Juvenile Law Resource Center
Fact Sheet

How do I prevent DHS from obtaining releases of information from my clients and what can I do once the releases are signed?

Answer: DHS intake workers routinely ask for and obtain written releases of information from parent clients for all types of records, including psychiatric records. Attorneys rarely find out about these releases until records are produced in discovery a few days before an important hearing. Although there is no statutory prohibition on DHS caseworkers asking parents to sign releases of information, there are legal arguments against this practice. Also, attorneys can take several precautions to prevent DHS from obtaining releases and using the records produced under those releases. Finally, attorneys should use arguments concerning privileges and the requirements of confidentiality and non-disclosure to protect various types of parent records.

Parents' statutory right to counsel and Oregon State Bar Attorney Performance Standards for Juvenile Dependency Cases suggest that attorneys should be informed before DHS asks parents to sign releases.

ORS 419B.875(2)(b) provides parents in dependency proceedings with the right to appointed counsel. This right has been interpreted to require effective assistance of counsel; otherwise, the statutory right would "prove illusory." *State ex rel Juvenile Dep't of Multnomah Cty. v. Geist*, 310 Or 176 (1990).

Although the Oregon State Bar "Specific Standards for Representation in *Juvenile Dependency* Cases" are not requirements of practice and do not attempt to define the contours of effective assistance of counsel, they do provide insight about the proper role for Oregon attorneys representing parents in dependency cases. (See, e.g., Forward to 2005 revision of the Principles and Standards for Counsel in Criminal,

Delinquency, and Dependency Cases.) Several standards indicate that attorneys are required to consult with their clients before signing releases of information, especially for sensitive medical or mental health records.

Standard 3.3, Implementation 2 requires a lawyer to guard a client's privacy: "A lawyer should protect the client's privacy interest . . . ." Within 72 hours of being appointed, an attorney also has the responsibility to explain to the client his or her rights and to review DHS procedures. Standard 3.4, Implementation 1. Moreover, the standards advise that in the initial interview, attorneys should elicit information from the client, including information about the client's prior contacts with DHS. Standard 3.4, Implementation 2. These standards suggests that the appropriate role of parents' attorneys in dependency cases includes protecting their client's privacy by informing their client of their right not to sign a release of information requested by DHS. The DHS practice of persuading parents to sign such releases without the knowledge of the parent's attorney undercuts the principles outlined in the standards.

Parents' attorneys should take precautions to prevent DHS from obtaining a release of information and from using the records produced under that release.

As a general practice, as soon as possible after appointment to represent a parent client, attorneys should notify in writing the DHS caseworker and the Attorney General representing DHS that DHS must obtain permission from the parent's attorney before asking the parent to sign releases of information. Thereafter, an attempt by DHS to acquire a release of information will likely violate ORPC Rule 4.2, which provides:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
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> (a) the lawyer has the prior consent of a lawyer representing such other person;
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> (b) the lawyer is authorized by law or by court order to do so; or
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> (c) a written agreement requires a written notice or demand to be sent to such

> other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

This rule explicitly prohibits an attorney from causing an agent to communicate with a represented party without the consent of the represented party's attorney. By permitting a DHS caseworker to seek releases from the represented parent despite knowing that the parent's attorney has denied consent for those releases, the Attorney General likely violates ORCP Rule 4.2.

Once a release has been signed by a client, either before or after an attorney has been appointed, the attorney should take several steps to limit unfavorable information about the client from being used in later dependency proceedings.

First, on behalf of the client, the attorney should revoke the releases signed previously by the client. Concerning releases for medical records, Oregon law requires that releases be revocable. ORS 179.505(3) provides:

> "If the individual or a personal representative of the individual provides an authorization, the content of any written account [by health care service provider] must be disclosed accordingly, if the authorization is in writing and is signed and dated by the individual or the personal representative of the individual and sets forth with specificity the following: . . . (e)the authorization is *subject to revocation at any time except to the extent that action has been taken in reliance thereon*, and a specification of the date, event or condition upon which it expires without express revocation. However, a revocation of an authorization is not valid with respect to inspection or records necessary to validate expenditures by or on behalf of governmental entities." (emphasis added).

Unfortunately, as the statute indicates, revocation of a release does not function retroactively.

