The Legal Ethics Committee of the Indiana State Bar Association (the "Committee") has been requested to provide an advisory opinion with respect to the following facts and issues.

FACTS

A law firm which primarily handles personal injury cases for plaintiffs desires to expand its use of paralegals. In particular, the firm desires to utilize paralegals in two specific areas in cases where a lawsuit has not yet been filed.

First, the firm desires to allow paralegals to negotiate the settlement of claims with insurance company adjusters. The firm states that a paralegal would conduct the negotiation based on specific guidelines from a lawyer. No settlement would be final without the lawyer's review and approval of the negotiation. The client would be informed of the paralegal's role, and if the client did not consent, then a lawyer would conduct the negotiation. Further, once a suit is filed, a lawyer would conduct all negotiations.

Second, the firm desires to allow paralegals to attend mediation sessions with clients in cases where mediation is conducted prior to any litigation being filed. The firm states that a lawyer would provide a paralegal with specific instructions and guidelines for that particular case. The paralegal would not appear if the client objected. Once a suit is filed, all mediation would be conducted by a lawyer.

ISSUE

Can a lawyer utilize paralegals to conduct negotiation and mediation sessions where no lawsuit has been filed without violating the Indiana Rules of Professional Conduct (the "Rules")?

DISCUSSION

Paralegals have long been used for a wide variety of tasks. The United States Supreme Court in 1989 recognized that the delegation of substantive legal work to paralegals is well-established.

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might
otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses, assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations, and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal.

Missouri v. Jenkins, 491 U.S. 274, 288 fn. 10 (1988). The American Bar Association Commission on Nonlawyer Practice conducted nationwide hearings between 1992 and 1994 and found that lawyers are increasingly assigning substantive legal work to traditional paralegals. ABA Commission On Nonlawyer Practice, Nonlawyer Activity In Law-Related Situations: A Report With Recommendations 53 (1995). The Commission recommended that the range of activities of traditional paralegals should be expanded, with lawyers remaining accountable for their activities. Id. at 11. The Commission also recognized that protecting the public from harm arising from incompetent and unethical conduct by persons providing legal services is an urgent goal of both the legal profession and the states. Id. at 7.

The Indiana Supreme Court has issued Guidelines on the Use of Legal Assistants (the "Guidelines") which allow for the use of legal assistants in accordance with those guidelines. Guideline 9.2 allows "any tasks normally performed by the lawyer" to be delegated to a paralegal provided that the lawyer maintains responsibility for the work product and provided that the delegation is not prohibited by a statute, court rule, administrative rule, controlling authority, or the Rules of Professional Conduct. Guidelines 9.3(c) provides that a lawyer cannot delegate to a paralegal the responsibility for rendering a legal opinion to a client. Further, Guidelines 9.1 requires that a service performed by the legal assistant be under "the direct supervision" of the lawyer.

As there is no statute or rule specifically prohibiting a paralegal from participating in pre-litigation negotiation or mediation, the question arises whether participating in negotiation or mediation is the unauthorized practice of law.

The Committee does not consider in this Opinion whether a paralegal can appear with a party in court-ordered mediation sessions. Such mediation sessions are governed by the Alternative Dispute Resolution Rules. See ADR Rule 2.7(B) concerning who must appear at court ordered mediation conferences.
Rule 5.5 provides that a lawyer shall not assist a nonlawyer in performing the unauthorized practice of law. The unauthorized practice of law is not limited to representation in litigation. In *Fink v. Peden*, 17 N.E.2d 95 (Ind. 1938), the Indiana Supreme Court held that a nonlawyer who assisted a widow to negotiate a settlement with a railroad company had engaged in the unauthorized practice of law and therefore could not collect for his services. The Court determined that Peden had to advise Mrs. Fink concerning the redress of a legal wrong in order to negotiate for her, which he was not allowed to do since he was not a lawyer. 17 N.E.2d at 100. *Fink* establishes that a nonlawyer acting alone cannot represent a client in negotiations of a personal injury claim, but it does not answer the question of whether a paralegal can act in a similar fashion, though under the direct supervision of a lawyer. The Comment to Rule 5.5, which concerns the unauthorized practice of law, specifically provides that this Rule does not prohibit the use of paralegals, so long as the lawyer supervises and retains responsibility for the work delegated.

In determining whether a legal assistant may (A) conduct negotiations, or (B) attend mediation sessions with the client, unaccompanied by the employing lawyer, the difference in the nature of the two proceedings must be considered.

A. Negotiations.

In negotiations of injury claims, the negotiations most often are conducted by intermittent communications, either by letter or telephone. The client rarely participates directly in the communications, but must be consulted with respect to all offers. Rules 1.2(a) and 1.4. There is ample opportunity for the lawyer to provide direct supervision of that communication process, including the consultation with the client.

