

2017 Beyond the Bench Conference

*When due process is long overdue:
Ethical Issues in Dependency Law*

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California



Bases of Procedural Due Process

- Fifth Amendment: “No person shall be . . . deprived of life, liberty, or property, without due process of law[.]”
- Fourteenth Amendment: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]”

Bases of Procedural Due Process

- Armstrong v. Manzo, 380 U.S. 545, 550-52 (1965)
- Procedural due process =
 - Notice
 - Opportunity to be heard at a meaningful time and in a meaningful manner

Canons of Judicial Ethics

- 6 Canons
- http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf

Rule 3-110: Failing to Act Competently

- (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
- Includes the duty to supervise the work of a subordinate and non-attorney personnel
- (B) "competence" ... shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

Rule 3-500 Communication

- A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Rule 3-600 Organization as Client

- (A) ... conform his or her representation to the concept that the client is the organization itself...
- (B) actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law ... member may take such actions as appear to the member to be in the best lawful interest of the organization.

Notice

- Substantive requirements
- All phases
- Everyone's responsibility to ensure proper notice
 - Court
 - CoCo
 - Parent's Counsel
 - Child's Attorney

CoCo

- If a tree falls in the forest and no one is around to hear
 - Sensitive case
 - Parent's attorney waives defect on behalf of an absent client

Parent's Attorney

- Duty to preserve the appellate record?
 - What if you know agency erred?
 - Cases where ICWA may apply (duty to assist client)

Child's Counsel

- Family Finding efforts
- How much do you trust the process?
 - Due diligence
 - Absent parents

Right to Counsel

- Lassiter v. Dep't of Soc. Svcs., 452 U.S. 18, 32 (1981) (no federal due process right to counsel in termination proceedings; to be determined by trial court on case-by-case basis)
- 317

Child's Counsel

- What is competent counsel?
 - Meeting with clients and caregivers
 - When minor's counsel stands alone
 - Opposing Placement Decisions (Group Home)
 - TILP disagreements
 - NMD's

Parent's Attorney

- Competent Counsel
 - For the other parent?
 - Difficult clients to access
 - Incarcerated clients
 - Out of State
 - Foreign Language speakers

CoCo

- Raising the issue
 - Private counsel (case on point)
 - Competent minor's counsel

Parentage

Parent's Attorney

- Telling clients to run ... run far away
 - Avoid DNA test
 - Avoid being found
- Advising gatekeepers (mom's)
 - Declarations of paternity
 - Three parent laws

Child's Counsel

- "My clients would be better off not knowing who their families were" (said no lawyer ever?)
 - Assisting with elevating parents to presumed status
 - Duty to make independent investigation extends?

CoCo

- Advising your client
 - Who are parents and what do they get?
 - Contrary results in different cases

Additional Resources

https://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf

https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf

https://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.authcheckdam.pdf

THANK YOU
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