Second, after revoking the parent's releases, a parent's attorney should move for a protective order to prevent the records already obtained by DHS from being used in future dependency proceedings. The Oregon Rules of Civil Procedure[1] permit a party from whom discovery is sought to move for any order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." ORCP 36C. Protective orders may require a number of limitations on

[1] Although the ORCP is not applicable in juvenile dependency and termination of parental rights cases, it can be argued that since there is no analogous procedure for a protective order specified in the juvenile code, the juvenile may use its equitable powers to devise a procedure to protect the parent's confidential information, and can look to the ORCP for guidance when doing so.

discovery, including: "(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . . ." ORCP 36C. Attorneys should argue that parent's medical, psychological, substance abuse or DHS records obtained by release without the consulation of the parent's attorney (and perhaps in defiance of the attorney's request that no release be signed without their consultation) should be excluded from future proceedings. If an attorney does not seek a protective order, other parties may use the discovered documents without restriction. ORCP 36 C. *Wilson v. Piper Aircraft Corp.*, 46 Or App 795, 613 P.2d 104 (1980) (Under former ORS 41.618 (replaced by ORCP 36C), the failure to seek a protective order at any time after discovery was made allows parties in litigation to use discovered documents without restriction).

Third, an attorney should request that the records previously released to DHS be sealed.

Fourth, the attorney can urge the the juvenile court to exercise its equitable powers[2] to prevent disclosure of records produced under a release signed without consultation with counsel.

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[2] Oregon courts presiding over dependency proceedings have a long history of possessing equitable powers. At the time of the adoption of the Oregon Constitution, guardianship and wardship proceedings involving minors were tried in equity, without juries. Juvenile Law (Oregon CLE 2007), Sec.17.17 (citing 1853 Statutes of Oregon, Chapter II, at 361–366). Moreover, when the Juvenile code was reorganized in 1959, architects of the legislation emphasized that the juvenile court was a court of equity. *See* Ralph M. Holman, Oregon's New Juvenile Code, 39 Or. L. Rev. 305, 307 ("The juvenile court was previously a court of limited and inferior jurisdiction and had no powers other than those conferred by statute. It is now a court of record and one of general and *equitable* jurisdiction.") This status allows increased flexibility in juvenile court remedies and procedure. *Id.* at 305 ("The underlying premise of the [pre-1960] juvenile code was that juveniles who offended against the law or who found themselves in need of protection should be dealt with through a specialized procedure in a court which, when possible, had a judge specialized in dealing with children. The procedure was civil, not criminal, and *equitable* in that the remedies might be *flexible* and based upon 'conscience' and judgment, *rather than upon more or less rigid rules of law*.") (emphasis added). The current juvenile code also reinforces the equitable nature of the juvenile court. ORS 419B.090(1) ("The juvenile court is a court of record and exercises jurisdiction as a court of general and equitable jurisdiction and not as a court of limited or inferior jurisdiction."). Moreover, the juvenile code specifically permits the juvenile court to allow pleadings or procedures other than those explicitly described. *See* ORS419B.800(3) ("ORS 419B.800 to 419B.929 [Juvenile Court Dependency Procedures] do not preclude a court in which they apply from regulating pleading, practice

Attorneys should also make arguments concerning privileges and the requirements of confidentiality and non-disclosure for various parent records.

Although not explored exhaustively here, several types of parent records are protected by various state and federal statutes. First, federal law provides for the confidentiality and non-disclosure of patient records relating to substance abuse. 42 U.S.C. § 290dd-2(a). Absent patient consent, these confidential communications may be disclosed only if the "good cause" test (established in 42 U.S.C. § 290dd-2(b)(2)(C)) is met and one of the three express circumstances of disclosure outlined in 42 C.F.R. § 2.63(a) is also established. Second, records of a parent's communications with a psychotherapist, physician, social worker, school employee, or counselor are generally privileged under the Oregon Evidence Code. *See* ORS 40.230 (Rule 504, Psychotherapist-patient privilege); ORS 40.235 (Rule 504-1, (Physician- patient privilege), ORS 40.240 (Rule 504-2, Nurse-patient privilege); ORS 40.245 (Rule 504-3, School employee-student privilege), ORS 40.250 (Rule 504-4, Clinical social worker-client privilege). Moreover, ORS 419B.040(1) does not necessarily abrogate these privileges in all dependency cases. In particular, the privileges are not abrogated for records which contain no reference to child abuse. *See State v. Reed*, 173 Or App 185 (2001); *State v. Hansen*, 304 Or 169 (1987).Third, if the parent client was previously a ward of the court, ORS 419A.255(2) creates a privilege for juvenile dependency records relating to the parent's history and prognosis. Although the contours of this privilege remain uncertain, case law indicates that the privilege is applied broadly. *See Kahn v. Pony Express Courier Corp.*, 173 Or App 127 (2001).

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and procedure in any manner not inconsistent with ORS 419B.800 to 419B.929." Consequently, juvenile courts have been entrusted with a range of equitable powers. *See State ex rel. Juvenile Dept. of Multnomah County v. Johnson*, 168 Or App 81, 89 (2000) ("the juvenile court was entrusted with a wide array of powers to effectuate the best interests of a child . . . Juvenile courts, necessarily, had to have been bestowed with discretionary power to implement the proper tools to achieve this end.") (citations omitted).