The Committee is of the opinion that the Rules and Guidelines do not prohibit the use of a paralegal to conduct negotiation before litigation is filed so long as the paralegal is not responsible for rendering any legal opinions to the client. Guidelines 9.1 provides that a lawyer must directly supervise the paralegal's services. The lawyer must be responsible for assessing the merits of the client's claims, rendering any needed legal opinions, and establishing, with the client's consent, acceptable settlement amounts. The lawyer must insure that the paralegal has been trained in the procedures to follow, that the paralegal understands and adheres to the limits of his or her authority, and that the paralegal maintains a high level of competence and integrity. See Guidelines 9.10. The Committee would also recommend that the paralegal first be given the opportunity to observe negotiation sessions, and we recommend that the lawyer be readily available to respond to any questions of law that may arise.
The client must be fully informed of the extent to which a paralegal will be used. Rule 1.4(b); Guideline 9.4. The client must have the opportunity to determine whether it is acceptable for a paralegal to handle these tasks.

Finally, the lawyer must make all reasonable efforts to insure that the paralegal acts competently and in accordance with the lawyer’s professional obligations. Rule 5.3; Guidelines 9.10(d). The lawyer can potentially be disciplined for the actions of the paralegal. Rule 5.3(c). The lawyer must maintain a direct relationship with the client and must be responsible to the client for the paralegal’s work product.

B. Mediation.

In contrast with negotiations, mediation traditionally is conducted in a single bargaining session (but sometimes in multiple sessions). Often, the client participates directly. The essence of mediation is decisional flexibility, in which the client must actively participate in the flow of demands and offers of settlement, often accompanied by consideration of the adversary’s legal arguments and newly presented factual information, which may bear upon settlement value of the claim. There is the need for continual consultation between the lawyer and the client. As an advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. See Preamble, Indiana Rules of Professional Conduct. A paralegal cannot fulfill the advisory role of a lawyer in a mediation setting.

The Committee is of the opinion that a paralegal may not attend and participate in mediation sessions without the presence and direct participation of the lawyer.

CONCLUSION

It is the opinion of the Committee that a lawyer can delegate tasks to a paralegal relating to negotiation in cases where a lawsuit has not been filed, if the Rules of Professional Conduct and the Guidelines for Use of Legal Assistants are followed, as explained above. The lawyer may not delegate to a paralegal the representation of the client in mediation.
INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE
OPINION # 2 OF 1997

ISSUE

What are the lawyer’s duties when an unanticipated and irreconcilable conflict arises during a representation?

FACTS

A lawyer receives a telephone call from the mother of a pregnant teenager. The teen intends to give her baby up for adoption after its birth, and her mother inquires whether the lawyer knows of a prospective adoptive couple.

The lawyer represents a couple whom he believes may be interested in adopting the baby. After contacting them to confirm their interest, the lawyer calls the mother back and arranges for her and her daughter to meet with him at his office.

Accompanied by the daughter’s father who is married to the mother, mother and daughter attend the meeting with the lawyer. The lawyer explains that he is representing a couple whose prospective interest in adopting may be adverse to the pregnant teen and her family, and he advises them that they may wish to consult with their own lawyer. He gives the teen and her parents further information about the adoption process.

The pregnant teen will not divulge the name of the father of her unborn baby either in the presence of her parents or privately to the lawyer. She states that the father is also a minor who lives in another state. She believes he will consent to the adoption and tells the lawyer that she will have him call the lawyer.

Several hours after the lawyer concludes the meeting with the teen and her parents, her father returns to the lawyer’s office. He is agitated and asks to speak with the lawyer in confidence, stating that he needs a criminal lawyer and probably a divorce lawyer as well. After obtaining the lawyer’s agreement to keep his confidence, he informs the lawyer that he is certain that he is the father of his pregnant daughter’s unborn child.

The lawyer advises the father that he will have to inform the prospective adoptive couple that the unborn child is the product of incest. He then contacts a lawyer in another firm who agrees to schedule an appointment with the teen’s father to discuss his legal problem.
SPECIFIC ISSUES PRESENTED

1. Does the lawyer have an ethical obligation to preserve the father’s confidence?

2. How is the lawyer affected by the duty under Ind. Code § 31-6-11-3(a) to report instances of child abuse to the appropriate authorities?

3. In the event that the prospective couple decides to proceed with the adoption, does the lawyer’s conversation with the father prohibit the lawyer from representing the prospective adoptive couple in the adoption proceedings?

4. Can the lawyer disclose to the prospective adoptive father that the unborn child is the product of an incestuous relationship?

