

**Legal Aid for the Non-Specialist:
Complying With ABA Rule of Professional Conduct 1:1**

The Problem: The Need for Legal Aid vs. the Requirement of Competency

Legal aid workers (the Lori Youngs) are limited

Colorado Legal Services (CLS) reports only having one available attorney for every 18,750 eligible indigent Colorado residents. (CO Access to Justice Commission, “Justice Crisis in CO 2014: Report on Civil Legal Needs in CO” (2014)).

Non-specialists (the Jim Helfriches) are desperately needed for legal aid

The first rule of ethics—Rule 1.1:

Client-Lawyer Relationship

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

ABA Rule of Professional Conduct 1:1.

Competency means:

1. Legal knowledge & skill.

Factors include:

- a. relative complexity and specialized nature of the matter;
- b. the lawyer's general experience;
- c. the lawyer's training and experience in the field in question;
- d. the preparation and study the lawyer is able to give the matter; and
- e. whether **it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.**

Rule 1:1 cmt. 1 (emphasis added).

NOTE: In my opinion (Jim speaking here) Section e (associating or consulting with a competent lawyer) is the **pillar** for non-specialists fulfilling their duty of competency when providing legal aid

CONCEPT #1: Tell the client you are not an expert:

What you do not know
What you cannot do
Define your lack of expertise

NEVER pretend to know more than you do

CONCEPT #2: Tell the client what you are comfortable doing

Example: I have never been family court
But I am a licensed lawyer
The courts' website has resources online for family law matters
Then:
- Let's look at them together
- Here's how you get to the website
- Let me print the forms for you

In this example, the lawyer is not claiming to know anything other than how to navigate and read what is on the website

NOTE: Using the court's approved online resources is the equivalent of
"consult[ing] with, a lawyer of established competence in the field in question."

Example: I have handled one landlord-tenant case
It involved habitability of premises
What you have here is a security deposit issue
I do not know about that
But here's a book by experts
It has a chapter on security deposits
Let's read it together
The book cites a statute
May I give you a copy of the statute?

In this example, the lawyer is not claiming to know anything about landlord tenant law, but can help the client navigate the book by the experts

NOTE; By using the landlord-tenant book, the lawyer is consulting with experts

DO find these resources in your locality

CONCEPT #4: Call a specialist

Determining legal problems often = 90%

Expert input often = 10%

Call an attorney you know

Develop a list of like-minded attorney who want to help

Call an attorney you do not know

Legal aid clients often have legal problems in other states

The out-of-state specialists will almost always give a five minutes

For an out-of-state pro bono client

When you call, have the issue well-refined

Limiting the Scope of Services

One may also choose to limit the scope of representation to an area of competency. Under ABA Model Rule of Professional Conduct 1.2(c):

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

However, before drafting on behalf of a *pro se* client, please consult your jurisdiction's ethical rules and opinions regarding ghostwriting.

Full Service Representation

Comment 2 to Rule 1:1 encourages venturing into new practice areas:

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. **A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.**

Rule 1:1 cmt. 2 (emphasis added).

CONCEPT #3: Is necessary study an option?

If you can get the answer, have at it
If not, find another path to competency

CONCEPT #4: Associate with a specialist

Figure out what you can do
Let the specialist know what you need and expect from them

REMEMBER: say "I cannot help" if you are not in a position to provide competent services within the meaning of Rule 1:1.

Rule 2.1 of the Model Rules of Professional Conduct: Integrating Faith in Legal Advice

Rule 2.1. Advisor provides:

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 law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.**

Comment 2: Moral & Ethical Advice provides:

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. **It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.**

Observations & questions:

Moral = right & wrong
Economic = money
Social = relationships
Political = power

What does our faith have to offer in the areas of right & wrong, money, relationships, and power?

When does bringing faith into practice go too far?

The Florida Bar v. Buckle, 771 So.2d 1131, (Fla. 2000)

Issue: Freedom of an attorney to proselytize clients by enclosing religious materials with legal correspondence.

Holding: While Disseminating religious materials was not per se inappropriate, the court “agreed with the referee that an attorney should carefully exercise his or her professional judgment and discretion with regard to the dissemination of religious material enclosed with legal correspondence.” Id. at 1133 n.1.

