

Collaboration vs. Zealous Advocacy: Ethically Inconsistent or Highly Compatible?

By Candi Mayes, J.D., C.W.L.S.¹
John P. Passalacqua, J.D., C.W.L.S.²
Gary C. Seiser, J.D., C.W.L.S.³

"It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law."⁴

Introduction.

Attorneys have a duty of zealous advocacy, but frequently courts want them to work together, to "collaborate." Can an attorney ethically do both or does zealous advocacy mean you can't collaborate? Is there a wall between the two? Does the duty of competence help create a bridge? What of the evolving change from "zealous advocacy" to "reasonable diligence and promptness"; does that make a difference? And what of professionalism and civility? These are all good questions, especially in the juvenile dependency system where a state's rules of professional responsibility may not always seem to "fit," attorneys sometimes represent multiple parties or take on hybrid roles, and reasonable minds can differ as to what is best for children and families.

This paper seeks to briefly shed some light on this very important topic through the views of three experienced practitioners; two have years of experience representing children and parents, and one has represented a social services agency for over two decades. If we three can agree, then perhaps our thoughts can provide a starting place for others to begin or continue this discussion. This article, as is the field of juvenile dependency law and practice, is a work in progress.

¹ Candi Mayes is the CEO and Executive Director of the Dependency Legal Group of San Diego (DLG), a California non-profit public benefit corporation, which represents parents and children. She was the recipient of the Outstanding Acts of Civility Award by the San Diego County Bar Association in 2008.

² John P. Passalacqua has a private practice in Mendocino and Lake Counties, California, where he is appointed counsel for children and parents in juvenile dependency proceedings, and previously worked in Sacramento and Stanislaus Counties representing parents.

³ Gary C. Seiser is a supervising deputy with the Juvenile Dependency Division of the Office of County Counsel, San Diego County, California, which represents the San Diego County Health and Human Services Agency. In 2010 he received the L. Michael Clark Civility and Professionalism Award from the County Counsels' Association of California, Child Welfare Study Section.

⁴ *In re S.C.* (2006) 138 Cal.App.4th 412, 41 Cal.Rptr3d 453, 468, quotation marks and citations omitted.

Counsel for Parents/Guardians.

The right of a parent to the care, custody, and control of their child has been described by the United States Supreme Court as perhaps the oldest of the fundamental liberty interests (*Troxel v. Granville* (2000) 530 U.S. 57, 65). Attorneys who represent parents in dependency proceedings play a critical role in safeguarding these liberty interests [Sankaran, Representing Parent in Child Welfare Proceedings, (2010)]. Under the ABA Model Rules of Professional Responsibility, the ABA approved Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases and state rules, attorneys have an obligation to provide competent and zealous advocacy. The validity of the agency's position must be thoroughly analyzed and tested on both a factual and legal basis at every hearing [Murray, California Juvenile Dependency Practice § 11.3 (CEB 2009)]. Even the appearance of divided loyalty may impair the client's trust and undermine the ability to maintain a productive attorney-client relationship [Duquette & Haralambie (eds.), *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Proceedings* (2d ed. 2010)].

Notwithstanding this duty of zealous advocacy, dependency cases are required to be conducted in an informal and non-adversarial atmosphere when possible and it is recommended that parent's counsel cooperate with other professionals in the case [See California Welfare & Institutions Code § 350, subd. (a)(1); Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, p. 3 (ABA 2006)]. There is however, considerable debate as to how a competent and zealous parent's counsel should fulfill his or her obligations to advocate for their clients' parental rights. In recognition of the unique and less formal nature of dependency proceedings, the term "collaboration" is often used to describe the ideal culture for effective resolution of the dependency case. Many parents' counsel take issue with the notion of collaboration and feel that it is antithetical to the concept of zealous advocacy. These individuals point to the dictionary definition of collaboration as "the act of cooperating as a traitor" and focus on the fact that unlike other players in the dependency process, a parent's counsel is not charged with the duty to act in the best interests of the child.