ANALYSIS

1. The Lawyer’s Duty to Preserve the Father’s Confidential Communication.

A. Applicable Rules

Rule of Professional Conduct 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client consents after consultation. Rule 1.6(b)(1) permits the lawyer to reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing any criminal act. The Comment to Rule 1.6 notes that "[a]lmost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct."

The Scope to the Rules of Professional Conduct states:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

B. Discussion.

The question of whether the lawyer had an obligation to protect the information imparted to him by the father depends on whether the father is his "client" and, if he is not, on whether
the father's meeting with the lawyer was a meeting for the purpose of possibly establishing an attorney-client relationship in order for the father to obtain legal advice. As noted by the court in Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 (7th Cir. 1978), a lawyer has a duty to protect a prospective client's confidences even though an attorney-client relationship is not established. Indiana appellate courts have noted on several occasions "that when an attorney is consulted on business within the scope of his profession, the communication on the subject between him and his client should be treated as strictly confidential." Colman v. Heidenreich, 381 N.E.2d 866, 869 (Ind. 1978) (citations omitted); Corll v. Edward D. Jones & Co., 646 N.E.2d 721, 724 (Ind. App. 1995). See also Matter of Anonymous, 655 N.E.2d 67 (Ind. App. 1995) (stressing the importance of the prospective client's subjective belief as to whether he is consulting the lawyer in a professional capacity). However, if the father was not seeking legal advice or assistance from the lawyer but was simply giving the lawyer information (even information detrimental to the father's interest), the lawyer would be under no duty to maintain the father's communications in confidence.

In this case, it appears that the father had come to the lawyer's office seeking legal assistance. This is evidenced by the fact that the father stated to the lawyer that he probably needed a criminal and a divorce lawyer. By inviting the father to explain his situation, the lawyer, regardless of whether the lawyer ever intended to provide the father with legal assistance, behaved as if he would at least consider the establishment of a lawyer-client relationship. The lawyer's agreement that he would preserve the father's confidences confirms the lawyer's understanding that the father had come to him seeking legal advice and assistance. Thus, the lawyer is under a duty to preserve the father's communications under Rule 1.6.


Ind. Code § 31-6-11-3(a) provides that "any individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by this chapter." Further, Ind. Code § 31-6-11-20(a) provides that it is a Class B misdemeanor to fail to make a report required under § 31-6-11-3(a). Thus, assuming that the teen is a victim of child abuse, the issue is whether the lawyer is bound to make the report required by the

3The facts of this opinion underscore the importance of ascertaining whether a conflict exists before beginning an interview, to avoid creating the type of ethical dilemma that occurs here. As noted in the Comment to Rule 1.7, a "lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts."
statute or whether he is prohibited from doing so by the requirements of Rule 1.6.

Although Rule 1.6(b) does permit a lawyer to reveal confidential information to the extent the lawyer believes reasonably necessary to prevent commission of a criminal act, the Rule does not authorize a lawyer to reveal information that a client has already committed a criminal act. Such a requirement would run counter to the purpose of the Rule, which is to encourage clients and prospective clients to communicate candidly and fully with their attorneys. Further, as noted above, the requirements of Rule 1.6 are applicable equally to clients and to individuals consulting a lawyer for the purpose of obtaining legal advice and assistance. A lawyer who reported a client or prospective client under the provisions of Ind. Code § 31-6-11-3(a) would be in violation of his obligations under Rule 1.6.

It is worth noting that on several occasions, the Indiana Supreme Court has held that legislative enactments that conflict with the Rules of Professional Conduct are unconstitutional because they violate the separation of powers provision of the Indiana Constitution, Article, Section 1, because Article 7, Section 4 of the Indiana Constitution vests in the Supreme Court the exclusive responsibility and duty to regulate the professional legal activity of lawyers. See Matter of Mann (1979), 385 N.E.2d 1139, 1141 (Ind., 1979); Matter of Public Law No. 154-1990, 561 N.E.2d 791 (Ind. 1990).

3. The Lawyer’s Continued Representation of the Prospective Adoptive Couple in this Matter.

A. Applicable Rules

Rule 1.7(a) prohibits a lawyer from representing a client if the representation is directly adverse to another client unless the lawyer believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. Rule 1.7(b) prohibits a lawyer from representing a client if representation may be materially limited by the lawyer’s responsibility to another client or a third person, unless each client consents. The Comment to the Rule directs the lawyer to withdraw from representation should a conflict arise after representation has been undertaken.

B. Discussion.

In this case, the prospective adoptive couple are the lawyer’s clients. However, a possible conflict arises when the lawyer permits the teen’s father to consult with him about a legal matter that is substantially related to the matter in which the lawyer represents the couple. Even if the father is simply the grandparent to the unborn child, the father is a potential adverse party because certain of his legal rights, including grandparent visitation, will terminate upon adoption. Should the prospective
couple desire to proceed with the adoption, the lawyer's representation of them may be materially limited by his duty to keep confidential those communications made to him by the father concerning the parentage of the unborn child.

