

## **Hypothetical and Questions/Answers Rule 3.3, 3.4, 4.2, 4.3**

### **FACT PATTERN FOR ALL QUESTIONS**

You have a new client - Olivia. She claims that her “narcissistic” husband, Tyler, is abusive, totally self-absorbed, and a terrible parent. Olivia says Tyler has all kinds of issues that make living with him intolerable. She and Tyler have recently separated, and she wants to file for divorce. Tyler is staying with a buddy but wants to get back into the house. He also told her that he wants 50/50 custody of their child, a 9-year-old son named Alvin. She says Alvin has straight A's and is in the gifted program at the public school near the marital residence.

Olivia wants sole custody, as she believes he is an inappropriate influence, but she says she may wait until Alvin finishes third grade to leave her husband. She says that does not believe that her husband intends to leave her or file for divorce, but she says she has evidence that he is having an affair.

Olivia says that Alvin confided in her that one night when Olivia was out of town for work, Tyler brought over a lady. Alvin was supposed to be in bed, but he snuck out to see what they were doing, and he saw them going into mom and dad's room. He didn't see her again and he didn't ask his dad any questions, because he sensed that he'd get in trouble for spying and not being in bed. Alvin has been mad at his dad ever since. Olivia did not confront Tyler, because she wanted to save this information for Court and confront him before he has a chance to lie.

Olivia retains you, paying \$20,000 in advance. She signs a representation agreement stating she will follow your advice and keep you informed... with other typical agreement items included. After she leaves, you look on her social media pages and see several hundred photos of her, her husband, and their child. They look like a happy family on social media. She has some questionable posts, some photos of herself wearing revealing outfits, and some photos you make a note to yourself are not ideal in terms of how they will look in a custody trial.

Meanwhile, you look up her husband and see some of what she's talking about: selfies after workouts, selfies in the bathroom, lots of pics of his tats, political rants, posts about how much he loves partying, selfies outdoors, selfies indoors, long exchanges with his pals about their excessive nights out, clubbing, lots of photos of him and a woman who fits the description of the lady Alvin says he saw, with the caption “I have the best ‘work wife’ ever!”

On the dad's social media, you also see a photo of Alvin riding his bike, with dad cheering in the background. You also see that Tyler, in response to congratulatory messages from his friends, has posted comments that Alvin was a “sissy” and a “momma's boy” because he took a while to learn to ride without training wheels, but ultimately, the post says he is proud of him for “the eventual W after a so many painful L's.” You print the posts and save them for presentation at a later date. These posts give you some confidence that your client is telling you the truth about Tyler, but they look happy in the pictures... but then again.. who posts photos of sad times?

Once you and Olivia file the complaint for divorce, you file a *Pendente Lite* Motion asking for exclusive use and possession of the home, as well as primary custody of Alvin. Tyler's lawyer has filed an answer, denying all allegations and accusing Olivia of constructive desertion and alienation of the child. His counterclaim states that Olivia has a habit of falling asleep in Alvin's

room when she tucks him in, and that she has created a situation in which Alvin is too dependent on her for his age, which is making him “soft and antisocial.” Tyler has asked for the appointment of a GAL and for 50/50 custody. He has also asked that Olivia be ordered into counseling to address her “helicopter mom issues.”

Just before the *Pendente Lite* hearing, Olivia comes to your scheduled meeting to prepare her testimony... and, to your surprise, she brings Alvin. You are dismayed, and you say only “hello” to him. You ask your assistant to set Alvin up in a conference room with some markers, a puzzle, and a TV tuned to cartoons.

Once Alvin is situated and you are alone with your client, you ask Olivia what is going on. She says Alvin WANTED to come, that he WANTS to talk to you, and that Alvin will have a terrible reaction if he is forced to spend more than two nights per month with his dad. You are irritated, because why did she even tell him she was seeing you? How does he know there’s a divorce pending? And why is he expressing an opinion about visitation? You sense that she has been discussing this with him and it makes you uncomfortable. You tell her that you don’t think Alvin should be so wise to the situation and that you want her to stop talking to him about all adult issues including this case.

