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Juvenile Law Resource Center Issue Brief

Ethical Parent Representation

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Representing parents in child welfare proceedings requires special attention to ethical considerations. The stakes are high - a parent could lose custody, have parental rights terminated, or be prosecuted criminally - and the cases combine typical adversarial elements with the complex issues of service planning. Adhering to ethical rules and representation standards in this context presents a formidable challenge. This article will address one particular ethical dilemma with regard to parent representation: How to provide quality representation.

Hypothetical Case: *You represent parents in several counties and carry over 100 dependency cases, as well as a number of juvenile delinquency cases. Last week, you were appointed to represent a non-custodial father who is currently homeless and difficult to reach by phone. The petition includes allegations of physical abuse against three children. At the shelter hearing, the children were placed in substitute care. Father has a history of mental illness and shows limited interest in parenting his children. How do you ethically represent this client considering your other obligations and the difficulties inherent in working with this client?*

One of the core concepts of ethical lawyering is providing quality representation, and the contours of this obligation are created by a variety of sources. First, case law on the ineffective assistance of counsel establishes only a minimal standard for parent representation; a proceeding must be “fundamentally fair,” providing the parent with “the opportunity to be heard at a meaningful time and in a meaningful manner.” *State ex rel Juvenile Dep’t. of Multnomah Cty. v. Geist*, 310 Or 176, 197-90 (1990). Oregon courts have found certain egregious lapses in parent representation to constitute ineffective assistance under this standard. See *State ex rel SOSCF v. Rogers*, 162 Or App 437 (1999) (addressing counsel’s failure to prepare for termination trial by meeting client for the first time on the day of trial); *State ex rel SOSCF v. Thomas*, 170 Or App 383 (2000) (addressing counsel’s failure to transport father client to termination trial, accept telephonic testimony, or leave the record open); *State ex rel SOSCF v. Hammons*, 169 Or App 589 (2000) (addressing counsel’s failure to file timely notice of appeal at instruction of client).

However, parents’ attorneys are required to do more than just avoid ineffective assistance. The Oregon Rules of Professional Conduct affirmatively require competence, i.e., “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation” (see ORCP 1.1), diligence, i.e., “not neglect[ing] a legal matter” (see ORCP 1.3), and communication, i.e., “keep[ing] a client reasonably informed about the status of a matter and promptly comply[ing] with reasonable requests for information . . . , and explain[ing] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation” (see ORCP 1.4). The Oregon State Bar performance standards for juvenile dependency cases attempt to translate these general requirements

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into specific implementation steps for attorneys in the child welfare context. Standard 3.1 describes the experience and training necessary for competence; Standards 3.3 and 3.6 address communications with a client; and Standards 3.5 – 3.15 describe attorneys’ obligations at each step during representation.

With regard to the above example, quality representation should include the following: interviewing father extensively about his short- and long-term goals; explaining the child welfare system and the available options for proceeding; exploring whether the agency made reasonable efforts to prevent the children’s removal or to reunify children with father; investigating the events giving rise to the allegations; having a mental health expert evaluate father and his interactions with the children; obtaining information from social service agencies and other individuals who have worked with father in the past; determining whether paternal relatives can take physical or legal custody; exploring rehabilitative and social services to assist father in reunification; creating visitation plans; responding to father’s phone calls and requests for information; and tracking a potential criminal case associated with the abuse allegation. See *Addressing Ethical Issues*, Jennifer L. Renne at 152-153 in *Advocating for Nonresident Fathers in Child Welfare Court Cases*, ABA Center on Children and the Law (2009); *Specific Standards for Representation in Juvenile Dependency Cases*, Standards 3.5- 3.7, Oregon State Bar (2005). Even if the father is initially ambivalent or uninterested in gaining custody of his children, it is important for the attorney to be involved early, since case planning can begin immediately. Renne, *supra*, at 153. With early participation, the father can become a key player in the case and has a better chance later to gain custody of or have regular contact with a child. *Id.*

Attorneys with large caseloads may struggle with the difficulty of providing ethical representation to each client. The Oregon State Bar has analyzed the ethical implications of this conundrum. See OSB Formal Ethics Op. No. 2007-178 (discussing the requirement of lawyers and supervisors to control workloads to ensure that each client is represented competently and diligently). If a caseload “prevents [attorneys] from fulfilling their ethical obligations to each client,” it is excessive and “must be controlled so that each matter may be handled competently.” *Id.* at 511 (*quoting* ABA Model Rule of Professional Conduct 1.3, Comment [2]). For example, attorneys at an indigent defense organization could take “a variety of remedial measures, which might include transfer of nonrepresentational duties to others within the office, declining appointment on new cases, transferring current cases, and filing motions with the court to withdraw from enough cases to achieve a manageable workload.” *Id.* at 511-12. Attorneys working within a consortium should take similar steps, including “requesting . . . the administrator of the consortium [to] withhold the assignment of new cases, and/or approve the transfer of cases to another lawyer within the consortium, as long as another lawyer will be able to provide ethical representation.” *Id.* at 512. Sole practitioners, meanwhile, should decline new appointments to reduce caseloads to a level that permits accepting new cases. *Id.*

More information about legal ethics in dependency representation can be obtained by contacting the JLRC.