

The Children's Advocacy Institute Presents  
*Sponsored by the California Judicial Council*

The Pursuit of Permanency:  
The First 90 Days  
*Ethical Issues Affecting  
Permanency and Outcomes*

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**Competent Representation  
Improves Outcomes**

- Social science research shows that competent legal representation shortens the time to permanency and improves outcomes
- Studies have identified various attorney tasks that were shown to have a positive effect on the time to reunification or time to adoption or guardianship

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**Competent Representation:  
Studies**

- Parents' attorneys' tasks that are shown to improve outcomes:
  - Client contact and communication
  - Court preparation
  - Motions practice to require agency to do what the law requires it to do
  - Avoid continuances/observe timelines
  - Make sure services are appropriate
  - Pay attention to client's well-being
    - Address implicit bias, cultural competency, and trauma

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### Competent Representation: Studies

- Children’s attorneys tasks that improve outcomes:
  - Client contact/communication/guidance
    - Client-directed representation
  - Facilitate appropriate assessments of needs of child and family and child safety
  - Effective advocacy
    - Motions practice
    - Develop a forward-looking theory of the case
    - Problem-solving and non-adversarial approaches when appropriate
    - Avoid continuances
  - Facilitate development of an effective case plan

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### QUIZ!

- Q. The term “permanency” does *not* include:
  - TPR and adoption
  - Return to parental custody
  - Review hearing finding that child is not likely to be adopted and that there is no one willing to become the child’s guardian
  - Guardianship ordered at disposition
- A. Review hearing finding that child is not likely to be adopted and that there is no one willing to become the child’s guardian

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### Duties of Counsel-- Representation

- § 317(d): Counsel shall represent client at the detention hearing and and all subsequent proceedings before the juvenile court, unless relieved by court upon substitution of other counsel or for cause.
  - (*Marsden/IAC*)
- Appointed counsel must be competent as defined by statutes and rules of court
  - W&I Code § 317.5(a)
  - Rule 5.660

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### Competency Defined— All Attorneys

- Rules of Professional Conduct (RPC) Rule 1.1:
  - (a) A lawyer shall not intentionally, recklessly, with gross negligence, *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
    - (i) *learning and skill*, and
    - (ii) mental, emotional, and *physical ability* reasonably necessary for the performance of such service

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### Rule 5.660(d): Competency Defined

- Attorney in good standing with State Bar
- Training in juvenile dependency law
- Demonstrated adequate forensic skills
- Knowledge and comprehension of:
  - Statutory scheme
  - Purposes and goals of dependency proceedings
  - Specific statutes, rules, and cases
  - Procedures for filing writ petitions

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### Duties of Competent Counsel Rule 5.660(d)(4)

- Meet regularly with clients
- Contact social workers and other professionals associated with child’s case
  - *i.e.*, investigate
- Work with other counsel and the court to resolve disputed aspects of case without contested hearing (if possible)
- Adhere to mandated timelines

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### Duties--Client Contact

- RPC, rule 1.4: A lawyer shall:
  - (a)(3) keep the client reasonably\* informed about significant developments relating to the representation, including promptly complying with reasonable requests for information
  - (a)(2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;
- rule 1.4(b):
  - explain a matter to the extent reasonably\* necessary to permit the client to make informed decisions regarding the representation.
- rule 1.0.1:
  - "Reasonable" means the conduct of a reasonably prudent and competent lawyer.

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### Duties--Client Contact Child's Counsel

- § 317(e)(3): If child is four or older, counsel shall interview the child to determine the child's wishes and assess the child's well-being, and shall advise the court of the child's wishes.
- Rule 5.660(d)(4):
  - Attorneys or their agents are expected to meet regularly with child client, regardless of age or child's ability to communicate verbally
  - Attorney for the child must have sufficient contact with the child to establish and maintain an adequate and professional attorney-client relationship
    - Some local rules require attorney to visit child in placement

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### Duties--Client Contact Child's Counsel

- Attorney for child must provide contact information to caregiver no later than 10 days after receipt of caregiver's name, address, and telephone number § 16010.6(d), rule 5.660(d)(5)
  - Attorney must also provide contact info to child if child is 10 or older
- Agency required to provide attorney with new placement info within 1 business day of placement decision; 10 days in advance if placement change will separate siblings. 16010.6(a), (b)

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### Client-Directed Representation vs. Best Interests

- *RPC, Rule 1.2, effective 11/1/18*
  - A lawyer shall *abide by a client's decisions concerning the objectives of representation* and, as required by rule 1.4, shall reasonably\*consult with the client as to the means by which they are to be pursued.
  - New rule—no counterpart in old rules
    - *No exception if client is a child*

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### Duties--Investigation

- All Counsel : *Contact social workers and other professionals* associated with client's case. Rule 5.660(d)(4)
- Child's counsel *shall* make or cause to be made any further investigation deemed reasonably necessary in good faith to ascertain the facts, *including interviewing witnesses, and shall examine and cross-examine witnesses.* § 317(e)(2)
  - Exceptions authorizing contact with social worker and other county employees/agents when county counsel forbids it?
    - Formal discovery motion?

