Hypothetical A1:

A man comes to speak with you about the custody of his child with his ex-wife. Currently, the two have joint custody of the child and share parenting time equally. The man, however, would like to seek full custody of the child. He is concerned because he feels like his ex-wife doesn’t take good care of the child because she sends him to spend significant time with the child’s grandparents, aunts, and uncles. You know that the ex-wife and child are citizens of the local Ojibwe Tribe, and it is the tradition of the Tribe to encourage a significant role in the raising of children for the extended families of all children in the Tribe. The custody order was entered by the Ojibwe Tribal Court, and the Tribal Court considers the customary law of the Tribe.

Discussion Questions:

1) Assume you decide to represent the man. What are your ethical obligations under the rules of professionalism? What steps might you take to ensure you are meeting these ethical obligations?

2) Can you identify any cultural norms different from your own that might be present in this case? If yes, how might those different norms impact your representation of the man?

3) Now assume that your client tells you he is very familiar with Ojibwe customs but that he has reason to believe his ex-wife truly is not taking good care of the child. He appears reluctant to say more but is adamant that the child’s well-being will be in jeopardy unless he obtains custody.

What might be possible explanations for your client’s seeming reluctance to share more? How would you obtain the additional information you need to understand your client’s perspective?
Hypothetical A1: Talking Points

1) Assume you decide to represent the man. What are your ethical obligations under the rules of professionalism? What steps might you take to ensure you are meeting these ethical obligations?

Ethical considerations:

- Assuming that jurisdiction is in tribal court, M.R. 1.1 (Competence) is implicated. Also M.R. 1.2(a) and (b) (Scope of Representation) is triggered.

M.R. 1.1 – Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

To the extent that tribal law is different from state law in domestic relations cases, competence in tribal law is necessary for the lawyer in this hypo.

M.R. 1.2 – Scope of Representation (in relevant part)
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

The client makes the ultimate decisions about his case even if the lawyer may disagree with the client’s motives or decision on how to proceed with the legal matter. The lawyer’s job is to be competent in the law, advise the client about his options under the law, and to advocate for her client (per the client’s wishes) within bounds of the law.

- Students should recognize their duty of competence and that they may not be competent in Indian law. A key aspect of cross-cultural lawyering and competent lawyering is being aware of what we do not know.

- To gain the necessary knowledge, students could reach out to potential co-counsel who is an expert, refer the case to an expert, learn Indian law and the tribal court system to become competent.

- Students should recognize that they will be working with a foreign court, the Ojibwe Tribal Court, so they should become familiar with the court’s rules.

2) Can you identify any cultural norms different from your own that might be present in this case? If yes, how might those different norms impact your representation of the man?
• Students should identify that in this tribal community, extensive reliance on extended families is accepted and common practice. This may be a different norm than the client’s, and may or may not be a different norm for each student. Our own culture, background, experience, etc. influences our own norms and how we process information or assess a situation.

• Reliance on extended family could potentially significantly impact how a tribal court from the same community views the concerns raised by the father. Students might discuss managing client expectations and also potential obstacles in tribal court.

1) Now assume that your client tells you he is very familiar with Ojibwe customs but that he has reason to believe his ex-wife truly is not taking good care of the child. He appears reluctant to say more but is adamant that the child’s well-being will be in jeopardy unless he obtains custody. What might be possible explanations for your client’s seeming reluctance to share more? How would you obtain from the client the additional information you need to understand your client’s perspective?

• Students should recognize that there may be additional information we need to appropriately advise the client. It could be that the client is reluctant to share information. There could be a number of reasons the client has not shared more information at this point. The client may not fully trust the lawyer; may not wish to speak poorly of the mother of his child; may be concerned that actions taken by the mother could result in both parents losing custody of the child; may feel that other cultural barriers would prevent the lawyer from understanding his perspective. It is also possible that we have simply misinterpreted our client’s communication, that our client is not holding back any information, and just believes that the child will be better cared for in his custody. We should emphasize that we do not have enough information at this point to draw any conclusions but that it is important to consider multiple explanations for what may be happening in this communication. Client-centered lawyering compels us to try to understand the situation and the client’s goals from our client’s point of view.

• Students should discuss strategies to talk more to the client about this, focusing on how to ask open-ended, non-judgmental questions. The lawyer should validate the client’s feelings and ask for more information. This is part of empathic and active listening. For example,

  o “I see how very strongly you are concerned about your child. Tell me more about your concerns if you do not obtain custody.”
  o The lawyer may need to remind the client of confidentiality and that if he shares additional information, the lawyer cannot share it with anyone else absent the client’s consent.
Hypothetical A2:

You have been appointed by the court to represent Anthony, who was charged with Possession of Marijuana. From the police affidavit you received, you learn that Anthony is 15 years old, African American, and currently residing in a group home in Lawrence for foster children. The affidavit alleges that a teacher at Free State High School walked by the bathroom and thought he smelled burnt marijuana. Anthony walked out of the bathroom at that time, and the teacher stopped him and sent him to the principal’s office. The principal searched his backpack and found a clear plastic bag containing a leafy green vegetation she believed was marijuana. She then brought in the School Resource Officer, and Anthony was later charged in juvenile court. Anthony’s child welfare case manager (considered his legal guardian through the state) brings him to the clinic office to meet with you. During your interview, Anthony only gives brief yes or no answers, does not make eye contact, and admits that he had marijuana at school. He seems like he does not care about the outcome of his case and tells you his case manager already told him to take responsibility for his actions and accept whatever his punishment will be.