To be clear, the obligation of a parent's attorney is to protect the interests of the parent and advocate for their position, not to safeguard the best interests of the child. That duty falls upon the agency, minors' counsel and the court [Rauber, Representing Parents in Child Welfare Cases, p. 6 (ABA 2000)]. However, the ethical and effective representation of parents requires an amalgamation of collaboration and zealous advocacy and recognition of when to employ each. A zealous advocate is one who, with knowledge of the law, the facts of the case, and their client's position, charts the course most likely to achieve success. This requires thorough consultation with the client, particularly those clients whose myopic or emotional view of the circumstances could undermine their goals. Often, the most effective dependency attorneys labor extensively

outside the courtroom, gaining the most for their clients by focusing on negotiation [Laver, *Representing Parents Effectively Post-ASFA* in *ABA Child Law Practice*, vol, 18, No. 10 (Dec.1999)]. The strong dependency practitioner also understands that having a productive relationship with the agency social worker will often benefit the client in each case. Furthermore, zealous advocacy oftentimes *necessitates* collaboration to make systemic changes which benefit parents as a whole such as increasing the quantity and quality of visitation and available services. In short, quality parent representation encompasses both zealous advocacy *and* collaboration. It requires the ability to recognize: (1) when to fight, by carefully selecting what issues need to be contested, (2) how to fight, by selecting a measured response to the problem, and (3) when to resolve issues through non-adversarial methods or collaboration [Raubert, *Representing Parents in Child Welfare Cases*, p. 4 (ABA 2000)].

Counsel for Child Protection Agencies.

Whether a state or county department, child welfare agencies are represented by counsel in the vast majority of dependency proceedings. Who the attorney actually represents is not always clear for social workers and other participants, however. In those jurisdictions where the prosecuting attorney assists the juvenile court in the presentation of evidence in dependency cases, the attorney generally advises the department but represents the state, the "people." Where counsel other than a prosecuting attorney is involved, such as county counsel representing a county welfare agency, the client is generally the department, not the individual social worker. In doing so, counsel represents agency policy through advocating for the social worker's position in an individual case, unless the two are inconsistent [Standards of Practice for Lawyers Representing Child Welfare Agencies (ABA 2004); Laver, *Agency Attorneys and Caseworkers: Working Well Together* in *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Proceedings*, ch. 27 (2d ed. 2010); Clark, *Representing Petitioner* in *Cal. Juvenile Dependency Practice*, ch. 14 (Cal. CEB 2010); Scahill, *The Prosecuting Attorney in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases* (NCJJ 2000)].

Each model of agency representation has its strengths and difficulties. Regardless of the model, unless properly trained, individual counsel may find their greatest problem is communicating and working with social workers. This is for a number of reasons: lawyers are schooled in the adversarial process while social workers are educated in a more collaborative process; counsel and case workers often differ as to what kind of results they value in a case; and they each communicate – at least at the beginning – in a different "language." This is where collaboration must begin for the agency attorney.

Social workers have an ethical duty to respect all people, including their clients and their colleagues [NASA Code of Ethics]. How do they feel when attorneys don't do the same, especially when the attorney is their own? Devalued, unappreciated, not supported or treated as a professional, and sometimes deservedly although uncharacteristically angry. Equally important, how do case workers feel when their lawyer makes a "legal" decision or presents an argument that is contrary to best social work practice despite the evidence supporting the social worker's assessment and recommendation? Unrepresented. Thus, the duties of loyalty, communication, and confidentiality are especially important in agency representation, with working together being essential to accomplishing not only the department's goals, but the attorney's ethical responsibilities.

Agency counsel also have the same duties of competence and diligence (zealous advocacy) as do counsel for children and parents. For agency counsel, however, an even stronger argument can be made that working together with other counsel, parties, service providers, and the court are essential to fulfilling the duties of both competence and diligence. This is because duty of diligence is "tempered by several factors unique to dependency proceedings" [Clark, *Representing Petitioner* in Cal. Juvenile Dependency Practice, ch. 14, § 14.25, p. 1157 (Cal. CEB 2010)]. These factors, which competent agency counsel must be aware of and consider in their practice, include such things as recognition that after jurisdiction is found the parents generally must work with the social worker and the social worker with the family; criticizing a parent or the parent's counsel in court, rather than just arguing facts in a balanced manner can make a parent hostile and a social worker's job more difficult. The same is true if the agency's counsel is unwilling to work with the parents' and children's counsel to resolve the language of the allegations, placement, visitation, and services. In many cases, going to trial is the least effective way to achieve the child's best interest while also protecting the child [*Ibid.*; see also Seiser & Kumli, *California Juvenile Courts Practice and Procedure*, § 2.10[3], p. 2-26 (Mathew Bender 2011 ed.)].

