

Small Children, Big Implications

Ethics rule comment advises family law attorneys to think of the children

BY JULIA CARDI
LAW WEEK COLORADO

Family law attorneys received new guidance this year from the Rules of Professional Conduct on how to counsel clients about how the conflicts in divorce cases impact children.

But some experts in the practice area said the amendment is merely a reflection of what they have done for years.

Comment 2 to Rule of Professional Conduct 2.1, concerning the advisory role attorneys play, was amended in December with the following addition: "In a matter involving the allocation of parental rights and responsibilities, a lawyer should consider advising the client that parental conflict can have a significant adverse effect on minor children."

"I think it's pretty standard for what we would advise clients of anyway," said Rebecca Williams, an attorney with the Harris Law Firm in Denver. She explained family law attorneys consider it important to counsel cli-



REBECCA WILLIAMS

ents that engaging in aggressive behavior such as saying disparaging things about each other that alienate their children can affect their custody battles.

Peggy Walker, another attorney with the Harris Law Firm who has practiced family law for more than 40 years, agreed that attorneys have given advice about the effect of conflict on chil-

dren for a long time. She explained the responsibility aligns with the wording of Rule 2.1 itself stating, "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."

Joan McWilliams, an attorney and mediator in divorce and family law with McWilliams Mediation, proposed the amendment and has worked on various proposals for such a change since 2009. The comment is important, McWilliams said, because in an attorney's role as advocate for his or her client's position, the children's needs might still get lost in the shuffle.

"If you look at our legal system, it is an adversarial system," she said. "You go into court, and one person has to be right, and one person has to be wrong. And the judge makes the ruling. That's terribly hard on a family. ... And they have to walk away, send their lawyers home and raise their children."

According to McWilliams, Colorado is the first state to have a provision such as the amendment to Comment 2 in its Rules of Professional Conduct, in part because changing the rules is a difficult process.

"It's hard to get (rules) changed. It doesn't happen easily," she said. "The fact that our Supreme Court unanimously approved it was really lovely." She added the intent of the comment is not to stop conflict from happening but to encourage clients to keep it away from their children.

McWilliams clarified she has focused her definition of "conflict" in the realm of legal disputes between parents, since that is her area of expertise.

Alec Rothrock, an expert in attorney ethics who chaired a subcommittee that debated the amendment's details, elaborated on the conflict between an attorney's advisory and advocacy roles. A client often wants his or her attorney to take a certain position, and

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COURT OPINIONS

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caring for the child.

The father reported that the child had choked while being fed and had become unresponsive. He stated that he called for emergency assistance, gave the child blows on the back, and began cardiopulmonary resuscitation but did not shake the child.

The juvenile court placed the child in the mother's protective custody and ordered the father to have only supervised visits with the child.

The Weld County Department of Human Services filed a motion with the juvenile court to dismiss the dependency and neglect petition.

The father agreed to the dismissal, but requested that administrative findings of child abuse made by the department against him be expunged.

The court granted the department's motion to dismiss but denied the father's request. The court also denied the father's motion for reconsideration. The father appealed the ruling of the trial court and the Court of Appeals concluded that the orders from which the father sought to appeal were not final and appealable.

The court dismissed the appeal for lack of jurisdiction.

People v. Johnson

Trevelle Johnson asked for the review of the revocation court's decision to deny him bond in two cases.

The Court of Appeals dismissed his petition because he already admitted his guilt, which rid the presumption of innocence. The revocation court therefore had discretion to deny his request for bond in those cases and did not abuse its discretion when it denied request for bond because the record supported its decision. •

ETHICS RULE

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so in a situation envisioned by the rule comment, the attorney would advise how taking that position may harm the client's children.

"(The lawyer will explain), all this will do is pour gasoline on a fire," Rothrock said.

Walker said in her experience, clients want the best for their children, and counseling them on the effect parental conflict has often helps temper aggressive behavior.