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### Duties--Investigation

- State regulations require social workers to contact other professionals working with the child, parents/guardians, and out-of-home care providers including, but not limited to, public health nurse, group home staff, physician/pediatrician, therapists, infant specialists, and workers from other counties who are providing services. MPP § 31-355.1
  - Purpose: to require social workers to confer and collaborate with the professionals for the most effective, efficient identification of, and plan for meeting, the child's or the parent's needs; to monitor the safety of the child and obtain the professionals' perception of the child's well-being; to determine whether parent is following through with commitments; and document reasonable efforts. MPP § 31-355.2

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### Duties--Investigation

- Contacting caregivers, service providers, physician/pediatrician, therapists, visitation monitors/supervisors, etc. can often provide information that social worker does not have and/or did not include in reports or alert you to problems that should be addressed before the next hearing
- Request professional assessments when necessary for complete picture of clients' needs or circumstances
- Request discovery early and often

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### Duties--Collaboration

- Rule 5.660(d)(4) All Counsel :
  - Work with other counsel and the court to resolve disputed aspects of case without a contested hearing (if possible)
    - Crowded court calendars often require contested hearings to be set out for months
      - Delays permanency
      - Disadvantages parents and children
      - Timelines
  - Share important info re: services problems, child's needs, etc., with SW and all other counsel between hearings for more timely adjustment to services and increased likelihood of reunification

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### Duties--Collaboration

- The parties do not have to have court approval to hold a settlement conference
  - *Tip:* Set an informal settlement conference with other counsel a couple of weeks before date of contest (via Zoom or other virtual meeting options if necessary)
    - But . . . client has right to put agency to its burden of proof
  - *Caveat:* Any settlement agreement reached must be approved by the court before it is binding
    - Court may reject if not in best interests of child

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### Duties--Timelines

- Rule 5.660(d)(4) Adhere to mandated timelines
- Ignoring timelines major cause of delayed permanency
  - Unless the court has sufficient evidence to support § 366.21(g) or 366.22(b) findings or makes a no reasonable services finding, the law does not permit continuing services beyond 12/18 months.
- § 352: No continuance if contrary to interests of child. Court must consider:
  - Child's need for prompt resolution of custody status
  - Need to provide children with stable environments
  - Damage to children of prolonged temporary placements

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### Duties--Timelines

- Continuances disfavored § 352
  - Dispo in 60 days from detention unless court finds exceptional circumstances
    - 30 days for an Indian child
    - Parents' time to reunify begins running on the 60<sup>th</sup> day at the latest. § 361.49
  - Court may not grant a continuance if would cause disposition hearing to be completed more than six months from detention
- § 361.5(a)(1) Timelines for provision of reunification services—statutory requirements must be met to continue services to next review hearing

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### Duties--Timelines

- § 352: Good cause showing required for a continuance
  - Must file *written motion* two days *in advance* of hearing, absent showing of good cause for not filing the motion
    - Separate good cause finding required
    - Motion must be supported by declarations or affidavits detailing specific facts showing that a continuance is necessary
- Things that are *not* good cause:
  - Stipulations of counsel
  - Convenience of the parties
  - Pending criminal or family law proceedings

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### All Counsel— Conflicts of Interest

- > RPC, Rule 1.7: (a) A lawyer shall not . . . represent a client if the representation is directly adverse to another client in the same or a separate matter.
- > (b) A lawyer shall not . . . represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.
- > Rule 5.660(c)(1)(B) Attorney may not represent multiple siblings if actual conflict of interest or reasonably probable that conflict will arise

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### Potential Conflicts of Interest

- > Assess as soon as you are appointed
  - > Need to appoint new counsel because of late discovery of conflict delays permanency
- > Possible sources of conflict:
  - > Prior representation of other parent or child (e.g., family law, guardianship, DV, prior dependency case)
  - > Contract office representing more than one party to the case, including multiple siblings
    - > Public law office exception: OK if sufficient separation from attorney who represented parent in prior proceeding to protect client confidences. Burden on law office to show.
    - > *In re Charlissee C.* (2008) 45 Cal.4th 145

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### First 90 Days--Things That Impact Permanency/Outcomes