The agency's counsel is in an excellent position to greatly influence the general tone of dependency proceedings. If the attorney is knowledgeable, reasonable, willing to negotiate where appropriate, and treats everyone, including the social worker, parents, and all counsel, with respect, that tone will be a very positive and productive one.

Counsel for Children.

All lawyers owe certain duties to their clients, including loyalty, competence, and diligent and dedicated advocacy. Attorneys who represent minors are no different in this regard from attorneys who represent adults [Duquette & Haralambie (eds.), *Child Welfare Law and Practice* (2d ed. 2010); ABA Standards of Practice for Lawyers Who Represent

Children in Abuse and Neglect Cases, Approved 1996]. Attorneys who represent minors must perform to the same professional level as all attorneys on the case. They are required to perform an independent investigation that includes meeting with and talking to their client, as well as to obtain, review, and analyze all relevant evidence from others involved [Child Abuse Prevention and Treatment Act (CAPTA) 42 U.S.C. §§1501-5119; Duquette & Haralambie (eds.), *Child Welfare Law and Practice* (2d ed. 2010); ABA Standards of Practice]. Attorneys who represent minors may not simply rely on the social worker's report or the representations of other parties when evaluating a case or determining a position. This is true whether the attorney is providing client directed representation as appointed counsel or advocating for the minor's best interest as a CAPTA GAL [42 USC 5106(a)(xiii), Duquette & Haralambie (eds.), *Child Welfare Law and Practice*; ABA Standards of Practice (2d ed. 2010); Renne, *Legal Ethics in Child Welfare Cases* (ABA 2004)].

Dependency attorneys are litigators and minor's attorneys must certainly be expected to try their cases when necessary. Of course, much of what happens in a dependency case happens outside of trial and minor's attorneys must also be effective advocates in those circumstances as well. Too often minor's attorneys rely on other counsel to develop the case or take a secondary role in negotiations. All clients are entitled to the same competent and zealous advocacy from their attorneys, regardless of their age [Duquette & Haralambie (eds.), *Child Welfare Law and Practice* (2d ed. 2010); ABA Standards of Practice, NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001)]. Attorneys who represent minors often perform a dual role but they are certainly not held to a lesser standard of representation. An effective attorney should take an active and involved role in developing their own side of the case as well as negotiating with others.

Quality representation requires both good trial skills as well as good negotiation and communication skills [ABA Standards of Practice, Model Rules of Professional Conduct]. Quality representation also requires a willingness and ability to work with others to discuss the status of cases and share information to the extent possible; in other words, the ability to play well with others. While there are attorneys who hold onto the notion that everyone else on the case is the enemy – there is no evidence that this attitude produces better outcomes for their clients. In fact, approaching the practice of law in this way could very well harm your client by denying them the benefit of cooperative reasonable negotiation and settlement discussions. Respect, cooperation, and good faith are all needed for successful negotiation [Gordon Wade Rule, *The Art of Negotiation*, © 1962].

Not every state has standards of practice for dependency attorneys but there does seem to be a trend towards emphasizing civility and collaboration. While some practitioners take

issue with the term ‘collaboration,’ this term of art is growing in popularity in the legal arena around the nation. In fact, the model rules and some states are deleting the adjective ‘zealous’ to modify advocacy in their rules of professional conduct [Arizona Attorney, April 2008]. Arizona was the first state to do so, specifically citing attorneys use of the term ‘zealous’ to justify all manner of terrible behavior. Many of the states who have followed the model rules and Arizona are choosing terms such as ‘reasonable diligence’ (see Illinois, New Jersey, Louisiana, Montana, Nevada, New Jersey, Washington, and Oklahoma Rules of Professional Conduct) or “commitment and dedication’ (see Indiana and Arizona Rules of Professional Conduct) to define appropriate attorney conduct and client representation instead of ‘zealous.’ While there are certainly those who will continue to define collaboration in military war terms of ‘conspiring with the enemy’, many others it seems prefer the Webster’s definition ‘to work together’ [Webster’s Dictionary (2000); *see also* Roget’s 21st Century Thesaurus (2005)].

