Juvenile Rights Project

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JUVENILE DEFENSE CASELOADS VS. ETHICAL STANDARDS: NO WINNERS HERE

by Mark McKechnie, MSW, Executive Director, JRP

A number of caseload standards have been developed by state and national organizations to determine the maximum number of public defense cases an attorney can handle competently and ethically. Standards have used a variety of measures to determine ideal or maximum caseload sizes. Some look at the number of cases at a point in time, while others consider the number of cases handled by an attorney in a year. Other standards have looked at the number of individual clients an attorney may represent competently and ethically at any one time, which is the crux of the issue.

Caseload sizes and numbers of clients are difficult to calculate in Oregon because defense contractors report case credits to OPDS, and those credits may represent new appointments or review hearings. Using data on juvenile cases and hearings in which public defense attorneys provided representation in 2009 and adjusting to reconcile case and hearing numbers, it appears that the number of cases handled by juvenile providers around the state varied from 136 to 353 cases per full-time attorney during the year.[i] In child dependency cases, attorneys frequently represent multiple siblings in one case. In order to arrive at an estimated number of clients for all dependency case types, the number of cases was multiplied by 1.2, to adjust for the representation of multiple clients in child dependency cases. The number of clients per full-time attorney, then, ranged from 163 to 424 in one year.

It is worth noting that these numbers are at or above the maximum caseload standards set by many state and national organizations. They are far above many of these standards.

Reviews of caseload standards from other states and national organizations, specifically related to child dependency representation, typically find that ethical standards demand lower caseload sizes. Here are some examples of standards developed describing the maximum caseload at any

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given time:

Arkansas Supreme Court Judiciary Administrative Order No. 15: 75 cases per attorney

Georgia Public Defender Standards Council: 60 child clients per attorney

Rules and Regulations of New York State: 150 child clients per attorney

National Association of Counsel for Children: 100 child clients per attorney

In a pilot project in Washington State, the maximum caseload standard for parents' attorneys was reduced from 90 to 80 clients at any given time after it was determined that the standards for parent representation could not be met when caseloads exceeded 80 clients.

Other standards have been developed which allow for caseload sizes of 200 (National Advisory Commission, 1973) to 310 juvenile cases per attorney per year (Colorado).

The numbers obviously vary widely and are a bit beside the point. For caseloads to be manageable, it means that the duty an attorney owes to each and every client can be met within the time and other resources available. Otherwise, an excessive caseload results in conflicts-of-interest among the needs of an attorney's various clients. Attorneys should no more represent too many clients at once than they should represent two adverse parties in a single case, such as representing both parents and children in the same dependency case.

In a recent law review article, entitled "The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice:"

"[An excessive caseload (EC)] is defined, in commonsensical and functional terms, as a caseload or workload that may reasonably be expected to materially interfere with counsel's ability to provide assistance to existing clients. EC means more than a heavy caseload. EC will actually or likely cause attorneys to provide substandard representation that violates constitutional, ethical and other professional norms so that what should be done cannot be done." (Brummer, St. Thomas Law Review, 2009)

Caseload standards cannot be viewed without recognition of the physical and temporal realities of what a single at-

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torney can do, nor can they ignore the ethical obligations that an attorney has to each and every client. There are 252 days per year when the courts are typically in operation each year. An attorney might take an additional 10 days of vacation and five days of sick leave and time for continuing legal education, leaving 237 regular working days.

Under the Colorado standard, that would mean that each client in a juvenile matter receives an average of 0.76 days, or six hours, of his or her attorney's time and attention for all case-related work, including travel, attendance at all court hearings, client meetings, consultation with experts, legal research, telephone calls, and everything else. Under the NAC standard, the amount of time for all case activities rises to 1.19 days (or 9.5 hours) per case per year. The National Association of Counsel for Children's caseload standard, by contrast, uses 20 hours per case as a working average.

Even to a non attorney, there is a clear disconnect between any accepted practice standards for juvenile attorneys, whether from the American Bar, the Oregon State Bar or the National Association of Counsel for Children, and the caseloads that public defense attorneys in Oregon carry in juvenile cases. It is inconceivable that those standards can be met when an attorney may have only five to ten hours to spend per case per year.

The Oregon State Bar standards for attorneys in juvenile dependency and delinquency cases include extensive lists of activities and obligations for attorneys appointed to represent children, youth and parents in these cases. In the dependency realm, for example, a lawyer representing a parent in a shelter hearing should: obtain relevant copies of all documents; talk to the client and caution him or her against self-incrimination; assist the client in exercising the right to an evidentiary hearing that the child can be returned home without further danger of harm; present facts regarding a variety of issues, as appropriate (e.g., the jurisdictional sufficiency of the petition, the necessity of shelter care, whether reasonable efforts were made to prevent removal, arrangements for visits, etc.); propose return to parents or placement in the least restrictive setting; request temporary orders (e.g., for visitation, to place siblings together, to provide appropriate treatment for the child, etc.);

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and several other activities that might be relevant in a case. These are just the obligations to be completed prior to and during the shelter hearing. (Standard 3.5)

Obligations to child clients include a similar list of duties. The Bar standards specifically indicate that attorneys should communicate directly with their clients who are age four and older in a private setting. Contact with child clients should also occur: before court hearings and CRB reviews; in response to contact by the client; when a significant change of circumstances must be discussed with the client; whenever notified that the child's placement is changed; or when a lawyer is apprised of emergencies or significant events impacting the child. (Standard 3.6.5)

Ultimately, the Bar standards state: "A lawyer should confer with the client as often as necessary after the initial interview to ascertain all relevant facts and otherwise necessary information. After a lawyer is fully informed on the facts and the law, the lawyer should advise the client concerning all aspects of the case." (3.6.7)

The list of specific tasks in dependency and delinquency cases is far too extensive to list here. The purpose of these tasks, of course, is to take the steps necessary -- through investigation, negotiation and litigation -- to protect a client's rights against unreasonable or unlawful encroachment by state actors and to work to achieve the desired goals of the client. Excessive caseloads directly impair attorneys from fulfilling these fundamental duties to their clients.

