



I. **CHILD CUSTODY AND SUPPORT**

A. **RECENT DEVELOPMENTS IN CUSTODY**

1. **Shared Legal Custody – trends demonstrate that “shared” legal may not always be in the child’s best interest.**

Shared legal custody involves the ability of both parents of a minor child to discuss together and reach a conclusion jointly in all major decisions affecting the child, including but not limited to educational, medical, and religious matters. In re Wesley J.K., a minor child, Appeal of Rosemarie K., Appellant, 299 Pa. Super. 504, 512, 445 A.2d 1243, 1247 (1982); referencing, Miller, *Joint Custody*, 13 Fam.L.Q. 343, 360 (1979). See also, 23 Pa. C.S.A. § 5302. The key element to an award of shared legal custody is that both parents are “able to communicate and cooperate in promoting the child’s best interests”. *Id.* at 517. The standard in addressing the ability to communicate and exchange information rises only to a level that requires the parents have “a minimal degree of cooperation.” *Id.* at 514; citing Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981).

However, the Superior Court has concluded that friendliness and kindness between the parties is not a necessity in shared legal custody awards.

This feature does not translate into a requirement that the parents have an amicable relationship. Although such a positive relationship is preferable, a successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents may harbor. Beck, *supra* at 498.



As stated in the Wesley, if shared custody, even legal, “proves unworkable because parents cannot agree and seek frequent court intervention, then the trial court may have to consider withdrawing the shared custody status.” See In re Wesley J.K., a minor child, Appeal of Rosemarie K., Appellant, *supra* at 517. As further explained by the Superior Court, shared custody is not always in the best interest of every child. *Id.* at 514.

2. **Case Examples: Father’s Award of Full Legal Custody**

The parties are the natural parents of child, born February 20, 1998. Shortly after the child’s second birthday, the parties became involved in custody litigation with Mother filing the initial complaint for custody. In July of 2001, psychological evaluations were scheduled. By December of 2001, an interim Order of Court was entered providing Mother with primary physical custody and Father partial custody. Following the psychological evaluation, a two day custody trial was held and, on October 31, 2002, the trial court awarded the parties *shared physical and legal custody* of child.

As stated in Appellant’s Statement of the Case, the psychologist noted in his report that the case was difficult based upon “the parent’s lack of communication skills.” Furthermore, the psychologist noted that Mother’s MMPI-II test was invalid because “the Mother’s Lie scale was significantly above the norm,” and concluded that the “more negative psychological characteristic of the mother is her unwillingness to understand the importance of the father to the child.” However, it is interesting to note that the psychologist commented about this particular cases’ hope for the future, by stating, “I believe after this custody case is over, much of the anger will subside and communication can improve.”



The above referenced comment by the court-appointed psychologist, in conjunction with the trial court's statement that sharing legal custody between the parties, was "wishful thinking", demonstrates the hope that the parents would be able to overcome their communication problems. However, due to Mother's behavior immediately following the two-day trial and thereafter, hope really never existed.

As early as December 17, 2002, Mother unilaterally, and without input from Father, registered the child at St. Matthew Lutheran Academy. In July of 2003, Mother sought court intervention regarding her vacation plans, ultimately denying the minor child of attendance at his t-ball banquet. Relief was also sought in Court for issues involving transportation, haircuts and even the choice of pediatricians.

Following a series of events which were designed to impede Father's rights to shared legal custody, the trial court scheduled a hearing to address both Mother's Petition for Special Relief and Father's various petitions for contempt and Petition for Modification. As concluded by the trial court, "there is open hostility, a lack of communication, and extreme "gamesmanship" on the part of mother." Furthermore, the trial court noted that the evidence presented at the hearing tending to show that "Mother has at times engaged in a course of activity to keep necessary information from Father and that she has demonstrated an unwillingness and/or inability to include Father in important decisions regarding child."

