

Beyond the Bench 23

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Ethical Obligations of Counsel for Parents and Children in Dependency Cases

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1. Overview.

Handling dependency cases can be a difficult challenge for any attorney. Many times the clients suffer from addiction, mental health issues, domestic violence, poverty, crime, neglect, abuse, illiteracy, and the list goes on and on. The ethical obligations of counsel for parents and children will be the primary focus of this presentation, including, but not limited to, competency, communication, and confidentiality. Additionally, in times of fiscal crises, reduced and restricted budgets, attendees should develop an understanding of what is ethically required of competent counsel in dependency cases. The presentation will in some ways reflect the reality of practice in a small county. Attendees should keep in mind the legislative intent: “The state has the duty to care for and protect the children that the state places into foster care, and as a matter of public policy, the state assumes an obligation of the highest order to insure the safety of children in foster care.” (California Welfare and Institutions Code sec. 16000.1(a)(1).)

Below, you will find the hypothetical situation which will be referred to during the presentation:

Three children are detained and one is under the age of three. All three have suffered serious neglect and abuse, including the lack of proper dental and health care, and all three appear to have some level of mental health issues. Both parents have a long term addiction to methamphetamine and alcohol. The mother has mental health issues, is the victim of domestic violence, and has difficulty reading. The father was arrested at the time of the children’s detention for an allegation of domestic violence.

At the time of the detention hearing, the father remains in custody and is not present, the children are not placed together in foster care and are not present, and the mother has a very hard time controlling her emotions and she is present. Separate counsel are appointed for the mother, father, and the children. Based on the mother’s testimony, the court finds the father is the “presumed father of each of the children” and that the Indian Child Welfare Act (“ICWA”) may apply. The mother has informed her court appointed attorney that “none of this is true” and “she can prove it.”

2. Competency.

What does it mean to be “competent” to handle dependency cases?

California Rule of Court 5.660(d)(1)-(6) states:

“(d) Competent counsel– Every party in a dependency proceeding who is represented by an attorney is entitled to competent counsel.

(1) Definition – "Competent counsel" means an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, and cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs.

(2) Evidence of competency – The court may require evidence of the competency of any attorney appointed to represent a party in a dependency proceeding.

(3) Experience and education – (A) Only those attorneys who have completed a minimum of eight hours of training or education in the area of juvenile dependency, or who have sufficient recent experience in dependency proceedings in which the attorney has demonstrated competency, may be appointed to represent parties. Attorney training must include:

(i) An overview of dependency law and related statutes and cases;

(ii) Information on child development, child abuse and neglect, substance abuse, domestic violence, family reunification and preservation, and reasonable efforts; and

(iii) For any attorney appointed to represent a child, instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home placement.

(B) Within every three years, attorneys must complete at least eight hours of continuing education related to dependency proceedings.

(4) Standards of representation – Attorneys or their agents are expected to meet regularly with clients, including clients who are children, regardless of the age of the child or the child's ability to communicate verbally, to contact social workers and other professionals associated with the client's case, to work with other counsel and the court to resolve disputed aspects of a case without contested hearing, and to adhere to the mandated timelines. The attorney for the child must have sufficient contact with the child to establish and maintain an adequate and professional attorney-client relationship. The attorney for the child is not required to assume the responsibilities of a social worker and is not expected to perform services for the child that are unrelated to the child's legal representation.

(5) Attorney contact information – The attorney for a child for whom a dependency petition has been filed must provide his or her contact information to the child's caregiver no later than 10 days after receipt of the name, address, and telephone number of the child's caregiver. If the child is 10 years of age or older, the attorney must also provide his or her contact information to the child for whom a dependency petition has been filed no later than 10 days after receipt of the

caregiver's contact information. The attorney may give contact information to a child for whom a dependency petition has been filed who is under 10 years of age. At least once a year, if the list of educational liaisons is available online from the California Department of Education, the child's attorney must provide, in any manner permitted by section 317(e)(4), his or her contact information to the educational liaison of each local educational agency serving the attorney's clients in foster care in the county of jurisdiction.

(6) Caseloads for children's attorneys – The attorney for a child must have a caseload that allows the attorney to perform the duties required by section 317(e) and this rule, and to otherwise adequately counsel and represent the child. To enhance the quality of representation afforded to children, attorneys appointed under this rule must not maintain a maximum full-time caseload that is greater than that which allows them to meet the requirements stated in (3), (4), and (5).”

The California Rules of Professional Conduct Rule 3-110 (Failing to Act Competently) states:

“(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service 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.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.”