For additional discussion of the ethical duties to parent clients and a discussion of potential responses to excessive caseloads, see "Ethical Parent Representation" in this issue.

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[i] In order to translate review hearing credits into case numbers, the total number of review hearing credits was divided by one-third, assuming there are typically two or three review hearings per year in an on-going dependency matter. This was also intended to adjust for potential duplication with new case appointments when a review hearing credit and either a TPR or new appointment might be recorded during the same year as a review hearing credit.

SUPREME COURT

Landmark Decision

In its landmark decision, the United States Supreme Court has guaranteed a significant right to juvenile offenders by imposing a clear, categorical rule. Holding that the Cruel and Unusual Punishments Clause of the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime, the Court has ensured greater proportionality for punishments meted out to young offenders.

Graham v. Florida ___US___ (May 17, 2010). http://www.supremecourt.gov/opinions/09pdf/08-7412.pdf

When he was 16 years old, petitioner Terrence Jamar Graham was charged in Florida with armed burglary with assault or battery, and attempted armed-robbery. The former, a first-degree felony, carried a maximum penalty of life imprisonment without the possibility of parole; the later, a second-degree felony, carried a maximum penalty of 15 years of imprisonment.

Following a plea of guilty to both charges, the court withheld adjudication of guilt and sentenced Graham to concurrent three-year terms of probation, the first twelve months of which were to be spent in county jail. Graham received credit for the time he had served awaiting trial, and was released from jail sooner than twelve months. Shortly thereafter, and 34 days short of his 18th

birthday, Graham was arrested for participation in a home invasion robbery. Subsequently, Graham's probation officer filed an affidavit with the court asserting that Graham had violated the conditions of his probation on several accounts, and the trial court agreed. Under Florida law, the minimum sentence Graham could receive absent a downward departure by the judge was five years of imprisonment; the maximum sentence Graham could receive was life imprisonment. Citing Graham's escalating pattern of criminal conduct, and reasoning that the criminal justice system could do no more to deter Graham from such conduct, the court sentenced Graham to life imprisonment for the earlier armed burglary charge, and to 15 years of imprisonment for the earlier attempted armed robbery charge. Because Florida has no parole system, Graham was left with no possibility of release apart from clemency. The First District Court of Appeal of Florida affirmed, and the United States Supreme Court reversed.

One of the reasons offered by the Supreme Court for its decision is that life without parole sentences for juvenile non-homicide offenders are infrequently imposed. The Court noted that while many jurisdictions allowed such sentences, this fact was not dispositive, and that the rarity with which such sentences have actually been imposed suggests a consensus as to their inappropriate nature. The Court also cited the inadequacy of penological theory to justify life without parole sentences for juvenile non-homicide offenders. Finally, the Court reasoned that the limited culpability of juvenile offenders, balanced against the severity of a life without parole sentence, is cruel and unusual.

The Court justified its issuance of a categorical rule by reminding that life without parole sentences can be issued based upon only a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved. The Court made clear that such a practice does not protect juvenile offenders against the possibility that they will be punished so severely, even where they lack moral culpability. The Court also justified its issuance of a categorical rule upon the belief that a case-by-case approach of weighing age against the seriousness of a crime would not allow for sufficient accuracy in distinguishing offenders who truly deserve a life without parole sentence from those that do not. Additionally, the Court took into account the unique difficulties encountered by juvenile defense counsel and suggested that a categorical rule would help avoid the risk that such difficulties could do injustice to a juvenile offender during the adjudication process. Finally, the Court cited worldwide rejection of life without parole sentences for juvenile non-homicide offenders as further support for its new categorical rule.

The Court reiterated the finding in *Roper v. Simmons* that "because juveniles have lessened culpability they are less deserving of the most severe punishments." Citing *Roper*, 543 U.S. 551 at 569. The Court also stated that, as compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility, are more vulnerable or susceptible to negative influences and outside pressures, and have characters that are not as well formed. (Internal quotations and citations omitted.) Again citing Roper, the Court went on to state,

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"No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles... [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds . . . Juveniles are more capable of change than adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." (Internal quotations and citations omitted.)

RECENT RULINGS

Against Admissibility of Expert Testimony

In several recent cases, the Oregon Court of Appeals has ruled against the admissibility of expert testimony diagnosis of sexual abuse, absent any corroborating physical evidence.

In *State v. Lovern*, ___ Or App ___ (March 31, 2010), Robert Howard Lovern challenged his conviction of 16 counts of sexual abuse in the first degree against his minor daughter, arguing in part that the trial court erred in admitting a medical doctor's diagnosis that the complainant had been sexually abused. The Court found this issue dispositive and did not reach Lovern's other ground for appeal.

The complainant, who was 12 years old when she disclosed the alleged sexual abuse, was examined by a doctor. The complainant later recanted her allegations, but over Lovern's objection, the trial court admitted the doctor's testimonial diagnosis – based solely on the complainant's earlier statements and history – that she had been sexually abused. On appeal, Lovern argued that the doctor's testimony should have been excluded under *State v. Southard*, because its prejudicial effect was substantially outweighed by its limited probative value. 347 Or 127 (2009). The Court of Appeals agreed, finding that the admission of the testimony was plain error under ORAP 5.45(1), and that under *Ailes v. Portland Meadows, Inc.*, 312 or 276 (1991), it was appropriate for the Court to exercise its discretion to correct the error.

The Court noted that the admissibility of an expert diagnosis of sexual abuse in the absence of any physical evidence of abuse is a question of law, and that the correct resolution of that legal question was not reasonably in dispute. The trial court judgment was reversed and the case was remanded.

