁷³ which permits disclosure of confidential client information to prevent reasonably certain death or substantial bodily harm by any person, whether or not the client.

Although disclosure to prevent a crime by a non-client thus seems generally unavailable under Rule 1.6 or its variants, a round-about path to disclosure exists. A client's refusal to disclose information regarding abuse of the child by someone else may constitute a violation of the child abuse reporting statute,⁷⁴ or it may constitute child endangerment (if the result of the non-disclosure is that the child remains in a dangerous situation). If the client's refusal to disclose information regarding the abuse is itself a crime, the exceptions to the confidentiality rules which either permit or mandate disclosure to prevent a crime may become applicable.⁷⁵

In any event, the duty to provide competent representation (Rule 1.1) and the duty to explain matters to a client (Rule 1.4(b)) require the lawyer to advise the client of the effect of failure to comply with any reporting obligation applicable to the client or of permitting an abusive situation to continue. For example, the lawyer must tell the client of the statutory penalties for noncompliance with an applicable reporting obligation, the

⁷² See *In re Pressly*, 628 A.2d 927, 930-31 (Vt. 1993) (disciplining lawyer whose client had told him that she suspected other spouse of child abuse and who then communicated those suspicions, in opposition to his client's request, to lawyer for other spouse).

⁷³ § 117(A)(1), *Proposed Final Draft No. 2*.

⁷⁴ Whether a reporting statute is violated will depend on the precise scope of the statute — for example, does it apply to “any person” or is it limited to professionals who come into frequent contact with children?

⁷⁵ See Cleveland Bar Ass'n Professional Ethics Comm. Op. 92-2, ABA/BNA Lawyers Manual on Professional Conduct, 8 Current Reports 299-300 (1992) (ruling that client who had decided to return with her child to an abusive spouse could be committing the crime of child endangerment and lawyer would therefore be permitted to make disclosure to prevent that crime).

possible civil or criminal ramifications of the client's permitting an abusive situation to continue, and the fact that an agreement resulting from the client's agreement not to disclose child abuse in return for economic considerations is almost certainly unenforceable.⁷⁶

4. *Past child abuse*

If it is clear that child abuse occurred in the past with no likelihood of current recurrence, ethics rules which permit disclosure to prevent a crime are inapplicable. However, child abuse reporting statutes still may apply since they generally require reporting of any abuse without being limited to continuing abuse. Ethics codes which permit disclosure of a retrospective or curative nature usually apply only where the conduct in question was accomplished through the lawyer's services, and hence would not be applicable in the usual case.

5. *Rights and responsibilities in the event of non-disclosure*

A lawyer who is not mandated to report or disclose child abuse, or a lawyer who does not wish to take advantage of permissive disclosure, has two essential choices. First, the lawyer can continue with the representation, always subject, however, to the ethics rules, including Rule 1.2(d) (prohibiting assisting a client in criminal or fraudulent conduct), Rule 4.1(a) (prohibiting a lawyer from making a false statement to a third person), and Rule 3.3(a) (mandating candor to a tribunal). If the lawyer decides to continue the lawyer can condition continued representation on the client's seeking treatment from a mental health professional knowledgeable in child abuse cases. (Note, however, that a mental health professional who becomes familiar with the client and believes that child abuse has occurred — whether or not there is a likelihood of continuation in the future — may well be obligated to report the abuse. A lawyer who conditions continued representation on the client's consulting a mental health professional would presumably have to advise the client of this possible reporting obligation, pursuant to the mandate of Rule 1.4(b) that a lawyer explain a matter to the extent

⁷⁶ See, e.g. *Quiring v. Quiring*, 944 P.2d 695, 702 (Id. 1997) (holding agreement unenforceable).

reasonably necessary to permit the client to make informed decisions.)

B. Intention Of A Client To Commit A Crime Other Than Child Abuse

Anecdotal evidence indicates that on occasion, matrimonial lawyers hear a client make threats against a third party (for example, the other spouse or the other spouse's attorney). Again, the starting point is that the rules of confidentiality prohibit disclosure of information relating to the representation without the consent of the client, subject to certain exceptions. As has been discussed, the Model Rules are very protective of confidentiality, permitting disclosure only where necessary to prevent a crime likely to result in imminent death or substantial bodily harm, but many states permit disclosure to prevent any crime by the client.⁷⁷ Where a lawyer concludes that the client intends a crime and that disclosure is permitted but not mandated under the state's ethical code (and, of course, after the lawyer has attempted to dissuade the client but still believes that the client intends the crime), the lawyer must decide whether to make disclosure. Relevant factors regarding this decision and its reviewability have already been discussed.⁷⁸

C. Intention Of A Client To Commit Perjury

If a client intends, notwithstanding remonstrances from the client's lawyer, to testify perjuriously (for example, as to the client's intentions regarding relocation or as to factual matters pertinent to custody litigation), the lawyer can not, under the Model Rules, continue to represent the client and assist the client in her testimony: Model Rule 1.2(d) prohibits a lawyer from assisting a client in conduct which the lawyer knows to be criminal or fraudulent; Model Rule 3.3(a)(2) prohibits a lawyer from knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a client in a criminal or fraudulent act; Model Rule 3.3(a)(4) provides that a lawyer may not offer evidence that the lawyer knows to be false; and Model Rule 1.16(a)(1) provides that a lawyer must withdraw when represen-

⁷⁷ See *supra*, text at notes 67 to 68.

