2016 Annual Child Support Training Conference & Expo

Piecing it all Together

May 3–5, 2016 » Garden Grove, California

Child Support Directors Association of California
ETHICS

Avoiding the Pitfalls

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Who is your client?
Family Code §17406
…the local child support agency and the Attorney General represent the public interest in establishing, modifying, and enforcing support obligations. No attorney-client relationship shall be deemed to have been created between the local child support agency or Attorney General and any person by virtue of the action of the local child support agency or the Attorney General in carrying out these statutory duties.
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Head Attorney Alice is summoned to Mr. Jones’ office. Mr. Jones is the director of the LCSA for LaLa County. Mr. Jones wants Alice to implement procedures where lump sum payments made by obligors (with multiple cases) must be applied first to welfare balances. Mr. Jones wants to increase collections on welfare cases because that will help increase LaLa County’s local funding. Mr. Jones needs more resources so the LCSA can hire more staff to better serve case participants in LaLa County.
Code of Civil Procedure §695.221

d) In cases enforced pursuant to Part D (commencing with Section 651) of Subchapter 4 of Chapter 7 of Title 42 of the United States Code, if a lump-sum payment is collected from a support obligor who has money judgments for support owing to more than one family, after the implementation of the California Child Support Automation System (CCSAS), all support collected shall be distributed pursuant to guidelines developed by the State Department of Child Support Services.
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Who does Alice represent?

State DCSS?
Her LCSA?
Mr. Jones?
FAMILY CODE §17304

a) The [State] director shall be responsible for implementing and administering all aspects of the state plan that direct the functions to be performed by the LCSA relating to their Title IV-D operations.

b) The director shall have direct oversight and supervision of the Title IV-D operations of the LCSA...

The LCSA shall be responsible for the performance of child support enforcement activities required by law and regulation in a manner prescribed by the department...

The administrator of the LCSA shall be responsible for reporting to And responding to the director on all aspects of the child support program...

f) … All staff shall be employees of the County and shall comply with all local, state, and federal child support laws, regulations, and directives.
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How should Alice handle Mr. Jones’ directive?

Can she call anyone and not violate her ethical duties?
ABA Rule 1.13 Organization As Client

a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
ABA Rule 1.13 Organization As Client

c) Except as provided in paragraph (d), if
1. despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

Then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
ABA Rule 1.13 Organization As Client

See Comment (8).

May be more difficult to analyze when involving a government agency:

…Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.

For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.
CA Rule 3-600 Organization as Client

A. In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

B. If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others....
CA Rule 3-100 Confidential Information of a Client

A. A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

B. A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.*

* A member who does not reveal information permitted by paragraph (B) does not violate this rule.
CA Rule 3-100 Confidential Information of a Client

C. Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

D. In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
CA Rule 3-100 Confidential Information of a Client

(a) A lawyer shall not reveal information protected by Business and Professions Code section 6068(e) unless the client gives informed consent or the disclosure is permitted by paragraph (b).

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e) to the extent that the lawyer reasonably believes the disclosure is necessary: (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

NOTE: Business and Professions Code §6068, subdivision (e)(1), provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve, the secrets of his or her client."
ABA Rule 1.6 Confidentiality Of Information

a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
1) to prevent reasonably certain death or substantial bodily harm;
2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
California’s former version of proposed ABA rule 1.6 still requires a threat of death or substantial bodily injury

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e) to the extent that the lawyer reasonably believes the disclosure is necessary: (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

(c)[Try to talk the attorney out of it.]
During a meet and confer on NCP’s request for modification of current support, the CP tells you that her only income is from a minimum wage job as a receptionist and provides her updated I&E and paystubs showing minimum wage income. The CP then gets an unexpected cell phone call which she answers in Mandarin. The CP tells the other person that she will be available to work the night shift cleaning offices and that she expects her usually pay of $10 per hour in cash. Unbeknownst to the CP, you studied Mandarin in college and understood the conversation, but you do not confront her.

You then interview NCP’s attorney who does not agree with the Guideline calculation and wants a hearing.
MRPC 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
(3) Offer evidence the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
ETHICS

MRPC 3.3: CANDOR TOWARD THE TRIBUNAL
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
MRPC 3.4: FAIRNESS TOWARDS OPPOSING PARTY AND COUNSEL

A lawyer shall not:...
(b) falsify evidence or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;....
Paula is a new paralegal eagerly wanting to help the attorneys prove income for NCPs that are hiding assets. On her own she creates a fake Instagram account and manages to share photos and messages with these NCP’s. Through her efforts she is able to discover some hidden assets that can be used by the staff attorneys.
Once you learn what Paula is doing, can the practice continue?
ETHICS

MRPC 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE
With respect to a non-lawyer employed or retained by or associated with a lawyer . . . .
a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;....
MRPC 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a non-lawyer employed or retained by or associated with a lawyer . . . .
b) A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
c) A lawyer shall be responsible for the conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer if:
1. The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;....
MRPC 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:
c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
d) Engage in conduct that is prejudicial to the administration of justice....
ETHICS

MRPC 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS
In the course of representing a client a lawyer shall not knowingly:

a) make a false statement of material fact or law to a third person; or

b) Fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
CRPC 5-200, Trial Conduct

In presenting a matter to a tribunal, a member:
(A) Shall employ, for the purpose of maintaining the causes confided to the member, such means only as are consistent with truth;
(B) Shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law;....
See Also B&P §6068 (d)

An Attorney shall...

