

**Parent and Child Performance Standards Work Group
Oregon State Bar
Monday October 3, 2016 (10:00AM-12:00AM)
Meeting Notes**

Attendees: Megan Jacquot, Amy Miller, Inge Wells, Liz Wakefield, Joe Hagedorn, Leslie Harris, Lea Ann Easton (*Chair*), Linn Davis, Amy Zubko, Angela Sherbo, and Shannon Storey

Did not attend: Amy Benedum

Minutes: There were no changes to the meeting notes from the September 12, 2016 meeting.

Review draft of Standard 9 – Modifying or setting aside an order or judgement (Child Representation Standards)

After reviewing the draft of Standard 9 for the Child Representation Standards, Angela Sherbo proposed combining Standards 8-10 for both the Parent and the Child Standards. A subcommittee of the work group (Angela, Megan, Inge, and Shannon) will combine these three sections based on the outline they shared with the larger work group during the meeting.

There was extensive discussion regarding the inadequate assistance of counsel issue. The concern is that it would fall under both Standards 8-10 and Standard 11 and might need a separate standard. Further, the group did not decide at this point whether it should be included in an “Action” or in the “Commentary.”

In addition to questions on where inadequate assistance of counsel should be addressed in the Standards, there were questions regarding whether *In re TL* created a duty to raise the issue and whether there should be a laundry list of other claims/issues to raise. Finally, if inadequate assistance of counsel is going to be called out independently, then the conflict of interest between the trial lawyer and the appellate lawyer should also be addressed.

Next Steps: After discussion, the group decided to consider the language currently addressing inadequate assistance of counsel as a placeholder, and return to the issue after discussing the *In re TL* case which will be discussed during the December meeting.

Review draft of social media/communications guidance for attorneys, children, and parents

Amy Miller presented a draft of the social media/communications language to be incorporated into Standard 2B (Communication) for both parent and child and Standard 5 (Investigation) for both parent and child. In her research, she did not find models from other states to reference.

The group discussed whether there was a generally accepted definition of social media. Specifically, whether there was an appropriate term that would be broad enough to encompass not only what is currently technologically available but would also encompass future types of communication. Lea Ann Easton suggested the term “electronic communications” which is used in Human Resources. The suggestion was made to also look to criminal law and see what is used in that area.

In addition to adding in new language, the group discussed expanding the reference to “email” in Standard 2B. Further, the suggestion was made that the Standards may want to either identify the most secure form of communication or tell practitioners to use the most secure form of communication.

For Standard 5, the suggestion was made to add a sentence that states, if a parent or child to decline provide access to social media, request a subpoena.

Next Steps: Lea Ann Easton offered to forward an eDiscovery article.

Amy Miller will edit the draft and there will be additional conversation on the issue at the November meeting.

Review draft of special immigrant juvenile cases/immigrant family cases

Megan Jacquot presented a draft Standard dealing with special immigrant juvenile cases/immigrant family cases. In addition, she suggested that there were a number of places throughout the Standards where immigration issues could be addressed. Similar to Amy Miller's research, there did not appear to be examples from other states to reference.

One concern was how to loop in immigration attorneys. Issues raised included the complex and specialized nature of immigration law, the cost of referring a case to an immigration lawyer and whether OPDS was able to provide funding.

Next Steps: Angela will send proposed language to Jordan Bates, Christa Obold Eshleman, and Jennifer Stoller for feedback.

Amy Miller will clarify what OPDS pays for in terms of immigration law consultation.

Megan Jaquot will send background information. (Note, the information has already been posted on the webpage).

Pre-Petition

Professor Harris requested input on the pre-petition Standards she will be drafting for the December meeting. The group agreed that the Standards should be written for both parents and children. The second question was how to get a lawyer involved if there is not a formal court case. This second question brought about a larger discussion regarding the purpose of the Performance Standards and whether they should address the system as it currently works or identify practice goals. Further, it's unclear how pre-petition representation would be funded.

Next Steps: A subcommittee was formed including: Lea Ann Easton, Amy Miller, Professor Harris, and Joe Hagedorn. Amy Miller will provide background information including information on programs in New York and Michigan. The November agenda will include additional time to discuss this issue.

Additional Issues

Oregon Rules of Professional Conduct

Linn Davis identified questions to be discussed in an email prior to the October 3rd meeting. His e-mail is below.

- 1) *The commentary to Standard 2 B second paragraph seems a bit odd to me in two respects 1) it might be better to refer to electronic communications to capture texts and other forms of instant messaging and 2) "The lawyer should treat this form of communication as not confidential and advise the client accordingly." I think what this is saying needs to be spelled out. I would (and*

should) treat a client's texts to me as confidential. I would be aware that anything I send the client, whether paper or electronically, might be shown to others. I might want to advise a client to avoid using these forms of communication. Should there be a cross reference to the social media item?

- 2) *Standard 2 F the Action paragraph refers to ORPC 1.8-1.13 relating to conflicts of interests and duties to former clients. Conflicts start at RPC 1.7, Current client conflicts.*

My suggestion is the Action item should read: "A lawyer or a lawyer associated in a practice, should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases or matters that are substantially related unless it is clear there is no conflict of interest between parties as defined by Oregon Rules of Professional Conduct Rules 1.7-1.13. Lawyers should be aware of the rules relating to conflicts of interests including duties of loyalty to former clients."

In the commentary for that item it states, "Conflicts of interest among siblings are likely if one child is allegedly a victim and the others are not" Victim of what or whom?

The commentary warns lawyers of considering whether representation of one client will "prevent" the lawyer from pursuing the objectives of another. This is too narrow. A current client conflict of interests exists any time there is a "significant risk" that the representation of a client will be "materially limited" by the lawyer's responsibilities to another client or a former client (or a third person or the lawyer's own interests). ORPC 1.7(a)(2).

Next Steps: These issues will be discussed during the November meeting.

Other issues to consider:

- 1) Advocating for last clearly advocated position.
- 2) Add "often" to commentary for Standard 4(e).
- 3) The removal of "solely" from Standard 5 Commentary.