3. Mother's Award of Full Legal Custody

The Petitioner avers that the Respondent is not following the above Order as follows;



- a. He fails to follow the parties shared legal custody arrangement by making unilateral decisions regarding the parties minor child without Petitioners knowledge or consent;
- b. He changed the enrollment of the parties' minor child from West Allegheny Elementary School to Burgettstown Elementary School without Petitioners knowledge or consent. Transportation to and from said elementary school is now extremely inconvenience for Petitioner.
- c. He removed the parties' minor child from the Daycare Center which he has attended from birth without Petitioners knowledge or consent.
- d. He fails to keep the Petitioner informed of major school activities as scheduled for the parties minor child;
- e. He has placed the minor child in the care of a babysitter whom mother has neither met nor approved."

Mother contends that she submitted significant and substantial evidence that Father made unilateral decisions without her knowledge or consent. Father admitted that he registered the child in both primary elementary school and extra after-school activities without even asking Mothers approval. In doing, so Father violated not only the spirit of the Settlement agreement but also violated the law in that;

"In making an Order for Custody...the Court shall consider among other factors which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the non-custodial parent and the child. In addition the court shall consider each parent and adult household members present and past violent or abusive conduct which may include but is not limited to abusive conduct as defined under the PFA Act". See 23 Pa. S.C.A. Section 5303 et. seq.

Mother presented significant and substantial evidence that she has encouraged decision making between both parents while Father has not. This behavior continues to this day. Therefore, it is in the best interests of the child that she be the legal custodial parent for. The law in this area is clear that:

"In the past, non-custodial conscientious parents have been frustrated by the second-class status to which the law has assigned them. It was difficult to develop healthy relationships to a child where their role may have been limited to a weekend parent who



counsel was not sought in decisions affecting the child. Shared Custody allows both parents input into the major decisions in the child's life." *Id.* 299 Pa. Super. at 512, 445 A.2d. 1247.

It is clear that the Trial Court did not follow the law in this area. See DeNillo vs. DeNillo, 369 Pa. Super. 363, 535 A.2d 200 (1987). An award of shared custody may not be appropriate whenever the parents are unable to co-operate, such as enrolling the child in two different school districts.

In Senatore vs. Senatore, 58 Pa. D. & C. 4th 564, (2000), the concept of shared legal custody also known as joint legal custody, was created in an attempt to remedy difficult custody situations where a choice must be made between two very competent and loving adults. See Wesley, supra at 511, 1246 (1982). That case however dealt specifically with unilateral decisions made by one parent over that of the other.

"Upon consideration of the credible evidence, it is clear that the minor child's father has been deprived of his right to equally participate in the major decisions impacting his son's life". See *Id* at 564. Furthermore, the parents have joint legal custody over their son and agreed not to embark on any major decisions without first consulting one another. In this case as in Senatore,

"Defendants unilateral decision to give her son Celexa is in blatant disregard of Mr. Senatore's rights and obligations under the concept of shared custody...Clearly the concept of shared legal custody does not contain the principle of giving one parent final authority in the event of a dispute. If this court were to permit the custodial parent to do this, we would be giving the non-custodial parent authority in name only and essentially ignoring the goals behind the policy of shared custody." See *Id*, page 564.

Finally the court so eloquently stated... "as this court has already found it to be in the minor's best interest for his parents to have joint legal custody and decision making



authority, we cannot say it is in his best interests to have his custodial parent unilaterally make such a major decision in total disregard of this custody agreement.” See *Id* at 565.

4. Practical Approach – Examine Carefully the Child’s Legal Custody Needs

Examine the factors of choices of school, doctors, religious preferences, social preferences, extra curricular activities, sports, music, holiday rituals, vacation or summer camps, family traditional functions. The list is presumably as detailed as the active life of the child within each family. These are extremely important consideration requiring the drafting of the Custody Order to be specific if legal custody is shared.

Furthermore, the case law indicates that such an analysis may lead to decisions that legal custody should not be shared. If not then question the other party if such language truly is important to them. As the case may be you may be surprised how many parties have custody arrangements which after explanation do not harm the non-custodial rights at all to give the custodial parent Full Legal Custody.

Finally, as the case may be, if any of the examples which are detailed above are present in your case, then discuss carefully the issue of pursuing Full Legal Custody as an option regardless of the physical custody arrangements.