Commentary: “The court’s reasoning, in effect, upholds attorneys’ ability to discuss religious matters with clients and nonclients; it simply affirms that attorneys should not discuss such matter in a way that conflicts with attorneys’ other duties, such as attorneys’ duty not to use means that have ‘no substantial purpose other than to embarrass’ a third person.” Larry O. Natt Gantt, II, More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations, 18 Geo. J. Legal Ethics 365, 387 (2005).

Comment 4: Reliance on Experts

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. **Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.** At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

From a faith-based perspective, is there a better outside advisor than God?

What is the place of prayer in the practice of law?

Sustaining Morale

Comment 1: Candid Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and

alternatives that a client may be disinclined to confront. **In presenting advice, a lawyer endeavors to sustain the client's morale** and may put advice in as acceptable a form as honesty permits. **However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.**

(see also Ephesians 4:15's admonition to speak the truth in love)

Do those served by legal aid need special effort to support morale?

Some Basics for Legal Aid Competency

In many legal aid clinics, family law issues are the most common. They also bring a tremendous emotional toll on our clients. This course will provide an overview of the types of family law cases frequently faced by the legal aid client, the basic pleadings required in all family law cases, generalized advice that applies to all clients experiencing a family law case, and a discussion of uniform paternity and jurisdiction laws applicable in most states.

- I. What is "Family Law"
 - a. Divorce/Paternity
 - i. With divorce with not children: marriage and property division, support
 - ii. With divorce with children AND paternity: Custody and child support
 - b. Guardianship
 - c. Adoption
 - d. DHS/Juvenile matters
 - e. Ancillary: Probate, criminal matters, social security, etc. can all affect or be intermingled with family law cases.
- II. Child Custody. When does the court get involved?
 - a. Divorce or Paternity
 - b. Guardianship or Adoption
 - c. DHS Child Welfare Matter
- III. Common Advice: Do's and Don'ts for Parents
 - a. Social Media
 - b. Texts or Phone calls
 - c. Best Interests/ Safety of child PARAMOUNT
 - d. Abide by anything the court has ordered (is there an automatic temporary injunction?)

- IV. Costs can be very difficult for legal aid clients. Check to see if your state offers to waive fees
- V. Relevant questions for the family law client:
 - 1. Is this a divorce or a paternity action? Key: are the parties married? Date of marriage?
 - 2. Has there already been any court action? If yes, when and where (what state/county)?
 - 3. Has the state been involved, such as making a child support order?
 - 4. For a divorce: Make a list of property (real and personal) and debts. Explain to the client you need ALL property and ALL debts, regardless of the names on the property. Explain that you will help determine whether it is relevant.
 - 5. How old are the children? Do any of them have special needs?
 - 6. What does the client want in terms of custody/visitation?
 - 7. What has “normal” daily life been like for the children for the past six months or so?
 - 8. Are there any safety concerns for the client or the children?
 - 9. If the parties are already separated, has the “non-custodial” parent been paying any child support? If yes, how much and how often?
- VI. Divorce
 - a. Ends a marriage.
 - b. Most common ground: Incompatibility
 - c. Judge decides:
 - i. How to divide marital assets and debts
 - ii. Alimony
 - iii. Custody and time with children
 - iv. Child support
 - d. Parenting Classes may be required
 - e. Child Support Guidelines: likely codified in your state.
- VII. Paternity. Establishes paternity. Uniform Parentage Act, adopted by 25 states
 - a. The mother-child relationship is established between a woman and a child by:
 - i. The woman’s having given birth to the child;
 - ii. Adoption of the child by the woman; or
 - iii. As otherwise provided by law.
 - b. The father-child relationship is established between a man and a child by:

- i. An un rebutted presumption of the man's paternity of the child under Section 8 of the Uniform Parentage Act;
- ii. An effective acknowledgment of paternity by the man under Article 3 of the Uniform Parentage Act, unless the acknowledgment has been timely rescinded or successfully challenged;
- iii. An adjudication of the man's paternity;
- iv. Adoption of the child by the man; or
- v. As otherwise provided by law.

Understand that if the parties are married, all children born during the marriage are presumed to be the husbands' children. Age 2 is a critical age, and it changes the procedure that must be followed.