In State v. Merrimon, ___ Or App ___ (March 31, 2010), http://www.publications.ojd.state.or.us/A139106.htm, defendant Edward Merrimon appealed his conviction of one count each of defendant Edward Merrimon appealed his conviction of one count each of sexual abuse in the first degree and endangering the welfare of a minor, arguing the trial court erred in admitting a medical expert's diagnosis of the child complainant as "highly concerning of sexual abuse," where the diagnosis was rendered in the absence of any confirming physical evidence. The Court of Appeals concluded that, consistent with its decision in *State v. Lovern*, ___ Or App ___ (March 31, 2010), and in light of *State v. Southard*, 347 Or 127 (2009), the admission of the expert's testimony constituted an "error of law apparent on the face of the record" in violation of ORAP 5.45(1). The Court also concluded that it was proper to exercise its discretion to correct the error under *Ailes v. Portland Meadows, Inc.*, 312

Or 376 (1991).

Following disclosures, Merrimon's then-14-year-old daughter was evaluated by a pediatric nurse practitioner. Over Merrimon's objection, the nurse practitioner testified at trial as to her diagnosis of the complainant as "highly concerning of sexual abuse," despite the absence of any physical evidence to that effect. The testimony was based on a police officer's report of his interview with the complainant, a school counselor's report to a child abuse hotline, and the complainant's interview at CARES Northwest, a child abuse assessment center.

The Court disagreed with the state's argument that this case could be distinguished from *Lovern* due to the fact that here the diagnosis was "highly concerning" rather than definitive for child sexual abuse, and that as a result, the error was not sufficiently grave to warrant correction. The Court reasoned that a diagnosis of "highly concerning of sexual abuse" without confirming physical evidence is of marginal probative value, and that even in this case, there was a substantial risk that the jury had not made its own credibility determination, deferring instead to the nurse practitioner's diagnosis. The Court also noted that the interests of justice militated conclusively in favor of it exercising its discretion to correct the trial court's erroneous admission of the testimony, due to the gravity of the error. The trial court judgment was reversed and the case was remanded.

In State v. Clay, ___ Or App ___ (April 21, 2010), http://www.publications.ojd.state.or.us/A136583.htm, Stephen Anthony Clay appealed his conviction of two counts of sexual abuse in the first degree, challenging the trial court's admission of a pediatric nurse practitioner's expert diagnosis, rendered absent any physical evidence of abuse, that the complainant had been sexually abused.

Following disclosure, one alleged victim was interviewed at CARES Northwest, but no physical examination took place. Based on the CARES evaluation, a pediatric nurse diagnosed the complainant as having been sexually abused.

Clay objected to testimony as to the nurse's diagnosis at trial, arguing that it did not constitute scientific evidence under *State v. Brown* because CARES had not performed any physical examination of the complainant, and the diagnosis was therefore not predicated on established protocol. The trial court overruled defendant's objection and allowed the nurse practitioner's testimony.

Holding the trial court's admission of the sexual abuse diagnosis testimony to be plain error, the Court of Appeals exercised its discretion under *Ailes v. Portland Meadows, Inc.* to remedy that error. Citing *State v. Southard*, the Court noted that the jury's assessment of the complainant's credibility was critical, and that because there were no disinterested eyewitnesses to, or any physical corroboration of, the alleged abuse, the admission of the testimony created a substantial risk that the jury would improperly defer to the nurse practitioner's conclusion. The Court reversed defendant's convictions and remanded the case.

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THE CHALLENGE OF QUALITY PARENT REPRESENTATION

by Noah Barish, Law Clerk

Representing parents in child welfare proceedings requires special attention to ethical considerations. The stakes are high—a parent could lose custody, have parental rights terminated, or be prosecuted criminally—and the cases combine typical adversarial elements with the complex issues of service planning. Adhering to ethical rules and representation standards in this context presents a formidable challenge. Using a common case scenario, this article will address the challenge of providing quality parent representation.

Case scenario: You represent parents in several counties and carry over 100 dependency cases, as well as a number of juvenile delinquency cases. Last week, you were appointed to represent a non-custodial father who is currently homeless and difficult to reach by phone. The petition includes allegations of physical abuse against three children. At the shelter hearing, the children were placed in substitute care. Father has a history of mental illness and shows limited interest in parenting his children.

Query: How do you ethically represent this client considering your other obligations and the difficulties of working with this client?

One of the core concepts of ethical lawyering is providing quality representation. The contours of this obligation are created by a variety of sources. First, case law on the ineffective assistance of counsel establishes only a minimal standard for parent representation; a proceeding must be "fundamentally fair," providing the parent with "the opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel Juvenile Dep't. of Multnomah Cty. v. Geist*, 310 Or 176, 197-90 (1990). Oregon courts have found certain egregious lapses in parent representation to constitute ineffective assistance under this standard. *See State ex rel SOSCF v. Rogers*, 162 Or App 437 (1999) (failure to prepare for termination trial by meeting client for the first time on day of trial); *State ex rel SOSCF v. Thomas*, 170 Or App 383 (2000) (failure to transport father client to termination trial, accept telephonic testimony, or leave the record open); *State ex rel SOSCF v. Hammons*, 169 Or App 589 (2000) (failure to file timely notice of appeal at instruction of client).

But parents' attorneys are required to do more than just avoid ineffective assistance. The Oregon Rules of Professional Conduct affirmatively require competence ("the legal knowledge, skill,

thoroughness and preparation reasonably necessary for the representation"- ORPC 1.1), diligence ("not neglect[ing] a legal matter"- ORPC 1.3), and communication ("keep[ing] a client reasonably informed about the status of a matter and promptly comply[ing] with reasonable requests for information . . . explain[ing] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." - ORPC 1.4). The Oregon State Bar performance standards for juvenile dependency cases attempt to translate these general requirements into specific implementation steps for attorneys in the child welfare context. Standard 3.1 describes the experience and training necessary for competence, Standards 3.3 and 3.6 address communications with a client and Standards 3.5 – 3.15 describe attorneys' obligations at each step in representation.

