

ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday February 20, 2020

No. 2 Discussion and possible action regarding:

- EO-19-0003 Public Comments

Committee member Angela Woolridge will present information at the meeting.

ETHICS OPINION DRAFT

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-19-0003

The Attorney Ethics Advisory Committee was created in accordance with [Rule 42.1](#) and Administrative Order No. [2018-110](#).

A lawyer that engages a social worker to provide services in connection with a representation must advise the client that the social worker may be obligated by law to report physical injury, abuse, or neglect of a minor when the lawyer is not otherwise required to do so. It is the decision of the client whether to utilize the services of the social worker.

ISSUE PRESENTED:

What are the ethical duties of a lawyer supervising a non-lawyer professional who may have a statutory obligation to report offenses against minors?

FACTUAL BACKGROUND:

An agency provides legal and social services to victims of crime. The agency employs lawyers and social workers who work closely together to provide holistic services to victims. The duties of the social worker focus primarily on enhancing the agency's representation. They provide emotional and crisis support to victims, inform victims of court dates, explain steps, and accompany victims to court. They do not provide formal counseling services to clients.

The lawyers represent victims at hearings. The lawyers work with prosecutors, law enforcement, defense counsel, and others involved in criminal justice to ensure the rights of victims are upheld.

In Arizona, under Arizona Revised Statutes Section 13-3620, a social worker must report suspected physical injury, abuse, child abuse, a reportable offense, or neglect to a law enforcement agency, tribal social services, or the Department of Child Safety. There are certain exceptions.

In working with a social worker, a client may disclose an instance of physical injury, abuse, child abuse, a reportable offense, or neglect that does not lead to death or substantial bodily injury. A client may reveal past abuse by a non-client.

RELEVANT ETHICS OPINIONS:

District of Columbia Bar, Legal Ethics Committee Opinion 282 (June 1998)

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT:

ER 1.0 Terminology

- (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

ER 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) [A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued.

ER 1.4 Communication

- (a) A lawyer shall:

- (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;

- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ER 1.6 Confidentiality of Information

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry of the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

ER 5.3 Responsibilities Regarding Nonlawyer Assistants

- (a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;
- (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
- (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or,
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

OPINION

The Committee was presented with the question of whether a social worker, in connection with a lawyer's representation of a client, can break confidentiality and report the suspected physical injury, abuse, child abuse, reportable offense, or neglect pursuant to Arizona's mandatory reporting statutes.¹ The Rules of Professional Conduct apply to a lawyer, not to a nonlawyer individual, and therefore, the Committee is constrained to addressing questions of lawyer ethics and cannot decide the extent of a social worker's obligations under the mandatory reporting statute.

Every lawyer owes his or her client a duty of confidentiality under ER 1.6. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by the Rules.²

In many instances, a lawyer works in connection with nonlawyer assistants, who provide support to the lawyer in his or her practice. When a nonlawyer is employed, retained by, or associated with a lawyer, ER 5.3 requires the lawyer to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations including the lawyer's responsibility to maintain the confidentiality of information relating to the client representation.

According to the Rules of Professional Conduct, a lawyer has supervisory obligations and responsibilities when associating with nonlawyers. ER 5.3(a) requires a lawyer with managerial authority to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a nonlawyer's conduct is compatible with the professional obligations of the lawyer. Likewise, a lawyer having direct supervisory authority over a nonlawyer must make a reasonable effort to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations. ER 5.3(b). Comment [2] to ER 5.3 provides further guidance. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. . . . The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline." Comment [3] to ER 5.3 recognizes that these obligations extend to a nonlawyer outside of the firm as well.

Given these obligations, the lawyer has an affirmative duty to make a reasonable effort and reasonably assure that a nonlawyer assisting the lawyer is aware of the lawyer's duty of confidentiality regarding the matter, and that the duty of confidentiality extends to the nonlawyer as well. Not ensuring that such measures are in place, or allowing the nonlawyer to violate the Rules, could result in the lawyer being disciplined for the failure to supervise the nonlawyer if the "lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or . . . knows of the conduct at a time when its consequences

¹ The statutory requirement in question is A.R.S. §13-3620(A), stating that "[a]ny person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect . . . shall immediately report or cause reports to be made of this information"

² For purposes of addressing the requestor's question, the Committee assumed that no exception in ER 1.6 applied to the lawyer and therefore, the lawyer was not required to report suspected abuse or neglect.

can be avoided or mitigated but fails to take reasonable remedial action.” ER 5.3(c) *see also In re Phillips*, 226 Ariz. 112, 244 P.3d 549 (2010) (reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that a nonlawyer employed by the firm or associated with the lawyer comply with the professional obligations of the lawyer requires not only supervision but also that the supervising lawyer establishes internal policies and procedures).

In situations where a lawyer employs, retains, or is associated with a nonlawyer individual who is subject to a mandatory reporting statute, the lawyer remains obligated by ER 1.6 to maintain client confidentiality. Likewise, the nonlawyer involved is also generally obligated to maintain ER 1.6 confidentiality by operation of ER 5.3. However, the nonlawyer may be required to breach confidentiality to comply with the mandatory reporting obligation.

Accordingly, given the mandatory reporting requirements some nonlawyers may have, the supervising or employing lawyer has an ethical obligation to the client whose matter is potentially impacted by a reporting requirement. More specifically, the lawyer is obligated to ensure Rule compliance to the extent permissible (including confidentiality) by the nonlawyer individual regarding information not subject to mandatory reporting, to inform any possibly affected client of the confidentiality limits and risks created by the involved nonlawyer’s statutory reporting obligations and to ascertain the client’s informed consent as to whether to proceed with the use of such a nonlawyer given the risk it presents to some aspects of the confidentiality of the client’s matter.

Because the possibility of disclosure by a nonlawyer statutory reporter poses a serious risk to the confidentiality of a client matter, it is imperative that the lawyer, at either the inception of representation or at the time of involving a nonlawyer subject to a mandatory reporting requirement, informs the client of the confidentiality duties of the lawyer and its extension to the nonlawyer, as well as the limitations on those duties and the risk posed by possible mandatory reporting. When discussing the risks associated with the use of a nonlawyer subject to a mandatory reporting statute, it is vital that the client receives adequate information that would allow the client to give informed consent. “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. ER 1.0(e).