4. Whether the Lawyer can Disclose to the Prospective Adoptive Couple that the Unborn child is the Product of Incest.

The lawyer's statement to the father that he intended to inform the prospective adoptive couple that the unborn child is the product of an incestuous relationship emphasizes the ethical dilemma faced by the lawyer. On one hand, he is bound to protect the confidentiality of the father's communications; on the other hand, he is required by Rule 1.4 to explain matters to existing clients to the extent reasonably necessary to permit them to make informed decisions. The Comment to Rule 1.4 states that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation." Only in very limited circumstances may a lawyer withhold information from a client; these circumstances, which are discussed in the Comment to Rule 1.4, do not permit a lawyer to withhold information "to serve the lawyer’s own interest or convenience."

In this case, because of the conflict that has arisen, the lawyer is prevented from continuing to represent the adoptive couple. (See analysis of Issue #3, supra.) Once the lawyer has a duty to keep the father's communications confidential, the lawyer may not continue to represent the adoptive couple. This prohibition extends not only to representation in the adoption process but also to the giving of advice and information concerning the parentage of the unborn child. The lawyer is limited to advising the prospective adoptive couple that a conflict of interest now exists and that he can no longer assist them with the adoption matter.
INDIANA STATE BAR ASSOCIATION  
LEGAL ETHICS COMMITTEE  
OPINION NO. 3 OF 1997  

The Legal Ethics Committee of the Indiana State Bar Association (the "Committee") has been requested to provide an advisory opinion with respect to the following facts and issues:

FACTS

An organization which assists victims of crime ("Victim Assistance") receives funding from, and is physically located in, a police department. The role of Victim Assistance is to provide support, information and education about restitution and compensation and the availability of protective orders to victims of violent crimes. Victim Assistance also attends meetings and court hearings with the victims, and tracks criminal court cases, reporting the status to the victims. Victim Assistance does not provide services by certified counselors or social workers.

Prior to the adjudication of guilt or innocence of a defendant, a memo is submitted in a sealed envelope by Victim Assistance to the criminal court, indicating the purported interest of the victim, including factual allegations regarding the conduct of the defendant and recommendations regarding the disposition of the case. Attached to the envelope is a printed docket sheet with the title "Red Alert." The "Red Alert" designation shows the court that a Victim Assistance memo is in the file. The memo is not provided to the defendant or defense counsel.

Furthermore, Victim Assistance has been allowed to pull a pending criminal case and request a hearing during the court’s general call, without notifying the defendant or defense counsel. The prosecutor, generally available during court call, is able to participate. At these hearings, Victim Assistance has addressed issues, such as continuances of the criminal trial or revocation of bond, without notice to the defendant or defense counsel.

ISSUES

1. Is Victim Assistance an agent of the prosecutor’s office?

2. Is Victim Assistance engaging in prohibited ex parte communications with the judge?

ANALYSIS

Issue One
A. Applicable Rules

Indiana has long held that the police are agents of the prosecutor’s office, and as such enjoy their privileges and
immunities. State ex rel. Keaton v. Circuit Court of Rush County, 475 N.E.2d 1146 (Ind. 1985). (Courts are powerless to order production of complete, verbatim police reports, as they constitute the work product of the prosecutor.) Heeter v. State, 661 N.E.2d 612 (Ind. App. 1996). (Long-standing Indiana tradition permits a police officer to remain in the courtroom at counsel’s table even though the officer may also be called to testify as a witness.)

In Hastings v. State, 560 N.E.2d 664, (Ind. App. 1990), the Court was called upon to determine the voluntariness of a confession taken by a caseworker from the Department of Welfare. Part of the analysis necessarily included whether the caseworker was an agent of the state. The caseworker testified that she understood that she was obligated to cooperate with the prosecutors and to turn over any evidence received concerning the criminal charges. The Court found that while the caseworker was not expressly given law enforcement status, the level of cooperation between the Department of Public Welfare in a CHINS proceeding and the police and prosecutor’s office in a related criminal proceeding was such that any effort to deny a caseworker’s status as an agent of the state would be ludicrous. Id.

Chapter Six of the Criminal Code (Title 35) creates a privilege for communications between a crisis counseling center and a victim of a sex crime, battery, neglect or incest. The language of the provisions clearly indicates that the purpose of this rule is to protect the counselor from being compelled to reveal the confidences of the victim to the court. Ind. Code §§ 35-37-6-9 to 11. The definitions of "victim counseling center" and "victim counselor" specifically exempt agencies affiliated with law enforcement. Ind. Code § 35-37-6-5 and 35-37-6-6.

