

Ethical Responsibilities In Dependency Cases



Source Material

- Renne, [Legal Ethics in Child Welfare Cases](#) (available on amazon.com)
- Rules of Professional Responsibility
- State Law
- ABA Standards
- NACC Standards
- AG Opinions
- Case Law



Here's something new

In re FELICITY S.
221 Cal.App.4th 27



What we'll cover today

- Client Communication
- Client Confidences v. Candor to the Tribunal
- Conflicts
- Collateral Consequences



Dara Drugs is the mother of a 3 year old girl and a 16 year old boy. She came to the attention of CPS after a report came in that she was dropping off her 3-year-old child at daycare under the influence and not returning to pick her up. Mother's new boyfriend just got out of jail for a sex crime and the 16-year-old reports the boyfriend has moved into the family home, but the social worker wrote in her jurisdictional report that she has no other evidence that the boyfriend is in the home.

The Agency removes the children and recommends to bypass mom (361.5(b)(13) on the 3-year-old and refer the child for adoptive placement. The maternal grandmother is willing to enter into a PPLA with the 16-year-old boy.

Mother contests the Agency's recommendations. At the jurisdictional hearing, the social worker does not attend. Mother's counsel approaches you with language to amend the petition and settle jurisdiction. The lawyer also wants a court order for overnight visits to occur and the judge wants to know the Agency's position.

What should the Agency lawyer do?

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 3-510 Communication of Settlement

A lawyer shall promptly communicate to the client all terms and conditions of any written offer of settlement made to the client. Discussion: Any oral offers of settlement should also be communicated if they are "significant."

BPC 6068(m): An attorney must "respond promptly to reasonable status inquiries of clients" and "keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

ABA Standards of Practice for Lawyers Representing Child Welfare Agencies (Aug. 2004)

#4. Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client/Agency. "The agency attorney should have regularly scheduled opportunities to meet with caseworkers and other agency staff."

Cal. Rules of Court, rule 5.660(d)(4):

Attorneys in dependency proceedings are expected to "meet regularly with clients."

In re O.S. (2002) 102 Cal.App.4th 1402, 1411: "Adequate communication with clients is an integral part of competent professional performance as an attorney." (Court reversed TPR where counsel for father did not respond to father's phone calls for 3 months and asked for a paternity test. Counsel admitted father called 3 times and left fax no. Counsel did not seek to elevate father or object to notice. Court found this lack of communication to constitute IAC.

ABA Model Rules of Prof. Conduct, rule 1.2: "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."

Possible Solutions:

1. Attempt to contact the worker/supervisor and convey settlement offer/position on request for overnight visits.
2. Ask to continue or set the matter for trial so that the social worker can be present.
3. Ask court to give the social worker discretion to allow the visit, if the social worker believes it is safe to do so.

Counsel cannot settle the case without input or consent from the client.

COMMUNICATING WITH CLIENTS

Representing Parents:

- ABA Standards of Practice (2004)
- Cal. Rules of Court, rule 5.660

Representing Children:

- ABA Standards of Practice (1996)
- NACC Recommendations (2001)
- Welf. & Inst. Code sects. 317, 349, 353.1
- Cal. Rules of Court, rules 5.534, 5.660

Duty to Communicate with Client

- Meet and communicate *regularly* with the client well *before* court proceedings. Counsel the client about all legal matters related to the case, including ...the potential consequences of failing to obey court orders or cooperate with service plans.
- *Commentary: The parent's attorney's job extends beyond the courtroom. The attorney should be a counselor as well as litigator. They should be available to talk with the client to prepare for hearings, and to provide advice and information about ongoing concerns. Open lines of communication between attorneys and clients help ensure clients get answers to questions and attorneys get the information and documents they need.* (A.B.A. Std. of Prac. for Attys Rep. Parents, #11)



• The attorney should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options. At the same time, the attorney should be careful not to usurp the client's authority to decide the case goals. (A.B.A. Std. of Prac. for Attys Rep. Parents, #7)

• The dispositional recommendation for Dara Drugs is to bypass mother under 361.5(b)(13) as to the 3 year old, and set a .26 for TPR with adoption to foster home. Counsel for the mother obtains a secret psychological evaluation in an effort to establish that it is in the best interests of child to provide services. The Dr. opines based on mothers sobriety since detention, services should be provided. Mother's counsel gives report to other attorneys and obtains a stipulation that it be entered into evidence. The report of the Dr. is filed with the court

• On the eve of trial, mother contacts Dr. seeking help and reports that since they met 3 weeks ago she has been using drugs daily. Dr. informs you that based on this new information, if called to testify she would no longer recommend services. What do you do?

