Representing Parents with Communication Challenges: Ethical Considerations in Tennessee Dependency and Neglect

The Court Improvement Program's First Friday Series: Session 3 with Carrie Mason Tennessee Court Improvement Program Attorney <u>Carrie.Mason@tncourts.gov</u> March 7, 2025

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Representing Parents In Dependency and Neglect, Considerations, Challenges and Opportunities

- Representing Parents in Dependency and Neglect
- Ethics Focus: Communication
- A Motivational Interviewing Primer for Parent Representation
- Application
- Ethics Focus: Competence, Diligence, and Communication
- Representing Parents with Communication Challenges
- Legal Protections for Persons with Disabilities
- Ensuring Accessible Hearings



Parental Rights

"The U.S. Supreme Court has repeatedly held that parents have a fundamental right to make decisions as to the companionship, care, custody, and management of their children, which right is a protected liberty interest under the due process clause of the Fourteenth Amendment. The state is not permitted to interfere in a family unit absent a showing of unfitness." *Troxel v. Granville*, 530 U.S. 57, 65–66, 120 S.Ct. 2054, 2060 (2000).



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Parental Rights

"The fundamental liberty interest of natural parents in the care, custody and management of their child is protected by the Fourteenth Amendment and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).





The Role of Parent's Counsel

The Rules of Professional Conduct establish the basic parameters of the attorneyclient relationship.

- The attorney should possess the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. (Tenn. Sup. Ct. R. 8, RPC 1.1)
- The attorney must zealously advocate on behalf of his or her client and maintain an undivided loyalty to the client's interests, regardless of the attorney's personal beliefs. (Tenn. Sup. Ct. R. 8, RPC 1.7)
- The attorney must act with reasonable diligence and promptness in representing a client. (Tenn. Sup. Ct. R. 8, RPC 1.3)
- The attorney must not knowingly reveal a confidence or secret of a client except in narrowly defined circumstances. (Tenn. Sup. Ct. R. 8, RPC 1.6)
- The attorney and client must establish joint decision-making. While the client has the ultimate authority to determine the goals of the representation, the attorney typically decides how best to accomplish those goals after consulting with the client. (Tenn. Sup. Ct. R. 8, RPC 1.2)

The Role of Parent's Counsel

Establish and Maintain Trust

- Consider the perspective of the parent.
- Explain your role and loyalty. Consider acknowledging professional relationships that may ultimately serve the parent.
- · Listen and demonstrate understanding.
- Share information and documents.

Define Your Client's Goals

- Know your client's overarching goal, as well as short and long terms goals regarding placement, visitation and services.
- Provide objective feedback and carefully considered advice.
- Know your client's desired focus: Are they future-focused on improvement or past-focused on the inaccurate allegations?

Sankaran, V. (2016). Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases. Chapter 30: Representing Parents in Child Welfare Cases, pp. 967-815.

The Role of Parent's Counsel

Define the Scope of Representation

- Parents in juvenile court often need support related to collateral matters.
- How much should you do for your client?
 - This is an individual determination based on the facts (but know counseling, information and referral may go a long way to resolving the child welfare case).
 - Define the scope of representation early and in writing.
- Manage pressures and commit to zealous advocacy.



Advocacy in the Preliminary Hearing

The purpose of the preliminary hearing is to determine whether probable cause exists to believe that the child is dependent, neglected, or abused AND there is an immediate threat to child's health or safety likely to result in severe or irreparable harm AND there is no less drastic alternative to the removal.

Make the most of what is likely your initial meeting. Elicit information concerning:

- The case and allegations
- Personal information
- Native American or Alaskan Native ancestry
- Previous DCS involvement
- Special needs, outside resources and services
- Alternative placements if removal is continued.

Sankaran, V. (2016). Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases. Chapter 30: Representing Parents in Child Welfare Cases, pp. 967-815.



Preliminary Hearing: Client Counseling

Explain decisions that will be made by the court.

- Parent must decide whether to contest the petition, or whether to allow the case to go forward to adjudication.
 - Legal sufficiency challenge: Do the allegations set forth a prima facie case of dependency and neglect?
 - Factual challenge: Lower standard of proof and relaxed standards of evidence (reliable hearsay is admissible) create an uphill battle at the preliminary hearing.