B. Discussion

The close relationship between the police department and Victim Assistance strongly indicates that Victim Assistance is an agent of the state. The fact that this type of relationship was exempted from the privilege granted in the criminal code suggests that the agency’s alignment with law enforcement falls into a different category of protection. Furthermore, Victim Assistance provides information traditionally furnished by the prosecutor to the victim -- the status of the case, means of restitution, and access to the court regarding the criminal case. The committee believes that Victim Assistance, through its alliance with the police, becomes their agent, effectively serving as a non-lawyer assistant to the prosecution.
Issue Two

A. Applicable Rules:

The hypothetical facts suggest that Rule 3.4, 3.5, 5.3, and 8.4 are all implicated.

The act of communicating evidence and argument to a judge without affording opposing counsel the benefit of that information and the opportunity to respond is unethical conduct, whatever the motive. Matter of Marek, 609 N.E.2d 419 (Ind. 1993). Improper ex parte communications undermine our adversarial system, which relies heavily on fair advocacy and an impartial judge. Id. at 420. Such conduct threatens not only the fairness of the court in resolving the matter at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice. Id. at 420. The American Bar Association has commented that under Rule 3.5(b), ex parte communications are barred even if it is not clear that the lawyer intended to influence the judge. Annotated Model Rules of Professional Conduct, Second Edition, Center for Professional Responsibility, American Bar Association, p. 367 (1992). In one reported case, a lawyer bringing a decree to a judge's chambers for submission encountered the judge in the hallway and in good faith "inadvertently" obtained his signature on the decree, in the absence of the opposing lawyer. This was held improper in In re Bell, 294 Or. 202, 655 P.2d 569 (1982), because certain aspects of the decree were still in dispute at the time signature was procured.

B. Discussion:

In accordance with R.P.C. 5.3, the prosecutor's office has a duty to ensure that the conduct of Victim Assistance conforms to the Rules of Professional Conduct. Victim's Assistance enjoys no more rights and privileges than the prosecutor's office. The ex parte communications of Victim's Assistance, especially in attaching documents to the criminal case file and initiating hearings with the judge, appear to be proscribed by the Rules of Professional Conduct. The prosecutor's office may be seen as ratifying the conduct of Victim Assistance through its knowledge of (and acquiescence in) the conduct.

The conduct of the judiciary in this situation is clearly outside of the purview of the Committee. However, the Committee would note that the exposure to information regarding a cause in a judicial officer's court could create an ex parte communication prohibited by Canon of Judicial Conduct 3(A)(4), which forbids prospective litigants discussing potential litigation or admissibility of evidence in the presence of the judge but outside the presence of the other party. See, e.g., Stivers v. Knox County Department of Public Welfare., 482 N.E.2d 748 (Ind. Ct. App. 1985).
The information conveyed to the court, in both the packet and the hearings, may be relevant to the proceedings. That is a question of evidence, and not one of ethics. However, the conveyance of this information *ex parte*, prior to the adjudication of guilt or innocence, offends the very core of justice in our legal system. Such inappropriate communications place the judiciary in an untenable position of being exposed to information which may destroy its impartiality.

It is the opinion of the Committee that Victim Assistance, in both written and oral communications with the court outside of the defendant's presence, is engaging in *ex parte* communications in violation of R.P.C. 3.5. Due to the prosecutor's knowledge and acquiescence in these communications, the prosecutor runs a very serious risk of being held responsible for the questioned conduct.
The Legal Ethics Committee of the Indiana State Bar Association (the "Committee") has been requested to provide an advisory opinion with respect to the following facts and issues:

**FACTS**

Daughter is administrator of Father's intestate estate. The only other heir is Son, who, although an adult, has an I.Q. of 70 and lives in a group home on account of his developmental disabilities. Further, Son has very little education and may not be able to read or write.

Daughter tells Lawyer that Son doesn't want any part of the estate, and asks Lawyer to "prepare some paper" which Daughter will take to Son to have him sign. Lawyer advises Daughter that Son may not have the capacity to disclaim or make a gift of his interest. Daughter says if Lawyer isn't going to "do things her way," she'll hire another lawyer.

Daughter does retain new counsel. When Daughter comes to Lawyer's office to pick up the file, Daughter tells Lawyer that her new counsel has a plan to "get around things."

**ISSUES**

1. Who did Lawyer represent, Daughter as personal representative, "the estate," or other interests, such as heirs, creditors and taxing authorities? (In effect, does Lawyer have any duty to protect Son's interests?)

