

The Children's Advocacy Institute Presents
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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 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

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): Competence 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

- 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 option 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 a major cause of delayed permanency
- § 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 60th 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
 - Absent no-reasonable-services findings, 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 when there is a 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--Issues 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 *first* appearance
- Raise issue at every hearing until court can make a definitive finding as to whether ICWA applies
 - No more 60-day limit
 - Agency is obliged to show due diligence in its inquiries and in giving notice before court can find that ICWA does not apply

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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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ICWA--Children's Counsel

- ICWA notice failure is one of the biggest impediments to timely resolution of custody status for dependent children
- If child is eligible for membership, explore whether child can or should be enrolled in the tribe
 - Connection to culture and customs
 - Gaming \$\$\$
 - College scholarships
 - Oil Money (Alaskan Natives)

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First 90 Days: Relative Placement

- Relative placement efforts must start at detention § 309(e)(1)
- Agency required 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 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

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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 out-of-state 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
 - Not all sibling relationships are healthy relationships
 - 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 believe would be an appropriate permanent placement?
 - PAP after six months, § 366.26(n)

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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 60th 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 (not a service)
 - 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, therapist, or child 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" §361.2
- 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 to file 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 consult 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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