Some Quick Answers:

• "Tell the truth. Have the expert do an addendum considering the new information. If time is too short, call her as a witness at the trial and let her explain her position. Give all parties the heads up about what his testimony is going to be".

The Flip Side

- “The report was accurate at the time you submitted it to the court....so use it in your argument. It’s up the County Counsel and minor’s counsel to call and cross examine the witness”.

Confidentiality:



Rule 3-100 Confidential Information of a Client

(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.

BPC §6068 . 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.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

**Is Doctor's Change Of
Opinion Information
Protected By
Confidentiality Rules?**

"Secrets" Defined:

- "information gained in the professional relationships...the disclosure which would be embarrassing and would likely be detrimental to the client"

---ABA Code of Prof. Resp., DR 4-101(a)

- Rule 3-100 notes:[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].)

A.B.A. Std. of Prac. for Attys Rep. Parents, #9

Adhere to all laws and ethical obligations concerning confidentiality.

- Action: Attorneys representing parents must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client. The attorney must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. Consistent with the client's interests and goals, the attorney must seek to protect from disclosure confidential information concerning the client.

Why Not Just Use Report?

- Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

- MR 4.1. Truthfulness in Statements to Others

... a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a C, unless disclosure is prohibited by MR 1.6.

• Comment [1]: L required to be truthful, but generally has no duty to inform opposing party of relevant facts.

• Comment [2]: Whether a particular statement should be regarded as one of fact can depend on the circumstances.

• Comment [3]: Substantive law may require a L to disclose certain info to avoid [assisting] a C's crime or fraud. [unless prohibited by MR 1.6]

- BPC §6128. Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

Ethics Opinion No. 1986-87

During representation of a criminal client at a sentencing hearing, client reveals a prior conviction privately to his attorney. The court is not aware of the prior conviction and attorney does not have permission to disclose.

- 1) Should attorney volunteer this information to the court?
- 2) What if Court asks attorney if client has a prior record?

Opinion: Info is public record therefore not atty-client privilege. However, it is confidential info pursuant to B&P Code 6068. Therefore, disclosure is forbidden voluntarily or in response to inquiry.

However, Duty of Candor to court!

- "Neither the duty of attorney confidence nor the duty of candor can be subordinated one to the other. Both duties must be upheld".
- The attorney should remain silent. If the attorney's silence appears to be relied upon by the court as an affirmation that there is no prior record, the attorney is obligated to inform the court that his silence is not intended as an affirmation, and no further comment is appropriate.
- If the attorney is expressly asked the attorney should suggest other sources would be more appropriate.

Ethics Opinion No. 1983-74

- Client surprises attorney by giving perjurious testimony.
- An attorney in a civil, non-jury trial does not have a duty to advise the court that his/her client has committed perjury; the attorney is precluded from divulging the perjury absent client's consent. However, that attorney is required promptly to pursue remedial action. If the remedial action fails, the attorney is required to move to withdraw—but without disclosing and confidence. If the attorney is unable to withdraw, they may not use the perjured testimony in support of the client's claim.

• Rule 3-700 Termination of Employment

(A) In General

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

• (B) Mandatory Withdrawal.

• A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

- (2) The member knows or should know that continued employment **will** result in violation of these rules or of the State Bar Act; or

- (C) Permissive Withdrawal.
- If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
 - (1) The client
 - (b) seeks to pursue an illegal course of conduct, or
 - (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
 - (2) The continued employment is **likely** to result in a violation of these rules or of the State Bar Act; or



Conflicts

Conflicts in our Hypo

- Siblings with adverse interests
- What if the conflict related to parental visitation not placement/plan?
- What if the parent was the one who wanted disparate visits?