2. May or must Lawyer disclose to the court the concerns Lawyer has about Daughter's plan or about Son's capacity?

**ANALYSIS**

**Issue One**

A. Applicable Rules

R.P.C. Rule 1.7(b) provides that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third person, or the lawyer's own interests, absent the lawyer's reasonable belief that the representation will not be adversely affected and consent of the client. The Comment highlights the issue:

Conflict questions may also arise in estate planning and estate administration. . . . In estate administration the identity of the client may be unclear under the law of a
particular jurisdiction. Under one view, the client is the fiduciary, under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

R.P.C. Rule 1.2(d) provides that a lawyer shall not counsel a client to engage, or assist a client in engaging in criminal or fraudulent conduct, but a lawyer may discuss the legal consequences of proposed conduct and counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law. The Comment to Rule 1.2 contains the following:

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary.

R.P.C. Rule 1.14 governs a lawyer’s representation of a client under a disability, and subsection (b) provides that a lawyer may take protective action or seek the appointment of a guardian of a client only where the lawyer reasonably believes the client cannot act adequately in the client’s own interest. The Comment to Rule 1.14 states:

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Rule 1.2(d).

R.P.C. Rule 1.16(a) provides that a lawyer shall withdraw from representation if, among other grounds, the representation will result in violation of the Rules of Professional Conduct. Subsection (b) provides that a lawyer may withdraw from representation if withdrawal can be accomplished without material adverse effect upon the client’s interest or if, among other grounds, the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.

B. Discussion

Indiana case law provides scant authority on who is the client. In Vollmer by Vollmer v. Rupright, 517 N.E.2d 1240 (Ind.App. 1988), guardians of a minor child sought to challenge the attorney fee agreement between the personal representative of the child’s mother’s wrongful death estate and the attorney. The Court of Appeals affirmed the trial court’s denial of the petition to vacate the award of attorney fees. In the course of assessing the fairness of the contingent fee agreement, the Court of Appeals observed that a wrongful death estate personal representative is a trustee for the benefit of distributees, and
does not act in his individual capacity or for his own benefit in hiring counsel. Further, given the extraordinary fiduciary nature of such a personal representative's responsibility, his activities and those of his attorney must be totally above reproach. The Court of Appeals held that any proposed contingent fee contract should be submitted for court approval prior to execution, but upheld the agreement at issue even though it was not submitted to the trial court for approval.

In Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988), the Indiana Supreme Court held that an action will lie by will beneficiaries against the attorney who drafted the will on the basis that the beneficiaries are known third parties. A terminally ill woman asked her lawyer for advice on how to convey her estate to her two sons and not to her second childless spouse. The lawyer prepared a will disinheriting the husband and devising her entire estate in trust to the two sons. After her death, the spouse filed an election to take against the will. Sons sued lawyer, alleging he should have employed some other device to protect the estate against husband. While affirming the existence of a legal duty owed by lawyer to known third parties such as sons who would be will beneficiaries, the Supreme Court held that there was no mechanism available to lawyer to carry out wife's intent, so lawyer's failure to do so was not malpractice.

Hermann v. Frey, 537 N.E.2d 529 (Ind.App. 1989) was another malpractice case involving whether an attorney is subject to suit by a known third party who is not his client. The trial court granted summary judgment in favor of attorney, reasoning that attorney represented the administrator of the wrongful death estate, not surviving spouse individually. The Court of Appeals reversed, finding privity was not a requirement in a suit against attorneys by known third party beneficiaries. Spouse was permitted to proceed with her suit against attorney, which alleged that attorney was negligent in not naming one particular physician as a defendant in a medical malpractice action.


Tuttle finds fault with the two leading models of fiduciary representation, which would operate as default rules in the absence of a specific agreement. The two models are the American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 94-380, and the model of Professor Geoffrey Hazard set out in "Triangular Lawyer Relationships: An
Exploratory Analysis," 1 Geo. J. Legal Ethics 15 (1987). ABA 94-380 states that the fiduciary is the lawyer's only client, and a lawyer owes the client's beneficiaries only the obligations owed to third parties. Hazard would treat the fiduciary and the beneficiary as joint clients of the lawyer, extending the lawyer's duties of loyalty and care to include the client's beneficiaries. Tuttle finds that ABA 94-380 ignores the peculiar nature of a fiduciary's role and the fiduciary's relationship to beneficiaries, and that the Hazard approach does not deal with all contexts in which lawyers represent fiduciaries, discounts the potential for conflict of interest, and exposes lawyers to increased malpractice liability.