In addition, the general client communication requirements of ER 1.4 requires a lawyer to advise a client, in advance, of the risk that information—that may otherwise be protected under ER 1.6—may have to be disclosed by a nonlawyer with a mandatory reporting obligation. Such information is necessary for a client to be reasonably informed about the status of his or her matter, such that the client can make an informed decision regarding the case. *See* ER 1.4(a), ER 1.4(b).

ER 1.4(a)(2) requires a lawyer to reasonably consult with the client about the means by which the client’s objectives are to be accomplished, and ER 1.2(a) directs that a lawyer abide by a client’s decisions concerning the objectives of representation and consult with the client as to the means by which the objectives of representation are to be pursued. The risk posed to client confidentiality by a mandatory reporter’s potential obligation to reveal information is serious enough that a client should be fully informed of the potential risk and presented with the decision whether to proceed with taking that risk in furtherance of the representation. Once the client has been advised of the risks associated with involving a nonlawyer

with a mandatory reporting obligation, the client should be permitted to make, and the lawyer should confirm with the client, the decision whether to proceed with the utilization of such a nonlawyer.³

Neither informed consent nor ER 1.4 require a writing memorializing the discussion with the client. However, it is advisable that at or about the time of the communication, the lawyer create a writing that adequately describes the nature of the communication with the client, including the risk to the confidentiality of the client's matter. This document should be signed by the client and retained by the lawyer.

The District of Columbia Bar addressed a similar question from an association of social workers who sought guidance about the obligation of a social worker who is employed by or acting as a consultant to a lawyer in the course of representing a client. "Under D.C. Code §2-1352, social workers and certain other professionals who reasonably suspect that child abuse or neglect has taken place must 'immediately' report the suspected abuse to the Metropolitan Police department or to the Child Protective Services Division of the Department of Human Services."

The District of Columbia Bar concluded that a lawyer who engages a social worker to provide a service in connection with the representation of a client must inform the client that the social worker may be required under law to report suspected child abuse or neglect, and, although the lawyer must ensure that the persons employed by the lawyer preserve client confidences, other laws may require the social worker to report abuse or neglect.⁴ It is then the client's decision whether to proceed with the use of the social worker.⁵

³ If the client determines that the representation should not continue with the use of the social worker, the firm should take steps to eliminate access to the client's matter. The process to do so depends on the systems in place in the firm. For example, if the firm keeps paperless files, the social worker's permissions to that file should be revoked/restricted. If the firm keeps paper files, the file should have some advisory on it to denote restricted access and should not be kept in a central file location where the social worker may inadvertently come across the file. Additionally, proper instructions should be given to support staff that serve both the lawyer and the social worker that the social worker should have no access to the file. Given the physical set up of the workspace, consideration should be given to whether general discussions regarding the client may be heard by the social worker.

⁴ Following the issuance of District of Columbia Bar Legal Ethics Opinion 282 (1998) District of Columbia Code §4-1321.02 was enacted and addressed the issue that was the subject of the opinion. "Such persons are not required to report when employed by a lawyer who is providing representation in a criminal, civil, including family law, or delinquency matter and the basis for the suspicion arises solely in the course of that representation" Other states have taken a converse position, specifically, Tennessee mandates, through Tennessee Code §37-1-403, that anyone with knowledge of child neglect or abuse is required to report the information and the lawyer shall reveal such information to "comply with other law" which is an exception to ER 1.6.

⁵ Also noted in the opinion is that the lawyer should not provide legal advice to the social worker regarding a reporting obligation under the statute because the lawyer's duty to the client to assure protection of confidences prevents giving any contrary opinion to the social worker. *See* ER 1.7(a) In addition, the lawyer should not request that the social worker ignore a provision of the law mandating the reporting of child abuse or neglect.

In conclusion, the inquiring lawyer who employs a social worker in connection with the representation of a client must advise the client that the social worker may be required by law to report physical injury, abuse, child abuse, a reportable offense, or neglect of a minor when the lawyer is otherwise prohibited from disclosing the client's confidences. It is the client's decision whether to proceed with the use of the social worker.

ETHICS OPINION REQUEST

Dear Members of the Attorney Ethics Advisory Committee:

seeks the Committee’s guidance on the application of attorney-client confidentiality obligations when a social worker, employed by , learns of suspected offenses committed against children that would otherwise be required to be reported by the social worker. Because the Committee, the Arizona Attorney General, and the Arizona courts have not addressed this issue, requests an ethics opinion.

I. Background

is a non-profit agency that provides legal and social services to victims of crime. represents crime victims during all phases of the criminal justice process and ensures that victims are able to exercise their state constitutional and state and federal statutory rights. employs five lawyers, two social workers, and two office staff members. The social workers and lawyers work closely together to provide holistic services to victims. The duties of an social worker focus primarily on enhancing ’s representation of victims. Among other things, the social workers provide emotional and crisis support to victims, keep victims informed of court dates, and accompany victims to court.¹ They do not provide formal counseling or therapeutic services to victims.

The lawyers appear at hearings on behalf of victims, file motions, and work with prosecutors, law enforcement, defense lawyers, and other criminal justice personnel to ensure that the rights of the victim are enforced. lawyers also file petitions for special action, petitions for review, petitions for certiorari, and amicus briefs with appellate courts to develop victims’ rights case law in Arizona and the United States.

II. Can an social worker break confidentiality and report suspected physical injury, abuse, child abuse, a reportable offense or neglect?

In Arizona, a social worker must report suspected physical injury, abuse, child abuse, a reportable offense, or neglect to a law enforcement agency, tribal social services agency, or the Department of Child Safety.² Lawyers, on the other hand, generally cannot reveal such information unless the client consents or an exception to the duty of confidentiality applies.³ One such exception requires a lawyer to reveal otherwise protected information “to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial

¹ These duties fall under the statutory definition of the “practice of social work.” See A.R.S. § 32-3251(11)(b) (stating that the “[p]ractice of social work” means the professional application of social work theories, principles, methods and techniques to...assist individuals, families, groups

² A.R.S. § 13-3620(A) (stating that “[a]ny person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect . . . shall immediately report or cause reports to be made of this information[.]”); see also *id.* at 13-3620(A)(1) (including “social worker” in the definition of “person”).