Discussion Questions

1) What ethical rules are implicated in this situation?

2) What might be possible explanations for Anthony’s seeming disinterest in the outcome of his case?

3) How might your client perceive you? When you consider your client’s possible perceptions of you, does that influence how you may approach your representation?

4) How would you proceed in your discussion with the client?
Hypothetical A2 – Talking Points

1) What ethical rules are implicated in this situation?

- Since the client in this hypothetical is a minor with other possible impairments and limitations, M.R. 1.14 (Client with Diminished Capacity) is triggered along with M.R.s 1.4 and 1.6. Importantly, comments to M.R. 1.14 discuss how a lawyer should address matters related to a client with diminished capacity.¹

M.R. 1.14 – Client With Diminished Capacity
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Proper communication with this client is imperative in order to provide competent representation to this client.

2) What might be possible explanations for Anthony’s seeming disinterest in the outcome of his case?

- Students should be aware that what is characterized as disinterest, based on our own perceptions, may not be actual disinterest. Students may discuss many possible explanations for Anthony’s reaction:
  - Anthony may feel like he has no say or no control over the outcome of his case. He is a minor, in state custody, and may not feel like his voice is ever heard.
  - Anthony may feel like he was wrongly targeted because of his race, or because of his status as a foster youth, or for another reason we are not

¹ I did not include the Comments to M.R. 1.14 here. They are helpful, but lengthy and can be found on the ABA website at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14.html
aware of. Based on his past experiences, he may feel like nobody would believe him or advocate for him.

- It is also possible that Anthony may actually not care about the outcome of this case because he has other, more pressing concerns on his mind right now.
- There are other possibilities we may not even be thinking about because we do not have all of the information.
- Students should also identify that we should avoid assumptions at this point and that we need more information to build understanding.

3) How might your client perceive you? When you consider your client’s possible perceptions of you, does that influence how you may approach your representation?

- Anthony may see the lawyer as just another adult who does not believe him, who thinks he should face consequences, or who wants to “help” him without understanding his perspective. Anthony may not trust the lawyer or believe the lawyer cannot understand him due to possible differences in race, age, education, foster care status, etc. On the other hand, Anthony could feel completely comfortable with the attorney and truly just want to accept consequences and move on, as he stated.
- We should acknowledge that the client may perceive barriers to understanding and that the lawyer should take steps to ensure Anthony realizes that, even as a minor, he directs the representation.

4) How would you proceed in your discussion with the client?

- Students should identify that more information may be needed from the client, and that perhaps the client needs more information from the attorney to make an informed decision. Client-centered lawyering compels us to try to understand the situation and the client’s goals from our client’s point of view.
- The lawyer should ask open-ended, non-judgmental questions to try to understand the client’s perspective. Some questions that may help the lawyer gain understanding might include:
  - “When the teacher sent you to the principal’s office/searched your bag/pulled in an officer, how did you feel?”
  - “What would be the best outcome from your perspective?”
- The lawyer also needs to ensure that the client understands that he, not the case manager, directs the representation.
- The lawyer should show interest in learning, and concern for, Anthony’s thoughts about this case (engaging in empathic and active listening).
Hypothetical B1

You are a first-year associate at a large law firm. The firm runs a summer program in which third-year law students come to work for the firm for several weeks. The firm uses the summer to recruit top students to work at the firm when they graduate, so the firm intentionally presents an appealing picture of employment there. You are assigned to serve as a mentor for one of these law students, Sam. Your boss tells you that Sam is a highly desirable candidate; the firm’s hiring committee wants Sam to choose the firm over several other options.

Part of your job is to attend social events with Sam over the summer. While you are at lunch with Sam, you are discussing travel experiences and Sam mentions several overseas shopping experiences that involved bargaining. Sam uses the term “Jew down the price.” Stunned, you say nothing. Two weeks later, at a group dinner, Sam uses the term again.

Discuss competing issues of professionalism here, and what, if anything, you should do in this situation.
Hypothetical B1 – Talking Points

Discuss competing issues of professionalism here, and what, if anything, you should do in this situation.

- Hopefully students will recognize that Sam’s use of the phrase “Jew down the price” is offensive and unprofessional.