Undaunted, Olivia says Alvin talked about not wanting to see his dad the whole way to the office and that once he said it, she secretly recorded it to prove she’s telling the truth. She plays the recording. You hear this:

Olivia: Sorry, son, I didn’t hear you because of the radio, can you repeat that?

Alvin: Sure, mom... I said I don’t want to see dad and I want to talk to the judge about it. I want to tell the judge that I am super mad at him. I want him and that stupid, mean lady to just go live together and then you and me can stay together forever and we don’t have to talk to him ever again.

Olivia: Aw, sweetie, you are such a good boy. I love you for being so loyal to me, always, but I am sure you will meet a prettier girl and marry her and leave me all alone someday!

Alvin: Impossible! There is nobody prettier than you, mom!

### **A. QUESTIONS:**

1. At this point, after you clean up your vomit, what do you do with Alvin? Do you interview him?

A: Yes      B: No      C: Maybe

2. If yes, does the fact that he does not yet have a GAL influence your decision?

A: Yes      B: No

3. If no, does the fact that there’s a PL Motion in which one of the attorneys has asked for a GAL influence your decision?

A. Yes    B:    No

4. At the *Pendente Lite* hearing, do you have an obligation to tell the Court that you met Alvin and that he was at your office?

A: Yes B: No C: Only if you interviewed him D: Only if a GAL is appointed

E: Only if you interviewed him AND a GAL is appointed

5. Has Olivia done anything wrong by recording Alvin's car comments?

A. Yes B. No

6. Do you save the car recording for evidence?

A. Yes B. No C. Maybe D. Only If the dad disputes the child's preference

7. Your client wants you to object to the appointment of a GAL. She wants you to offer the child's testimony and argue that his interests are adequately represented since she believes that he has a preference that he's mature enough to tell both parents in court. Do you make that argument?

A. Yes B. No C. Yes, but only in a pro forma way D. Yes, this course of action is best for my client and achieves her goals, so it's the right thing to do.

**ADDITIONAL FACTS FOR NEXT QUESTIONS:**

Assuming you DO interview Alvin, the interview reveals that Alvin does, in fact, want to tell you and anyone who will listen that he is sad for his mom and angry at his dad because Alvin did, in fact, see his dad with the other lady, and he did confide in his mom unprompted.

He says he's not sure what they were doing, or why it was such a secret, but that he knows that since dad was sneaking her in and told him to go to bed and not come out until morning and not to tell mom that he had to go to bed early, he knows whatever they were doing was not ok.

He says he thinks maybe mom doesn't want other ladies in her room trying on her clothes or jewelry. He also says he loves his dad but knows he isn't very nice to mom, who deserves someone to be nice to her because she's the best mom ever.

You instantly know that he's compassionate and pretty mature for 9, but still very innocent. You see that Alvin is very articulate, sad his parents aren't getting along, and clearly aligned with his mom.

Finally, Alvin closes by telling you that it will be super fun after the case is over because they can do whatever they want, maybe even get a puppy, since dad will be gone and he's allergic and that's why they never had a dog before. He says he feels a lot better after talking to you, and that if you could please just tell the Judge so that he can go to school that day, he would really appreciate it.

## **B. QUESTIONS**

1. Does the child's statement about the puppy worry you?
  - A. No, it's fine because it wasn't me.
  - B. Yes, I worry that she gave him an incentive and it influenced his preference.
  - C. OTHER
  
2. If a GAL is appointed, do you tell the GAL about your talk with Alvin?
  - A. Yes
  - B. No
  - C. It depends on what the GAL says Alvin said. If Alvin tells the GAL the same thing, I do not need to disclose.
  - D. It depends on what the GAL says Alvin said. If Alvin says something different to the GAL, I will want to play the recording and/or tell what Alvin said to me to combat the conflicting information.
  
