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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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FLYNN, J., dissenting. Although I believe that both the trial court and the majority have taken a principled approach to a difficult issue before them, I respectfully dissent. I believe the result reached not only was unfair to the two attorneys reprimanded but also has chilling effects reaching beyond them. It was unfair to them because I do not believe that there is sufficient evidence to show that it was highly probable that either plaintiff made or participated in a material misrepresentation. The chilling effect on others relates to the legal profession's duty to keep a client's confidences and to bring applications for emergency relief from child abuse in Connecticut. I would therefore reverse the trial court's decision reprimanding the plaintiffs.

The court found that both of the plaintiffs were in violation of rule 3.3 (a) (1) of the Rules of Professional Conduct, which provides that "[a] lawyer shall not knowingly: (1) Make a false statement of material fact or law to a tribunal . . . ." The court also found that the plaintiffs violated rule 3.3 (d) by failing, in the course of an ex parte proceeding, to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Rules of Professional Conduct 3.3 (d). By their very terms, both rules apply to facts only when they are material facts. A material fact is one that will affect the outcome of the case. See *Tutsky* v. *YMCA of Greenwich*, 28 Conn. App. 536, 540, 612 A.2d 1222 (1992). Furthermore, "the applicable standard of proof for determining whether an attorney has violated the Rules of Professional Conduct is clear and convincing evidence . . . ." (Citation omitted.) *Briggs* v. *McWeeny*, 260 Conn. 296, 322, 796 A.2d 516 (2002). Evidence is clear and convincing if it "induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *Lopinto* v. *Haines*, 185 Conn. 527, 534, 441 A.2d 151 (1981).

I begin by noting that serious issues of child safety were raised in the underlying application. The affidavit of the applicant mother, Inez Montalvo, supporting emergency relief against the father made disturbing allegations concerning the physical safety of her two children who were residing with their father in New Jersey. In her affidavit,[1] she described a warning from the respondent father's live-in girlfriend that the children were at risk residing with their father and that they should not be brought back to him from Connecticut to New Jersey after finishing weekend visitation. The girlfriend told Montalvo that the level of violence had

escalated to the point where the children "were in imminent danger." This information was confirmed by the children themselves, who described being hit by their father. On one occasion, only three weeks before the affidavit, a bruise on one child's thigh, which the father inflicted, took almost ten days to clear. Both children were afraid to return to live with their father in New Jersey. He had a history of drug abuse and violence. There were ample factual grounds to initiate the emergency application in Connecticut to protect the children, who were then in this state, from abuse in New Jersey.

Second, our law clearly provides that such emergency applications for relief from abuse may be made in situations where children are abused, even though divorce proceedings affecting their custody are pending in a sister state. Section 15 of Public Acts 1999, No. 99-185, now General Statutes § 46b-115n (a), confers upon the Connecticut Superior Court "temporary emergency jurisdiction if the child is present in this state and . . . (2) it is necessary in an emergency to protect the child because the child, a sibling or a parent has been, or is under a threat of being, abused or mistreated . . . ." This is not dependent on whether another state has exercised jurisdiction or the applicant has a lawyer in another state or what that lawyer's opinion is. Under General Statutes (Rev. to 2001) § 46b-120 (3), now (4), " 'abused' means that a child or youth (A) has had physical injury or injuries inflicted upon him other than by accidental means . . . ." Under § 46b-115n, the factors that are material are (1) whether the child or children are present in this state, and here they were, and (2) whether a child, sibling or parent is under a threat of mistreatment or abuse, meaning that a child had physical injuries inflicted on him or her other than by accidental means. Those are the only material issues on which material facts need be found. Representations on other matters are collateral, because, being outside the statutory criteria, they should not have an effect on the outcome of the case.

The majority cites something that the trial court did not, namely General Statutes § 46b-115q, in that the court in any proceeding under Chapter 815p, the Uniform Child Custody Jurisdiction and Enforcement Act, "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum . . . ." General Statutes § 46b-115q (a). The majority, however, does not set forth the statutory factors which the court would consider in determining whether a forum was inconvenient. An analysis of those factors reveals that whether a client's joint, out-of-state counsel should, could or would proceed in the sister state is not a factor.[2] The trial court did not cite forum non conveniens or § 46b-115q, because none of the eight statutory factors which a

court is to consider can, even under a strained interpretation, be construed to include an out-of-state counsel's opinion about seeking emergency relief in any state. Furthermore, the court, pursuant to statutory authority, had its own direct conversation with the New Jersey judge who had been hearing the matter and was thereby able to satisfy any questions it had about how quickly the matter might be heard in New Jersey.

