



# Ethics Issues for CHIPS Attorneys

2018 CHIPS Conference



# Ethics Considerations for Government Attorneys

- Who is my client?
- How do I identify who has authority to act on behalf of my client?
- What are my obligations to government clients?
- How do I balance potentially competing interests in representing clients I am required by law to represent?

# Ethics Scenarios

- How do you address potential conflicts of interest when representing different clients in separate matters involving the same opposing parties?
- How do you address potentially competing obligations to keep client information confidential across multiple cases involving similar parties, with your obligation to disclose information to parties.
- What are your obligations to opposing parties, whether represented or unrepresented?

# Scenario 1

- You are an ACA handling primarily criminal matters
- Your office has one attorney handling CHIPS matters, but when his caseload becomes too large due to other matters, you agree to take over part of the CHIPS caseload.
- Not long after, you charge a case involving a defendant who is a bio dad in an existing CHIPS matter.
- The victim in the criminal matter is mom in the CHIPS file.

# Scenario 1

- Defense counsel in the criminal matter, knowing that you are also the attorney in the CHIPS matter, asks for all potentially exculpatory evidence from the CHIPS file.
- You review the CHIPS file and believe that there is no potentially exculpatory evidence, but realize that defense counsel may have a different view.

# Scenario 1

## Discussion Questions (part 1)

- May a criminal prosecutor simultaneously serve as a CP attorney?
- May a criminal prosecutor appear in a CP matter when the CP attorney is unavailable – a limited appearance at a CP review hearing or an EPC hearing with tight timelines, for example?
- Can an ACA ethically prosecute a defendant when that ACA has actual knowledge about CP data involving the defendant as a parent in an active CP case?
- Can an ACA ethically seek CP consequences against a parent when that ACA has actual knowledge that the parent is the alleged victim in an active criminal prosecution?

# Scenario 1

## Ethical Duties at Issue

- The scenario implicates two distinct obligations:
  - (1) *the lawyer's duty to avoid representation of separate clients where such representation creates a concurrent conflict of interest, and*
  - (2) *the lawyer's duty of confidentiality to those clients.*
  
- Answering the questions therefore requires the lawyer to identify the clients involved and then determine if there is a conflict in the lawyer's duties to those clients.

# Scenario 1

## Identifying the Client(s)

- A CHIPS attorney's client:
  - *Minn. R. Prof. Conduct 1.13(a): "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."*
  - *Minn. Stat. § 260C.163, Subd. 4: "In representing the responsible social services agency, the county attorney shall also have the responsibility for advancing the public interest in the welfare of the child"*



# Scenario 1

## Identifying the Client(s)

- A prosecutor's client:
  - *ABA Standards of Prosecutorial Investigation, Standard 1.2(b): “[t]he prosecutor’s client is the public, not particular government agencies or victims”*

# Scenario 1

## Is there a Conflict?

- Minn. R. Prof. Conduct 1.7(a):
  - “Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
  - (1) the representation of one client will be directly adverse to another client; or*
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.”*
- Minn. R. Prof. Conduct 1.7, cmt. 1:
  - *A lawyer has a duty of loyalty and independent judgment to each client and may not use one client’s case to the detriment of another*

# Scenario 1

## Is there a Conflict?

- Minn. R. Prof. Conduct 1.6:

- (a) *Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.*

- (b) *A lawyer may reveal information about a relating to the representation of a client if:*

- (2) *The information is not protected by attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client.*

- (9) *the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order.*

# Scenario 1

## Is there a Conflict?

- Minn. R. Prof. Conduct 1.6, cmt. 10:
  - *Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (b)(9) permits the lawyer to make such disclosures as are necessary to comply with the law.*

# Scenario 1

## Is there a Conflict?

- Minn. R. Prof. Conduct 1.8(b):
  - *“A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.”*

# Scenario 1

## Addressing the Conflict

- Minn. R. Prof. Conduct 1.4:

- (a) *A lawyer shall*

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

- (b) *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

# Scenario 1

## Discussion Questions (part 2)

- Must the criminal prosecutors be screened from CP files, physically and electronically?
- Must the legal secretaries (except for the CP secretary) be screened from CP files, physically and electronically?
- What, if anything, must we do to segregate CP files, physically and electronically, from those who cannot/should not have access to these files?
- Must the CP attorney and the CP secretary be physically segregated from the rest of the prosecutor's office, perhaps by moving the CP attorney's office to the county social services office?