B. FULL CUSTODY EVALUATIONS

1. The Psychologist As Expert Witness

The basic structure of the Psychologist function in custody evaluations is to determine (1) risk factors and (2) protective factors. Risk factors can include the age of



the child, the exposure of the child to the litigation process, the exposure of the child to overt behavior by the parents during their own separation and divorce process, the frequency of the contact with the separated or non custodial parent.

Secondly, protective factors to consider range from, the relationship and closeness of the child to the parents, both jointly and individually, the closeness to other siblings, limited parental conflict, NO exposure to the litigation process or the written materials, access to age appropriate information and joint or ‘family’ discussions, extended family and community support.

Taken from excerpts of Child Custody and Shared Parenting in Pennsylvania, Behavior Based Custody Evaluations: The Power of Multiple Data Sets In Assessing Risk and Protective Factors; Presented and written by Bruce Chambers, PhD – Child Custody Professionals. (NBI, Inc. 2003).

In examining or cross examining the Expert Witness determine from his/her report if an analysis of the above risk and protective factors has been made and focus the testimony on those areas or the lack thereof. This is extremely important in arguing to the Court the credibility of the witness.

2. The Evaluation Process and its Reporting

In the development of the testimony of the expert, be certain that the evaluation process was completed with at least a cursory knowledge of the actual parties and their lifestyles at it relates to the best interests of the child. The basic evaluation approach should obviously include;



(1) Multiple observations with the family members. The parties and the child should be seen at least on two occasions for testing and structure observation and interview. In this scenario determine whether or not the evaluator focus on any ‘candid’ observation such as in the interview room or waiting room or the litigants interactions with other office or secondary staff. These insights can be extremely valuable to the Court and if properly brought to attention during the testimony of the expert can be the most valuable test of credibility.

(2) Use of collateral information and the credibility of that information. It is extremely important for the evaluation to have verified information about or concerning a third party if that evaluation relied on it in any way in making the recommendation. Remember that third parties such as teachers, Police, Clergy, physicians or office personnel of any of the above are considered very reliable witnesses. Therefore the use or non use of such sources by the Psychologist during the evaluation process can be a very powerful evidentiary and persuasive factor in the Courts ruling.

3. The Interview with the child – Credibility and Preference

Perhaps the most important consideration in a custody trial is the testimony the child or children would give. A determination of the importance of such testimony is critical given the unreliability of the child as a witness. PA R.C.P. 1915.11 provides for the Court to interview the child either in open Court or in Chambers. It is set forth that the “interrogation shall be conducted in the presence of the attorneys and, *if permitted by*



the Court, the parties”. It is this writer’s opinion that the testimony of a child should never be given with the parties present. Secondly a determination must be made by Counsel to determine if the child can testify with the competency that is required by law. See In the Interest of J.R., 436 Super 416, 648 A.2d 28 (2004). Also in a recent case as well as the revisions to the Custody Act, the Court must now consider the preferences of the child as well as other factors which legitimately impact the child’s physical and intellectual well being. See 23 Pa. C.S.A. Section 5303(a). Furthermore, in the most recent case of Bovard vs. Baker, 2001 Pa Super 126 (2000, 775 A.2d 835) the trial court was held to have erred and abused its discretion since it did not interview children ages 16, 14, 12 and 10.

If the Psychologist has not interviewed the children at such ages as to their preferences, such information should be developed during the direct or cross examination testimony of the expert. Again this interview or the lack thereof can be an extremely consideration for the trial court and if properly developed can be used to bolster or destroy the testimony of the expert.

C. DOMICILE RESTRICTIONS AND RELOCATION

The Gruber factors with regards to relocation issues and the Plowman requirements with regards to the due process considerations of relocation are still the controlling cases with regards to both determining domicile of the child and the relocation of the child whether it be out of county or out of state. Cited as Gruber vs. Gruber 583 A.2d 434 (Pa. Super 1990) and Plowman vs. Plowman 597 A2d. 701 (Pa. Super 1991).



Counsel for the moving party must present a Plowman petition and ask the court for a hearing on the issue of the relocation. Thereafter and at the time of the hearing the Gruber factors come into play. The factors are;

1. The potential advantages of the proposed move, economic or otherwise and the likelihood the move would improve substantially the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent;
2. The integrity of the motives of both the custodial and non-custody parent in either seeking the move or seeking to prevent the move and;
3. The availability of realistic, substitute visitation arrangements which will foster adequately an on going relationship between the child and the non custodial parent.