> The Oregon Rules of Professional Conduct affirmatively require competence, diligence, and communication.

For the father in this example, quality representation might include: interviewing father extensively about his short-term and long-term goals, explaining the child welfare system and the available options for proceeding, exploring whether the agency made reasonable efforts to prevent the children's removal or to reunify children with father and requesting "no reasonable efforts findings" if appropriate, investigating the events giving rise to the allegations, having a mental health expert evaluate the client and his interactions with his children, obtaining information from social service agencies and other individuals who have worked with father in the past, determining whether paternal relatives can take physical or legal custody, exploring rehabilitative and social services to assist father to reunify with his children, creating visitation plans, responding to father's phone calls and requests for information, and tracking a potential criminal case associated with the abuse allegation. *See Addressing Ethical Issues*, Jennifer L. Renne at 152-153 in *Advocating for Nonresident Fathers in Child Welfare Court Cases*, ABA Center on Children and the Law (2009); *Specific Standards for Representation in Juvenile Dependency Cases*, Standards 3.5- 3.7, Oregon State Bar (2005).

Even if the father is initially ambivalent or uninterested in gaining custody of his children, it is important for the attorney to be involved early, since case planning can begin immediately. Renne, *supra*, at 153. With early participation, the father can become a key player in the case and has a better chance later to gain custody or have regular contact with the child. *Id.*

Attorneys with large caseloads may struggle with the difficulty of providing ethical representation to each client. The Oregon State Bar has analyzed the ethical implications of this conundrum. OSB Formal Ethics Op. No. 2007-178 (discussing requirement of lawyers and supervisors to control workloads to ensure that each client is represented competently and diligently). If a caseload "prevents [attorneys] from fulfilling their ethical obligations to each client," it is excessive and "must be controlled so that each matter may be handled compe-

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tently." *Id.* at 511 (*quoting* ABA Model Rule of Professional Conduct 1.3, Comment [2]). For example, attorneys at an indigent defense organization could take "a variety of remedial measures, which might include transfer of nonrepresentational duties to others within the office, declining appointment on new cases, transferring current cases, and filing motions with the court to withdraw from enough cases to achieve a manageable workload." *Id.* at 511-12. Attorneys working within a consortium should take similar steps, including "requesting . . . the administrator of the consortium [to] withhold the assignment of new cases, and/or approve the transfer of cases to another lawyer within the consortium, as long as another lawyer will be able to provide ethical representation." *Id.* at 512. Sole practitioners, meanwhile, should decline new appointments to reduce caseloads to a level that permits accepting new cases. *Id.*

For more information about legal ethics in dependency representation, consult the JLRC Parents' Attorney Legal Ethics Bibliography.

http://www.jrplaw.org/Documents/JLRCethicsbibliog.pdf

RECENT CASE LAW

Summaries by Noah Barrish and Rochelle Martinsson, Law Clerks

***Dept. of Human Services v. B.J.W.*., 235 Or App 307** (May 12, 2010) (Shuman, P.J.) (Lane Co.) Permanency judgment affirmed.

http://www.publications.ojd.state.or.us/A143593.htm

In this case, the Court of Appeals addressed the admissibility of documents at a permanency hearing where objections under ORS 419B.325 had been made. Father appealed from a judgment authorizing DHS to change the permanency plan for his child from reunification to adoption, arguing the trial court erred in admitting hearsay evidence in the form of exhibits that did not fall within the exception for evidence "relating to the ward's mental, physical and social history and prognosis."

The Court of Appeals construed the statute, emphasizing the meaning of the above words, and began its discussion by identifying the nature of the exhibits sought to be admitted, which consisted of material focusing on the father and which included material from two years before the child's birth. The Court concluded that an "all-purpose bright line rule" was not necessary, but provided some helpful guidance. After analyzing the word "prognosis," the court concluded that:

> "… a prognosis or general forecast regarding a ward's physical, mental, or social condition depends to some extent on the environment in which the ward is placed. Thus, information about that environment - including possible caretakers – 'relates to' the ward's prognosis. In sum, we conclude that evidence relates to

> a ward's 'mental, physical and social * * * prognosis' if it provides information that is relevant to a forecast or prediction of how the ward will fare in the future, and it necessarily includes information about the ward's future potential caregivers. We therefore reject father's contention that ORS 419B.325(2) encompasses material only if its direct and exclusive subject is the ward." Slip Op. at 4.

However, the Court noted that its rejection of the position that material must relate directly and exclusively to the ward to be admissible—

> "does not necessarily mean that ORS 419B.325(2) allows the court to receive any and all evidence that has a relationship, no matter how tenuous, with any of the ward's past, present, or potential future caregivers." *Id.*

The Court found it unnecessary to define the precise line between admissible and inadmissible, but its ruling is instructive:

> "Material that deals expressly with [the child's] history is admissible. Additionally, the statute allows the admission of material in reports that either the court or DHS ordered for the purpose of evaluating whether, or to what extent, father can maintain his relationship with [the child]." *Id.*

Of the 11 exhibits to which father objected, the Court found that eight fell within one or another of the above categories. The court did not rule on other exhibits that were either cumulative of properly admitted exhibits or not objected to.

Although the court did not cite to it, this understanding of the meaning of "history and prognosis" is consistent with the holding in *Kahn v. Pony Express*, 173 Or App 127, 20 P3d 837 (2001).

***DHS v. G.G.*, ___ Or App ___** (April 14, 2010) (Wollheim, J.) (Washington Co.) Vacated and remanded.

http://www.publications.ojd.state.or.us/A143342.htm

This case discussed a juvenile court's obligations concerning communications with an out-of-state court about a transfer of jurisdiction under the UCCJEA. Soon after R.G. was born in Montana, Child Protective Services in Montana assessed R.G.'s parents. R.G.'s parents then brought R.G. to Oregon. Within two months, Oregon DHS placed R.G. in foster care and filed a dependency petition. Meanwhile, R.G.'s parents returned to Montana and the Oregon juvenile court found R.G. within its jurisdiction. Eight months later, R.G. was moved to a relative foster placement in Montana.