³ ER 1.6(a).

bodily harm.”⁴ Another exception gives a lawyer the discretion to reveal protected information “to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.”⁵

’s lawyers and social workers, however, anticipate situations where clients disclose cases of physical injury, abuse, child abuse, reportable offenses, or neglect that may not lead to “death or substantial bodily harm.”⁶ Clients may also disclose *past* abuse by *non*-clients. In these cases, ’s lawyers cannot break confidentiality.⁷ This leaves the social workers in a bind.

On the one hand, ’s social workers must follow the lawyers’ ethical obligation to maintain confidentiality.⁸ If they do not, they place the lawyers at risk for sanctions.⁹ On the other hand, the social workers must follow their own obligation to report even if the injury is not serious or life threatening.¹⁰ If they do not, they may face criminal prosecution¹¹ and professional sanctions.¹² In short, ’s lawyers are unclear on how to advise the social workers when a client discloses past abuse or abuse that may not lead to death or substantial bodily harm.

⁴ ER 1.6(b).

⁵ ER 1.6(d)(6).

⁶ Examples include minor physical injury—such as bruising—and surreptitious photographing. *See* A.R.S. § 13-3623(F)(4) (including “skin bruising” under the definition of “physical injury”); A.R.S. § 13-3620(P)(4) (including surreptitious photographing as a “reportable offense”).

⁷ No other exception to confidentiality seems to apply. ER 1.6(c) typically does not apply because either the crime has already occurred or the person that committed the crime is not AVCV’s client. ER 1.6(d)(5) does not apply because lawyers are exempt from Arizona’s mandatory reporting law and do not need to “comply with other law.”

⁸ A non-lawyer, such as a social worker, employed by a law office is bound by a lawyer’s ethical obligations. *See* ER 5.3.

⁹ Lawyers must give non-lawyer employees “appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client[.]” ER 5.3. This duty “clearly encompasses the protection of client confidences communicated to a nonlawyer assistant[.]” *Smart Industries Corp., Mfg. v. Superior Court*, 179 Ariz. 141, 146 (App. 1994).

¹⁰ “An injury need not be serious or life threatening to trigger the reporting obligation. All that is necessary is that the injury meet the statutory definition and that [the] person...have a reasonable belief that the infliction of the injury was non-accidental.” Ariz. Att’y Gen. Op. No. I07-006 at 2 (2007); *see also* *L.A.R. v. Ludwig*, 170 Ariz. 24, 27 (App. 1991) (stating that the threshold for reporting is “low”).

¹¹ A.R.S. § 13-3620(O) (“A person who violates this section is guilty of a class 1 misdemeanor, except if the failure to report involves a reportable offense, the person is guilty of a class 6 felony.”).

¹² Among other things, AVCV’s social workers can face sanctions for “[v]iolating any federal or state law, rule or regulation applicable to the practice of behavioral health.” A.R.S. § 32-3251(16)(ii).

III. The Committee should issue an opinion because this question has not been directly addressed by an ethics opinion, Attorney General opinion, or case law and is of statewide importance.

The Committee, the Attorney General, and the courts have not answered the question that _____ poses.¹³ The (former) Committee on the Rules of Professional Conduct has issued opinions on related issues, such as a lawyer’s duty to report elder abuse¹⁴ and a lawyer’s duty to supervise non-lawyers.¹⁵ It has not, however, directly addressed _____’s question.¹⁶ The Attorney General has also issued opinions on related issues, but has not squarely addressed _____’s question.¹⁷ Arizona’s courts have not offered any guidance either.

Furthermore, this issue may affect many other organizations in Arizona.¹⁸ This is an ethical issue that lawyers and mandatory reporters working all over Arizona may encounter.

IV. Conclusion

_____ respectfully requests that the Committee accept this request for an ethics opinion and offer guidance on this important issue.

Sincerely,

¹³ Other jurisdictions have addressed similar issues. *E.g.*, State Bar of Nevada, *Standing Comm. on Ethics and Professional Responsibility Op. 30* (2005); District of Columbia Bar, *Legal Ethics Comm. Op. 282* (1998); Maryland Att’y Gen. Op. No. 90-007 (1990).

¹⁴ Ariz. Op. 01-02 (2001).

¹⁵ Ariz. Op. 98-08 (1998); Ariz. Op. 01-11 (2001).

¹⁶ The Committee on the Rules of Professional Conduct referred to the issue in a footnote, but did not give an opinion. *See* Ariz. Op. 01-02, fn. 4 (2001) (“In the somewhat analogous context of mandatory child abuse reporting statutes, ethics committees in other jurisdictions have concluded that an attorney may ethically disclose confidential information when disclosure is required by statute.”).

¹⁷ *See* Ariz. Att’y Gen. Op. I05-007 (2005) (discussing the reporting responsibilities of teachers and school volunteers under A.R.S. § 13-3620); Ariz. Att’y Gen. Op. I07-006 (2007) (discussing reporting responsibilities under A.R.S. § 13-3620 generally).

¹⁸ For example, physicians, physician’s assistants, and nurses working in a medical-legal partnership may face this issue. *See* A.R.S. § 13-3620(A)(1) (including physicians, physician’s assistants, and nurses in the mandatory reporting statute).

PUBLIC COMMENT 1

OFFICE OF THE PUBLIC DEFENDER
MARICOPA COUNTY

JAMES J. HAAS
Public Defender

January 28, 2020

To: Attorney Ethics Advisory Committee
From: James J. Haas
Re: EO 19-0003

The Maricopa County Public Defender's Office requests the Attorney Ethics Advisory Committee (AEAC) consider this comment in reaching it's final opinion in EO 19-0003.

A.R.S. §13-3620(A)(1) requires certain listed professionals, including social workers¹, to report child abuse or neglect when the professional has learned of the abuse or neglect "in the course of treating a patient." The AEAC's Ethics Opinion 19-0003 concludes that when a lawyer employs one of these listed professionals to assist in the representation of a client, the attorney must advise the client that the non-lawyer assistant could be obligated by law to report child abuse or neglect learned in the course of that representation. The AEAC further concludes that the client must then decide whether the representation should include assistance from the listed professional.

This directive is overbroad and reflects an inaccurate application of the law. While a client advisement as described in the AEAC's draft opinion is necessary if or when a lawyer retains a social worker to treat a case-involved person, such an advisement should not be required when a social worker is hired to perform non-treatment work as a non-lawyer assistant.