Paternity actions

Subject to Article 3 of the Uniform Parentage Act and Sections 40 and 42 of this act, a proceeding to adjudicate parentage may be maintained by:

- 1. The child;
- 2. The mother of the child;
- 3. A man whose paternity of the child is to be adjudicated;
- 4. The Department of Human Services; or
- 5. A representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor.

Must have **PERSONAL JURISDICTION** 10 O.S. 7700-604 A. An individual may not be adjudicated to be a parent unless the court has personal jurisdiction over the individual.

Limitations of Actions A final order under this subsection shall not leave the child without an acknowledged or adjudicated father.

This is the key. Courts DO NOT want to leave a child fatherless.

Cases:

- 1. Child born during marriage
 Action filed within first two years of child's birth
 Husband denied being the father
 DNA test showed it was not husband
However, Mother could not name the father
 Husband, mother, and DHS child support services attorney all agreed it was not husband
 Judge finally, hesitantly, agreed to release husband from responsibility for child support

2. Child born during marriage
DNA test showed husband not the father
Husband signed denial of paternity days before two-year birthday
Father identified, but not available to sign acknowledgment of paternity

JURISDICTION

Note: This discussion does not cover cases governed by ICWA – again, know to ask enough questions to determine whether it applies. If in doubt, call an attorney in your area to ask if they think it applies

UCCJEA: Uniform Child Custody Jurisdiction and Enforcement Act.

Adopted in every state except Massachusetts, and in DC, US Virgin Islands, and Guam

The UCCJEA governs State courts' jurisdiction to make, modify, and enforce "child-custody determinations," a term that expressly includes custody and visitation orders.

What it does NOT do: UCCJEA does not set any subjective standards for the actual custody determination. That will be determined by your individual state's law.

What it DOES do: UCCJEA establishes the prevailing jurisdiction, and the criteria for determining which state's law will be applied in the event the child has been moved from one state to another. Once that is determined, the state law of that state will be applied by the state court.

Jurisdiction is established if:

1. The individual is personally served with summons within this state;
2. The individual submits to the jurisdiction of this state by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. The individual resided with the child in this state;
4. The individual resided in this state and provided prenatal expenses or support for the child;
5. The child resides in this state as a result of the acts or directives of the individual;
6. The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
7. The individual asserted parentage of a child in the putative father registry maintained in this state by the Oklahoma Department of Human Services; or
8. There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

B. The bases of obtaining personal jurisdiction are not the same as the bases for obtaining jurisdiction to modify. Generally, where a case is opened is where it remains.

The UCCJEA applies to a variety of proceedings:

- Divorce
- Separation
- Neglect and abuse
- Dependency
- Guardianship
- Paternity
- Termination of parental rights, and
- Protection from domestic violence.

The UCCJEA does not apply to

- Child support proceedings, or
- Adoption cases UCCJEA, section 103 (Proceedings Governed by Other Law).

Important: UCCJEA governs subject matter jurisdiction, which cannot be waived: Subject-matter jurisdiction is the requirement that a given court have power to hear the specific kind of claim that is brought to that court. While litigating parties may waive personal jurisdiction, **they cannot waive** subject-matter jurisdiction. law.cornell.edu

Common pitfalls/problems for legal aid clients and what to do about them:

Client has filed an action, but does not have service on the other party.

Client's attorney withdrew from case before the final order was entered.

Parties have been separated for years with no money to go to court, and now both have many different relationship problems.

Parents not complying with visitation/custody orders.

Husband is not the father of the child, but he does not enter a denial of paternity before child turns two.

Parent does not pay child support or maintain contact with the child, may open the door for a termination of parental rights action.

Client has been paying child support with cash or in-kind purchases (i.e. buying clothing, diapers, etc.) with no record and no indication that this is "child support).

Other types of law common to CLA clinics:

Probate and Real Property Matters

We see this most often where our clients have a home that has passed down through the family, but no one has had enough money to hire an attorney to probate the property. It is critical that the person be able to keep the home as it is affordable.

Transfer of real estate upon death. If the decedent did not otherwise provide for the disposition of the real property (title in JTWROS, trust, TDD, etc), then a probate will be required.

Also, it is important to help clients guard against scammers who would try to take advantage of their inability to hire a lawyer. Jamie's case.

Other examples: client whose father had multiple "heirs" per his funeral program

Expungement

Landlord/Tenant

Self Reflection Exercise

Do you feel less fearful about doing legal aid?