While the California Rules of Court and the California Rules of Professional Conduct apply to California attorneys, the State of California has not adopted the American Bar Association Model Rules or Standards of Practice. However, it would be prudent for any California attorney who handles dependency case to review the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases and the American Bar Association Standards of for Attorneys Representing Parents in Abuse and Neglect Cases.

Rule 5.660 (d)(1)-(3) covers competency for attorneys handling dependency case – attorney's should have a basic understanding of dependency law and procedure and have a minimum of eight (8) hours of training or education in the area of juvenile dependency, or have sufficient recent experience in dependency proceedings in which the attorney has demonstrated competency. What does that mean?

Doing back the hypothetical above, in addition to an understanding of dependency law and procedure, a competent attorney should have an understanding of the role of the social worker; visitation related issues, including bonding and attachment; ICWA, and culturally

appropriate services; addiction and treatment, including drug use and abuse; drug testing types, procedures and protocol, including the interpretation of test results; mental illness, including dual diagnosis issues, diagnosis of mental illness, an understanding psychological evaluations and the tests; trauma and the effects on children, and domestic violence in the home; childhood development; schools and special education requirements; CASA; the ability to work with incarcerated clients who have pending criminal cases; the ability to work with emotionally unstable clients, who may very well be under the influence of alcohol or other drugs and suffer from mental illness; housing and homelessness; services available in the community and how to access them; use and abuse of psychotropic medication, including the side effects; interviewing victims of violence, abuse, and neglect; literacy issues; and the list can go on and on depending on the specific facts of the case.

Rule 3-110 (b)(2) and (c)(2) provide guidance for attorneys to avoid failing to act competently. An attorney can be competent by acquiring sufficient learning and skill before performance is required. See also Welfare and Institutions Code sec. 317.5(a).

Much of the learning and skill required to be “competent” to handle dependency cases is found outside of law school and the legal books and requires far more than eight (8) hours of education and training every three years.

Revisit the hypothetical with a discussion of issues raised as it relates to the education and experience needed to be “competent” to handle the case and issues that may come up.

3. Communication and Confidentiality.

Attorneys are required to communicate with their client and keep those communications confidential. This discussion can be viewed as moving from “competent” to handling a case “competently.”

California Rules of Professional Conduct Rule 3-500 states:

“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.”

Business and Professions Code sec. 6068(m) states: “It is the duty of an attorney to do all of the following:

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

While a court may explain the dependency process at the initial hearing or detention

hearing, counsel for a party has an obligation to provide an overview of the dependency process, explain the issues related to each hearing, and determine the client's goals. Counsel should be prepared to address unrealistic goals of clients. Furthermore, while it is important to know and understand the client's goals, the client should have an understanding that it is the attorney who devises the strategy to meet the client's goal. The attorney for a client must abide by the client's informed decision concerning the objectives of representation.

Handling a case competently requires diligence and time. Attorneys must read all the reports and other documents regarding the client's case. All of which must be discussed with the client in a manner and setting that is conducive to client's ability to understand what is going on and what realistic options are available to the client. Furthermore, the attorney must gain an understanding of the client's position so that the attorney can develop a strategy for any investigation, discovery, reviewing the case file, interviewing witnesses, subpoenaing witnesses and documents, hiring experts, etc. There is no excuse for a lack of preparation and a lack of communication with the client. Being fully prepared and having spent a reasonable period of time with the client, will most likely make for a solid attorney-client relationship, one built on mutual respect and trust. Of course, gaining a client's trust is key and makes the case much easier to handle and potentially a greatly likelihood of successful reunification.

The easiest way to gain the confidence and trust of a client is to spend time with the client. The exact opposite is true too – don't spend any time with the client and there will little chance the client will have any confidence or trust in their attorney.

How much time does the attorney need to spend with a client? Again this discussion is more relevant to a small county and the answer can vary depending on the unique circumstances of each case. Personally, I spend enough time at a detention (or initial) hearing to make sure the client knows what is doing on, what is doing to happen, what will happen next, what is expected of them, and when they will see their child or children. (The average detention hearing in Siskiyou County takes about one and a quarter hours.) The first meeting with the client is very important – first impression can make a difference especially in developing a level of trust from the beginning. Next I want to meet with the client in a confidential setting between the detention hearing and the next hearing. Typically, it is best that at least a few days go by so the client may calm down, sober up, see their child or children, meet with the social worker, etc. It is very important to make sure your client knows to immediately engage in appropriate services. This meeting typically takes about one and a quarter hours. Sometimes, depending a number of factors, I may need to see the client again before the next hearing, especially if there needs to be some investigation, client needs to obtain documents, attorney needs to review the social worker's file, etc. One may need to have additional meetings with clients during the review periods depending on the individual needs of the client and the nature of the case. For each review, attorneys will need to review the report and meet with their client. This repeats itself until the case is finally dismissed. Don't forget one's obligation to address the exit or custody order at the time of dismissal.