Before the permanency hearing, R.G.'s father moved to transfer jurisdiction to Montana under the UCCJEA. During the permanency hearing, the Oregon juvenile court discussed father's motion with the Montana court, then sent a letter to the parties stating that both courts agreed that the Oregon juvenile court should retain jurisdiction over R. G. Father moved the Oregon court to disclose the record of its communication with the Montana court, but the Oregon court entered an order denying father's motion to transfer jurisdiction without first giving the parties an opportunity to address the communication with the Montana court. The Oregon court then amended the permanency plan from reunification to adoption. Several weeks

later, the Oregon court denied father's motion to disclose the record of the communications between the Oregon and Montana courts.

Father appealed the permanency judgment, arguing that the juvenile court denied his motion to transfer jurisdiction to Montana and failed to disclose the records of its communication to the court in Montana. Two weeks after oral arguments in the appeal, the juvenile court notified the parties that its communications with the Montana court had actually been placed in the left side of the court file and thus had not been included in the appellate record. The Court of Appeals permitted the state to supplement the record with those communications, but the Court held that the juvenile court failed to comply with certain obligations under ORS 109.731. Although the juvenile court ultimately disclosed the communications as required under ORS 109.731(4), it did not allow the father to present facts and legal arguments before making the jurisdictional decision on the motion to transfer, as required by ORS 109.731(2). Consequently, the Court of Appeals vacated the permanency judgment and remanded with instructions to permit father to present factual and legal arguments on father's motion to transfer jurisdiction.

***DHS v. K.L.R.*, ___ Or App ___** (April 21, 2010) (Brewer, C.J.) (Clackamas Co.) Reversed and remanded.

http://www.publications.ojd.state.or.us/A143609.htm

In this case of first impression, the Court of Appeals clarified that requiring a parent to make an admission of abuse as a condition of family reunification violates the parent's Fifth Amendment right to avoid self-incrimination. Mother and father stipulated to dependency jurisdiction in this case involving allegations of multiple unexplained injuries to their infant son. In the dispositional order, the juvenile court required the parents to complete a polygraph test to determine if they caused the child's injuries or if they knew who or what caused the injuries. Mother's attorney objected, contending that the polygraph requirement violated her right against self-incrimination. The court discussed the option of providing parents immunity from criminal prosecution for any incriminating statements that they might make during the polygraph examination, but ultimately did not grant immunity for the parents. Mother appealed the dispositional order.

The Court of Appeals first addressed whether mother's claim was unripe either because she had not yet refused to submit to the polygraph examination or because the juvenile court had not yet penalized her for refusing to take the polygraph. The Court distinguishing this case from *State ex rel Juv. Dept. v. Black,* 101 Or App 626 (1990), where a father's appeal of a dispositional order to participate in incest treatment was unripe because there was no indication that the ordered treatment would cause him to incriminate himself. In contrast, the Court reasoned that mother's appeal in this case was ripe because the juvenile court's order offered mother only the "Hobson's choice of waiving her rights against self-incrimination or suffering adverse consequences in her quest to preserve her parental rights." Slip Op. at 3. Answering questions during a polygraph examination could expose mother to criminal liability, while refusing to complete the polygraph could allow the juvenile court to draw an inference adverse to her parental interests.

In analyzing the merits of mother's appeal, the

Court drew widely from the Fifth Amendment jurisprudence of the United States Supreme Court and state appellate courts in Ohio, Vermont, Nebraska, Minnesota, New Jersey, New York, California, and Maryland. From these decisions, the court derived several principles concerning the balance between a parent's Fifth Amendment right to avoid self-incrimination and the juvenile court's role in dependency proceedings:

"(1) requiring an admission of abuse as a condition of family reunification violates a parent's Fifth Amendment rights; (2) on the other hand, terminating or limiting parental rights based on a parent's failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent's failure to acknowledge past wrongdoing inhibits meaningful therapy, may not violate the Fifth Amendment; and (3) providing use immunity from criminal prosecution is a necessary condition to compelling potentially incriminating statements as an inducement for full cooperation and disclosure during dependency proceedings."

Applying these principles, the Court held that, in this case, the polygraph requirement violated mother's Fifth Amendment right to avoid self-incrimination. First, the polygraph was imposed specifically to determine the cause of the child's injuries, not as one part of "a suite of treatment, training, or services" designed to enable reunification. Second, although the juvenile court discussed providing mother with immunity from criminal prosecution, the court never actually ordered the "use immunity" necessary to compel mother to participate in the polygraph examination. Consequently, the Court of Appeals reversed and remanded.

***Dept. of Human Services v. L.P.H.*, ___ Or App ___** (April 21, 2010) (per curium) (Jackson Co.) Permanency judgment reversed and remanded.

http://www.publications.ojd.state.or.us/A143299.htm

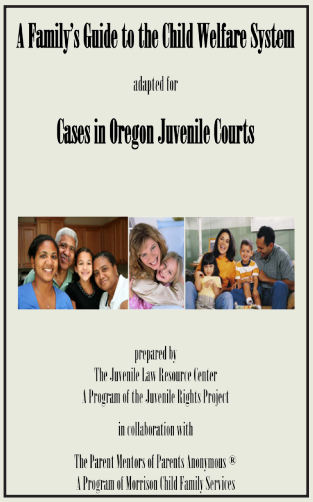
Mother appeals two judgments, one establishing jurisdiction over her son and committing him to DHS custody and the other approving a permanency plan of adoption. The Court focused on the second claim, in which mother asserted that the juvenile court failed to make the findings necessary under ORS 419B.476(5)(d) to authorize the change in permanency plan. ORS 419B.476(5)(d) requires that the permanency judgment must include the court's determination that "none of the circumstances enumerated in ORS 419B.498(2) is applicable. " Since the judgment in this case did not explicitly include the necessary determination and the Court could not infer that determination from the "judgment as a whole," the Court reversed the judgment and remanded.