Tuttle offers an alternative theory by which a lawyer representing a fiduciary assumes a relationship with the beneficiary that, while not an attorney-client relationship, is also not the same as the usual relationship between an attorney and a non-client. At a minimum, Tuttle would impose a legal duty on lawyers not to advise or assist fiduciary clients to breach fiduciary obligations, and in addition would impose a moral duty to protect the beneficiary from harm. Tuttle attempts to strike a balance between the two harms a lawyer might do a beneficiary through 1) not protecting the beneficiary against a fiduciary's breach, and 2) turning the lawyer into a "fiduciary watchdog" which would duplicate the oversight by courts or others and greatly increase costs, which tend to fall on beneficiaries.

Tuttle concludes that changes need to be made in the Rules of Professional Conduct. The first, a change to Rule 1.2(d), would prohibit a lawyer from counselling a client to engage, or assist a client, in conduct the lawyer knows is criminal, fraudulent, or a breach of fiduciary duties. The second is a change to Rule 1.6, so that a lawyer would have the discretion to disclose a fiduciary's breach of duty, without liability either to the fiduciary for disclosing or the beneficiary for failing to disclose. (Washington's version of Rule 1.6 authorizes an attorney to disclose a breach of fiduciary duty to a court which appointed the fiduciary, which would solve the problem involving a personal representative but would not address defalcations of a trustee, which is not court-appointed.) One other possible rule change bears consideration: Florida's Rule 1.7 expressly provides that the personal representative is the client and not the estate or the beneficiaries, and Pennell finds that this is a viable approach for other states in addressing the problem of who is the client, as it would minimize conflicts of interest and help clarify parties' expectations.

It bears mentioning that the lawyer and client may enter into an agreement affecting the scope or terms of representation. Some probate lawyers make it clear in an engagement letter that the lawyer has the right to disclose the client's breach of fiduciary duties. Some even go so far as to send a "non-
engagement letter" to estate beneficiaries making it clear the lawyer does not represent them. Finally, the Marion County Probate Court recently added the following language to the advisory of duties which each personal representative and guardian must sign:

I authorize my attorney to disclose to the court any information relating to his or her representation of me as personal representative even if such information would otherwise be confidential.

Such waivers eliminate any problem with the lawyer advising the court of client wrongdoing.

Absent rule changes, the law in Indiana would seem still to be unclear, though Tuttle's argument that a lawyer has legal duties running only to a fiduciary client is compelling. Having answered the question "who is the client?" with the answer "probably the personal representative as a fiduciary," the analysis of conflict of interest and confidentiality issues becomes somewhat more straightforward.

**Issue Two**

**A. Applicable Rules**

R.P.C. Rule 1.9(b) provides that a lawyer who formerly represented a client in a matter shall not thereafter use confidential information to the disadvantage of the former client except as Rules 1.6 or 3.3 would permit or require, or when the information has become generally known.

R.P.C. Rule 1.6(a) provides that a lawyer shall not reveal information relating to a client's representation without consent after consultation, except for disclosures impliedly authorized in order to carry out the representation or except as provided in subsection (b). R.P.C. Rule 1.6(b) provides that a lawyer may reveal confidential information to the extent the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act or where the lawyer's representation of the client has been called into question (in such contexts as a civil action against the lawyer, a criminal charge against the lawyer, or a disciplinary action against the lawyer).

R.P.C. Rule 3.3(a)(2) prohibits a lawyer from making a false statement of material fact to a tribunal and from failing to disclose a material fact to a tribunal which is necessary to avoid assisting a client's criminal or fraudulent act against the tribunal.

R.P.C. definition of "fraud" or "fraudulent" is conduct having a purpose to deceive and not merely negligent
misrepresentation or failure to apprise another of relevant information.

R.P.C. definition of "knowingly" is actual knowledge of the fact in question, which may be inferred from circumstances.

B. Discussion

Under the facts as set out, and under the assumption that Daughter as personal representative is Lawyer's client, four theories would support Lawyer's disclosure of Son's possible incapacity: 1) The information of Son's possible incapacity has become generally known, 2) disclosure is impliedly authorized to carry out Lawyer's representation, 3) disclosure is authorized because necessary to prevent Daughter's crime, and 4) disclosure is required in order not to assist Daughter in committing a fraud on a tribunal.

Under the first theory, lawyer would be permitted pursuant to Rule 1.9(b) to disclose Son's possible incapacity if such information has become generally known. (Note that information about Daughter's scheme to coerce Son into giving her his share of the inheritance is different, in that this information is almost certainly not generally known.) The director of Son's group home is aware of Son's condition, and if Son were placed there by any social service agency or after some agency study or report or a physician's diagnosis, it begins to look as though Son's condition is generally known. Any special education or testing by or through a school would also contribute to an inference that son's condition is generally known. Lawyer's belief that Son's condition is generally known would probably be reasonable if Lawyer learns of some of the circumstances such as the above. If the fact is generally known, Rule 1.9(b) authorizes Lawyer to disclose the fact to the court.