Another issue that frequently arises is what to do when the "parents" show up together for a meeting with the attorney who only represents one of them.

California Rules of Professional Conduct Rule 2-100(A) states:

“(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”

Extending the hypothetical from above, the father is now out of custody and the parents show up together. Your client is the mother. They both want to talk to you about the case. Naturally, the first words spoken are “we are in this together” and “nothing happened.”

Can you see them both together? If so, do you allow the “other parent” to say anything?

What impact can this have on the confidential information of the client?

California Rules of Professional Conduct Rule 3-100 states:

“(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.”

Business and Professions Code sec. 6068(e)(1) states: “It is the duty of an attorney to do all of the following:

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

Is it better to simply inform the parties of the above Rule and Statute and require the “other parent” to remain outside of the confidential setting? What if the attorney for the mother believes, based on experience, that the attorney appointed to represent the father will never speak to the father? And it's in the mother's best interest to hear from the father, because they are in this “together?” What if the father just starts talking about the case before you can advise him of your ethical obligations? Can you seek authorization from father's counsel to speak to the father?

Assuming that both parents showed up together at mother's attorney's office, and it's “properly authorized” for the attorney to speak with the father, how does the attorney avoid the development of any conflict of interest? Does Rule 3-310 apply to this situation?

What happens when the attorney for the County conveys an offer to parent's counsel to resolve the issues and avoid a contested hearing? The attorneys for the parents must communicate that settlement offer to the parents.

California Rules of Professional Conduct Rule 3-510 states:

“(A) A member shall promptly communicate to the member's client:

- (1) All terms and conditions of any offer made to the client in a criminal matter; and
 - (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.
- (B) As used in this rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class."

Counsel have a duty to provide zealous advocacy. However, dependency cases are required to be conducted in as informal and non-adversarial atmosphere as possible. Unless there is a contested issue, attorneys should make an effort to resolve disputes outside of court whenever this can be accomplished. (See Welfare and Institutions Code sec. 350(a) and California Rules of Court Rule 5.660(d)(4).) With dependency cases there exists a tension between zealous advocacy and the collaboration necessary for effective outcomes. Communication with your client can efficiently and effectively guide a parent through the dependency system in order to gain the best results. Effective counsel knows when to fight and what issues need to be contested; how to fight with a measured response; and when to resolve matters.

Briefly touch upon issues related to mediation and drug court as it pertains to the balance between being a zealous advocate and collaboration. Remember the client must fully understand the role of collaborative efforts so that you don't lose the trust of the client and become the enemy – just another person working against the parents.

4. Representing Children are Different.

Much of the discussion above the above applies to counsel appointed to represent children. There are a few areas worth addressing that are unique to minor's counsel. Children are considered "parties" to the action, and they are entitled to competent counsel. (See Welfare and Institutions Code sec. 317.5(a) and (b).) Additionally, an attorney may very likely be appointed to represent all the siblings in the case. This is some what unique as this would typically trigger a joint representation agreement and waivers of any conflict of interest. With that said, the current trend is to simply appoint one attorney to represent all children, unless an actual conflict arises. If an actual conflict arises, and it cannot be resolve through other measures, the court must appoint separate counsel for each child. (See Carroll v. Superior Court (2002) 101 Cal.App.4th 1423, 1425-1427.) The court in Carroll was faced with a tension between section 317 and Rule 3-310. It determined that in the dependency context a "potential conflict" means there is "a reasonable likelihood an actual conflict will arise." This approach also addressed the countervailing issues of separate counsel with many siblings in many cases so as to avoid overburdening the dependency system. The California Supreme Court approved the Carroll analysis in In re Celine R. (2003) 31 Cal.4th 45, 58. Besides the two cases cited above, counsel should be aware of the provisions of California Rule of Court Rule 5.660(c).

Counsel for the minor is typically appointed as "guardian ad litem" for the minor(s) as well. See California Welfare and Institutions Code sec. 326.5 and California Rule of Court Rule 5.662. In particular, see Rule 5.662(d) which states: "(d) General duties and responsibilities–

The general duties and responsibilities of a CAPTA guardian ad litem are:

- (1) To obtain firsthand a clear understanding of the situation and needs of the child; and
- (2) To make recommendations to the court concerning the best interest of the child as appropriate under (e) and (f)."