It would significantly chill the attorney-client relationship, and potentially limit the quality of representation a client receives, if a lawyer was obligated to advise a client that non-lawyer assistants may be subject to the mandatory reporting laws when, in fact, they are not. The type of information that must be obtained by lawyers and their assistants in developing defenses or mitigation in a client's case is highly sensitive and often extremely painful for clients and their families to discuss. A relationship of trust, with legally accurate assurances of confidentiality, is paramount to obtaining this critical information.

¹ A social worker is broadly defined in A.R.S. § 36-501(44) as " a person who has completed two years of graduate training in social work in a program approved by the council of social work education and who has experience in mental health."

LAW FIRM

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Delivering America's Promise of Justice for All

It is common practice for criminal defense attorneys to hire medical professionals, behavioral health professionals, and social workers to assist in preparing the defense of a case. In fact, the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases mandates the inclusion of a mental health professional as a member of the defense team.² Persons with social work training, who may or may not maintain their state licensing, are commonly hired to work as “mitigation specialists” by criminal defense attorneys for assistance in both capital and non-capital cases.

The Maricopa County Public Defender’s Office currently employs 26 mitigation specialists, nearly all of whom hold a bachelors or higher degree in social work, psychology, or other behavioral health related field and 4 of whom maintain an active social work or therapy license. The primary role of the mitigation specialist is to obtain a client’s social history information through interviews of the client, client’s family and collateral sources, obtain medical and educational records, recommend mental health related experts that could provide additional insight into the client’s circumstances, and to ultimately draft a report for the lawyer that can be used in plea negotiations or sentencing arguments. Mitigation specialists may also locate treatment services in the community to assist in securing the pre-trial or post-conviction release of a client. This work is done at the direction of the attorney to further the legal representation of the client. These non-lawyer assistants do not engage in treating the defendant or any other case-involved person. They do not provide therapy, counseling, or medication to the client or other case-involved persons.³

In addition to social workers, the Maricopa County Public Defender’s Office routinely retains medical and mental health professionals in various non-treatment capacities to assist in preparing the defense of a case. For example, psychologists and psychiatrists may be retained to assess a defendant’s mental health status, administer psychological testing, suggest diagnosis, and consult on case-related matters. Physicians and nurses may be retained to assess alleged victims’ or defendants’ injuries and provide opinions to the lawyer about the cause of those injuries. These medical and mental health professionals, while using their professional training and expertise in the course of the client’s legal representation, are not tasked with providing treatment to clients or other case-involved persons. Furthermore, the Public Defender’s Office may employ paralegals, secretaries, clerks or other non-lawyer assistants who have social work or behavioral health backgrounds but, as with the social workers employed as mitigation specialists, are hired to perform duties that do not fall within the ambit of A.R.S. § 13-3620(1).

² “ The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” (2003 ABA Guidelines 4.1(2)).

³ Neither A.R.S. § 13-3620 nor A.R.S. § 32-3251 define the term “treatment” but § 32-3251(10) does distinguish “treatment” from other functions a social worker may perform (“Practice of Social Work means the professional application of social work theories, principles, methods and techniques to: (a) Treat mental, behavioral and emotional disorders. (b) Assist individuals, families, groups and communities to enhance or restore the ability to function physically, socially, emotionally, mentally and economically. (c) Assess, appraise, diagnose, evaluate and treat individuals, couples, families and groups through the use of psychotherapy.”).

The current draft of the AEAC's EO 19-0003 suggests that a lawyer would always need to advise a client about the disclosure "risks" of working with any non-lawyer assistants who also meet the qualifications of those professionals listed in A.R.S. § 13-3620(1), even if the services provided by the non-lawyer assistants are not within the scope of A.R.S. § 13-3620's reporting requirements. Taking the draft opinion to its logical conclusion, a lawyer who hires a data entry clerk holding a degree in social work would be obligated to inform the client that the clerk may be mandated to report abuse learned from the client's file, and the lawyer may then be required to screen that clerk from performing any clerical work on that client's case.

This is obviously not what the committee intends.

A lawyer's compliance with ER 5.3 and ER 1.6 is best maintained not by misadvising clients about the applicability of A.R.S. § 13-3620 but, rather, by discussing the mandatory reporting requirements with the listed professional prior to their employment by the lawyer. If the non-lawyer assistant's interpretation of the law is such that they believe they are obligated to report abuse learned while performing non-treatment work on a client's case, the lawyer can choose not to employ that applicant or, if employed, can then make the appropriate advisements to the client about the lack of confidentiality.

To avoid confusion about the applicability of ER 1.6 in the context of A.R.S. § 13-3620's reporting requirements, the AEAC's opinion should clarify that advising clients of mandatory reporting obligations exists only when non-lawyer assistants are hired *to provide treatment* to a client or other case-involved persons, and that lawyers must continue to take reasonable steps as required by ER 5.3 to ensure that non-lawyer assistants working in *non-treatment* capacities maintain confidentiality pursuant to ER 1.6.

Sincerely,



James J. Haas

Maricopa County Public Defender

PUBLIC COMMENT 2

From: Arlington, Erika
Sent: Monday, February 03, 2020 12:54 PM
To: Attorney Ethics Advisory Committee
Subject: Comment re: EO19-0003

I note that this Ethics Opinion was requested by lawyers working in an agency that provides legal and social services to victims of crime. However, in phrasing the "Issue Presented" the opinion encompasses any lawyer supervising a non-lawyer professional with a statutory obligation to report offenses against minors. If the opinion were limited to the situation of services for crime victims I would have no comment. However, because the opinion has a potentially much broader scope I ask you to consider the issues described below.

My agency represents both parents and children in dependency proceedings brought by the Department of Child Safety (DCS). In regards to this ethics opinion my concern is about our representation of children. Obviously our representation of children often involves allegations of abuse. Some of these are known to DCS but some may not be. The Juvenile Court Rules since at least 2011 have required children's counsel to visit children before each hearing. This has added a significant time burden in terms of an attorney's duties, especially in rural counties. The children we represent are most often located out of county, hours away from our office. The Rule allows us to use appropriately trained support staff to accomplish the visitation requirement. (See Juvenile Court 40.1(G)). We have relied on social workers as appropriately trained staff to perform the required visitation with the children. Without the ability to use these social workers we would not be able to fulfill our duties.