# Scenario 1

## Ethical Duties at Issue

- Duty to maintain confidentiality of client information.
- Minn. R. Prof. Conduct 1.6(c):
  - *A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*



# Scenario 1

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 1.6 cmt. 17 (excerpts):
  - *Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.*
  - *The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.*

# Scenario 1

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 1.6 cmt. 17 (con't):
  - *Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients.*
  - *Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.*

# Scenario 1

## Ethical Duties at Issue

- This duty to safeguard a client's information applies to non-lawyer assistants in the CAO.
- Minn. R. Prof. Conduct 5.3:
  - *With respect to a nonlawyer 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 nonlawyer's conduct is compatible with the professional obligations of the lawyer;

# Scenario 1

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 5.3 (con't):
  - *With respect to a nonlawyer employed or retained by or associated with a lawyer:*
    - (b) a lawyer having direct supervisory authority over the nonlawyer 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 a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
      - (1) *the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or*
      - (2) *the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action*

## Scenario 2

- You file a CHIPS petition based on a report of a child sustaining injuries while in mom's care.
- The mother also runs a licensed daycare facility out of the home. She claims not to know how the injuries occurred, but suspects it was another child who she describes as being overly physical.
- The investigation includes interviews of the mother/daycare provider and her family members conducted jointly by law enforcement and HHS case workers. The investigation then spills over to an investigation into the daycare license.
- Based on the County's recommendation on the licensing issue, DHS issues an order for temporary immediate suspension (TIS) of the day care license.

## Scenario 2

- In the course of notifying parents of the license suspension, County HHS personnel learn that other children have also suffered injuries at the daycare, including suspicious bruising and a broken leg.
- These injuries were not previously reported because the parents were told by the provider that the injuries were accidentally caused by other children at the daycare.
- County HHS personnel then begin a separate investigation of the day care provider for potential maltreatment of children and all of the injuries are referred to law enforcement for potential criminal charges.

## Scenario 2

- The provider retains a criminal defense attorney to represent her in both the CHIPS matter and in her appeal of the TIS order.
- The CHIPS petition and the TIS order do not include any reference to the additional injuries that are now under investigation.
- Defense counsel asks for disclosure of all information that the County has relating to her client.

## Scenario 2

- When you consult with DHS regarding the requested TIS disclosure, they inform you that because of the open criminal and civil (maltreatment) investigations, DHS's position is that only limited information that relates solely to the TIS order should be released and anything that touches on the ongoing investigations must be withheld.
- This includes withholding records relating to the joint law enforcement/County HHS interview with the provider and the statements from the parents of the other injured children.



## Scenario 2

- As the hearings on both the CHIPS matter and the TIS appeal approach, no charging decision has been made in the criminal case and the civil maltreatment investigation has not been completed.
- Defense counsel informs you that her client intends to testify in her own defense and that she will say that she did not injure her child and has never had problems with injuries with other children in the home.
- It becomes clear to you that because you have not released all of the information that the County and DHS have, that neither the mom/daycare provider nor her attorney are aware of the full scope of the ongoing maltreatment and criminal investigations.

# Scenario 2

## Discussion Questions

- Assume the law is not clear on your obligation (or authority) to disclose records relating to the concurrent maltreatment and criminal investigations (data relating to open civil and criminal investigations is confidential, but parties to a licensing proceeding are entitled to data “necessary for the preparation of a defense”).
- Are there ethical considerations that affect your decision about whether to disclose records about the provider that overlap with the ongoing investigations in response to defense counsel’s request?
- Does it make a difference if you know about the other alleged incidents but have not actually reviewed the records yourself and do not have them in your possession?