3. How do you counsel your client after this meeting?
  - A. Keep doing what you're doing!
  - B. You may want to dial back the intensity about custody
  - C. Please stop talking to Alvin about custody, even if he wants to and please don't promise him any more puppies or anything like that.
  - D. Depends on whether the GAL is appointed.

### **ADDITIONAL FACTS FOR NEXT QUESTIONS:**

Your client brings Alvin to the PL hearing. Surprisingly, the Judge wants to hear from him in chambers. In chambers, Alvin tells the judge EXACTLY what he told you. The Judge awards primary custody to Olivia, with every other weekend to Tyler. Olivia is ecstatic. The GAL is appointed (the judge said it was important to make sure Alvin had a neutral advocate in case he changed his mind and missed his dad), and trial is set.

Six months later, the trial rolls around. The day of the GAL's final meeting with Alvin, Olivia mentions to Alvin on his way out the door that the GAL will probably be visiting him, and adds that "if things stay just like this, we will be able to get the puppy!" The GAL visits Alvin a few hours later at school. Alvin sticks to his stated preference to be with mom all the time, reiterating that "dad seems to like his lady friend better than me and mom." Olivia calls you after the Gal report comes out, super happy. She mentions that she was worried because Alvin told her a few days ago that he might want to see dad more often. She is relieved when the GAL report says that Alvin's preference has been "consistent and unwavering" and that she is confident that Alvin's preference is reasonable, since the mother has always been his primary care provider and that dad seems more interested in himself and his girlfriend than in Alvin. The GAL did not interview the child's counselor, but you did. You know that Alvin has told his therapist that he misses his dad and that he wishes his dad would pay more attention to him. He has told the counselor that he feels alone a lot, because dad used to do fun things with

him that mom tries to do, but she isn't good at them and "it's just not the same without dad." He lists basketball, frisbee, and fishing as things that he used to do with dad "before the lady showed up." The counselor wants dad to engage with the counseling, but he has not responded to the requests sent by email and text. The counselor told you that there were requests to dad's lawyer, but still no response.

### C. QUESTIONS

1. Do you have any obligation to disclose to the court any of the information about the child's preference possibly being to see dad more?  
A: Yes    B: No    C.    No, but you should tell the GAL
  
2. Does your answer change if the child testifies in court that he doesn't want to see dad and that he never wants to see him again?  
A. Yes    B. No    C.    I cant! The GAL was supposed to figure this out and didn't ... but I can't work against my client by disclosing it.
  
3. Do you call the therapist as a witness, even though the GAL didn't?  
A. No way. The therapist may say that the child misses dad, which is not good for my client!  
B. Yes! The therapist will testify that the dad has ignored requests to participate, so it's good for my client!  
C. Yes. I have a duty to present accurate evidence to the court and I cannot allow my client to mislead the court that the child has no interest in seeing dad. This child is hurt, and I do not want it to be on my conscience that the child's emotional issues may get worse as he gets older if this case goes the way it's going and I don't offer this evidence as to the child's emotional state and attachment to dad.

END OF PROGRAM MATERIALS

### **DISCUSSION AND "ANSWERS"**

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### A. QUESTIONS:

1. At this point, after you clean up your vomit, what do you do with Alvin? Do you interview him?

A: Yes      B: No      C: Maybe      (Comment: You can ethically, but barely. The child is an unrepresented person under 4.2, BUT arguably has a right to have his interests represented per 4.4 since he is not really being treated fairly here. This is a close one.)

2. If yes, does the fact that he does not yet have a GAL influence your decision?

A: Yes      B: No      (Comment: If he already had a GAL, there's no way you'd be able to interview him without committing an obvious violation per LEO 1870)

3. If no, does the fact that there's a PL Motion in which one of the attorneys has asked for a GAL influence your decision?

