

Representing the Low-Income Family Law Client in Montana: Ethical Considerations

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1 Ethics Credit

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CORE OBLIGATIONS – 5 C's

- Communication
- Competence
- Confidentiality
- Control
- Identifying Conflicts

COMPETENCE - Rule 1.1

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1 - Comment 5 to Model Rules

- Competent handling of a particular matter includes:
 - inquiry into and analysis of the factual and legal elements of the problem
 - use of methods and procedures meeting the standards of competent practitioners
 - adequate preparation
- The required attention and preparation are determined in part by what is at stake
- An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible

Competence

Factual and Legal Elements that may present in
Low Income Family Law Representation

Property distribution likely to involve allocating debt,
rather than splitting assets

- May require working knowledge of bankruptcy, tax and creditor law

Only significant asset may be government or retirement benefits

- May require working knowledge of how different benefit programs work

Competence

Factual and Legal Elements that may present in Low Income Family Law Representation

Client and/or family members may be in need of more than legal representation

Competence includes a holistic assessment of client's situation

- May require knowledge of social services/benefits available
- May require knowledge of landlord/tenant law, housing options
- May require knowledge of mental health resources

Communications – Rule 1.4(1)(a)

A lawyer shall promptly inform client of any decision or circumstance with respect to which client's informed consent is required by these Rules

"Informed consent" = agreement to a proposed course of conduct *after* lawyer has communicated:

- adequate information and explanation about material risks
- reasonably available alternatives to the proposed course of conduct

Communications – Rule 1.4(a) – con't

Lawyer shall:

(2) reasonably consult with client about means by which client's objectives are to be accomplished

(3) keep client reasonably informed about status of matter

(4) promptly comply with reasonable requests for information

(5) consult with client about any relevant limitation on lawyer's conduct when lawyer knows client expects assistance not permitted by Rules or other law

Communications – Rule 1.4(b)

A lawyer shall explain a matter to the extent reasonably necessary to permit client to make informed decisions regarding the representation.

“To the extent reasonably necessary” requires communicating:

- Enough information
- On the right level
- Using the right tools

Requires awareness of differences in socio-economic and in education levels

Requires awareness of client’s life situation (access to mail, email, telephone)

Communications – Best Practices

Assess potential communication barriers

- Cognitive
 - Does client have any difficulty reading or writing or other literacy issues?
 - Does client have any mental health or substance use issues that would impact communications?
- Language
 - Is English client's native language? If not, how fluent is client?
 - Even if client can speak English, can s/he read and write English, what level?
- Cultural
 - Do you and client share a cultural background?
 - If not, do you understand your client's cultural attitudes towards conflict, negotiation, family, child rearing?

Communications – Best Practices

- If answer to any of those question is “no” – who can you enlist to facilitate communication?
 - Family member, interpreter, social worker, counselor
 - If necessary to carry out the legal representation, will not waive Attorney/Client Privilege
 - Memorialize purpose of third party participation in writing
- Logistics
 - Does client have stable living situation?
 - Does client have reliable access to cell phone, voicemail, text, email?
 - If not, need to develop communications plan with client to maintain regular communication?

Control – Rule 1.2

Scope Of Representation And Allocation Of Authority Between Client And Lawyer

- Lawyer shall abide by client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with client as to the means by which they are to be pursued
 - Can't make decisions for client
 - Dangers of “directive” styles of lawyering
 - Dangers of projecting objectives on clients
- Lawyer may take such action on behalf of client as is impliedly authorized to carry out the representation
- Lawyer shall abide by a client's decision whether to settle a matter

Confidentiality – Rule 1.4, Cmt. 6

- Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult
- However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14

Rule 1.14 Client With Diminished Capacity

(a) When client's capacity to make adequately considered decisions diminished (minority, mental impairment or some other reason) lawyer shall, as far as reasonably possible, maintain normal client-lawyer relationship

Rule 1.14 Client With Diminished Capacity

(b) When lawyer reasonably believes:

- client has diminished capacity
- at risk of substantial physical, financial or other harm unless action is taken
- cannot adequately act in own interest

Lawyer may take reasonably necessary protective action

- consult with individuals or entities that have ability to take action to protect client
- in appropriate cases, seek appointment of a guardian ad litem, conservator or guardian

Control – R 1.2 (b)

Limited Scope Representation

- A lawyer may limit the scope of the representation if:
 - limitation is reasonable under the circumstances
 - client gives informed consent
 - Informed consent must be confirmed in writing unless:
 - Telephone consultation
 - Representation by nonprofit legal services program and advice consists solely of providing information and advice in preparing court-approved legal forms
- or
- Court appoints for limited purpose

Control – R 1.2 (b)

Limited Scope Representation

- If client gives informed consent in writing signed by client, presumption arises that:
 - Representation is limited to services described and
 - Attorney does not represent client generally or in matters other than those identified
- Threshold question - must be reasonable under the circumstances
- All core obligations in play, but only as to agreed scope

Control – R 1.2 (b)

Limited Scope Representation

- Best practices
 - Writing signed by client (not just confirmed in writing)
 - Signature triggers presumptions
 - Detail informed consent factors, facts and circumstances as understood by attorney
 - Require client to inform you of any change in circumstances that might affect reasonableness analysis
 - List circumstances that might affect reasonableness

Managing Conflicts of Interest

CONTESTED DIVORCE

- Dual representation of both spouses in a contested divorce is a per se conflict of interest and improper regardless of full disclosure by lawyer and client consent
- Untenable conflict that one clients will be injured by lawyer's actions on behalf of other client

Managing Conflicts of Interest

UNCONTESTED DIVORCE

American Academy of Matrimonial Lawyers: lawyer should not represent both spouses even if they do not want independent representation

Some jurisdictions permit dual representation of both spouses in uncontested divorces when the parties are in agreement on all material matters in uncontested, no-fault divorces

Managing Conflicts of Interest

Mont. St. Bar Op. 10 (12-80): lawyer may represent both parties in non-adversarial joint petition for dissolution

- need full disclosure and informed consent
- no minor children

Dual representation in uncontested matters is fraught with peril - despite the parties' early affirmations that they have reached an agreement, potential conflict lurks in every family law matter

Even with consultation and full disclosure, clients often misunderstand that dual representation does not provide for true adversarial representation

Rule 4.3 Dealing With Unrepresented Person

- 60% of family law cases in Missoula County involve at least one pro se litigant – high likelihood of unrepresented litigant on other side of case
- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested
- When lawyer knows or reasonably should know that unrepresented person misunderstands lawyer's role, lawyer shall make reasonable efforts to correct misunderstanding
- Lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client

Engagement Letters

- Part of Communication
- Especially important in LSR
- Best practices:
 - Address nature and scope of representation
 - Include post-dissolution litigation? Appeals?
 - Disposition of documents/files