Juvenile Law Resource Center

The Juvenile Law Resource Center (JLRC) assists attorneys representing parents in child welfare dependency proceedings throughout Oregon. It provides written resources including case law updates, sample motions, practice guides and issue briefs. The JLRC offers trainings for parents' lawyers. Additionally, JRP attorneys are available to consult with attorneys on individual cases. More information is available at http://www.jrplaw.org/juvresocent.aspx. Check periodically for updates.

Oregon's Champion for Children in the Courtroom and the Community

JLRC PUBLISHES FAMILY GUIDE FOR OREGON



The Juvenile Law Resource Center is pleased to announce the publication of **A Family's Guide to the Child Welfare System Adapted for Cases in Oregon Juvenile Courts**. JLRC has adapted the well respected national publication A *Family's Guide to the Child Welfare System*, with permission from the national groups which publish that Guide. The Oregon Guide is intended to be a comprehensive resource that answers many of the questions families face when they become involved in the juvenile dependency process.

Written in a simple, question-and-answer format and grounded in the experiences of parents and lawyers involved in these cases, the Oregon Guide is intended to be a tool to assist parents involved in juvenile dependency cases. Lawyers are encouraged to distribute the Oregon Guide to their parent clients as a way to build positive lawyer-client relationships and help answer the many questions that arise in these cases. The Oregon adaptation was produced in collaboration with the parent mentors of the Morrison Child and Family Services Parent Mentoring Program.

Copies of the Oregon Guide will be available for distribution at the June OCDLA conference and public defense attorneys who will not be at the conference can contact Kelly Ashton at OPDS Kelly.Ashton@opds.state.or.us) to obtain.

SAVE THE DATE

Parents' Attorney Skills Training
September 16-17, 2010
Offered by the Juvenile Law Resource Center of Juvenile Rights Project, Inc.

This training is targeted at parents' attorneys within their first five years of juvenile practice. The curriculum will teach general lawyering skills and cover substantive topics unique to parent representation.

Wilsonville Inn and Suites
29769 SW Boones Ferry Road
Wilsonville, OR 97070
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*By application only

3rd Annual National Prisoner's Family Conference
February 23-25, 2011 (Wednesday through Friday)

Building Bridges to Strengthen Families & Communities
Portland, Oregon
info@prisonersfamilyconference.org
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www.solutionsforelpaso.org

POPULAR ADOLESCENT SEX OFFENDER RISK ASSESSMENT BIASED AGAINST GAY YOUTH

by Emily Simon, Attorney at Law and Noah Barish, Law Clerk

Have you ever represented a juvenile sex offender who was considered a higher risk to reoffend because his victim was a male? This misguided perception plays out in any number of ways but usually starts with an assessment that purports to prove that this notion is empirically based. Guess what folks, it isn't.

Predicting whether an adolescent will sexually reoffend is not easy. Experts have been struggling since the 1980's to separate the 10% of adolescent offenders who will later become adult rapists or pedophiles from the 90% who won't ever commit another sexual crime. And, the task is made more difficult because research on adult sexual recidivism can't be generalized to youth. Unlike adults, adolescents' cognitive and sexual development is so dynamic that they have been described as "moving targets" for risk assessment.

Nevertheless, in 2001 Canadian researchers designed the Estimate of Risk of Adolescent Sexual Offense Recidivism (EASOR), a psychological tool used to predict whether youth who have committed sexual misconduct are likely to reoffend. The ERASOR identifies 25 separate risk factors purportedly associated with higher rates of sexual recidivism in adolescents and relies on the evaluator's clinical judgment to assign an overall level of risk (low, moderate, or high) based on the presence of various risk factors. The ERASOR is used extensively in Oregon by private psychologists, county juvenile departments, and the Oregon Youth Authority and carries significant weight with juvenile courts.

One of the risk factors included in the ERASOR for male adolescents is "ever sexually assaulted a male victim." Thus, all other factors being equal, the ERASOR assumes that a male youth who commits sexual misconduct with a male victim is at higher risk to reoffend than if his victim was female. The ERASOR included this risk factor based on two studies indicating a correlation between victim gender and sexual recidivism in

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adolescents and adult literature drawing the same association.

The bulk of empirical research, however, refutes this connection in adolescents. One of the studies relied on by the ERASOR actually showed no statistically significant correlation between gender and recidivism. Four other studies with a variety of youth in the U.S., Canada, Sweden, and Australia also found no statistically significant linkage. The researcher who created the ERASOR even wrote in a 2006 literature review that "one should use considerable caution when basing risk assessments on these factors [including victim gender] given the current lack of empirical support."

Experts also recognize that inaccurate risk assessments can have dire consequences. Youth incorrectly labeled as "high risk" are stigmatized, placed in inappropriate treatment and correctional facilities, and distanced from healthy social outlets. Further, the field of adolescent risk assessment has consistently been overconfident about the predictive value of various risk factors. One former president of the international Association for the Treatment of Sexual Abusers concluded: "[p]ut simply, much of what our field believed to be true has turned out to be unsupported."

If you are currently representing a juvenile sex offender (or a person who is no longer a juvenile but who was found within the jurisdiction of the juvenile court) and there is currently a recommendation from the Juvenile Department, OYA or the State that is harsher because of the same sex conduct, help is on the way. (This issue could come up in the context of a petition for relief from sex offender registration that the State is recommending be denied, or a person who can't get off of probation without a penile plythismograph because he is deemed to be a higher risk due to the male on male conduct, or a recommendation for close custody based upon the application of the ERASOR at the onset of probation, or maybe even the failure of the court to grant a motion for alternate disposition.) Emily Simon has invited attorneys interested in collaborating on potential legal challenges to contract her at endbuiltinbias@gmail.com."