- > Paternity determination
- > ICWA inquiry and notice
- > Relative search, notice, assessments of interested relatives
  - > ICPC process initiated for out-of-state relatives
- > Sibling placement/contact
- > Concurrent plan
- > Appropriate services, including visitation, before and after dispo
  - > Bypass and other immediate permanency options considered
- > Placement problems; multiple placements

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**First 90 Days**

**Parentage Determination**

- Early determination prevents delays later when ignored fathers appear
- § 316.2. Paternity inquiry required at detention; must continue until determination is made
- Due diligence, Rule 5.635
  - Attempt to serve alleged father(s)?
    - Served with JV-505?
  - JV-500 sent to child support services?
- Public policy favors at least two parents for each child

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**First 90 Days**

**ICWA Inquiries and Notice**

- Make sure ICWA inquiry is made at detention hearing
- Make sure parent completes and submits ICWA-020 at detention/first appearance
- Raise the issue at every hearing and ask for evidence of agency's inquiry efforts until court makes a definitive finding
  - No more 60-day limit
  - Agency is obliged to show due diligence in inquiries before court may make finding

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**First 90 Days**

**ICWA Inquiries and Notice**

- Insist that copies of notices, all documents showing proof of mailing, and tribe's responses be filed with the court and served on all counsel
  - Required by § 224.3(a)
- Object early and often if notice is not being done correctly
- Court must proceed as if child is Indian child until ICWA determination is made

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### ICWA--Parents' Counsel

- *In re S.B.* (2009) 174 Cal.App.4th 808:  
"An attorney practicing dependency law in the juvenile court should be sufficiently familiar with ICWA notice requirements to point out a flaw in notice if the record shows that there is one."
- ICWA advantages for parents:
  - Agency has higher burdens of proof/active efforts required
  - No bypass because active efforts finding required at .26 hearing
  - Tribal customary adoption does not require TPR

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### Quiz!

- Q. Which of the following tasks is *not* a legally imposed duty of court-appointed counsel?
  - Investigate the facts
  - Check for conflicts
  - Make sure proper ICWA Notice has been given
  - File continuance motions two days before hearing
- A. Make sure proper ICWA Notice is given
  - It is agency's statutory duty to give proper ICWA notice
    - But as a competent lawyer you will review notices for adequacy and object to improper notice and failures to make adequate inquiries regarding a child's status

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**First 90 Days**

**Relative Placement**

- Relative placement efforts must start at detention § 309(e)(1)
- Require agency to complete relative searches/vetting by disposition. § 309(e)
  - Late arriving relatives (post-dispo) cause delays in permanency § 361.3(d)
  - County not limited to only assessing one relative at a time—must assess all interested relatives who come forward.
- If disposition is delayed, request a due diligence hearing § 358(b)(2), rule 5.695(e) and (f)

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**First 90 Days**

**Relative Placement**

- Make sure disposition report covers relative search and a preliminary assessment under § 361.3 of any relative(s) considered for placement. § 358.1; rule 5.690(a)(1)(C)
- Ask agency to make emergency placement with suitable relative pending RFA approval of relative’s home § 309 (d)(1)

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**First 90 Days**

**Relative Placement**

- Where more than one relative is seeking placement before disposition, ask court to decide where child should be placed. § 361.3(a)
- Relative placement is advantageous to both parents and children
  - Child: placement with someone child knows instead of in stranger foster care
  - Parent: placement with relatives in the beginning can prevent TPR later in the case

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### First 90 Days Relative Placement

- Parent's Attorney: Ask client for names of suitable relatives and state their names on the record at detention or first pre-dispo opportunity to document that information was provided to agency
- Tell relatives to file JV-285 form stating interest in being considered for placement
- Child's attorney: Ask the child
- Where more than one possible relative placement, ask court to make decision
- § 361.3(a)

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### First 90 Days--ICPC

- Regular process is too slow
- Rule 5.616(h). Ask court to expedite placement process at disposition, or later, if:
  - Proposed placement is stepparent, relative, or guardian and
    - Dependency due to unexpected incarceration, incapacitation, or death of parent or guardian;
    - Child is 4 or younger or part of sibling group including a child who is 4 or younger
    - Child or sibling has substantial relationship with proposed placement; or
    - Child is in an emergency placement

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### First 90 Days--Sibling Contact

- Late attempts to place siblings together can delay permanency, especially if there was no previous sibling relationship
- Should siblings be together? § 16002
- What efforts are being made to place them together?
- If not placed together, what kind of contact and how much contact does each child need?
- Is contact appropriate?
- Is contact happening?

