



# Ethics Session on Substance Use Disorders

Supreme Court Task Force on Permanency Planning

April 12, 2023



# Sketchy Screening

You represent Marlene in a child in need of care case involving her daughter, Ellie. The matter is set for an adjudication trial. At the time of filing, Marlene tested positive for methamphetamine. Due to staff turnover, the Agency has not requested any additional drug testing from Marlene.

In a meeting on the eve of trial, Marlene provides you with a copy of hair follicle and urinalysis results that are negative for all substances. The tests are conducted by RAPID Testing, a provider that you've never heard of or seen used in cases before. You have doubts that (1) the testing is legitimate and (2) that Marlene is actually clean, as she says she is.

Marlene insists that you present the information at trial. What are your options?



## Rule 1.1 Duty to Investigate

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [5] **Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem**, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.



## Rule 3.3 Candor to Tribunal

(a) **A lawyer shall not knowingly:**(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or(3) **offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.**



## Rule 3.3 Candor to Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.



## Rule 3.3 Candor to Tribunal Comments

*[8] The prohibition against offering false evidence only applies if the lawyer **knows** that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. **A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances.** See Rule 1.0(e). Thus, **although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.***



## Rule 3.3 Candor to Tribunal Comments

*[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].*



# Poll Questions





## Scope of Representation – Rule 1.2

(a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue.



## Scope of Representation – Rule 1.2

Comment [1] **Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.** A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.



## 38-2249(b) – Rules of evidence.

(2) In all proceedings under this code, a report concerning the results and analysis of a court-ordered test of a person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs shall be admissible in evidence if the report is prepared and attested to by the person conducting the test or an authorized employee of the facility that conducted the test. Such person shall prepare a certificate that includes an attestation as to the result and analysis of the test and sign the certificate under oath. Nothing in this section shall prevent a party from calling such person as a witness.



# A GAL's Dilemma



## A GAL's Dilemma

Mike and Karen are parents of two daughters, Kara age 5 and Ava aged 3. A CINC petition is filed based upon parental drug use. While the case is pending, Karen becomes pregnant and gives birth to another child, Tommy, who also comes into care. Ultimately, the parents are not successful in completing reintegration. A motion for termination of parental rights is filed as to all 3 children. On the morning of the severance trial, both parents relinquish their parental rights and permanency goal is changed to adoption.



## A GAL's Dilemma

Kara and Ava were placed in the home of Ben and Jan. Tommy was also placed with them when he came into care. At the time of termination, all 3 children have been in the home for over two years and have a significant bond with one another. Initially, Ben and Jan were an adoptive resource for all three children, but now have changed their minds – they would adopt Tommy and possibly Ava, but not Kara.



## A GAL's Dilemma

Ben and Jan are the only parents Tommy has ever known and they have a biological child who is only 1 year younger than Tommy. Ben and Jan file a motion for the court to approve a sibling split and for direct placement of Tommy.



## A GAL's Dilemma

When either case was filed, no family resources were available for placement. Paternal Grandmother was interested in placement, but her home was not approved for placement because of the size of the home and because her husband had significant criminal history for property crimes such as forgery and theft. Now at post-termination, Paternal Grandmother seeks placement of all three of the children for adoption. She appears to be the only family resource available for adoption. The placement agency appears to favor adoption by Paternal Grandmother, even though they previously would not approve her home for placement.





## A GAL's Dilemma

You are the guardian ad litem (GAL) for all three children. You are concerned about any placement or adoption by Paternal Grandmother because of her home situation and because in the past she has made comments that she wanted to get the kids so that they could continue to have a relationship with Mike (who continues to use illegal substances).



## A GAL's Dilemma

Prior to the hearing on Ben and Jan's motion, the judge in the case raises concerns with having one GAL represent the best interests of all three children. Does the Code of Professional Conduct allow the GAL to represent all three children? Is the court required to appoint a different GAL for each child?



## A GAL's Dilemma

Rule 1.7 applies to conflicts of interest with concurrent representation of clients where there is a concurrent conflict of interest. A conflict exists if the representation of one client will be directly adverse to another client; or there is a substantial risk that the representation of one or more clients will be materially limited by the lawyers' responsibility to another client.



## A GAL's Dilemma

Notwithstanding the existence of a concurrent conflict of interest a lawyer may represent a client if: The lawyer reasonable believes that the lawyer will be able to provide competent and diligent representation to each affected client and the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation; and each affected client gives informed consent.



## A GAL's Dilemma

Is there a conflict of interest in one GAL representing all three children under these circumstances, where advocating the best interest of one or more children might conflict with the best interest of another?

If there is a conflict can informed consent be given?



# Poll Questions



# Joe's Jumble



## Joe's Jumble

Liz is a 28-year-old mother of two who has struggled with substance use issues for close to 10 years. She has two children: Kenzie, age 6, and Jeremy, age 18 months.





## Joe's Jumble

Liz recognizes there have been times when drug and alcohol use has negatively impacted her parenting. When Kenzie was a year old, a child neglect report was filed on Liz due to her inability to properly care for Kenzie, and her drug use was a large reason for the concern. A child in need of care case was filed, and Liz successfully completed inpatient and outpatient treatment to break her drug habit and jurisdiction was terminated.



## Joe's Jumble

Liz credits her attorney Joe for a lot of her success; Joe took her to treatment, drove her to NA meetings, and helped set her up with housing and a job when she got out of treatment. Joe remained a support for Liz as she was a single mom and did not have many supports in the community.



## Joe's Jumble

Liz remained drug free until she was prescribed painkillers as part of her recovery from Jeremy's birth. Liz began increasing her substance use combining prescription and street drugs. A new report was made and DCF called Liz to speak with her regarding the report. Liz informed them she was at work and scheduled a meeting for the following afternoon.



## Joe's Jumble

Liz immediately texted Joe and asked to meet. Joe agreed to meet Liz at her apartment. As he approached her door, he could smell the odor of marijuana. Liz let him into the home and confessed to him that she had been using again since Jeremy was born. She begged him to keep her children out of the system and wanted to know what he could do so that she would not lose her children. Joe scheduled a consultation with Liz the following morning.



# Joe's Jumble

Overnight the children were placed into police protective custody.



## Joe's Jumble

Joe was no longer handling CINC cases, but sat in the gallery at the temporary custody hearing to see what would happen in Liz's case.

At the temporary custody hearing, Liz pleaded with the court to return her children and admitted she would be positive for marijuana, but said she hadn't used marijuana for two weeks and hadn't used anything else not prescribed to her.