However, since these two principle cases have been decided, their applications have been expanded to include issues beyond when a custody parent desire to relocate. Gruber and Plowman are now used when a non-custodial parent desires to relocate as well; See Tripathi vs. Tripathi 787 A2d 436 (Pa Super 2001) and in shared custody arrangements when one of the parties wants to relocate See McAlister vs. McAlister, 747 A2d 390 (2000).

Most importantly, the Superior Court has now changed the requirement that only the party with primary physical custody can request relocation and furthermore a party can request relocation even when NO prior Custody Order existed. In those cases the



Gruber Factors as they have been called are still used. See Marshall vs. Marshall 814 A2d 1226 (Pa. Super 2002).

Finally in the case of Hurley vs. Hurley, 754 A.2d 1283 (Pa. Super 2000), the Superior Court held that *BOTH PARTIES* now bear equally the burden of proof on the relocating parent. It specifically held in that case that neither parent should have a specific legal advantage when the trial court devises an initial custody order. See Id at 1285.

Therefore with the exception of intra-county relocations, the court analyzes relocations using the Gruber Factors and does so irrespective of the current custodial arrangements, primary, shared, non-custodial, initial, agreements when a parent desires to relocate a geographical distance away from the other parent. See Attached Appendix I.

D. JURISDICTION, MODIFICATION AND REMOVAL

When analyzing whether jurisdiction is proper, Counsel must refer to both the Uniform Child Custody Jurisdiction Act as well as the Child Custody Act found in 23 Pa. C.S.A. 5348.

Mother has moved by consent out of state and out of the jurisdiction of Pennsylvania. The Court in Pennsylvania however continued to maintain jurisdiction over the divorce until that matter was finally concluded. Father then filed to modify the Custody Order which the Pennsylvania Court originally entered. At the time Father filed the Petition for Modification, the child had resided in Missouri for approximately 5 years.

Does the Pennsylvania Court have jurisdiction over Father's Petition for Modification of a Custody Order?

Answer NO.



Should the Matter be properly removed and transferred to the Missouri Court?

Answer YES.

Counsel is directed to file Preliminary Objections to the filing of such request for Modification. The objections should include;

1. Motion to Dismiss due to non-compliance with the Jurisdictional requirements of the Uniform Child Custody Jurisdiction Act 23 Pa. C.S.A. Section 5344. Mother would submit that the Court must refrain from exercising jurisdiction since Pennsylvania is not the “home state” of the Child; it is not in the best interests of the child since ALL substantial evidence regarding the child’s present and/or future care, protection, training and personal relationships exist out of state; the child is NOT physically present in the state; and it appears that the other state would have jurisdiction under prerequisites substantially in accordance with 23 Pa. C.S.A. Section 5344 (1)(2) and (3).
2. Motion to Dismiss for Inconvenient Forum Pursuant to 23 Pa. S.C. A. Section 5348. Mother would submit that the Court must decline to exercise jurisdiction since Pennsylvania is an inconvenient forum for the resolution of the dispute because; the other state is clearly the “home state”; the other state has a closer connection to the child; the other state



has all the evidence concerning the child's life, school, medical, and religious life; and finally; the exercise of jurisdiction by this Court would contravene the purposes of 23 Pa. C.S.A. Section 5341 et seq.

See Specifically Appendix II

II. PRACTICAL CHILD SUPPORT PROBLEMS

A. Earning Capacity Issues/Mitigating Loss

Amount of awarded support is based largely upon each party's monthly net income. Pa.R.C.P. 1910.16-2.

