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February 28, 2008

VIA E-MAIL

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Ingrid Swenson
Office of Public Defense Svs.
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Dear Colleagues:

I am writing this as a follow up to the presentation at the most recent juvenile law continuing legal education program on February 8, 2008. As you no doubt perceived, there was a strong reaction to the presentation concerning attorney responsibilities for claims against public bodies.

I am appointed to represent clients in juvenile dependency proceedings (and delinquency proceedings too) and of course a significant portion of those clients are children. In addition to being abused in some fashion by a parent or other person while in the parent's care, a number of these children experience injury while in substitute care, be that a DHS foster placement, guardianship, residential care, or the other varieties of care.

In dependency cases, my appointment is pursuant to ORS 419B.195. That statute gives the court authority to appoint counsel with "skills and experience commensurate with the nature of the petition and the complexity of the case". I am part of an indigent defense consortium contracted to provide services, but those contract services are not all encompassing. I am not a torts attorney and do not feel qualified to evaluate or otherwise present tort claims. I am not a guardian, an educational surrogate, a court appointed special advocate, conservator, or custodian of the client. I have the following inquiries and request your thoughts.

1. Since the statute refers to counsel with skills commensurate with the nature of the petition and complexity of the case, is the "case" limited in some fashion?

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2. Since I am not a personal injury lawyer, civil rights lawyer or similar practitioner, when such an issue arises, should the court appoint a qualified attorney for that purpose? If so, will the PDSC be contracting with qualified attorneys for that purpose? Can I hire such an attorney for purposes of giving notice, investigating, and pursuing such claims? From which fund will this come?
3. Where does the obligation end? Does the "duty" end at giving the torts claim notice or is there a duty to investigate, preserve claims and see that they are brought at the most expeditious time for the client? That is, if there is a duty to give the notice, why is there not a duty to pursue the claim?
4. Is the duty different for other claims or benefits such as Medicaid or disability benefits?
5. Does this need to provide Torts Claim notice arise whenever the Department of Human Services has provided substandard care in any fashion resulting in potential injury to the client?
6. Since attorneys are generally required to follow the dictates of the client, if the client is capable of reasoned judgment (and this generally will have occurred by the time the child is school age), what if the child says he or she does not want the claim pursued?
7. Is there a duty to pursue claims against nongovernmental entities who have injured the child causing him or her to come into care (for example, medical malpractice)?
8. Why can't the attorney limit the terms of representation so long as the limits are approved by the court as being within the terms of the appointment? This is routinely done with adult clients for whom appointment is made by informing them of limits of the representation including pursuit of tort claims; I didn't really receive an explanation that I could fully understand.
9. What if the attorney is arguably negligent in not overseeing terms of the placement such as assuring that no dangerous children are in the home? Is there a conflict at that point?

Any help you can give me is appreciated because I do not think that these are the sorts of questions which can just remain open.

Thank you.

Sincerely,

MARK A. TALEFF

MAT:rr

Cc: Jody Meeker



Oregon

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February 29, 2008

Mark A. Taleff
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Via Email

Dear Mark:

While the planning committee had hoped that the "Preserving and Pursuing Tort Claims for Children" segment of the February 8 CLE would clear up some issues which have arisen for lawyers in dependency cases, I am afraid most people went away more confused than ever.

I think a number of issues need to be discussed and clarified, and then some kind of joint statement should be issued as a follow-up to the presentation.

I have asked Paul Levy, our General Counsel, to assist me with a reply from OPDS. I have also asked Paul, who is a past chair of the bar's Legal Ethics Committee to help clarify the bar's position on some of these issues.

The Executive Committee of the Juvenile Law Section, which sponsored the CLE, is also considering possible responses. One such response may involve proposed legislation. Some of the assistant AGs who were present expressed concern about whether DHS or its counsel may have a duty to disclose to a child's attorney, or parent or the court a potential claim against DHS or its agents for torts committed against a child in the agency's care. Whether or not such a duty exists, the group will consider whether one should be created by statute.

While these wider discussions need to occur and are being planned, I wanted to respond immediately to at least some of your questions.

Question 2: Since I am not a personal injury lawyer, civil rights lawyer or similar practitioner, when such an issue arises, should the court appoint a qualified attorney for that purpose? If so, will the PDSC be contracting with qualified attorneys for that purpose? Can I hire such an attorney for purposes of giving notice, investigating, and pursuing such claims? From which fund will this come?

The scope of representation to be provided by attorneys under contract with PDSC is expressed in the text of the contract. Paragraphs 7.1.1 and 7.1.2 of the model contract provide that:

7.1.1 Contractor shall provide representation at all stages of a case assigned under this contract as limited by this contract. Representation means the provision of competent legal advice and assistance by appointed counsel to a person that a state court has determined to be financially eligible and entitled to appointed counsel at state expense on all matters related to the appointment, except DMV license suspension hearings, civil forfeiture proceedings, domestic relations proceedings and other civil proceedings.