A. Yes      B: No      (This is a close one, but since one party has asked, it's best practice to wait and see... sneaking in an interview under the wire seems unethical from a "best practice" standpoint even though it's not technically a violation that day before the hearing)

4. At the *Pendente Lite* hearing, do you have an obligation to tell the Court that you met Alvin and that he was at your office?

A: Yes      B: No      C: Only if you interviewed him      D: Only if a GAL is appointed

E: Only if you interviewed him AND a GAL is appointed

5. Has Olivia done anything wrong by recording Alvin's car comments?

B. Yes      B. No      (This is not a violation. It may be distasteful, but is not unethical)

6. Do you save the car recording for evidence?

B. Yes      B. No      C. Maybe      D. Only If the dad disputes the child's preference

7. Your client wants you to object to the appointment of a GAL. She wants you to offer the child's testimony and argue that his interests are adequately represented since she believes that he has a preference that he's mature enough to tell both parents in court. Do you make that argument?

A. Yes      B. No      C. Yes, but only in a pro forma way      D. Yes, this course of action is best for my client and achieves her goals, so it's the right thing to do. Ok, to be honest, I don't think there's a "right answer" to this. I hate this hypothetical because it's really murky. I wrote it because it happens ALL the time and I want you all to think about what you should do... it's not black and white but it's a moral issue, possibly.

## **B. QUESTIONS**

4. Does the child's statement about the puppy worry you?

D. No, it's fine because it wasn't me.

E. **Yes, I worry that she gave him an incentive and it influenced his preference.**

F. OTHER

**Comment: This witness has been incentivized even if the client doesn't think she has done it on purpose. This appears to be a violation of 3.4 Fairness to opposing parties/counsel**

5. If a GAL is appointed, do you tell the GAL about your talk with Alvin?

E. **Yes**

F. No

G. It depends on what the GAL says Alvin said. If Alvin tells the GAL the same thing, I do not need to disclose.

H. It depends on what the GAL says Alvin said. If Alvin says something different to the GAL, I will want to play the recording and/or tell what Alvin said to me to combat the conflicting information.

**Comment: Very close call. Your client will probably argue otherwise... Again, I think you have to disclose it as a 3.3 and 3.4 Candor and Fairness measure.**

6. How do you counsel your client after this meeting?

A. Keep doing what you're doing!

B. You may want to dial back the intensity about custody

C. **Please stop talking to Alvin about custody, even if he wants to and please don't promise him any more puppies or anything like that.**

D. Depends on whether the GAL is appointed.

**Comment: All rules implicated - If She follows it, this advice may keep your client from having an embarrassing revelation or from running afoul of the court later when and if this comes out. You will be on the right side of the ethics rules if you explain to your client that she cannot offer incentives or coerce the child to express a certain preference, even if she is doing so inadvertently.**

## **C. QUESTIONS**

4. Do you have any obligation to disclose to the court any of the information about the child's preference possibly being to see dad more?

A: Yes    B: No    C.    No, but you should tell the GAL

**D. Yes, IF you believe that your client offered false testimony about the child's preference OR if she induced him to do so with the promise of the puppy.**

**RULES 3.3, 3.4 are implicated in this case. You cannot hide.**

5. Does your answer change if the child testifies in court that he doesn't want to see dad and that he never wants to see him again?

- B. **Yes (see above)**      B. No      C. I cant! The GAL was supposed to figure this out and didn't ... but I can't work against my client by disclosing it.
6. Do you call the therapist as a witness, even though the GAL didn't?
- B.** No way. The therapist may say that the child misses dad, which is not good for my client!
- C.** Yes! The therapist will testify that the dad has ignored requests to participate, so it's good for my client!
- D.** Yes. We have a duty to present accurate evidence to the court and I cannot allow my client to mislead the court that the child has no interest in seeing dad. This child is hurt, and I do not want it to be on my conscience that the child's emotional issues may get worse as he gets older if this case goes the way it's going and I don't offer this evidence as to the child's emotional state and attachment to dad.

END OF MATERIALS