

LOS ANGELES COUNTY BAR ASSOCIATION
ETHICS COMMITTEE
FORMAL OPINION NO. 459

(May 25, 1990)

ADVERSE AND CONFLICTING INTERESTS -- When County Counsel has a conflict of interest in a juvenile dependency proceeding, County Counsel should be relieved of its representation of both the child and the Department of Children's Services, and the court should appoint separate counsel for both the child and the Department.

AUTHORITIES CITED:

Welfare & Institutions Code
§ 300
§ 317(a)
In re Patricia E., 174 Cal.App 3d 1, 219
Cal.Rptr. 783 (1985)
Rule 3-310
Rule 3-700(B)
Opinion No. 395
California Formal Opinion No. 1988-96

INTRODUCTION

The Juvenile Department of the Los Angeles County Superior Court has requested an opinion of the Committee on the propriety of the representational role of the Los Angeles County Counsel's office and certain auxiliary legal units in Juvenile Court dependency proceedings.

A dependency proceeding is a legal action brought in the Juvenile Court on behalf of an allegedly abused, neglected and abandoned child pursuant to Welfare and Institutions Code §§ 300 et seq. The action is designed to protect children, preserve and reunify families, and provide permanent homes for children who cannot be returned to their parents. Dependency

proceedings include actions to appoint a legal guardian, terminate parental rights, and grant adoptions for dependent children of the Juvenile Court.

In Los Angeles County a dependency proceeding is initiated by the Department of Children's Services by filing a petition which seeks to have a child declared a dependent of the Juvenile Court. Approximately 50,000 children currently are dependents of the Juvenile Court, and nearly 20,000 additional petitions will be filed this year by the Department of Children's Services.

The Los Angeles County Counsel's office, through its Juvenile Division, represents the Department of Children's Services in Juvenile Court dependency proceedings. Except where a conflict is declared between the Department of Children's Services and the child, the County Counsel's Office represents both the agency and the child.

Although lawyers for petitioning child protective services agencies do not represent the children in some California counties, Welfare & Institutions Code § 317(c) provides:

In any case where it appears to the court that the minor would benefit from the appointment of counsel the court shall appoint counsel for the minor. Counsel for the minor may be a county counsel, district attorney, public defender, or other member of the bar provided that the counsel does not represent another party or county agency whose interests conflict with the minor's. The fact that the district attorney represents the minor in a criminal proceeding pursuant to Section 300 as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to Section 300 is not in and of itself a conflict of interest. The

court shall determine if representation of both the petitioning agency and the minor constitutes a conflict of interest. If the court finds there is a conflict of interest, separate counsel shall be appointed for the minor.

In In re Patricia E., 174 Cal.App.3d 1, 219 Cal.Rptr. 783 (1985), the Court of Appeal addressed the issue of County Counsel's dual representation of both the petitioning agency and the child in the same action, and ruled that the failure of the trial court to consider the need of the child for independent counsel was prejudicial error.

Under statutory and appellate court guidelines, the Juvenile Court must determine whether County Counsel's dual representation of the Department of Children's Services and the child creates a conflict of interest. If a finding is made that no actual conflict exists, County Counsel can be appointed to represent both the Department and the child. If a conflict is declared, independent counsel must be appointed to represent the child.

The initial hearing in dependency proceedings occurs within 72 hours after a child is placed in protective custody and within 48 hours after a petition is filed. That hearing is designated an "arraignment and detention" hearing. At the hearing the court determines whether a conflict exists between the Department of Children's Services and the child. If not, a Deputy County Counsel represents both the Department and the child.

At the arraignment/detention stage of the proceeding, a conflict is declared in only 15% of the cases. The small

percentage may be attributable to several factors. In most situations, a Deputy County Counsel meets the child for the first time on the day of the arraignment/detention hearing and has an opportunity to conduct only a brief interview with the child. Moreover, at that stage of the proceeding the case investigation conducted by the Department of Children's Services is quite limited. Only after the arraignment/detention hearing is a case investigator assigned to the case and a thorough investigation conducted.

The conflict of interest issue usually arises after the Department of Children's Services completes a full case investigation and the Deputy Counsel conducts an extensive interview with the child. Frequently the issue is presented to the court immediately prior to the adjudication hearing, which determines the truth of facts alleged in the petition, or alternatively just before the disposition hearing, which determines the child's placement.

INQUIRY

When a conflict is declared after the arraignment/detention hearing, should County Counsel be relieved of its representation of the child and be permitted to remain counsel for the Department of Children's Services; or should County Counsel be relieved of its representation of both the child and the Department of Children's Services, thereby requiring the court to appoint separate counsel for both the child and the Department?

ANALYSIS

It is elementary that an attorney is not permitted to represent clients whose interests conflict. Rule 3-310(B) provides: "A member shall not concurrently represent clients whose interests conflict, except with their informed written consent."

The traditional rule is that counsel is required to withdraw from all representation in a case where a conflict develops between counsel's clients in a particular matter. Opinion No. 396; California Formal Opinion No. 1988-96. The withdrawal requirement results from Rule 3-700(B), which provides:

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 . . . if:

(2) The member knows or should know that continued employment will result in violation of these rules . . .

This rule would require that County Counsel be relieved of its representation of both the child and the Department of Children's Services when a conflict is declared after the arraignment/detention hearing.

It is not uncommon for an attorney who represents two or more clients in a matter to agree with the clients that the attorney may continue to represent one if a conflict of interest arises in the matter. Such an agreement is authorized by Rule 3-310(B), supra. Such a waiver is normally requested at the outset of the case. However, it would be effective even if granted only after an actual conflict has arisen.

The solicitation of a child's waiver of a conflict of interest is apparently not part of the Juvenile Court's current practice. Furthermore, a minor may not have the legal capacity to give such a waiver in these circumstances. Many minors do not have sufficient knowledge and understanding to comprehend the full disclosure required before such a waiver may be given. Where the minor lacks the legal capacity to consent, County Counsel must withdraw from representation of both the child and the Department of Children's Services when a conflict arises.^{1/}

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinions are based only on such facts as are set forth in the question submitted.

1. This opinion does not address whether a waiver could properly be given by a guardian ad litem of the child if one were to be appointed.