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[i] Maggie Jones, *How Can you Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?* New York Times Magazine, July 22, 2007 at (http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html).

[ii] Robert Prentky & Sue Rightland, *Juvenile Sex Offender Assessment Protocol-II (JSOAP-II) Manual* (2003), (http://www.csom.org/pubs/JSOAP.pdf).

[iii] James R. Worling & Tracey Curwen, The "ERASOR" Estimate of Risk of Adolescent Sexual Offense Recidivism (Version 2.0) 3 (2001) in JUVENILES AND CHILDREN WHO SEXUALLY ABUSE: FRAMEWORKS FOR ASSESSMENT 372-397 (Martin C. Calder et al. eds., 2nd ed., 2001) (on file with author).

[iv] *See* Oregon Youth Authority Policy Statement II-E-5.0 Sex Offender Risk Assessment [Facility] (2007) (http://www.oregon.gov/OYA/policies/II-E-5.0.pdf) (requiring that OYA use the ERASOR for all offenders receiving formal court action for a sex crime and committed to OYA).

[v] Wayne R. Smith & Caren Monasterksy, *Assessing Juvenile Sexual Offenders' Risk for Reoffending*, 13 Crim. Just. & Behav.115, 123-125 (1986); Niklas Långström & Martin Grann, *Risk for Criminal Recidivism Among Young Sex Offenders*, 15 J. Interpersonal Violence 855, 860 (2000).

[vi] Smith & Monastersky, *supra*, at 125.

[vii] Lucinda A. Rasmussen, *Factors Related to Recidivism Among Juvenile Sexual Offenders*, 11 Sexual Abuse: J. Res. & Treatment 69, 78 (1999); James R. Worling & Tracey Curwen, *Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction*, 24 Child Abuse & Neglect 965, 975 (2000); Niklas Långström, *Long-term Follow-up of Criminal Recidivism in Young Sex Offenders: Temporal Patterns and Risk Factors*, 8 Psychol., Crime & L. 41, 53 (2002); Ian A. Nisbet et al., *A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sex Offenders*, 16 Sexual Abuse: J. Res. & Treatment 223, 228 (2004).

[viii] James R. Worling & Niklas Långström, Risk of Sexual Recidivsim in ADOLESCENTS WHO SEXUALLY OFFEND: CORRELATES AND ASSESSMENT IN THE JUVENILE SEX OFFENDER 225 (Howard E. Barbaree & William L. Marshall eds., 2nd ed., 2006).

[ix] Robert A. Prentky et al., *Assessing Risk of Sexually Abusive Behavior Among Youth in a Child Welfare Sample*, 28 Behav. Sci. & L. 24, 43 (2010).

[x] David Prescott, *Twelve Reasons to Avoid Risk Assessment* in RISK ASSESSMENT OF YOUTH WHO HAVE SEXUALLY ABUSED: THEORY CONTROVERSY, AND EMERGING STRATEGIES 1, 5 (David Prescott, ed., 1st ed., 2006).

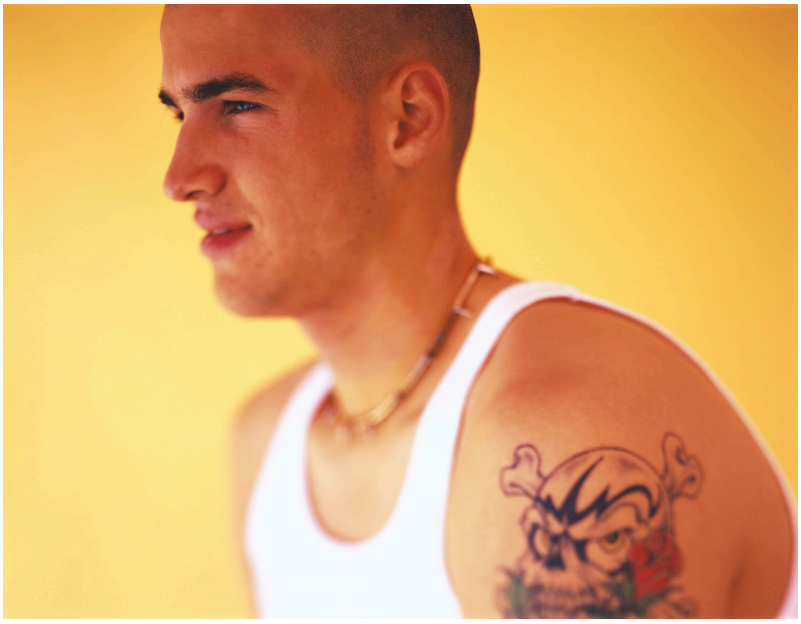
WHY ALL THIS TALK ABOUT BIAS?

by Abbey Stamp, Juvenile Court Improvement Coordinator

Why Bias?

In 2010, few of us encounter blatant racist behavior. In progressive Multnomah County, we rarely see acts of bigotry. Just because we are not overtly racist or bigoted does not mean we do not make *unconscious* assumptions about groups of people different from ourselves.

Shawn Marsh, in his article "The Lens of Implicit Bias," defines implicit bias as "a preference (positive or negative) for a social category that operates outside of awareness." (www.jdaihelpdesk.org/Docs/Documents/lensofimplicitbias.pdf). Think about meeting a young client at the court who is full of tattoos and wears saggy pants. Or a mother client who is unkempt and struggles with addiction.



Even though we are helpers, implicit biases about these and other presentations can unknowingly feed the way we feel about or perceive others. Although implicit bias operates outside our awareness, it can impact our decision-making. As we walk through life we collect information based on our experiences, family, friends and environment which creates a lens through which we see the world.

What Do We Do About Our Biases?