Some parties do not maintain employment that is appropriate to their history or ability. The Court can conclude that a party has an "earning capacity" based upon their "age, education, training, health, work experience, earnings history and child care responsibilities" in determining what their potential earning are. Pa.R.C.P. 1910.16-2(d)(4). See also, *Riley v. Foley*, 783 A.2d 807, 811 (Pa. Super. 2001)

In some cases, the facts may purport to show that a person is not meeting their earning potential, when a more in depth review of the facts would indicate otherwise. In *Arbet v. Arbet*, the trial court found that the Wife's actual earnings did equal her earning capacity even though she did not work full time. "While earning additional money as a night shift employee, Mother's week on/week off schedule maximizes her availability to the needs of the children and eliminates the cost of child care during the weeks when she has custody, thus lessening the support obligations of Father." *Arbet v. Arbet*, 863 A.2d 34 (2004) citing *Isralsky v. Isralsky*, 824 A.2d 1178, 1190 (Pa. Super. 2003)



In addition, when a party claims reduction or loss of job thus affecting earning capacity, the Court shall look towards that party's ability to mitigate their earning's change.

In order to “modify a support obligation based upon reduced income, a petitioner must first establish that the voluntary change in employment which resulted in a reduction of income was not made for the purpose of avoiding a child support obligation and secondly, that a reduction in support is warranted based on petitioner's efforts to mitigate any income loss. In effect, Petitioner must present evidence as to why he or she voluntarily left the prior employment and also as to why the acceptance of a lower paying job was necessary. Otherwise, for calculation of a support obligation, the petitioner will be considered to have an income equal to his or her earning capacity as defined in the support guidelines.” Bredbenner v. Bredbenner, 2003 WL 22506517 (Pa.Com.Pl.) citing Grimes v. Grimes, 408 Pa. Super. 158, 163, 596 A.2d 240, 242 (1991).

Therefore, you must question the following:

- a. Was the change reasonable under the circumstances?
- b. What was the party's history of employment?
- c. Did the party seek a comparable paying job?
- d. How quickly did they secure the current job?
- e. Did the party act in bad faith?

The Defendant in Bredbenner did not comply with the prong in Grimes regarding by spending time search for a similarly paying position, the Defendant did find quickly and secure employment and thus was determined to have mitigated his income loss and permitting modification.



B. Additional Expenses

A party's basic support obligation can be adjusted by taking into consideration expenses for child care, health insurance premiums, unreimbursed medical expenses, private school tuition, summer camp, mortgage payment or other costs that the Court deems reasonable under the circumstances. Pa.R.C.P.1910.16-6.

Seeking contribution for expenses can be either at the establishment phase or in any modification request, however, it was the moving party's burden to establish by competent evidence a material and substantial change in expenses from the entry of the last modified order in a future request for an increase based upon additional expenses.

For example, in Samii v. Samii, 847 A.2d 69,

Mother's comparison of her 1999 expenses to her current expenses through use of Plaintiff's Exhibits 9 and 10 is not adequate proof of an increase during the past year. Lacking a schedule of expenses for March of 2002, Mother instead testified that tuition at the child's private school had increased from \$5,000 to \$7,300. The child's horseback riding lessons had increased from once to twice a week, for a cost differential of \$45 per week. Additionally, Alexa now takes swimming lessons three times a week at a cost of \$10 per session and requires a pool membership for \$300 per year. Mother believes that the child requires an additional \$100 per month for clothing. She also claims that the taxes for her New Jersey house had increased, as had the costs of garden care at the Lancaster house, but she was unable to specify the amount of those increases. **Mother presented no documentation for any of the claimed increases and the Court cannot consider vague statements about increases in taxes and gardening costs as competent evidence.** Mother testified that her financial situation was so bad that she had to cut back on lunches out with friends, stop her yoga study and color her hair at home instead of having it done at a salon. (N.T. 69) These relatively minor budgetary restraints do not prove the dire circumstances Mother claims as a result of the increased costs of raising her daughter, and the Court cannot treat them as indicative of serious financial difficulties.

In Samii, the Court questioned the allocation of the minor child's expenses on the



schedules submitted by Mother as well as whether certain listed items can be said to be reasonable expenses for the child. Such a division of all of the expenses of the family into equal parts is not permissible. Fitzgerald v. Kemp, 805 A.2d 529 (Pa.Super 2002). As a result of these difficulties, the Court has little, if any, competent evidence before it to indicate that Alexa's expenses have increased materially and substantially, and finds that Mother has not proven a change of circumstances in this regard.