"When they stop and think about their behavior ... I think the advice from the attorney can help change (it)," she said.

A NUANCED DEBATE

The amendment is unusual, Rothrock said, because rules typically do not guide attorneys in how to practice specific cases. He explained wording defines a key difference between rules and comments. Rules use terms such as "must," "prohibit," and "may" or "may not." By contrast, comments interpret and explain the rules and do

not mandate actions. Attorneys can be charged with misconduct for violating rules, but not comments.

The distinction was highlighted in a July 22, 2016, committee meeting when McWilliams emphasized the amendments, at that time proposed as amendments to the rule itself and an existing comment, would not require attorneys to advise clients on the adverse effect of parental conflict on children.

Minutes from that meeting also outlined objections raised to the changes. Concerns raised included that an attorney "should" give specific advice to a client in a particular type of situation would be an unenforceable concept, as well as whether the provision would be appropriate to put in the Rules of Professional Conduct because it would only apply to attorneys practicing family law.

Other concerns raised were that the proposed amendments sought to change the behavior of clients rather than attorneys, and a majority of marriage dissolution cases — 65 percent — proceed with neither party represented by counsel, so do not present the opportunity for lawyers to give such advice. Rothrock pointed to the country's approximate 50 percent divorce rate as reasoning for the comment's need. "Divorce cases with children are different kinds of cases," he said.

A subcommittee to consider the proposed amendments was formed following the July 22 meeting. The standing committee voted to recommend adopting the change to Comment 2 of Rule 2.1 at its Nov. 4 meeting, and the amendment was adopted Dec. 1.

Because the comment does not mandate behavior, and its purpose is largely to raise awareness, its concrete effect on attorneys will likely be difficult to quantify. Rothrock acknowledged it's difficult to say exactly what the comment's influence will be, but to him, uncertain doesn't mean not worthwhile. "I don't see it doing any harm, and I do see it doing some good, even though it's ... not tangible," he said. McWilliams said she believes the comment will be difficult to ignore.

"Will lawyers do it? I hope so," she said. "Is there any adverse action if they don't do it? I would say probably not. ... But part of this is all educational." She noted the Colorado Bar Association approved a flier distributed to attorneys that contained information on how parental conflict can affect children, and McWilliams and various judges have given talks on the subject.

She said she also believes Colorado's amendment will have a "groundswell effect" on other states. Louisiana is now considering such an addition after a presentation McWilliams made in Boston.

"We're getting a broad cross-section of the judiciary, of the legal system, that are adhering to this," McWilliams said. "So my hope is that it will become part of the conversation. ... We have the opportunity to change the direction of children's lives, and I just don't think we should miss it." •

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SHIFTING SCHOOL OF THOUGHT

According to McWilliams, understanding of the negative impact of parental conflict on children is a fairly recent school of thought. A series of events have laid the path for bringing it into divorce litigation.

1995

Kaiser Permanente and the Centers for Disease Control and Prevention began conducting the Adverse Childhood Experiences Study. The study demonstrated an association between traumatic childhood experiences and health and social problems in adulthood.



2007

A study published by psychiatrists at Harvard and Northeastern University found that verbal abuse can impact children's brains as much as physical or sexual abuse.

2009

A similar proposed amendment to the Rules of Professional Conduct did not pass.

McWilliams speculated the attorneys who opposed it worried the amendment would make children third-party beneficiaries, giving them the ability to later sue attorneys in family law cases.



In *Baker v. Wood, Res & Hames*, the Colorado Supreme Court affirmed the strict privity rule, which states third parties cannot later sue drafting attorneys in family law cases. McWilliams said she believes this ruling alleviated prior concerns about the proposed amendment.



"While for many years we've said conflict hurts kids, we've never had anything really to grab onto to say, 'Wait a second, conflict hurts kids today, and it hurts them into adulthood,'" McWilliams said.

"We now know that parental conflict hurts children, not just at the time they see it or hear it, but they carry that scar into adulthood."