# Scenario 2

## Discussion Questions

- Do you have any obligation to consult with your client(s) about what records to disclose?
- If so, how do you resolve any conflict of opinion on what to disclose between DHS and County personnel (or even law enforcement)?
- How do you resolve any conflict between you and your client about your authority/obligation to disclose records?

# Scenario 2

## Discussion Questions

- Assuming you do not disclose any records relating to the other allegations against the provider, do you have an obligation to say something to defense counsel before she allows her client to take the stand?
- Should you ever be concerned about an opposing party potentially offering false testimony?

# Scenario 2

## Discussion Questions

- Can you discuss the case with the prosecutor to find out whether criminal charges will be filed?
- What if you are the prosecutor?
- If you find out the prosecutor is leaning toward declining prosecuting, can you ask her to hold off on the final decision until your case is done so as to keep certain material confidential?

# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 1.7 (Conflict of Interest: Current Clients)
- Minn. R. Prof. Conduct 1.8 (Conflict of Interest: Current Clients: Specific Rules)
- Minn. R. Prof. Conduct 1.13 (Organization as Client)

# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 1.6 (Confidentiality of Information)
- Minn. R. Prof. Conduct 1.0(g) (Definition of “Knowingly”)
  - (e.g., “knowingly” reveal client information)
  - (e.g., “knowingly” fail to comply with a mandatory disclosure rule)
- (g) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 2.1 (Advisor)
  - *In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.*



# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 3.3 (Candor Toward the 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.

# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 3.4 – Fairness to Opposing party and Counsel
  - *A lawyer shall not:*
    - (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
    - (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
    - (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
    - (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 3.4 – Fairness to Opposing party and Counsel (con't.)
  - *A lawyer shall not:*
    - (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
    - (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
      - (1) the person is a relative or an employee or other agent of a client; and
      - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

# Scenario 2

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 4.4 (Respect for Rights of Third Persons)
  - (a) *In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*
  - (b) *A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.*

# Scenario 3

- You represent the county in a child protection case involving a mother who has problems with alcohol and has been court-ordered not to use alcohol.
- The mother has been friendly to you at court appearances and often calls you for advice on issues in the case, explaining that she can never get ahold of her court-appointed attorney.
- Although making clear that you are not her attorney, you have occasionally talked with her when she calls.

# Scenario 3

- Upon returning from court one day you find a message on your voice mail from the mother.
- She is obviously drunk, slurring her words, alternately giggling, swearing or crying.
- From the background noise it sounds as if she is calling from a bar.

# Scenario 3

## Discussion Questions

- Knowing that the mother does not understand that you are an adversary, can you use the tape of this message in court as evidence of her violation of the prohibition against her drinking?
- If you are going to use it, what steps should you take?

# Scenario 3

## Discussion Questions

- If you are aware the mother is also on probation for a DUI, and a condition of her probation is to abstain from alcohol, can you disclose this taped message to the criminal prosecutor to use as evidence for a probation revocation case?
- What if you are also the prosecutor? Does that affect your responsibility to any of your clients and/or the court?



# Scenario 3

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 4.2 – Communication with Represented Persons
  - *“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”*

# Scenario 3

## Ethical Duties at Issue

- Minn. R. Prof. Conduct 3.4 – Fairness to Opposing Party and Counsel
- Minn. R. Prof. Conduct 3.7 – Lawyer as Witness
  - (a) *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:*
    - (1) the testimony relates to an uncontested issue;
    - (2) the testimony relates to the nature and value of legal services rendered in the case; or
    - (3) disqualification of the lawyer would work substantial hardship on the client.
  - (b) *A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.*

# Resources

- MCAA Ethics Advisory Panel (<https://mcaa-mn.org/page/EthicsPanel>)
  - *Request for consultation/advisory opinion*
    - <https://mcaa-mn.org/page/EthicsPanelSubmit>
  - *Ethics Advisory Panel Decisions (5 currently published)*
    - <https://mcaa-mn.org/page/EPDecision>
- Office of Lawyers Professional Responsibility
  - *Ethics hotline: 1-800-657-3601*