- There are ethical rules that are implicated. Sam’s statement could violate the amended Mr. 8.4(g). The statement may also trigger a reporting requirement from a supervising attorney or other attorney.
  - It is important for the first-year associate to understand that if the intern Sam becomes an associate at the firm then her supervisor will have an obligation under M.R. 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) to report Sam’s conduct if she makes these kinds of statements as a licensed attorney. (As an intern, Sam may also be subject to the Rules of Professional Conduct, at least for character and fitness purposes on a bar application.) Thus, Sam’s statement could violate the amended M.R. 8.4(g).
  - M.R. 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
    (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
    (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Moreover, M.R. 8.3 (Reporting Professional Misconduct) requires a lawyer to report Sam’s statement to the proper disciplinary authority.

  - M.R. 8.3 – Reporting Professional Misconduct
    (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

- Students may identify feeling some conflict between wanting to address the offensive language and the law firm’s desire to recruit Sam. There may also be a question raised about whether the hiring committee should be aware of Sam’s language, and whether that information would influence the hiring committee’s assessment of Sam.

- There are several possible ways to address the situation.
- Do nothing. This could help the firm recruit Sam but also may hurt the firm in the long run, if Sam continues to use offensive language around coworkers and clients.

- Report Sam’s behaviors of the hiring committee or somebody more senior. This could backfire on you as an associate, or could have implications for Sam’s hiring. It also may provide you with additional feedback or support for how to address the issue.

- Seek out additional guidance from your own mentor or a Lawyer Assistance Program about how to handle the situation.

- Address the issue with Sam. There may be many explanations for Sam’s behavior. He may not realize the language is offensive because of his own background and experiences (this does not excuse the behavior but helps us understand it in context). Or, he may be prejudiced against Jewish people and be unaware enough to think he can use offensive language in a professional setting. As his mentor, the associate is in a position to explain the expectations of the office and that he really wants to see Sam succeed. Using offensive language will impede Sam’s ability to progress at the firm.
Hypothetical B2

You are a newish attorney in solo practice. You attend one of the local bar association’s social events. One of the judges you frequently appear in front of engages in a conversation with you. She asks if you have met this other attorney who is also in solo practice, and then tells you she wants to introduce you. As the two of you walk toward the attorney, who appears to be of Asian descent, the judge tells you the attorney’s name is Wong Jones. The judge tells you that she has trouble remembering the attorney’s “funny” first name, so she always just thinks of the cartoon character Elmer Fudd who can’t say his ‘r’s. And then, doing an Elmer Fudd impression, the judge says, “Hey Wabbit, don’t go the wong way,” with a wink.

Discuss the competing issues of professionalism here and what, if anything, you should do in this situation.
Hypothetical B2 – Talking Points

Discuss the competing issues of professionalism here and what, if anything, you should do in this situation.

- Judges are subject to the rules of Judicial Conduct in their respective jurisdictions. This scenario implicates the rule regarding bias, prejudice, and harassment. The judge’s behavior could also trigger a reporting requirement, or lead to a report, whether or not required.
  - Cannon 2, Rule 2.3 provides: (in relevant part)
    (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
    (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

The comments made by the judge probably violate this Cannon, and Rule.

- M.R. 8.3 – Reporting Professional Misconduct
  (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

As in Hypo B1 above, the lawyer shall report the judge’s statement to the proper disciplinary authority when conduct raises a substantial question of the judge’s fitness for office. In reality, a lawyer will probably not report the statements made either in hypo B1 and B2 to the proper disciplinary authority, but the seriousness of these statements should not go ignored in light of the fact that they probably violate both Model Rule of Professional Conduct 8.4(g) and judicial cannon 2, M.R. 2.3.

- Hopefully students will acknowledge that it may be offensive to the attorney for a judge to be mocking her name. Students may acknowledge that this example might be considered more subtle in its offensiveness, though perhaps not for others.

- Students should acknowledge that there is a tension between wanting to address the offensive behavior with the judge but also not wanting to offend the judge who decides many of your cases.

- There are several possible ways to address the situation. Because it is such a quick exchange and in a social (but still professional) setting, how we address the situation might look different from other examples.
- Do nothing. It may be that the other attorney does not know this is happening, and that there is no harm to her if you say nothing. But, even if there is no ethical obligation, should lawyers acknowledge offensive statements from other lawyers or judges when we hear them?

- Address the issue directly with the judge. Recognize that the judge’s behavior is influenced by her own culture, background, and experiences and we don’t have all the information. The judge may not realize her actions could be offensive. Or, you may learn that Wong Jones actually tells people she thinks her name is funny and that if you have trouble remembering her name, just think of Elmer Fudd. Or, on the other end of the spectrum, the judge could harbor negative beliefs toward individuals who are different from her. You might be able to respond by saying just enough to let the judge know there might be an issue.
  
  - “Hmmm, I think I will just remember that her name is Wong.”
  
  - “I wonder if Wong wants people to remember her name that way.”
  
  - “Wong is a pretty common name; I think I can remember it.”