CA Rule 3-310. Avoiding the Representation of Adverse Interests

- (C) A member shall not, without the informed written consent of each client:
- (1) **Accept representation** of more than one client in a matter in which the interests of the clients **potentially conflict**; or
 - (2) **Accept or continue representation** of more than one client in a matter in which the interests of the clients **actually conflict**; or
 - (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is **adverse** to the client in the first matter.
- (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

CONFLICT GUIDELINES AND PROCEDURES

Prior to Appointment: Attorneys shouldn't accept representation of any siblings where an actual or a potential conflict exists as to those children

Actual conflicts arise when the lawyer would be forced into **directly adverse positions as to material issues** in the case.

CONFLICT GUIDELINES AND PROCEDURES

A potential conflict is **more than a possible or a theoretical conflict** and does not arise simply by virtue of representing multiple siblings with differing interests.

- In the *Carroll* case, the court defined a potential conflict as a "reasonable likelihood that an actual conflict will arise."
- The following facts alone do not constitute a basis for finding a potential conflict:
 - Children in different placements;
 - Children of different ages;
 - Children with different parents.

Note, also, that the recommendations of DCFS or any other party to the case does not create an actual or potential conflict; conflict analysis turns on the position the attorney will advocate for each client.

CONFLICT GUIDELINES AND PROCEDURES

Certain situations, however, will almost always require the finding of a conflict:

- Prior representation of a parent;
- Allegations of serious or extreme abuse between siblings;
- One child indicating another is lying, or children taking factually inconsistent positions on material aspects of a case;
- Potential criminal liability of one child relating to the facts of the dependency case or some other criminal case where the children are likely to have adverse interests or need to testify against each other.

- No withdrawal is required until an actual conflict occurs. (See *In re Candida S.* (1992) 7 Cal.App.4th 1240.)
- If withdrawal is required due to a conflict, appellate cases support the notion that the attorney may continue to represent siblings when the attorney conflicts off of a child from whom no confidential information was received. (See *In re Jessica B.* (1989) 207 Cal.App.3d 504 *In re Katrina W.* (1994) 31 Cal.App.4th 441 **If a child is able to effectively communicate, the sharing of confidential information is presumed.** (See *Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 79-80.)
- Once an actual conflict does develop between clients, and an attorney cannot argue that no confidential information was received, the attorney must be relieved from further representation of any client in the case. (See *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423.)
- While an attorney may be able to conflict off of a client where no effective communication could take place, in continuing to represent a sibling, counsel will still need to consider that an attorney may do nothing in the case that injuriously affects the former client nor may that attorney use against the former client information received by virtue of the attorney-client relationship. (*Wutchurna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574.)

Rule 5.660. Attorneys for parties (§§ 317, 317.6)

(c) [Conflict of interest guidelines for attorneys representing siblings]

- (1) (A) The court **may appoint a single attorney** to represent a group of siblings involved in the same dependency proceeding.
- (B) An attorney **must decline** to represent one or more siblings in a dependency proceeding, and the court must appoint a separate attorney to represent the sibling or siblings, if, at the outset of the proceedings: (if)
- (i) An **actual conflict of interest exists** among those siblings; or
- (ii) Circumstances specific to the case present a **reasonable likelihood** that an actual conflict of interest will arise among those siblings.

Rule 5.660. Attorneys for parties

- (C) The following circumstances, **standing alone, do not necessarily demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise:**
 - (i) The siblings are of **different ages**;
 - (ii) The siblings have **different parents**;
 - (iii) There is a purely **theoretical or abstract conflict** of interest among the siblings;
 - (iv) Some of the siblings appear **more likely than others to be adoptable**; or
 - (v) The siblings may have **different permanent plans**.

Rule 5.660. Attorneys for parties

- (2) [Withdrawal from appointment or continued representation]
- (A) An attorney representing a group of siblings has an ongoing duty to evaluate the interests of each sibling and assess whether there is an actual conflict of interest.
- (B) The following circumstances, standing alone, do not necessarily demonstrate an actual conflict of interest:
(5 circumstances from (1)(C)), plus ...
 - (vi) The siblings **express conflicting desires or objectives**, but the issues **involved are not material to the case**; or
 - (vii) The siblings give **different or contradictory accounts of the events**, but the issues involved are not material to the case.