Placement: Can the child return home?

- Court must assess risk and parent's ability to mitigate that risk. Can we remove the danger and not the child? Will parent submit to conditions?
- · Out of home placement options
- · Initial visitation if child remains in out of home

Sankaran, V. (2016). Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases. Chapter 30: Representing Parents in Child Welfare Cases, pp. 967-815.

Preliminary Hearing: Courtroom Advocacy

Preliminary Hearing Preparation and Practice:

- Ascertain the client's position on the critical issues.
- Prepare parent for the preliminary hearing and ask them to be mindful of their presentation to the court, DCS and GAL. Perceptions matter.
- Introduce the parent to the court and tell the story.
 - Slow it down and be sure to address the key questions. Decisions here are the foundation for the rest of the case.
 - Know your local resources and propose conditions so that parent can keep the child and use those resources to mitigate risk.
 - If parent will accept services, request an order to begin services by a date certain.
 - Know placement options for out of home care and advocate for the least restrictive visitation that is appropriate for the child and parent.
 - Did DCS provide reasonable efforts to prevent removal? If not, why not?

Sankaran, V. (2016). Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases. Chapter 30: Representing Parents in Child Welfare Cases, pp. 967-815.

Pre-Adjudication Advocacy

Try to keep the parent engaged

- Permanency planning
- Visitation
- · Health and education
- Reasonable efforts advocacy

Explore settlement possibilities

• Mutually agreeable solutions

Trial prep: Investigate, interview and review

- Review local rules
- Consult with guardian ad litem and DCS legal, and DCS caseworker, as appropriate.



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Disposition

The purpose of disposition is to determine the care of the child and services for the parent.

- Ensure that the dispositional plan is narrowly tailored to address the issues that led to adjudication.
- Address alternative disposition options.



Permanency Planning

The permanency plan should be narrowly tailored to address the reasons for removal and reasons the child(ren) cannot return home.

- Your client should have a voice in the development of the permanency plan.
- Maintain communication with DCS, GAL, and foster parents.
- The agency must offer services of sufficient quality, duration, and intensity to allow a parent who complies with a fair chance to demonstrate parental improvement. Consider whether services to the parent are of sufficient quality and whether they address the parent's needs. Have reasonable efforts to reunify been provided?
- Note that some parenting deficits may be associated with conditions covered by the Americans with Disabilities Act (ADA). Aside from reasonable efforts, the ADA additionally requires the agency to make "reasonable accommodations" to address that parent's specific disability.

Sankaran, V. (2016). Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases. Chapter 30: Representing Parents in Child Welfare Cases, pp. 967-815.



Reviews

In periodic progress reviews, foster care review boards or other court reviews:

- Preparation: Obtain a copy of the agency's report and documents prepared by other parties/individuals in the case. Review documentation with client and speak to service providers to determine who may provide the court with helpful information.
- At the review: Party compliance is always a focus, so detail your client's progress toward reunification. Use every opportunity to demonstrate progress!
- Reasonable efforts are relevant whenever placement is continued. Address services and reasonable efforts.
- At periodic progress review, request modifications to placement and visitation that the client requests. Request recommendations for modifications at foster care review board.
- Where the risk to the child is eliminated, the child is no longer vulnerable to risk, or the parent has sufficient protective capacities to manage or control the threats of danger to the child, advocate for return of the child to the parent's custody (or a recommendation of the same from FCRB).

Permanency Hearing

Federal and Tennessee law require the court to hold a permanency hearing within 12 months after the child's removal or within 30 days of a determination that no reunification efforts are necessary. In the permanency hearing, the court decides on the final permanency outcome for the child, based upon the reasonable efforts provided by DCS to reunify family, the parents' compliance, and the best interest of the child.

- Urgency: DCS must file a petition to terminate parental rights within 90 days of a juvenile court's finding that the parent or guardian has been substantially non-compliant with the statement of responsibilities in the child's permanency plan. (T.C.A. §§ 36-1-113; 37-2-400; 37-2-409; Effective date: 7/01/2024)
- Maintain communication with the GAL and DCS throughout the custodial episode, know their positions and prepare your client for same.
- Consider having your client testify, if able to be persuasive about the steps taken to address the issues that led to the foster care placement.
- Reasonable efforts!