7.1.2 Representation further means providing a level of service that does not fall below the minimum professional standards and canons of ethics of the Supreme Court of Oregon, the Oregon State Bar, the American Bar Association, and any applicable case law and court rules that define the duties of counsel to their clients.

[Emphasis added.]

There is no right under Oregon constitutional or statutory law to appointed counsel in personal injury matters. Even if the court has the inherent authority to appoint counsel for a child in such an action, PDSC is not authorized to pay for it.

Question 3. Where does the obligation end? Does the "duty" end at giving the tort claim notice or is there a duty to investigate, preserve claims and see that they are brought at the most expeditious time for the client? That is, if there is a duty to give the notice, why is there not a duty to pursue the claim?

I will not attempt to respond to this question and will ask Paul to work with the ethics and liability experts to prepare a response. However, having practiced juvenile law for many years I want to acknowledge that when an attorney became aware of a potential claim on behalf of a child who was not capable of considered judgment most of the attorneys with whom I practiced generally made the effort to contact at least one plaintiff's attorney for the purpose of exploring the merits of the possible claim. In some cases that attorney agreed to review the case and consider filing a claim. This common practice is what led to the question that the panel was asked to address because in at least one instance, the attorney to whom the matter was referred failed to follow through and the juvenile attorney was held liable. In Multnomah County, at the request of the juvenile court bench, the Oregon Trial Lawyers created a project that accepts referrals from juvenile attorneys under these circumstances and assigns them to participating attorneys, relieving the juvenile attorney of the need to personally select a particular lawyer. This project is

unfortunately available only in Multnomah County. The question we posed to our panel was: If the juvenile attorney practices in some county other than Multnomah what, if anything, should the attorney do to explore the potential claim or find qualified counsel who might be willing to do so. This question was not really answered for you and we will be working on getting an answer.

Question 4. *Is the duty different for other claims or benefits such as Medicaid or disability benefits?*

This question relates to potential benefits that juvenile dependency attorneys should be aware of and may be obligated to help their clients pursue. For example, if a child is being denied appropriate benefits or services under one of these provisions, DHS as the guardian of the child should pursue them on the child's behalf. If the agency fails to do so without reasonable cause, it might well be the attorney's obligation to persuade the agency, or ask the court to order the agency, to seek such benefits. The same answer probably applies to Question 7 as well, about whether there is a duty to pursue claims against nongovernmental entities who have injured the child. DHS as the guardian of the child may again be obligated to pursue these claims. In my experience the agency has generally done so.

Question 8. *Why can't the attorney limit the terms of representation so long as the limits are approved by the court as being within the terms of the appointment?*

I think we have to look to the ethics attorneys on this question but PDSC would certainly question whether attorneys are ethically obligated to provide representation in any matter other than the case in which the attorney is appointed and believes that the order of appointment does limit the scope of representation. There is certainly express authority for this position in the official commentary to the American Bar Association's Model Rule of Professional Conduct 1.2, which concerns the issue of scope of representation. Addressing Model Rule 1.2(c), which is identical to Oregon Rule of Professional Conduct 1.2(b), the commentary states that "[t]he scope of services to be provided by a lawyer may be limited by agreement with the client *or by the terms under which the lawyer's services are made available to the client*" [emphasis added]. While Oregon has not officially adopted the ABA commentary, it is often cited in OSB Formal Ethics Opinions as persuasive authority.

Question 9. *What if the attorney is arguably negligent in not overseeing terms of the placement such as assuring that no dangerous children are in the home? Is there a conflict at that point?*

I think this is a very good question. A related question might be, if an attorney advocates for a return of the child who is not capable of considered judgment to the parent and the parent then injures the child, is the attorney liable for the injury. We'll want to get the

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input of others on this question but I have always assumed the answer comes down to what the attorney knew or reasonably should have known about the circumstances of the placement.

Thanks for moving this discussion along, Mark. Any further thoughts you have on any of these issues would be most welcome.

Sincerely,

/IS/

Ingrid Swenson

cc: William Kwitman
Stacy Hankin (email)
Jody Meeker (email)

March 13, 2008

Mark A. Taleff
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Re: Informal Written Advisory Ethics Opinion/Scope of Appointed Representation

Dear Mr. Taleff:

This letter constitutes an informal written advisory ethics opinion of OSB General Counsel's Office in response to your February 28, 2008 request. In addition to reviewing your letter and the response from the Office of Public Defense Services, I also met briefly with Ingrid Swenson and Paul Levy of that office.

Your questions involve the scope of obligations when a lawyer is appointed to represent a child client in juvenile dependency proceedings.¹ In the course of the representation it is apparently not uncommon for the appointed lawyer to learn that, in addition to the circumstances that bring the children before the court, the children may also have experienced abuse or other injury while in temporary foster or similar care under the auspices of DHS. You raise several concerns about what, if any, obligation the appointed counsel has when learning that the child client has potential injury claims against DHS and others. You also mention claims for benefits that might not have been pursued by the agency.

Your letter includes nine specific questions, but I believe that questions 1-8 really turn on the same issue: what is the scope of your representation when you appointed to a dependency case?