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### First 90 Days Concurrent Planning

- Is there a specific concurrent plan?
- Is placement one that can and is willing to provide permanency and meet child's needs on a long-term basis if parents are not able to reunify?
  - Required to be in dispo report x 3
    - § 358.1(b), (f) and (i)
- Is placement one that you would approve of as a permanent placement?
  - PAP after six months, § 366.26(n)

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### QUIZ!

- *True or false:* Delaying disposition as long as possible is helpful to your parent client
  - *False:* Parent's time to reunify starts running on the 60<sup>th</sup> date after detention at the latest
- *True or false:* An early relative placement may prevent the termination of parental rights later in the case.
  - *True:* The first adoption exception will often apply when the child is already placed with a relative who is willing to provide a permanent home. § 366.26(c)(1)(A)

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### First 90 Days--Services

- The agency is required to offer services between detention and disposition. § 319(e), § 361(d)
- It is to the parent's advantage to engage in services from day one
  - Development/continuity of relationships is crucial for infants and toddlers
  - Time is of the essence
    - Parents' time to reunify starts running on 60<sup>th</sup> day whether or not jurisdiction or disposition hearings have been held

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### First 90 Days--Services

- Object to generic reunification plans
  - If requirement does not address a problem that was a reason for the dependency, it should not be in there:
    - Drug testing
    - Parenting classes
- Specific and measurable
  - Vague plans give too much weight to social worker's opinions about extent of compliance and progress
  - Specific plans prevent unwarranted extensions of services or termination of services because of insufficient evidence of progress or lack thereof
- A good plan allows for an assessment of parents' understanding of the child's needs and parents' ability to meet those needs

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### First 90 Days--Services

- Adequately address problems that brought child into system?
- Appropriate services for child in timely manner?
  - Therapy
  - Assessments and treatment of other physical and/or emotional issues
- Monitor for compliance
  - Delays in getting child into therapy
  - Visitation problems

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### First 90 Days--Visitation

- Visitation must be ordered starting at detention.
- Court may not delegate to agency whether there will be visits
  - Court must specify minimum number of visits per week/month.
    - "As frequently as possible consistent with the well-being of the child"
- Ask court to order a "step-up" visitation schedule
  - A parent who never progresses beyond supervised visits is unlikely to be able to reunify

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### First 90 Days--Visitation

- As frequent as possible with progressive increases in time and responsibilities based on parental progress
  - Helps create and maintain a relationship with the child
    - Enhances engagement/attunement
    - Improves chances of successful reunification
      - Tenuous relationship with child sets up parents to fail
  - Demonstrates ability to care for child
    - Increase parental responsibilities over time
      - Dr.'s visits, playgroup/school functions, etc.

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### First 90 Days--Visitation

- Does visitation schedule/order meet needs of parent and child?
  - Younger children need more frequent visits to develop or maintain emotional connection with parent
    - Shorter frequent visits where parent can play with baby, feed baby, change diapers, and put down for a nap are preferable to visits once a week for one hour
    - Video visits for very young children are inadequate to develop emotional connection

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### First 90 Days—Parent's Failure to Engage in Services

- Waiting until six month review when parent is not engaged in services delays permanency
- § 388(c)(1): Any party may file a § 388 petition to terminate services early.
  - Children's Attorneys: You won't know whether petition needs to be filed unless you are monitoring parents' engagement in services and/or you are in communication with your client

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### First 90 Days--Placement

- Is placement appropriate and able to meet child's needs?
- Is placement close enough to facilitate frequent visitation?
- Is placement one that you would approve of as a permanent placement?
  - PAP after six months, § 366.26(n)
- Placement considerations require counsel to have personal knowledge
  - Visit child in placement at least once
    - Regularly is better.
    - Some local rules *require* child's counsel (not counsel's agent) to visit child in caregiver's home
  - Visit child whenever placement changes

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### First 90 Days--Placement

- Out-of-county placements. § 361.2(h); rule 5.614
  - SW required to give 14 days advance written notice to parent(s), caregiver, child's attorney, child 10 or older, CASA, tribe, and Indian custodian?
    - Notice not required if CFT determined placement change is in child's best interests, and no one entitled to notice objects
  - File objection w/i 7 days (JV-556) to prevent move until court can decide the issue
  - If no notice and/or move is prejudicial to your client, take it to the court

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### Post-Dispo—Agency Initiated Placement Changes

- Multiple placement changes are bad for children § 16010.7
  - SW must develop and attempt to implement a placement preservation plan
    - Assumes no court order or imminent risk
    - Must include caregiver in development of plan and consultation with CFT
    - Must give 14-days advance written notice of move to parent(s), caregiver, child's attorney, and child 10 or older—*use time to take to court if disagreement*
    - Child's attorney is child's representative for purposes of agreement to move between hours of 9 pm and 7 am

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**Questions? Email to:**

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