Rule 1.4 Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Rule 2.1 Advisor

Comment [2]: Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.





Motivational Interviewing for Lawyers

- This isn't about becoming a therapist. It's about representing your parent-client in a more psychologically-informed way.
- It's all about communication with your clients and how you relate to them.
- MI is not about persuasion as much as it is about drawing out your clients' own inclination towards positive actions and growth.
- Anyone can use MI to support effective, engaged, and meaningful communication about positive change.¹
- Evidence suggests it is a skill that can be developed quickly and it has a great application to our work.²



¹ Christensen, A. Miller, W.R., & Muñoz, R.F. (1978) Paraprofessionals, partners, peers, paraphernalia and print: Expanding mental health service delivery. Professional
Psychology 9 (249-270)
² AMERICAN BAR ASSOCIATION, MOTIVATIONAL INTERVIEWING: COUNSELING CLIENTS IN CHALLENGING CONTEXTS
https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/may-june-2017/motivational-
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What is Motivational Interviewing?

- A Conversation
- A philosophy of care (SPIRIT): <u>Compassion</u>, <u>Acceptance</u>, <u>Partnership</u>, <u>Empowerment</u>
- A set of communication styles and skills like a dance that you can adapt to role setting and tasks
- A set of response strategies (decision rules based on client language and signals) and a powersharing method of offering feedback, suggestions and finding the plan with the client
- OARS: Open Questions/Evocative Questions, Affirmations, Reflections, Summaries (More reflections less questions)



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Ask open-ended questions

Open Ended Questions

Open questions invite others to "tell their story" in their own words without leading them in a specific direction. Open questions should be used often in conversation but not exclusively. Of course, when asking open questions, you must be willing to listen to the person's response.

Key to using open ended questions is being deliberate and focused on topics that are relevant to your client's circumstances.



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Affirmations

Affirmations are statements and gestures that recognize client strengths and acknowledge behaviors that lead in the direction of positive change, no matter how big or small. Affirmations build confidence in one's ability to change. To be effective, affirmations must be genuine and congruent.

Pointing out client's strengths. Keep the focus positive.



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Affirmations Examples:

You are a very resourceful person.

You handled yourself really well in that situation.

You were mature enough to make that decision

You feel in control of your future.

You believe in honoring your promises.







Example









Reflections

- Reflections have the effect of encouraging the other person to elaborate, amplify, confirm or correct. They convey accurate understanding and reduce defensiveness.
- It is the pathway for engaging others in relationships, building trust, and fostering motivation to change. Reflective listening appears easy, but it takes hard work and skill to do well. Sometimes the "skills" we use in working with clients do not exemplify reflective listening but instead serve as roadblocks to effective communication. Examples are misinterpreting what is said or assuming what a person needs.
- It is vital to learn to think reflectively. This is a way of thinking that accompanies good reflective listening. It includes interest in what the person has to say and respect for the person's inner wisdom.

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Forming Reflections:

- "I'm not sure what to do."
- Stabilizing: "You're not sure."
- <u>Forward Moving</u>: "You're not sure and you want to make the right decision."

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Forming Reflections:

- "It pisses me off when people tell what to do."
- Stabilizing: "It makes you mad."
- <u>Forward Moving</u>: "It makes you mad and you don't want to always be mad."





Application

Your client, Tina/Tim Davis, had his/her two children (ages 3 and 5) removed by the Department of Children's Services (DCS) due to concerns about unsanitary living conditions, lack of supervision, and Tina/ Tim's history of substance use. The court found probable cause of dependency and neglect at the preliminary hearing last week. Tina / Tim feels overwhelmed, defensive, and distrustful of the system, but he/ she really wants the kids to come home. You are meeting with your client ahead of a child and family team meeting to develop an initial permanency plan. Tina/Tim is unsure whether to engage with services because of a feeling that no one understands the situation. Your goal is to use motivational interviewing skills to engage your client in a productive conversation and help consider the possibility of taking steps toward reunification.