Therefore, in seeking contribution for expense related support for the purposes of child support, it is important to clearly and precisely identify the nature of the expense and the exact cost as it relates to the child or children in question, submitting into evidence the documentation to support each expense.

C. Each Party Has a Child

When calculating a child support order and each parent has primary custody of at least one child, the Court shall offset each parties' child support obligation, awarding the difference between the amounts to the obligee. Pa.R.C.P. 1910.16-4(d)

The example provided in the Pennsylvania Rules of Civil Procedure is as follows:

If the parties have three children, one of who resides with Husband and two of whom reside with Wife, and their net incomes are \$1500.00 and \$800.00 respectively, the child support obligation is calculated as followings:

- a. First, Husband owes to Wife the sum of \$508 for her two children;
- b. Second, Wife owes to Husband the sum of \$188.00 for his child;
- c. Third, $\$508 - \$188 = \$320.00$ payable to Wife from Husband.



However, in the practical application of Rule 1910.16-4(d)(1), when one party is sued for child support and they wish to implicate Rule 1910.16-4(d) seeking an offset, they must file their own complaint for support for the children in their primary custody, thereby putting the other party on notice that they will seek a support order using 11910.16(d).

In Allegheny County, this could be simply by presenting a support intake questionnaire well in advance of the pending hearing seeking child support or by way of a Motion to Consolidate Child Support Issues prior to the hearing.

D. Consolidating Spousal Support Issues with Child Support Establishment to Offset Child Support Award

When children are residing with the higher income earning spouse and said spouse sues for child support, the lower income earning, non-custodial parent, can make a claim for spousal support thus offsetting their respective child support calculation.

Pa.R.C.P. 1910.16-4(e).

The example provided by the Pennsylvania Rules of Civil Procedure is as follows: The parties have two children and the non-custodial parent’s monthly net income is \$1000.00 and the custodial parent’s not monthly income if \$2600.00.

- a. First, determine what the custodial parent owes in spousal support to the non-custodial parent using the ‘spousal support without dependent children’ formula.

Ex. \$2600.00 custodial parent
 -\$1000.00 non-custodial parent
 \$1600.00
 x 40%



\$640.00 owed in spousal support to non-custodial parent

- b. Second, recalculate the parties' income deducting the spousal support payment from the custodial parent and adding it to the non-custodial parent.

Ex.	\$2600 custodial parent	\$1000.00 non-custodial parent
	<u>-\$640.00</u>	<u>+\$640.00</u>
	\$1960.00	\$1640.00

- c. Third, determine the child support with the recalculated incomes:

Ex.	\$1960.00 custodial parent
	<u>+\$1640.00 non-custodial parent</u>
	\$3600.00 combined monthly net income

\$1040.00 is the guideline amount

\$468.00 due in child support from the non-custodial parent

- d. Fourth, recomputed the support obligation as follows:

Ex.	\$640.00 owed by custodial parent in spousal support
	<u>- \$486.00 owed by non-custodial parent in child support</u>
	\$172.00 owed by the custodial parent to the non-custodial parent

The above is applicable, of course, when the parents are separated spouses and the spousal support claim is available to the non-custodial spouse.

However, the practitioner should remember that in the event that the non-custodial spouse cannot claim spousal support due to an entitlement defense argument that may be forth coming from the custodial parent, one should consider the filing of a divorce complaint that would eliminate any spousal support entitlement defenses and



provide the non-custodial parent with the alimony pendente lite award to offset the child support obligation.

III. THE LAWYER'S ETHICAL RESPONSIBILITY DURING DISSOLUTION OF MARRIAGE

The preamble to the Pennsylvania Rules of Professional Conduct clearly sets forth the scope of the responsibility of an attorney regarding privileged communications, issues of confidentiality, conflicts of interests and disqualifications. The general scope of these rules were promulgated to encourage the privacy of the attorney client relationship and foster the relationship so that the client feels comfortable and can fully disclose the facts, circumstances and specific conduct of the client as it relates to the disputes. The following represents the most asked questions of Ethical consideration which affect Domestic Relations Attorneys.