⁷⁸ See *supra* text at notes 69 to 70.

tation will result in violation of the rules of professional conduct. What may or must be disclosed to a court in connection with a withdrawal motion has been discussed above. But the lawyer has no general disclosure obligation so long as the lawyer withdraws prior to the false testimony and does not otherwise assist the client. Although Model Rule 3.3(a)(2) provides that a lawyer may not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, the rule seems inapplicable where a lawyer has withdrawn and no longer represents the client. (By way of contrast, Rule 3.3(a)(4) provides that if a lawyer comes to know that he has offered false material evidence, "the lawyer shall take reasonable remedial measures.")

D. Location Information

Sometimes a client leaves a jurisdiction in violation of a statute or a court order. As has been previously discussed,⁷⁹ the prohibitions of Rule 1.2(d) come into play in such an instance and the lawyer may not assist the client if the client's conduct was criminal or fraudulent. But assuming that the lawyer does not counsel the client to leave the state in violation of the law or actively assist the client thereafter, may or must the lawyer disclose information about the location of the client? The answer to this question depends upon both the applicable ethics code and the attorney-client privilege.

The attorney-client privilege controls whether a court can compel a lawyer to provide location information. The privilege, which applies only to judicial proceedings (and in this respect is not as protective of confidentiality as ethics rules), is the client's, but may be asserted on behalf of the client by the attorney. Location information which results from communications by the client would normally be sheltered by the privilege and hence non-disclosable. However, the privilege does not protect communications "where the client's purpose is the furtherance of a future intended crime or fraud."⁸⁰ Any location information or other information relevant to the removal of the child received as the result of such a communication would be unprotected by the

⁷⁹ See, in general, discussion in Part IV, *supra*, text at notes 44 to 51.

⁸⁰ MCCORMICK ON EVIDENCE, FOURTH EDITION, § 95 at 350 (1992).

privilege and therefore a lawyer could not rely on the privilege in refusing to comply with a disclosure order.⁸¹ (Since the crime/fraud exception only applies when the client knows or should have known that the intended conduct was criminal or fraudulent, communications made in the course of a good faith consultation with an attorney are privileged even if it later develops that the intended conduct was criminal or fraudulent.) States may also hold the privilege inapplicable for reasons of public policy.⁸²

Normally, since location information relates to the representation of the client, it is protected by ethics codes' confidentiality provisions. For example, Model Rule 1.6(a) provides that a lawyer may not reveal information relating to the representation of a client unless the client consents,⁸³ no matter from whom the lawyer learned the information and even though the lawyer-client relationship has been terminated.⁸⁴ Nonetheless, if disclosure is ordered by a court, then disclosure seems implicitly permitted by the Model Rules.⁸⁵ Indeed, refusal to reveal location information pursuant to a valid court order could violate Model Rule 8.4(d) (lawyer shall not engage in conduct which is prejudicial to the administration of justice) and, if the client's conduct in leaving the jurisdiction and refusing to return constitutes a crime,

⁸¹ See, e.g., *In re Marriage of Decker*, 606 N.E.2d 1094, 1103 (Ill. 1992); *Jafarian-Kerman v. Jafarian-Kerman*, 424 S.W.2d 333, 339-340 (Mo. Ct. App. 1967). See also *Bersani v. Bersani*, 565 A.2d 1368, 1371-72 (Conn. App. Ct. 1989).

⁸² See, e.g., *Brennan v. Brennan*, 422 A.2d 510, 517 (Pa. Super. Ct. 1980) (holding that privilege is inapplicable where its exercise would frustrate the interests of justice but also finding the exception inapplicable to the case at hand).

⁸³ For a discussion of American Bar Association ethics opinions concerning the disclosure of information about a fugitive client, see Shelly K. Hillyer, *The Attorney-Client Privilege, Ethical Rules of Confidentiality, and Other Arguments Bearing on Disclosure of A Fugitive Client's Whereabouts*, 68 *TEMPLE L. REV.* 307, 316-22 (1995). In a nutshell, the last opinion on this subject (Formal Opinion 84-349 (1984)) withdrew a prior opinion (Formal Opinion 155 (1936)) which had concluded that the lawyer must reveal the whereabouts of his client. Formal Opinion 155 did not appear to involve a court order requiring disclosure but the Opinion is somewhat ambiguous on this point; see Hillyer, *supra*, at 319-20.

⁸⁴ The Comment to Rule 1.6 states that the duty of confidentiality continues after the client-lawyer relationship has terminated.