When we are appointed for younger children or those who have disabilities that render them unable to comprehend the proceedings we act as guardian ad litem and the confidentiality is not an issue. However, for our older minor clients where we act as counsel, it is conceivable that they may disclose past abuse in a visitation with our social worker that may not previously have been disclosed. Normally this would not be something we disclose without permission from our client. However, this ethics opinion indicates that if the disclosure is made to the social worker acting as an employee of the attorney the confidentiality would be compromised. I understand that the proposed solution is to advise the client of the lack of confidentiality when dealing with a social worker, but that does not seem practical when dealing with minors as clients. If our social worker would be required to disclose past abuse it would jeopardize our ability to use them to fulfill our visitation duties. ER 5.3 indicates that our assistants must comply with our professional obligations. In this regard, I would argue that the confidentiality requirement extends from the lawyer to the social worker instead of the social worker's disclosure requirements being imposed on the lawyer/client relationship, at least in regards to representation of minors. To hold otherwise would negate the whole purpose of allowing attorneys to hire social workers to perform the significant additional burden imposed by the juvenile rules. I would also note that we are talking about clients that already have DCS involvement which means disclosing past neglect would serve no practical purpose because the minors have already been removed from the perpetrators.

I would ask that the Ethics Opinion limit its scope to lawyers working with crime victims as that was the original request.

Thank you for your consideration.

Erika A. Arlington
Coconino County Legal Defender

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PUBLIC COMMENT 3



Maricopa County Office of the Public Advocate

Sabrina Ayers Fisher
Public Advocate

Shannon Burns
Deputy Director

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TO: Arizona Supreme Court's Arizona Ethics Advisory Committee

**SUBMITTED BY: Sabrina Ayers Fisher,
Director/Office of the Public Advocate**

DATE: February 4, 2020

RE: Comment on proposed EO 19-0003 for Rule 42.1 (h)

In Ethics Opinion No. EO-19-0003, the advisory committee proposed that an attorney is required to do the following:

1. Ensure the social worker is aware of the attorney's duty of confidentiality and that the duty extends to the social worker,
2. Inform the client of the confidentiality limits and risks created by the social worker's statutory reporting obligations,
3. Obtain the client's informed consent, and
4. Establish measures to remove the social worker from access to the client file.

The proposed ethical obligations that attorneys are tasked with is over-inclusive and misinterprets the application of the law regarding social workers. Specifically, §13-3620(A)(1) of the Arizona Revised Statute ("A.R.S.") requires a person to report to the appropriate authorities if there is a reasonable belief that a minor is or has been a victim of child abuse or neglect. A person is defined, in pertinent part, as a "social worker who develops the reasonable belief in the course of treating a patient." A.R.S. §13-3620(A)(1). (Emphasis added.) What this comment aims to do is distinguish whether social workers are treating clients subject to mandatory reporting or practicing social work not subject to mandatory reporting.

The Practice of Social Work is Broader than Treatment

Title 32, Chapter 33 of the A.R.S. governs behavioral health professionals. It is there where the statute provide insight on the distinction between "treating patients" and "practicing social work." A.R.S. §32-3251(11) provides in its entirety the following:

"Practice of social work means the professional application of social work theories, principles, methods and techniques to:

- (a) **Treat** mental, behavioral and emotional disorders.
- (b) Assist individual, families, groups and communities to enhance or restore the ability to function physically, socially emotionally, mentally and economically.

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(c) Assess, appraise, diagnose, evaluate and **treat** individuals, couples, families and groups through the use of psychotherapy.” (Emphasis added.)

Pursuant to the above definition, the *practice* of social work is broad and encompasses more than solely treating clients as noted in subsection (a) and (c). It extends to also “[a]ssist[ing]... families... to “enhance or restore the ability to function...” *Id.* This language demonstrates that social workers can practice social work without actually treating clients. As such, the advisory committee should clarify that attorneys contracting social workers to be a part of the litigation team are not required to get informed consent from clients if the social worker is not providing treatment.

Multidisciplinary Parent Representation Model

The Office of the Public Advocate (“OPA”) represents indigent clients in family dependency, juvenile delinquency and mental health cases. One of the unique things OPA does is contract vendors such as social workers to assist parent representation in family dependency matters. This approach follows the Multidisciplinary Parent Representation Model.

Historically, the parent was – and still is in many areas – responsible for hiring a social worker to do home studies and assessments in his or her parent-child dependency case. This approach has proven to lengthen the rate and speed of family reunification, be costly for the parent and judicial system, and, among other things, result in more parent-child severances within the child welfare system. However, the old way is being replaced with a much more progressive model for parent representation.

The core value of the Multidisciplinary Parent Representation Model is to provide high quality legal representation to parents involved in the child welfare system nationwide. Under this model, attorneys hire professionals on the litigation team to assist with strengthening their parent skills and to help complete their court ordered services. These professionals are typically parent allies and social workers.

The parent ally is a parent who has navigated through the child welfare system with most of them successfully reunifying with their child(ren). Parent allies break down the child welfare system, explain the roles of the attorney and social worker – independent from the agency – and discuss ways for the parent to productively engage in the system. In other words, parent allies provide emotional support and mentorship to the parent through their success and experience with the child welfare system.

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On the other hand, the social worker is brought on to the case to help with a specific area or service, such as parenting skills, monitoring visits, and finding housing or employment. In addition, the social worker can accompany the parent to hearings and meetings, be a witness in support for the parent, and can also monitor parent-child visitation, giving parents more contact and time with their child.

In 2000, Washington state implemented multidisciplinary representation for indigent parents in dependency cases statewide. It was piloted by two counties and audited by the state Office of Public Defense. The pilot programs “showed increased quality and significant savings outpacing costs of the program overall...”¹ It was then when the Parents Representation Program, known as PRP, expanded into other counties and went statewide in 2018.²

In 2011, a rigorous study was conducted by the Washington State Office of Public Defense and the National Council of Juvenile and Family Court Judges.³ This study compared non-PRP counties to PRP counties within the state of Washington.⁴ Child welfare outcomes resulted in an 11% higher rate of reunification than counties without PRP.⁵ The majority of PRP cases were more compliant with statutory time frames.⁶ PRP cases had an 18.3% rate increase in earlier case resolutions, whereas non-PRP counties showed no significant change in reunification or case resolution rates.⁷ Lastly, the PRP program offset costs and avoided an additional \$10 million each year in out-of-home care and adoption subsidy costs.⁸

Similarly, New York City contracted with interdisciplinary law offices (“ILO”), also known as a parent defender office, in 2007. These offices employ parent advocates (or parent allies) and social workers to help lawyers, agencies, and the court better understand parent needs. In fact, the ILO has other legal specialists to help with immigration, benefits, criminal, housing, or other concerns.⁹ This team had remarkable results. “Over 50% of children avoid[ed] foster-care placement

¹ Strong Families: How Does High-Quality Legal Representation for Parents Support Better Outcomes?, Casey Family Programs (2019), at page 3.