Oregon RPC 1.2 (b) recognizes the right of a lawyer to limit the scope of the representation of a client, provided the limitation is reasonable under the circumstances and the client gives informed consent.² Comment [6] to ABA Model Rule 1.2, on which the

¹ Your letter also mentions juvenile delinquency appointments, but the concerns you raise appear to arise in dependency matters. While similar questions might be asked about representing youth in delinquency cases, the issues are sufficiently different that they should be dealt with separately. For example, most youth, even those placed outside their homes, have parents who could be involved in making decisions about tort claims.

² "Informed consent" in this context denotes "agreement by the client to [the limited representation] after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the [limited representation]."

Oregon rule is based, indicates that the scope of services to be provided by a lawyer may be limited by agreement with the client "or by the terms under which the lawyer's services are made available to the client." The precise scope of a representation, then, will depend upon the facts and circumstances of each case.

Your services are made available to clients under statute and, if you are under contract to PDSC, pursuant to the terms of its contract with you or the contracting group of which you are a part. ORS 419B.195 refers to "the case," which suggests that your representation is limited to the specific dependency proceeding. The PDSC contract refers to "a case assigned under this contract" and "all matters related to the appointment," but specifically excludes "other civil proceedings." While I am not in a position to determine the precise scope of your representation under the appointment, the foregoing language suggests that your responsibilities are limited to the issues related to the dependency matter to which you are appointed. That may include advocating for the child's best interests with regard to safety and other issues affecting temporary and permanent placement decisions. Expressing concern or disagreement about a placement that may be unsafe for the child is quite a different thing, however, than initiating a tort claim on behalf of the child for injuries resulting from the placement.

If the lawyer is not under contract to PDSC, nothing in RPC 1.2 would prevent the lawyer from attempting to expressly limit the scope of the representation to the "case" arising under ORS Chapter 419B in the appointing order.

Assuming, then, that the scope of representation is limited by statute and contract (or perhaps by order) when a lawyer is appointed to represent a child in a juvenile dependency matter, it follows that the lawyer has no "duty" to address unrelated civil claims of which the lawyer might learn or become aware. The absence of a duty, however, does not preclude the lawyer from bringing information about the claims to the attention of someone who might be in a position to act, such as DHS or the court. Ms. Swenson indicates that PDSC is not authorized to and does not pay for representation on civil claims. Even if the court were to appoint a qualified lawyer for the purpose of evaluating and, perhaps, pursuing a civil claim for a child, how such appointments would be funded is clearly not within the bar's jurisdiction.

It should also be noted that, although statute and contract circumscribe the scope of the representation, a lawyer appointed in a dependency case may enlarge the scope of the representation if his words or conduct lead the client to reasonable belief that the lawyer is undertaking other duties to the client. For instance, in raising concerns about a teenager's placement, a lawyer may suggest to DHS that the agency could have civil liability for not making the requested change. Depending on how that letter is phrased, the client who receives a copy of it may reasonably conclude that the lawyer has assumed responsibilities in addition to those provided under the appointment.

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Because the lawyer has no duty by virtue of a dependency appointment alone, the wishes of the child in regard to civil claims are not relevant. If the lawyer were to suggest to the client that a personal injury or other claim is available, and the child indicated a desire not to pursue the claim, that decision may not necessarily rest with the child as a matter of law. In order to avoid acting outside the established scope of the representation, better course for the lawyer who believes the child may have a tort or other claim is to give the information to the child's legal custodian or the court.

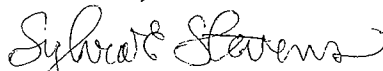
Your question #9 raises an entirely different issue: Is there a conflict of interest when an attorney is negligent in overseeing the child's placement?

If overseeing the child's placement into foster or other care is within the scope of the lawyer's representation, the lawyer could well be civilly liable to the child for failing to meet the standard of care with regard to that aspect of the representation. In that situation, if there is a significant risk that the lawyer's continued representation of the client will be materially limited by the lawyer's interest in avoiding civil liability, the lawyer may continue the representation only with the client's informed consent, confirmed in writing. RPC 1.7(a)(2) and (b). See also *In re Obert*, 336 Or 640 (2004). Because the client here is a child, the consent will presumably have to come from another source including, possibly, the court.

I hope this discussion is helpful to you. Remember that bar members are responsible for their own conduct; reliance on an advisory opinion is not a defense to a complaint of misconduct. However, the Disciplinary Board and Supreme Court may consider a lawyer's good faith effort to comply with a written advisory ethics opinion of the bar as (1) evidence of the lawyer's good faith effort to comply with the Oregon Rules of Professional Conduct and (2) a basis for mitigation of any sanction that may be imposed if the lawyer is found to be in violation of the Rules. See Oregon RPC 8.6.

Feel free to contact me if you have additional questions or if I have misunderstood any of the facts.

Sincerely,



Sylvia E. Stevens
General Counsel

cc: Stacy J. Hankin
Ingrid Swenson
Jody Meeker
William Kwitman