In a sworn affidavit attached to her petition, Montalvo swore that the father had hit one of their two children so hard with a belt that the resulting bruise lasted ten days. While there may be a place for corporal punishment in the discipline of children by parents, the conduct attributed to the father in the mother's affidavit goes beyond proper parental discipline and qualifies as child abuse under § 46b-120 (3), now (4). At the ex parte hearing on the application for immediate relief, Montalvo took the witness stand and testified under oath that both her daughters and the father's live-in girlfriend had told her of the threats to the safety of the two girls when she picked up the children for weekend visitation. There was both statutory jurisdiction and authority to grant emergency relief from this abuse, and a factual basis on which to exercise jurisdiction in Connecticut if the court chose to do so. Our law contemplates that even though a proceeding is pending in another state, an application for such an emergency temporary order may be made here in Connecticut because the safety and best interests of children are paramount.

I have already discussed what elements of § 46b-115n are material to the court granting relief, and the discussions between Montalvo's New Jersey and Connecticut counsel clearly do not fall within the realm of matters considered material. I now observe that the record contains no evidence of a misrepresentation of a nonmaterial fact either, unless one concluded that, confronted with evidence of excessive beating of the children and danger to their physical welfare in New Jersey, one ''should'' bring a motion for emergency custodial relief in New Jersey through an attorney in New Jersey who stated to the plaintiffs and the court that she did not want it filed at all, either in New Jersey or Connecticut. Attorney Davis stated that she was not prepared to divulge her reasons for opposing any petition because she did not think they were relevant. Montalvo and attorney Driscoll, however, did testify that attorney Davis had told them that the New Jersey judge would be angered[3] if a motion of this sort were brought.[4] I see no misrepresentation, therefore, in Daniels' answer to the court's questions that it was the opinion of New Jersey counsel, Davis, ''that we should not do it in New Jersey for a number of reasons, none of which'' Daniels thought were ''flattering to the judiciary there . . . .''

Daniels' representation was that the application for

emergency relief *should* not be brought in New Jersey, not that the New Jersey attorney *would* not bring the case in New Jersey or that the case *could* not be brought in New Jersey. It seems to me, for example, that whether one *could* jump over a cliff, *would* jump over, or *should* jump all involve different considerations. In the hearing the court held on the complaint of the New Jersey counsel, attorney Driscoll testified that in attorney Davis' conversation with him she opined that bringing a relief from abuse petition and seeking temporary custody would alienate the New Jersey judge who might preside over the case. Davis did not dispute this testimony. Whether attorney Davis said that filing in New Jersey would alienate the New Jersey judge who had reserved decision on permanent custody was therefore not at issue.

In terms of some duty of further disclosure by attorney Daniels, he clearly did not disclose all of his associate's conversations with attorney Davis. This was clear from what Daniels did say on the record. Daniels described the conversations to the court as follows: ''In an attempt to talk to counsel, we learned a couple of things. One, that there is no pushing that judge in New Jersey, and who has had the case for some time. And it's not clear even that he would be the judge to hear a restraining order issue in New Jersey. But while that was pending, the children would presumably have to be returned to the father by the mother.'' Daniels elaborated upon those statements when he said, ''Mr. Driscoll spoke to counsel in New Jersey, and it was her opinion that we should not do it in New Jersey for a number of reasons, none of which I think are flattering to the judiciary there, but we are relying on that.'' These statements clearly were not an attempt to repeat verbatim the conversations between Driscoll and Davis. It was clear that Daniels paraphrased only a small portion of the conversations, and he did not imply in any way that that was all that was said.

At the hearing on Davis' complaint, there was evidence from Davis and Driscoll about their conversations, but I would not uphold Driscoll's reprimand for failure to interject something on the record in the course of his senior associate's handling of the case because, as I have already indicated, there was no proof of a misrepresentation as to anything material under § 46b-115n or § 46b-115q, which govern this case.