The analysis of the second theory begins with viewing Lawyer's role as assisting Daughter as personal representative in complying with her duties under the law. Among these are, in supervised administration, a duty to file an accounting with the court; in unsupervised administration, a duty to furnish an accounting to interested distributees and file a verified closing statement with the court; and in every estate, a duty to make distribution only to the persons entitled thereto. Note also I.C. 29-1-1-20(b), which provides that in a probate proceeding where an interested person is incapacitated, a court may appoint a guardian ad litem to represent such person if the court determines that representation of the interests otherwise would be inadequate, and which further provides that the court shall set out its reasons for appointing a guardian ad litem. Note also that under I.C. 29-3-3-2, if an incapacitated person's property does not exceed $3500, the court may authorize a suitable person to receive and manage the property instead of appointing a guardian. Where the property exceeds $3500, the implication is that only a
guardian may receive it. Thus, a personal representative may
never distribute property to an incapacitated heir or devisee,
but must distribute to a court-appointed suitable person where
the amount is $3500 or less, or otherwise, to a guardian.
I.C. 29-1-1-20(b) and I.C. 29-3-3-2 may be seen as imposing
additional duties on a personal representative where a
distributee is incapacitated. These duties of Daughter as
personal representative make the fact of Son’s questionable
capacity information the fiduciary must report to the court prior
to making distribution. Since Lawyer was retained to assist
Daughter in carrying out her duties, Lawyer is impliedly
authorized to disclose the fact to the court in order to carry
out the representation, pursuant to Rule 1.6(a). Under this
theory, then, Lawyer may disclose the fact of Son’s questionable
capacity to the court. There is some doubt, however, whether
disclosures can be impliedly authorized by a representation after
the representation has terminated, though such a result would
seem to follow because Rule 1.9 (which applies to former clients)
incorporates Rule 1.6 (which applies during a representation).

The third theory is that Lawyer may disclose the fact to the
court in order to prevent Daughter from committing a criminal
act, as authorized by Rule 1.6(b). If Son indeed lacks capacity
or is subject to undue influence and Daughter knows it,
Daughter’s having him sign over his inheritance to her may well
constitute all of the elements of criminal fraud or conversion.
This potential crime can be prevented by Lawyer disclosing Son’s
questionable capacity to the court and the court’s appointment of
a guardian ad litem in two ways: First, the court will make a
determination that Son is incapacitated, so that no subsequent
attempt by Son to alienate his property will be valid. Second,
Son will have an ally in the person of the guardian ad litem, who
can help Son resist undue influence and otherwise protect Son’s
interests.

Fourth, it can be argued that Lawyer is required to disclose
the fact to the court in order not to assist Daughter in
committing a fraud on the court, pursuant to Rule 3.3(a)(2).
Daughter’s failure to apprise the court of the relevant
information that Son may be an incapacitated person interested in
the estate may constitute fraud on the tribunal under the R.P.C.
definition of fraud. The failure to disclose relevant
information, coupled with a personal representative’s duty not to
distribute to an incapacitated person, may raise Daughter’s
silence to the level of conduct having a purpose to deceive, in
this case to deceive the court. Lawyer shall not then knowingly
fail to disclose the information, because such conduct would
assist Daughter’s fraud on the tribunal. Lawyer need not "know"
that Son actually lacks capacity; Lawyer need only know that
Son’s condition is such that the court ought to consider whether
Son’s interests require the appointment of a guardian ad litem,
and Lawyer certainly knows this.
In sum, Lawyer may disclose to the court the fact that Son may be incapacitated either because the fact is generally known, because the disclosure is impliedly authorized by the representation, or because disclosure is necessary to prevent Daughter from committing a criminal act. Alternatively, Lawyer must disclose the fact of Son's questionable capacity to the court in order not to assist Daughter in committing a fraud on the tribunal. Disclosure of Daughter's scheme itself (clearly something Daughter expects to be covered by lawyer-client confidentiality) would not be necessary if disclosure of Son's questionable capacity results in the court appointing a guardian ad litem for him.

While these good-faith arguments in favor of disclosure are available to Lawyer under the current state of Indiana law, the result is by no means clear-cut. Daughter would need to be audacious indeed to sue Lawyer in malpractice for breaching her confidence and defeating her scheme by disclosure, but a suit by Son's later-appointed guardian (suing Lawyer in malpractice because Son is a known third party) would be a real possibility if Lawyer does not disclose. Where, however, a personal representative client is merely negligent instead of greedy and corrupt and an estate beneficiary is not incapacitated, a more difficult balancing-of-interests problem is presented. Each fact situation is, of course, different, but one or more of the theories justifying Lawyer's disclosure here may apply in other circumstances.