⁸⁵ See *supra*, text accompanying notes 61 to 62.

could constitute assisting the client in that crime and hence violate Model Rule 1.2(d).⁸⁶

Even where a court has not ordered disclosure of location information, disclosure may be permitted or even in some states mandated by state ethics codes. For example, ethics codes permit, and a few even mandate, disclosure to prevent either any crime or a crime which the lawyer believes is likely to result in death or bodily injury.⁸⁷ Under these types of provisions, disclosure of location information may be permissible if the lawyer believes that the client is likely to seriously abuse the child or if the client's conduct in remaining away from the state constitutes a continuing crime.⁸⁸ Similarly, ethics code provisions which permit disclosure of confidential information in order to rectify the consequences of a criminal or fraudulent act by the client in furtherance of which the lawyer's services had been used may be applicable, depending upon the precise factual situation, where a client has fled the jurisdiction with a child.

E. Information Regarding The Best Interests Of A Child

A lawyer has no general affirmative obligation to disclose to a court information regarding the best interest of a child. This conclusion follows from the general rule that ethics rules do not require that a lawyer adduce all of the facts of which the lawyer is aware which pertain to the matter under consideration. The lawyer, of course, is prohibited from making a misrepresentation to the court,⁸⁹ from failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,⁹⁰ and from offering evidence that the lawyer knows to be false.⁹¹ Thus, for example, a lawyer may not

⁸⁶ *But cf.* the North Carolina ethics opinion discussed *supra* at text at notes 63 to 66.

⁸⁷ For a fuller discussion of variation in state ethical codes regarding mandatory and permissive disclosure, see *supra* text accompanying notes 67 to 68.

⁸⁸ *Cf.* S.C. Bar Ethics Advisory Comm., Advisory Op. 83-11 (1984), 1984 WL 272905 (holding that lawyer may reveal client's intent to remove a child in violation of a court order if the client would be subject to criminal contempt after the removal).

⁸⁹ Model Rule 3.3(a)(1).

⁹⁰ Model Rule 3.3(a)(2).

⁹¹ Model Rule 3.3(a)(4).

assist a client who testifies falsely regarding facts relative to the best interests of a child. If, however, information exists relative to the best interests of a child that is unknown to the court and contrary to the position of the lawyer's client, the lawyer has no general obligation to disclose that information under the Model Rules. This lack of a general obligation to inform the court of all relevant factual information stands in interesting contrast to the obligation imposed by Rule 3.3(a)(3) to disclose legal authority that is directly adverse to the position of the client. Whether there should be such an obligation is a different question. New Jersey goes a long way toward imposing such an obligation, providing that a lawyer may not knowingly "fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure."⁹²

VI. Using Custody as a Bargaining Chip

The Model Rules are not clear whether ethical rules permit a lawyer to use a custody demand as a bargaining chip in negotiations when the client has no wish for custody but simply wishes to use the demand as leverage. The issue is whether such a demand would violate Rule 3.1 (which prohibits asserting an issue in a proceeding unless a non-frivolous basis is present for doing so) or Rule 4.4 (which prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person). The Standards of Conduct, however, are very clear: Standard 2.25 provides that an attorney should not contest custody or visitation for either financial leverage or vindictiveness. I have elsewhere taken the position that Rule 4.4 should be interpreted to preclude a "bargaining-chip-only" custody demand.⁹³ But even if such a custody demand is not prohibited by the Model Rules, a lawyer for a client who is making such a demand must avoid violation of other applicable ethics rules. For example, Model Rule 4.1(a) provides that a lawyer may not knowingly "make a false statement of material fact or law to a third person." A false statement regarding a client's intentions regarding custody could well violate this rule. However, the

⁹² N.J. Rules of Professional Conduct, Rule 3.3(a)(5).

⁹³ For a fuller discussion of this point, see Becker, *supra* note 2, at 628-29.

Comment to Rule 4.1(a) makes an important qualification of the rule in a negotiation context, stating:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value***and a party's intentions as to an acceptable settlement of a claim are in this category.

The morality of this exception has been both criticized and defended.⁹⁴ Application of the exception to the "custody-as-bargaining-chip" situation will depend on the precise facts.

The question, as posed, tends to be an academic one because clients are unlikely to state that they have no interest whatsoever in custody and are using the demand only for other purposes. And no lawyer with any conscience or soul is likely to propose that a client make such a demand or to go along with it. (I have never heard any matrimonial lawyer do anything other than strongly condemn such a practice.) If a client were to propose making such a demand, the lawyer should, pursuant to Rule 1.4(b), advise the client of the reasons why such a demand should not be made (for example, the deleterious effects that a custody fight and its aftermath could have on children). If the client insists, the lawyer should withdraw.

VII. Conclusion

This article has discussed some ethical issues facing a lawyer for a parent in a custody case, with an emphasis on the ways in which those issues can arise in the relocation context. In particular, the responsibility that a lawyer for a parent has toward a child whom the lawyer does not represent is a difficult and complex topic, and is one that present ethical codes are silent on. I have tried to discuss both the rules applicable to this topic and also, albeit in a preliminary way, whether and how the present rules should be changed. A detailed exploration of what the rules should be is a topic best left for a different article. The topic, however, is a matter of great importance.

⁹⁴ Criticizing the exception, see Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 437-41 (1988). Defending it, see James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. Bar Found. Res. J. 926, 932-35 (1980).