² *Id.*

³ Measurable Success: Characteristics of Stronger Parent Representation that Improve Outcomes for Children by Jaclyn Chambers, Eliza Patten and Zabrina Alequire (at page 3).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at pg 4.

⁷ *Id.*

⁸ *Id.*

⁹ Strong Families: How Does High-Quality Legal Representation for Parents Support Better Outcomes?, Casey Family Programs (2019), at page 4.

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altogether.”¹⁰ “For [ILO] children who enter[ed] care, their stay [was] less than 5 months compared to NYC’s median of 11.5 months.”¹¹

As such, the multidisciplinary model is not only progressive, but it has proven to be successful from the very start. For these very reasons, OPA has started its own pilot program to provide high-quality parent representation.

OPA Pilot Program

The OPA pilot program is part of the Multidisciplinary Pilot Program being run from the Office of Public Defense Services within Maricopa county. The Multidisciplinary Pilot Program was created in order to determine if using a “team” approach would produce faster unification times for parents and their children. There are two components to the Multidisciplinary Pilot Program: (1) the Family Involvement Center and (2) the social worker approach. Through the Family Involvement Center, parent allies mentor and guide parents through the child welfare system. For OPA role in the pilot program, OPA contracts with social workers to assist in providing additional services to parents that the Department of Child Safety (“DCS”) will not provide or is not providing the service in a way that is benefit to the client and their needs. The services can include monitoring visits so a parent can have additional visits to bond with their child, assisting a parent with locating safe and affordable housing and following through to make sure they have all the necessary items to obtain the safe and affording housing, assisting with applications for benefits (medical, disability, etc...) or another other service that is determined by the attorney and the client to help with the reunification process.

The contracted social workers neither treat parents for any mental, behavioral or emotional disorders, nor do they use psychotherapy treatment. In fact, OPA attorneys prohibit social workers from engaging in any type of treatment. The level of assistance from the OPA contracted social workers fits squarely within A.R.S. 32-3251(11)(b) – the only subsection that does not include treatment.

¹⁰ Measurable Success: Characteristics of Stronger Parent Representation that Improve Outcomes for Children by Jaclyn Chambers, Eliza Patten and Zabrina Aleguire (at page 4).

¹¹ *Id.*

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The Propose Order Chills Proper Parent Representation

The conflict EO-19-0003 creates is a chilling effect on parent representation. OPA has a vested interest with having social workers on the team under the pilot program. This proposed order will certainly undercut that interest unless it clarifies that not all social workers are used to treat clients.

The issue is whether contracted social workers are (1) treating disorders (2) treating patients using psychotherapy or (3) assisting families to enhance or restore their ability to function. EO-19-0003 correctly describes in detail the duties of the social worker in connection to their employment with not only enhancing the agency's representation, but also restoring family reunification. "[The social worker] provide[s] emotional and crisis support to victims, inform victims of court dates, explain steps, and accompany victims to court."¹² Furthermore, "[t]hey do not provide formal counseling services to clients."¹³ (underline added.) Even under the committee's description social workers are not treating clients.

Similarly, the role of the social worker is also explained as:

“Hav[ing] honest conversations with the parent about the parent's strengths and challenges and can then work with the parent to find resources to address identified problems. She has more time than the caseworker to locate effective services in the community and then can work closely with the client to access them. The social worker also communicates regularly with the agency case worker, accompanies the client to agency meetings and ensures that the client's voice is heard.”¹⁴

The chilling effect that would certainly happen under this proposal requires a better understanding of where parents are coming from. Parents already feel disrespected and confused in an overly adversarial system that they are likely to refuse to share information with their caseworkers and typically do not view agencies as partners.¹⁵ It is important for programs following the multidisciplinary model, like

¹² See EO-19-0003 at page 1, Factual Background.

¹³ *Id.*

¹⁴ Strange Bedfellows: How Child Welfare Agencies Can Benefit from Investing in Multidisciplinary Parent Representation by Vivek S. Sankaran, Patricia L. Rideout and Martha L. Raimon, (at page 5).

¹⁵ Strange Bedfellows: How Child Welfare Agencies Can Benefit from Investing in Multidisciplinary Parent Representation by Vivek S. Sankaran, Patricia L. Rideout and Martha L. Raimon, (at page 3).

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OPA's pilot program, to be built on a foundation of trust and loyalty. This foundation can not be built if parents cannot trust their social worker or understand where the social worker's loyalty may lay.

Conclusion

In conclusion, we ask that the advisory committee consider narrowly tailoring its definition of a social worker as it relates to the mandatory reporting statute to only those that "develop a reasonable belief in the course of treating a patient." Further we ask that the advisory committee acknowledge that examples exist under subsection (b) of §32-3251(11) where a social worker does not engage in any form of treatment, thereby not triggering any mandatory reporting obligations. Therefore, advisement to a client and presumably the social worker of any limits and risks of hiring a social worker would be unnecessary under §32-3251(11)(b).

Measurable Success: Characteristics of Stronger Parent Representation that Improve Outcomes for Children

Jaclyn Chambers, Eliza Patten, & Zabrina Alegruie

Executive Summary

Inadequate legal representation for parents presents a significant barrier to timely permanency for children in the child welfare system. Improved models of parent representation are arising across the country. These programs, which adhere to a core set of quality standards, are associated with improved permanency outcomes for children and reduce or eliminate the need for foster care in many cases. Policymakers, legislators, and funders should support the growth and continued evaluation of such models to determine the full measure of their potential to improve child well-being and to decrease overall system costs.