- Attorney: Practices using MI skills to engage the client.
- Parent (Client): Plays the role of a parent involved in a neglect and dependency case.

Role-Play (10 Minutes) The attorney leads the conversation, using MI techniques to build rapport and explore the parent's thoughts on reunification. The parent should respond naturally but with some resistance (e.g., frustration, distrust, uncertainty about change). Examples of dialogue to get you started or moving if you get stuck will be shared in the chat or with the distance materials.

Switch after five minutes.



Communication

Tenn. Sup. Ct. R. 8, RPC 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Rules of Professional Conduct and Clients with Communication Challenges

Tenn. Sup. Ct. R. 8, RPC 1.2: SCOPE OF REPRESENTATION & ALLOCATION OF AUTHORITY

A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Tenn. Sup. Ct. R. 8, RPC 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Tenn. Sup. Ct. R. 8, RPC 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances . . . the client's legal position may be destroyed.

Ensuring Professional Conduct in the Representation of a Parent with a Disability

Know the Law, Know your Client

- Title II of the Americans with Disabilities (ADA) applies to state entities like Tennessee courts and the Department of Children's Services.
- Section 504 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of any entity that receives Federal financial assistance or be subjected to discrimination by such entity. The ADA was modeled after the Rehabilitation Act and it expressly adopts the latter's remedies, procedures, and rights, so case law interpreting either statute is generally applicable to both. 29 U.S.C. § 794(a).



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Title II of the Americans with Disabilities Act (ADA)

- "Services, programs, and activities" provided by public entities include, but are not limited to, investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services.
- "Services, programs, and activities" also include child welfare hearings, custody hearings, and proceedings to terminate parental rights. 42 U.S.C. § 12131(1)(A),(B) and 42 U.S.C. § 12132
- In terms of child welfare administration and adjudication, two principles are fundamental to Title II of the ADA and Section 504:
 - (1) individualized treatment; and
 - (2) full and equal opportunity.

Who is a "Qualified Person"?

The ADA protects the rights of people who have a physical or mental impairment that substantially limits their ability to perform one or more major life activities, such as breathing, walking, reading, thinking, seeing, hearing, or working.

42 U.S.C. § 12131



Communication Disabilities under the ADA

People who have vision, hearing, or speech disabilities ("communication disabilities") may use different mechanisms to communicate effectively.

• The ADA requires that title II entities communicate effectively with people who have communication disabilities. The goal is to ensure that communication with people with these disabilities is equally effective as communication with people without disabilities.



Reasonable Accommodations



Providing Sign Language Interpreters in Tennessee Judicial Proceedings

In any case in law or equity before any court or the grand jury, wherein any deaf person is a party to such action, either as a complainant, defendant, or witness, the court shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to the deaf person and interpret the person's testimony or statements and to assist in preparation with counsel. T.C.A. 24-1-211(b)(1)



Other Disabilities and Diminished Capacity

Tenn. Sup. Ct. R. 8, RPC 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, *maintain a normal client-lawyer relationship with the client*.

"The goal is to find a practical solution that fits the circumstances, taking into consideration the nature, length, and complexity of the communication as well as the person's normal method(s) of communication. What is required to communicate effectively when a person is registering for classes at a public university is very different from what is required to communicate effectively in a court proceeding." US Department of Justice, Civil Rights Division, ADA Requirements: Effective Communication.

Brandeis Lurie Institute for Disability Policy: Support Parents with Psychiatric Disabilities with Child Welfare Involvement: <u>https://heller.brandeis.edu/lurie</u>

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Limitations

What kinds of assistance cannot be provided?

• The Tennessee judicial branch ADA program cannot provide assistance that would change the basic nature of the judicial system. For example, the ADA program cannot force a legal decision on the court, such as a dismissal of a case, a change of venue or ruling on a legal matter. The appointment of an attorney to represent a party to a civil case cannot be required. Transportation to and/or from a scheduled court appearance cannot be provided.

https://www.tncourts.gov/administration/human-resources/ada-policy





Questions?

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CIP Online Resources

https://www.tncourts.gov/programs/court-improvement

- On-Demand Training
- Upcoming Training/Events
- Sample Motions, Orders, and Forms
- Reference Guides and Manuals