A. CONFLICTS OF INTEREST AND DISQUALIFICATION OF ATTORNEYS

The prohibitions against conflicts contained in the Rules of Professional Conduct are premised upon the duty of loyalty a lawyer owes his client. A Lawyer must maintain the confidences of a client even after the attorney client relationship has ended. The Lawyer should therefore understand the ethical standards so as to avoid conflicts.

1. Rule 1.7 Adverse Relationships

A review of the basic conflicts provisions covers representation of clients concurrently who may have competing interests. Subsection 9A0 says that if the interests



of the two clients are directly adverse, the lawyer may not represent the client unless the lawyer believes that the representation will not adversely affect the relationship with the other client AND each client consents after the consultation.

Subsection (b) deals with the situation where the lawyer's responsibilities to another client may be materially limited by representation of a certain client and allows for such representation if the lawyer believes that the representation will not be adversely affected AND the client consents after full disclosure and consultation.

2. *Example Response to Disciplinary Board*

I do not believe that I have violated the provisions of Rule 1.9(a) because over the phone, with Mrs. F present Mr. F consented to my acting as her counsel in terms of finalizing the documents and pleadings in the event that the parties on their own would reach an agreement. When that negotiation failed, although Mr. F did not specifically withdraw his consent, I agreed to withdraw which I then did.

I do not believe that I have violated the provisions of Rule 1.9(b). At no time did I even possess the financial information, records, pay stubs, asset summaries or other information which would be disadvantageous in any way to Mr. F's position in any further litigation. I was not privy to assets, their source, whether they were marital or non-marital and did not discuss with either party any specific terms of the settlement or any offers made by either of them. All of those conversations took place between the two of them without my knowledge, information, input or advice on any issue.

Again the basic concern is that NO potential for violation of the lawyer's duty of loyalty exists and that the risk that confidential information learned in the pervious



representation will be used to the disadvantage of the former client. In effect therefore the rules prohibit changing sides. This is especially true for domestic relations practitioners. See example.

B. WHAT YOU DO WHEN YOU THINK A CLIENT IS LYING

The prohibition against disclosure of information relating to a client is not an absolute. In certain circumstances disclosure of such information is either required or is permitted by the rules.

Permissive Disclosure

1. Upon authority of the client. In divorce litigation certain disclosures are mandatory and necessary for the normal flow of information necessary for trial or to arrive at settlement.
2. Where relevant information has become generally known. Certainly when valuing assets especially in light of the internet and the sources of information which are now generally known to the public information can be disclosed and exchanged. Examples are values of real estate and personal property from various websites.
3. To prevent certain actions by the client. Rule 1.6 sets forth three situation where an attorney “may reveal” information relating to the representation. Those are (1) to prevent a client from committing a crime; (2) to prevent or to rectify the consequences of a client’s criminal or fraudulent act; and (3) to establish a claim or defense on behalf of the lawyers in the controversy such that the act will result in injury to another person, either physically or financially.



False Testimony to a Court

1. A client indicates his or her intention to testify falsely regarding facts in a conference, hearing or trial situation. While the rules do not expressly define the term “tribunal”, such definition does extend to proceedings before court personnel including conferences before a hearing officer, Master or any proceedings which may result in an Order of Court.
2. Rule 3.3 states that a Lawyer may refuse to offer evidence that the lawyer reasonably believes to be false. The comment to the Rule provides that generally speaking, “a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes to be untrustworthy. 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.” Furthermore the Rule is very specific that a lawyer may not (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact when disclosure is necessary to avoid assisting in criminal or fraudulent action by the client (3) fail to disclose legal authority adverse to the position and (4) offer evidence which the lawyer knows to be false.

Therefore specifically the Rules above create an affirmative duty upon the attorney to reveal information relating to the representation of a client to comply with the attorney’s duties under Rule 3.3 to maintain complete candor in representations to the court.



C. ATTORNEY-CLIENT CONFIDENTIALITY vs. INQUIRIES FOR DISCLOSURE FROM THE IRS

The IRS is not a tribunal and therefore the rules as outlined in Section A do not apply. Disclosures must however, specifically answer their (IRS Agents) specific inquires. The best policy is to answer what is required without volunteering.