Clearly, when minor's counsel is also appointed GAL, this Rule applies and triggers the attorney to read the reports, meet with the child who is four (4) years of age or older, conduct an independent investigation, so as to have a "clear understanding of the situation and needs of the child." (Please note that California Rule of Court Rule 5.660(d)(4) requires meeting the child client regardless of age.) The first step is part of the attorney's ethical obligations and forms the foundation for the second step, "to make recommendations to the court concerning the best interest of the child." Counsel for the minor must investigate the interests of the child beyond the scope of the juvenile proceedings and report to the court other interests of the child that may need to be protected. The court must take whatever appropriate action is necessary to fully protect the child's interest in other proceedings, which could include appointing an additional attorney to protect the minor's interest and initiate and pursue appropriate action on behalf of the minor in areas outside of the dependency case. (See California Welfare and Institutions Code sec. 317(e) and California Rule of Court Rule 5.660(g)(3).)

Counsel for the minor is not a mandated reporter under the Child Abuse and Neglect Reporting Act (California Penal Code sec. 11164, et seq.), and the attorney for the minor is bound by Business and Professions Code sec. 6068(e)(1) cited above.

Psychotropic medication applications. See Welfare and Institutions Code sec. 369.5 and California Rule of Court Rule 5.640. "For the purposes of this rule, "psychotropic medication" means those medications prescribed to affect the central nervous system to treat psychiatric disorders or illnesses. They may include, but are not limited to, anxiolytic agents, antidepressants, mood stabilizers, antipsychotic medications, anti-Parkinson agents, hypnotics, medications for dementia, and psychostimulants." Rule 5.640 sets forth the requirements of notice and the contents of the application. Counsel for the minor must carefully read the application including the attachments. Furthermore, counsel should talk to the minor as well. Additionally, assuming the court authorizes the medication, counsel should be aware of possible side-effects of the medication and talk to the client accordingly. Remember this application process was put in place because of the abusive use of psychotropic medication with children in foster care. Moreover, these types of medications are not tested in children and are "off-label" prescription use.

Holder of the privilege – therapists, doctors, and clergy. California Welfare and Institutions Code sec. 317(f) states:

"(f) Either the child or counsel for the child, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to consent, which shall be presumed, subject to rebuttal by clear and convincing evidence, if the child is over 12 years of

age, may invoke the psychotherapist-client privilege, physician-patient privilege, and clergyman-penitent privilege. If the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. Counsel shall be the holder of these privileges if the child is found by the court not to be of sufficient age and maturity to consent. For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician and surgeon or other health practitioner, as defined in former Section 11165.8 of the Penal Code, as that section read on January 1, 2000, or a child care custodian, as defined in former Section 11165.7 of the Penal Code, as that section read on January 1, 2000. Notwithstanding any other law, counsel shall be given access to all records relevant to the case that are maintained by state or local public agencies. All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request."

Note the presumption that a child over the age of 12 can be the holder of the privilege. Note who may and may not waive the privilege. Additionally, minor's counsel is granted statutory access to privileged records so that their ethical obligations to the client and the court can be fulfilled.

The rights of children in foster care are set forth at California Welfare and Institutions Code sec. 16001.9. Minor's counsel should advise their clients of those rights, including the foster child's right to speak to the judge.

In the event of a contested hearing wherein the minor will need to testify, minor's counsel should carefully observe the provisions of California Welfare and institutions Code sec. 350(b), taking the minor's testimony outside the presence of the minor's parent(s).

5. Trauma and dependency practice.

A brief discussion of "trauma and dependency practice" is important for one's continued good health. Working with parents and children in dependency, many of whom suffer from various ranges of trauma, can be "traumatic" for the attorney as well – high stress, large case load, under paid, depression, alcohol and drug abuse, working daily with individuals who struggle to make it through the day, homelessness, mentally ill clients, loss and grief, loss of children, loss of funds, coping difficulties, termination of parental rights, etc. are just a few things that can cause an attorney to suffer trauma. The attorney must be careful to balance rigors of dependency practice with a healthy lifestyle. (See California Rules of Professional Conduct Rule 3-110(A).)

6. Reasonable Compensation.

Dependency practice is a very demanding and complex with a host of laws and statutes that govern the practice and procedure. A competent dependency attorney who performs the job competently must be highly skilled in a variety of professions well beyond that of being an

attorney. The courts must consider that depth and far reach of knowledge required for attorneys who handle dependency cases competently when the court considers reasonable compensation. The compensation must be sufficient to recruit and retain good competent attorneys with years of experience, education, and training, so that they may assist and guide new, younger attorneys seeking to develop a dependency practice. The Judicial Council knows and understands the importance of dependency – taking care and protecting children in our society. (See California Welfare and Institutions Code sec. 16000 et seq.)