Introduction

Across the nation, the issue of inadequate legal representation for parents in child welfare proceedings is coming under scrutiny. While there is no nationally representative data available, several states have conducted thorough analyses of parent representation and have found significant areas in need of improvement. For example, a 2007 assessment led by the National Center for State Courts found that parent attorneys in Colorado faced a number of barriers to effective representation including high caseloads, poor compensation, lack of support services and resources, and lack of training.¹ In 2009, the American Bar Association conducted a performance-based analysis of Michigan parent attorney practice and discovered problems such as poor communication between attorneys and parents, limited out of court advocacy, and frequent use of substitute counsel.² Oregon's legislative Task Force on Dependency Representation issued a report in July 2016 detailing the reality of excessive caseloads, inadequate compensation for out-of-court work, lacking standardization, and a shortage of interdisciplinary models of practice.³ Similar reports from North Carolina, and Wyoming highlight many of the same problematic issues.^{4,5}

Poor representation leads to court cases not being processed in a timely and efficient manner. Cases handled by attorneys who do not have sufficient time, resources, or training to effectively prepare for court appearances tend to have a high rate of continuances, longer case processing, and less rigorously developed case resolutions. These attorneys are likely to have infrequent communication with their clients, which prevents parents from meaningfully participating in the process and prevents attorneys from proactively addressing the causes of dependency involvement or independently assessing available options for resolution. Additionally, insufficiently supported counsel may not have the time or expertise to adequately research and litigate complex legal issues. Flat fee compensation structures, a common way to keep costs low, create incentives that reward attorneys for doing less work on a case overall by creating financial pressure to carry high caseloads in order to make a living wage. More concerning, such fee structures often include no compensation for out of court advocacy. As child welfare cases are largely administrative in nature—involving sustained participation by parents in meetings with social workers, service providers, and multi-disciplinary teams—denying a parent access to an advocate from their legal team in out of court proceedings hampers the parents' ability to fully engage in their service plan and have their progress reliably assessed. Without multi-disciplinary representation, decision-makers in and out of court may be relying on incomplete and inaccurate information that has not been fairly tested through meaningful advocacy,

creating a lack of reliability for decisions of critical importance regarding family integrity and child safety and well-being.

When court cases are not processed in a timely and efficient manner, with complete and reliable information, children suffer by entering into unnecessary foster care placements and remaining in temporary placements for too long. The most recent national data shows that, for children exiting foster care in FY2014, the median length of time spent in foster care was 13.3 months, and over 25% were in foster care for 2 years or more.⁶ These extended stays in foster care are correlated with a range of poor outcomes, including homelessness, poor educational attainment, and physical and mental health problems (see Breakout Box for more detailed information).

EXTENDED FOSTER CARE AND CHILD WELL-BEING

According to the Administration of Children, Youth and Families (ACYF), there are four key domains for child well-being: 1) cognitive functioning, 2) physical health and development, 3) emotional/behavioral function, and 4) social function.¹⁷ Research has shown that children with extended stays in foster care have poor outcomes in each of these four areas:

- **Problems with cognitive functioning/academic achievement:** A longitudinal study comparing 603 youth aging out of foster care to a nationally representative sample of youth found that youth aging out of foster care are significantly less likely to have a high school diploma or GED (64% vs. 91%).¹⁸
- **Poor physical health:** Studies have shown that foster youth have high rates of physical health problems.¹⁹ Some estimates indicate that over 80% of foster children have at least one chronic condition,²⁰ and foster youth frequently do not receive appropriate and timely care for their health problems.²¹
- **High rates of behavioral and emotional problems:** Among a nationally representative sample of youth aged 11 to 18 with long-term stays in foster care, 27% had clinical levels of emotional problems and 41% had clinical levels of behavioral problems.²²
- **Social functioning problems:** A study that evaluated the long-term effects of foster care found that one-third of former foster youth were living in poverty and more than 20% experienced homelessness.²³

Several states have implemented model programs to address the issue of inadequate legal representation for parents and, in turn, improve outcomes for children. These programs utilize interdisciplinary teams and apply strong legal advocacy standards. While researchers are still building the evidence for this model, the existing research evaluations and performance management data have demonstrated overwhelmingly positive results. The available data show that when parent representation adheres to a core set of quality principles, there are improved outcomes in permanency, case processing, cost effectiveness, and parent and court satisfaction.

Approach

Parent representation pilot programs are developing in many states, and the initial outcome data is promising. The most robust outcome data is available for the following programs: Washington's Parent Representation Program (PRP); California's Dependency, Representation, Administration, Funding, and Training (DRAFT) Program; New York's Center for Family Representation (CFR); and Oregon's Parent Child Representation Program (PCRP). These four programs all follow a core set of quality principles:^{*}

1. **Strong practice standards for attorneys:** Attorneys have clear expectations to meet with their clients early and often, to provide strong advocacy in and out of court (including the appeals process when indicated), and to have an expert understanding of the relevant child welfare legal standards and statutes in order to provide effective representation.

2. Collaboration with interdisciplinary staff: Attorneys work in teams with social workers, parent advocates, and/or case managers. **
3. Training: Staff receive initial and ongoing training on topics of direct relevance to representing parents in child welfare cases.
4. Oversight and evaluation: Strong systems of oversight are in place, such as client complaint procedures, performance evaluation as a condition of contract renewal, oversight by court systems, and/or other methods of supervision.
5. Adequate compensation and caseload: While structures and rates vary by jurisdiction, attorneys and interdisciplinary staff receive adequate compensation and reasonable caseloads needed to provide effective advocacy both in and out of court.

Several favorable research evaluations of the Washington PRP program have been conducted by the Washington State Office of Public Defense and the National Council of Juvenile and Family Court Judges.^{7,8,9} The most recent and comprehensive study was conducted in 2011 by researchers who reviewed case data for over 12,000 children in Washington's child welfare system.^{10,11} They compared data across counties with and without PRP as well as intra- county data pre- and post- PRP implementation. Similarly, in 2007, California's Administrative Office of the Courts released a before and after comparison of DRAFT to non-DRAFT courts on several quantitative outcome measures.¹² Additionally, there is publically available performance management data from the programs themselves. While less methodologically rigorous than formal research evaluations, New York's CFR and Oregon's PCRCP both collected performance data on child welfare outcomes and compared it to relevant comparison groups at the county and/or state level. ***

Results

All of the current research and performance evaluation data show that improved parent representation is associated with better child welfare outcomes in terms of increased rate and speed of permanency, avoided foster care placement, more efficient case processing, cost effectiveness, and court and parent satisfaction. There are positive results across both urban and rural counties.