We learn. We question. We get aware. We teach our brain new ways of processing preferences. We have had conferences, trainings and CLEs about implicit bias. We talk at length about how our biases, in concert with larger issues of institutional racism, may exacerbate over representation of children of color in foster care and the juvenile justice system.

Take the Challenge!

There are online resources and articles about the science and reality of bias. There is a series of online tests developed by social scientists at Harvard University, the Implicit Association Test, which helps identify and increase awareness about our implicit biases. The Multnomah Model Court team challenges every person reading this article, when you have an extra 10-15 minutes, to take a few tests and see where your biases are (implicit.harvard.edu/implicit/demo/).

Courts Catalyzing Change

The Multnomah County Model Juvenile Dependency Court is part of the Courts Catalyzing Change (CCC) project, which seeks to identify and eliminate racial disproportionality and disparate treatment in dependency cases. As part of CCC, data is being collected, Dependency Court, Judi-

cial Officers are being trained on implicit bias in decision-making and how to best engage families. In addition, CCC helps fund trainings for juvenile dependency stakeholders about implicit bias, bias in decision-making and engaging families.

Judges as Subjects--The Benchcard

Did you ever imagine that judges could be subjects in an institutional review board authorized research project to address bias? That's what the National Council of Juvenile and Family Court Judges is doing by evaluating the effectiveness of a benchcard for judges.

The benchcard was developed for use at dependency shelter (preliminary) hearings. Eight Judicial Officers from Multnomah County participated in the study and collected samples of both control and experimental (benchcard) hearings. While the study is not yet complete, researchers indicate that Judicial Officers who used the benchcard were more likely to engage parents. The benchcard may also be a beneficial tool to help reduce disparities and disproportionality.

The benchcard itself will not "cure" all judicial officers or anyone else from our implicit biases or eliminate disproportionality. But, it is a tool that helps decrease the impact of our unconscious biases on others. The benchcard can be viewed at: http://www.jrplaw.org/Documents/benchcard.pdf

What Next?

Researchers, tests, articles and conferences can not change our behavior; only we can. In order to best serve all clients and grow healthier and equitable legal, justice and welfare systems, it is incumbent on all of us to learn about and eliminate our biases. Take **the challenge** to learn more about your own biases and join us on the path to eliminating the negative effects of bias for the families we serve.

RECENT CASE LAW

State ex rel Juv. Dept. v. K.C.W.R.

On de novo review of an adjudication for Assault in the Third Degree, the Court of Appeals found that the victim's injuries were caused by an assault with a bat by the youth's mother and that youth did not directly assault the victim with the bat. While the injuries were being caused, the youth was being held to the ground by the victim, but whenever the victim would try to release the youth, the youth continued to attack the victim. The Court found that that the youth was actively involved in the assault by the mother because his attacks on the victim prevented the victim from defending himself against the mother's assault or retreating from the assault. This conduct was so extensively intertwined in the infliction of the injury, that it could be said to have produced the injury, under *State v. Pine*, 336 Or 194, 82 P3d 130 (2003) and *State v. Derry*, 200 Or App 587, 116 P3d 248, *rev den* 340 Or 34 (2005). The court held, therefore, that the youth intentionally injured the victim while being aided by his mother, who was actually present, making him directly liable for third-degree assault.

Padilla v. Kentucky, ___ U.S. ___ *(March 31, 2010).* http://www.supremecourt.gov/opinions/09pdf/08-651.pdf

In an action for post-conviction relief, petitioner Jose Padilla argued that he had received ineffective assistance of counsel in violation of the Sixth Amendment, due to the fact that his attorney gave him erroneous deportation advice in relation to a guilty plea. The Kentucky Supreme Court denied Padilla's petition for post-conviction relief,

reasoning that the constitutional guarantee of effective assistance of counsel does not protect defendants from erroneous deportation advice, as deportation is merely a collateral consequence of a conviction. The U.S. Supreme Court reversed, holding that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" and that "Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country."

The Court declined to acknowledge a distinction between direct and collateral consequences with regard to defining the scope of the effective-assistance-of-counsel guarantee, reasoning that despite the fact that deportation is not itself a criminal sanction, it is "intimately related to the criminal process" and thus cannot be easily divorced from a conviction. The Court then analyzed Padilla's counsel's representation under Strickland v. Washington to determine whether it "fell below an objective standard of reasonableness." 466 U.S. 668, 688 (1984). The Court relied on prevailing professional norms to conclude that Padilla's counsel should have advised him regarding deportation, specifically noting that the consequences of Padilla's plea could have been easily deduced from the statute, Padilla's deportation was presumptively mandatory, and Padilla's counsel's advice was incorrect.

With regard to the scope of an attorney's duty to advise clients about deportation consequences, the Court stated that where the law is not succinct or straightforward, counsel need only advise a non-citizen that pending criminal charges may carry a risk of adverse immigration consequences, but that where deportation consequences are clear, there is a duty to give correct advice. Although the Court found that the first Strickland prong was satisfied, the Court remanded Padilla's case to the Kentucky Supreme Court for determination of whether the second Strickland prong was satisfied, or whether "there is a reasonable probability that, but for [Padilla's] counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

SAVE THE DATE

The sixth annual **Juvenile Law Training Academy** seminar is scheduled for **October 18 and 19, 2010** (during the Oregon Judicial Conference).

The seminar will be in Eugene at the Hilton Hotel again this year. Special room rates will be available at the time of seminar registration.

The planners of this seminar hope to again make it available at an affordable cost. A draft program will be circulated in early August.

Academy sponsors: the Juvenile Court Improvement Project, the Juvenile Rights Project, the Juvenile Law Section of the Oregon State Bar, the Oregon Criminal Defense Lawyers Association, the Office of Public Defense Services and the University of Oregon School of Law, with the invaluable assistance of the Department of Justice and the CASA program.

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August issue: EDUCATION

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