Rule 5.660. Attorneys for parties

- (2) [Withdrawal from appointment or continued representation]
- (C) It is **not necessary** for an attorney **to withdraw** from representing some or all of the siblings if there is **merely a reasonable likelihood that an actual conflict of interest will develop**.
- *Standard for withdrawal different from standard for appointment*

Rule 5.660. Attorneys for parties

- (D) If an attorney believes that an actual conflict of interest existed at appointment or developed during representation, the attorney must take any action necessary to ensure that the siblings' interests are not prejudiced, including:
 - (i) Notifying the juvenile court of the existence of an actual conflict of interest among some or all of the siblings; and
 - (ii) Requesting to withdraw from representation of some or all of the siblings.
- (E) If the court determines that an actual conflict of interest exists, the court must relieve an attorney from representation of some or all of the siblings.

Rule 5.660. Attorneys for parties

- (F) After an actual conflict of interest arises, the attorney may continue to represent one or more siblings whose interests do not conflict only if:
 - (i) The attorney has successfully withdrawn from the representation of all siblings whose interests conflict with those of the sibling or siblings the attorney continues to represent;
 - (ii) The attorney has exchanged no confidential information with any sibling whose interests conflict with those of the sibling or siblings the attorney continues to represent; and
 - (iii) Continued representation of one or more siblings would not otherwise prejudice the other sibling or siblings.

Rule 5.660. Attorneys for parties-

Advisory Committee Comment

- Court should initially appoint a single attorney to represent all siblings in a dependency matter unless there is an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise. (*In re Celine R.* (2003) 31 Cal.4th 45, 58.)
- After the initial appointment, the court should relieve an attorney from representation of multiple siblings only if an actual conflict of interest arises. (*Ibid.*)
- Attorneys have a duty to use their best judgment in analyzing whether, under the particular facts of the case, it is necessary to decline appointment or request withdrawal from appointment due to a purported conflict of interest.

Rule 5.660. Attorneys for parties-

Advisory Committee Comment

Nothing in this rule is intended to expand the **permissible scope of any judicial inquiry into an attorney's reasons** for declining to represent one or more siblings or requesting to withdraw from representation of one or more siblings, due to an actual or reasonably likely conflict of interest. (See Cal. Bar Rules, Prof. Conduct R 3-310, subd. (C).)

- While the court has the duty and authority to inquire as to the general nature of an asserted conflict of interest, it **cannot require an attorney to disclose any privileged communication**, even if such information forms the basis of the alleged conflict. (*In re James S.* (1991) 227 Cal.App.3d 930, 934; *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592-593.)

Conflict of Interest Analysis

Does representation of one client foreclose alternatives for the other?

Duty of Loyalty

- Adverse or antagonistic positions?
- Damage to atty/client relationship

Duty of Confidentiality

- Presumption that confidential info was disclosed

Considerations:

- Consent issue
- Duration of representation
- Stage of litigation – testimony?



Competence and Collateral Consequences



A Note about Competence

Rule 3-110. Failing to Act Competently.

- (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.

Collateral Consequences

- Navigating other systems of care
 - Mental Health
 - Housing
- Collateral Legal Matters
 - Immigration
 - Child Support
 - Landlord/tenant
 - Criminal



"Poor quality legal representation results from a variety of factors ranging from the pressure of high caseloads to poor customs and low expectations of representation in the jurisdiction. The old reputation of juvenile and family courts as a lesser "kiddie court" persists in some places, despite the increased sophistication and complexity of both the law and the underlying interdisciplinary perspective required to handle these cases effectively. Child welfare is a unique and highly specialized area of practice, yet many advocates have not received training in handling such cases. In many States, neither ethical requirements nor practice standards for attorneys in child abuse and neglect cases have been developed."

Department for Health and Human Services, Administration for Children and Families, Fact Sheet on the ABA Standards for the Legal Representation of Children, Parents and the Child Welfare DCFS.



CONTACT US:

John Passalacqua:
300law@att.net

Jennifer Williams:
bassjenn@aol.com

David Meyers:
dmeyerslaw@gmail.com