The decline of civility in the practice of law has become a much lamented and discussed topic in legal literature. U.S. Supreme Court Justice, Sandra Day O’Connor has expressed her concerns about the decline of civility in an article for Washington University Law Quarterly (reproduced on the Missouri State Bar Association website, www.mobar.org) stating, “When lawyers themselves generate conflict, rather than addressing the dispute between the parties they represent, it undermines our adversarial system and erodes the public’s confidence that justice is being served. Greater civility can only enhance the effectiveness of our justice system, improve the public’s perception of lawyers, and increase lawyers’ professional satisfaction.” There are a growing number of attorneys and judges who credit the doctrine of zealous advocacy with this decline [Allen K. Harris, *Zealous Advocacy: Duty or Dicta?*, Oklahoma Bar Journal, Ethics & Professional Responsibility.

Whether we use the phrase ‘working together’ or the term ‘collaboration’, the point is to ensure that the process is as congenial as an adversarial process can be and that the clients benefit from the ability of the attorneys to operate from a civil, professional point-of-view (as opposed to the emotional base that most clients are operating from). The furtherance of the client’s goals must be paramount – and while the client may receive some short-term satisfaction from drawing a line in the sand if they are no closer to their goal from a legal standpoint then the attorney has not done their job. In fact, in dependency cases especially, refusing or failing to work together can actually delay reunification for your client. The most effective minor’s counsel seeks out the facts and evidence independently, is open to re-evaluation as new facts and evidence come to light, honestly and frankly advises their client in an age appropriate manner, works with the other professionals in a congenial and civil manner, and takes those issues to trial that cannot be agreed upon. This is effective advocacy – the best kind!

Conclusion.

The most effective litigants in dependency proceedings, be they on the side of the agency, the child or the parent, are rarely those who consistently draw the hardest line or take the most cases to contested hearings. Instead, they are usually those who work with knowledge, insight, and a spirit of cooperation to achieve realistic and reasonable goals for their clients both inside and outside the courtroom. Litigants who achieve the best result regardless of their role in the proceedings strive to protect the child and to maximize the involvement of the family in decision making and services. Those litigants who focus on problem solving enjoy the greatest likelihood of success and the least degree of hostility. All agencies, attorneys and courts should evaluate their own approach to dependency proceedings in light of these guiding principles.⁵

The terms "zealous" and "collaboration" may not have been the best choice of words, but the words themselves are not the problem. It is the way we individually define and practice the words that creates the difficulty. Like "the best interest of the child," reasonable minds can differ. What can't be argued, however, is that zealous advocacy means you have to be argumentative, obstreperous, unprofessional, or less than civil. It doesn't. Nor does "collaborate" mean you have to sell out your client, be unethical, or always go to trial. Everyone in the system should be zealous yet civil, diligent yet professional; and all attorneys should be competent and effective, recognizing the best way to accomplish as much of your client's desires as reasonably possible is to work with other parties, counsel, and the court in a cooperative and ethical manner. Good luck.

⁵ Seiser & Kumli, California Juvenile Courts Practice and Procedure, § 2.10[3], p. 2-26 (Mathew Bender 2011 ed.)

Resources .

Duquette & Haralambie (eds.), *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Proceedings* (2d ed. 2010)

Heywood (ed.), *California Juvenile Dependency Practice* (Cal. CEB 2010)

Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 Rutgers L. Rec. 1 (Spring 2006)

Laver, *FOUNDATIONS FOR SUCCESS: Strengthening Your Agency Attorney Office* (ABA 1999)

Laver, *Representing Parents Effectively Post-ASFA* in *ABA Child Law Practice*, vol, 18, No. 10 (Dec. 1999)

Patton, *Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers* (Cambridge Univ. Press, 2006)

Rauber, *Representing Parents in Child Welfare Cases* (ABA 2000)

Renne, *Legal Ethics in Child Welfare Cases* (ABA 2004)

Scahill, *The Prosecuting Attorney in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases* (NCJJ 2000)

Seiser & Kumli, *California Juvenile Courts Practice and Procedure* (Mathew Bender 2011 ed.)

Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (ABA 2006)

Standards of Practice for Lawyers Representing Child Welfare Agencies (ABA 2004)

Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (ABA 1996)