I now turn to the interplay between rules 1.6 and 3.3 of the Rules of Professional Conduct, which bound both Daniels and Driscoll. The court recognized in footnote 5 of its decision that ''[i]t may well be that attorneys Daniels and Driscoll were not required to make any statements to me concerning the opinions of attorney Davis. . . .'' Attorney Davis, herself, belatedly recognized her duty to keep client confidences and advice confidential.[5] There was no legal requirement that confi-

dences of a client needed to be revealed to a judge or anyone else. See Rules of Professional Conduct 1.6. Communications between the petitioner's New Jersey and Connecticut counsel about her case are protected. There is a direct protection for client to attorney communications and derivative protection for attorney to client communications. 1 P. Rice, Attorney-Client Privilege in the United States (2d Ed. 1999) § 5.2, p. 35. An attorney's communication with cocounsel also is protected. See *Natta* v. *Zletz*, 418 F.2d 633, 637 n.3 (7th Cir. 1969). Despite starting the entire disciplinary process in motion before the court by sending a letter to the court disclosing confidential advice she had given to the client without any release from the client, attorney Davis refused to be examined by Daniels under oath at the hearing on her allegations against him and Driscoll based on her ''objection'' as to attorney-client privilege and only returned to the witness stand after the mother was called to the witness stand and waived her confidentiality privilege.

By reprimanding Daniels and Driscoll under rule 3.3 (d), the court implicitly held that where an attorney discloses a statement made to his office by cocounsel, Davis, there was a duty to disclose all conversations. I do not believe that such a duty existed here as to immaterial matters. Imposing such a duty seems at odds with rule 1.6 (a) of the Rules of Professional Conduct, which permits a lawyer to disclose some of a client's confidences where ''impliedly authorized in order to carry out the representation'' of the client. For example, a lawyer may use information gathered from confidential communications to draw an ex parte application for a prejudgment remedy. I know of no authority that in such a situation this opens the door to an obligatory exposition of *all* the client's communications or derivatively confidential communications with cocounsel unless they are material to the matter before the court.

In my opinion, a mistake has been made in the court finding that Daniels intentionally misrepresented any material fact which Driscoll had an obligation to correct. There was no clear and convincing evidence to support such a finding. Daniels' statements about what Davis thought should or should not be done were not material to any judgment to be made by the court under § 46b-115n, nor was there clear and convincing evidence that Daniels or Driscoll misrepresented the truth. I, therefore, would conclude that the Rules of Professional Conduct did not obligate either Daniels or Driscoll to say more than was said. Neither § 46b-115n nor § 46b-115q nor our Rules of Professional Conduct made Davis' opinions material. I am left with the definite and firm conviction that a mistake has been made. For these reasons I respectfully dissent.

[1] This affidavit is attached to the application for emergency relief in *Montalvo* v. *Nieves*, Superior Court, judicial district of New Haven, Docket No. FA01-0447041S (April 9, 2001, the same case and docket number of the memorandum of decision ordering reprimands that prompted this writ of

error, which causes our review of that decision.

[2] General Statutes § 46b-115q (b) provides: ''In determining whether a court of this state is an inconvenient forum and that it is more appropriate for a court of another state to exercise jurisdiction, the court shall allow the parties to submit information and shall consider all relevant factors including: (1) Whether family violence has occurred and is likely to continue in the future and which state could best protect the parties and the child; (2) the length of time the child has resided outside this state; (3) the distance between the court in this state and the court in the state that would assume jurisdiction; (4) the relative financial circumstances of the parties; (5) any agreement of the parties as to which state should assume jurisdiction; (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child; (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and (8) the familiarity of the court of each state with the facts and issues in the pending litigation.''

[3] Montalvo actually quoted attorney Davis as using a scatological term sometimes used to describe anger.

[4] In the hearing about attorney Davis' charges of unprofessional conduct against Daniels and Driscoll, Davis buttressed her claim that she was ready to bring an application for emergency relief in New Jersey by claiming to have drafted just such an application and presenting it in evidence. Whether she had really done so or instead prepared this paper much later after she knew the Connecticut application was filed only to support her complaint against Daniels and Driscoll, and to attenuate any damage to her professional reputation in New Jersey, would affect her credibility. She first attempted to hide behind attorney-client privilege when examined by Daniels about the application she claimed to have been prepared to file, despite the fact that she had publicized issues about conferences between the mother's lawyers in a letter to the judge apparently without any prior waiver from the client. After the mother was called to the witness stand and waived the privilege, and while Davis was a witness on the stand, Davis then objected that the line of questioning was irrelevant. The court sustained Davis' relevancy objection. Leaving aside whether it is appropriate for witnesses to interpose objections on the ground of relevancy to questions posed to them, the court's ruling deprived the plaintiffs of the opportunity to test her veracity.

[5] ''[Daniels]: Now, that weekend before the Martin Luther King holiday on Monday, I take it you had some conversations with Ms. Montalvo about something that had just occurred, is that right?

''[Davis]: Judge, I don't, you know, I don't know that I'm required to answer that question because it really does have to do with my representation of Ms. Montalvo. And that's a confidential relationship.''