(d) ... employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(And...B&P §6128(a)....)
B&P §6128(a)....
Every attorney is guilty of a misdemeanor who either:
(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.
(Punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.)
Are you a child support attorney who is buried in cases, in court all day every day and does not have time to prepare pleadings or prepare for trials?

You haven’t kept up with changes in the law because of your workload?

Ok to rely more and more on non-attorneys and paralegals for assistance?
Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
CRPC 3-110 Failing to Act Competently

Comment 1: The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.
Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 2: A lawyer's work load must be controlled so that each matter can be handled competently.
Tom admonishing Kate about Michael's whereabouts.
MRPC 1.6 Confidentiality Of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;...
CRPC 3-100 Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

California Business and Professions Code 6068 (e)(1)
It is the duty of an attorney to do all of the following:

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
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Question:
Does CRPC 3-100 allow what MRPC 1.6 prohibits?

Contrast:
“…the secrets of his or her client…” (California RPC)
“…information relating to the representation of a client…” (ABA MPRC)
You’re going to have a contested hearing after the lunch break with represented parties. You are in line at the court cafeteria and, coincidentally, the other attorneys are in line behind you. As you’re waiting in line the judicial officer hearing the case walks by to say hello. You reply and say “I have a real shady NCP for you this afternoon.”
CRPC 5-300 Contact With Officials

(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:
(1) In open court; or
(2) With the consent of all other counsel in such matter; or
(3) In the presence of all other counsel in such matter; or
(4) In writing with a copy thereof furnished to such other counsel; or
(5) In ex parte matters.
CRPC Former Proposed ABA 3.5

(b) Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
CRPC Former Proposed ABA 3.5 (Con’t)

(1) in open court;
(2) with the consent of all other counsel in the matter;
(3) in the presence of all other counsel in the matter;
(4) in writing with a copy thereof furnished promptly to all other counsel; or
(5) in ex parte matters as permitted by law.
ETHICS

If an attorney believes a Judge is violating the Rules of Judicial Conduct, what are the attorney’s obligations?
California Commission of Judicial Performance

http://CJP.CA.GOV
2014 Judicial Complaint Stats

1,825 judicial positions

1,212 new complaints against 882 different judges

1,039 of the complaints were closed without staff inquiry or preliminary investigation

90 were closed after preliminary investigation

84 staff inquires and 101 preliminary investigations

2 formal proceedings commenced

Final dispositions: 2 censures, 3 public admonishments, 9 private admonishments and 29 advisory letters
2014 Judicial Complaint Stats
For Subordinate Judicial Officers
(Court Commissioners and Referees)

332 positions

90 new complaints

86 closed after initial review

4 closed without discipline after independent investigation
ETHICS

Average time period from filing a complaint to disposition is 4.15 months

Types of cases receiving complaints: 38% criminal, 26% general civil, 17% family law, 7% small claims/traffic, 8% others and 4% (Court administration and political activities) out of court cases

Who are filing complaints? 89% litigant/family/friend, 3% attorneys, 2% other judges/court staff, 4% all others (members of public) and 2% anonymous letters and the news
ABA Model Rule of Judicial Conduct 1.1

A Judge shall comply with the Law, including the Code of Judicial Conduct.

Law encompasses court rules as well as statutes, constitutional provisions and decisional law.
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ABA Model Rule of Judicial Conduct 1.3
Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.
ETHICS

What conduct warrants discipline?

“Engaging in sexual intercourse in the courthouse is the height of irresponsible and improper behavior by a judge.” California commission on judicial performance.
Disciplinary Scenario

This judge has sex in his chambers with two former students. Then judge lobbies the local District Attorney’s office to hire one of these students.

Is this conduct worthy of discipline?
Judge Scott Steiner (Orange County)
He did it!

Disposition: Public censure
What about sex with your court clerk in chambers?

Or what about just passing her salacious notes during court proceedings?
Judge Cory Woodward (Kern County)

Disposition: Public censure

In the case summary the commission noted that his misconduct could have lead to removal form the bench. Being contrite, cooperative with investigators and earning positive reviews spared him from removal.
The Belittling Judge

In response to a lawyer objecting to the court’s evidentiary ruling, the Judge replied “I’ll explain it to you sometime when you pay tuition.”

Is this statement appropriate if done to curb an attorney’s disrespectful and provocative behavior without resorting to contempt?
Judge Ronald Sohigian (Los Angeles County)

Disposition: Public admonishment
What About Family Law?

Judge has a pattern of making denigrating and undignified remarks to Family Law in pro per litigants.

Examples:
Told parent they were “rotten.”
Told they should have child taken from them.
Told a mother she was a “train wreck” and a “liar” who deserved to have a “cell door closing on her.”

He made a comment to parents that if they’re child was like them they “might as well have her start walking the streets as a hooker.”

Told job hunting father that his plans to get a job represented pie in the sky because he was “morbidly obese and at risk of dying anytime.”
Judge Daniel Healy (Solano County)

Disposition: Public Admonishment
Do you have an obligation to report a judge’s ethical misconduct?
ABA Model Rule of Professional Conduct 8.3

Reporting Professional Misconduct

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
Can you give a judicial officer a copy of CSDA Child Support Attorney Sourcebook?

Can you participate in the Court staff’s pot luck?
ABA Model Rule of Professional Conduct 3.5
Impartiality and Decorum of the Tribunal

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law.
CRPC 5-300 Contact With Officials

(A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged.
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State Bar Ethics Hotline

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Please be sure to complete the session evaluation.
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