Child Welfare Outcomes

- Increased rate and speed of permanency:
 - Evaluation data shows the following results for counties where Washington's PRP is in operation, compared to counties where PRP is not in operation:¹⁰
 - Exit rate to reunification is 11% higher.
 - Rate at which children are adopted is 83% higher.
 - Rate at which child children enter guardianships is 104% higher.
 - PRP helps achieve reunification about a month sooner and achieve other permanency outcomes about a year sooner.
 - California DRAFT courts improved reunification rates, reentry and guardianship rates, and the frequency of placement with kin, at rates exceeding their non-DRAFT counterparts.¹²
 - Compared to statewide data, Oregon's PCRCP is associated with an increased reunification rate and increase in the percentage of children who achieve permanency within 24 months.¹³
 - For New York CFR families who are reunified, the foster-care re-entry rate is approximately 7% within 1 year compared with a statewide rate of 15%.

- Reduced/avoided foster care:
 - Oregon's PCRCP is associated with a reduced rate of foster care:¹³
 - PCRCP counties had an average foster care reduction rate of 19% in 2014, compared to a statewide decrease of 4.33%.
 - From 2014 to June 2015, the statewide rate of change in children exiting foster care to guardianship was 12.5%, while in the PCRCP counties the average rate of change was 111%.
 - New York's CFR data shows that among the families they serve:^{14,15}
 - Over 50% of children avoid foster-care placement altogether.
 - For CFR children who enter care, their stay is less than 5 months compared to NYC's median of 11.5 months.

Case Processing

- Low continuances:
 - Because they have reasonable caseloads, Oregon's PCRCP attorneys are requesting fewer continuances due to scheduling conflicts.¹³
 - Washington's PRP demonstrates low continuances resulting from attorneys being over-scheduled (only 4% of all continuances).⁷
- Compliance with statutory timeframes:
 - The majority of PRP cases are compliant with statutory timeframes.⁸
 - PRP is associated with significant reductions in the average number of days from removal to shelter hearing.⁸
- Earlier case resolutions:
 - PRP had an 18.3% rate increase in earlier case resolutions, whereas non-PRP counties showed no significant change in reunification or case resolution rates.⁹

Cost Effectiveness

- New York's CFR spends approximately \$6,500 per family over the entire life of the case versus a minimum of \$28,000 to keep a child in foster care for a year in NYC.¹⁴
- CFR conservatively estimates that in over ten years of parent representation it has generated more than \$130 million in public savings.¹⁶
- As Washington's PRP has expanded, its outcomes of increased reunifications and decreased time to permanency wholly offset the PRP program cost and avoid at least an additional \$10 million each year in out-of-home care and adoption subsidy costs.²⁴

Satisfaction and Quality Improvements

- Courts pleased with model
 - Qualitative data from letters from judicial officers showed that courts were extremely pleased with the Washington PRP program.⁷
- Parent satisfaction
 - 96% of clients report being satisfied or very satisfied with services received from the Oregon PCRCP.¹³
- Better attorney-parent communication
 - An early study of the Washington PRP program found that attorneys are communicating frequently with parents, averaging 3.1 hours/month on dependency cases and 4.8 hours/month on TPR cases.⁷

- The Oregon PCRP legal representation team spends over 70 hours per month in direct client out-of-court contact.¹³
- Decreased attorney turnover
 - Qualitative interviews with judicial officers and attorneys indicated significant improvements in attorney turnover during the California DRAFT pilot.¹²

Conclusion

High-quality, interdisciplinary legal representation for parents is a promising strategy to improve outcomes for families in the child welfare system. Evaluations have shown that when legal teams follow a set of best practices, children avoid foster care, have increased stability, and achieve permanency more quickly. Furthermore, this model appears to be cost-effective and improve efficient case processing. Court officials and parents are both pleased with the model.

Implications and Recommendations

Improving parent representation appears to address barriers to permanency and improve outcomes for children and families. The currently available data is encouraging but does have limitations, and this model is deserving of a further look with a more rigorous design to build on the existing evidence. Policymakers, legislators, and funders should support and fund model programs that follow the five core components described above. Furthermore, jurisdictions should oversee these systems as they roll out to monitor fidelity to the model and evaluate outcomes.

Notes:

^{*}The best practices listed here are consistent with a more comprehensive set of practices recommended by the ABA in their *Indicators of Success for Parent Representation*.

^{**}The California DRAFT program did not explicitly require but did contemplate an interdisciplinary component.

^{***} A rigorous research evaluation of the New York institutional providers of parent representation that adhere to these best practices is currently underway through New York University School of Law in partnership with New York City's Administration for Children's Services, funded by Casey Family Programs.

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Strange Bedfellows



How Child Welfare Agencies Can Benefit from Investing in Multidisciplinary Parent Representation

Vivek S. Sankaran, Patricia L. Rideout and Martha L. Raimon*

This is the second of a series of articles that examines the role that advocates for parents and families can play in furthering the well-being and safety of children. This article highlights emerging parent representation models that expedite the safe reunification of children already in foster care.

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Effective child welfare leaders are not interested in adversarial relationships with parents or their attorneys. They are invested in accomplishing their mission: making sure children, youth and families get what they need so that every child can grow up in a safe and stable family.

*Patricia L. Rideout, Former Administrator,
Cuyahoga County, Ohio, Division of Children and Family Services*

After the child welfare agency removed Maria's three children and placed them in foster care, Maria sank into despair. She was confused about why her children were taken from her. She could not understand the legal jargon on the paperwork given to her. She did not know why everyone refused to tell her where her children were and when she could see them next. By the time of the first court hearing, Maria was angry, upset and frustrated. She wanted nothing to do with the agency that took her children from her.

Child welfare agencies face a humbling task. Their overarching goal is to ensure the safety, permanency and well-being of children in their community, but they

face difficult decisions about when a child's safety is in jeopardy and placement in foster care may be necessary. Understanding the severe consequences for the child and his or her family, they must try, in the first instance, to prevent unnecessary removals of children from their families. When placement into foster care is necessary to ensure the safety of the child, they must work diligently to reunify children with their birth parents. And to do that, they must juggle a number of difficult tasks, such as identifying appropriate placements for children, securing services for parents and arranging visitation.

Yet, to achieve success, agencies must do one thing especially well in every circumstance—*they must effectively engage birth parents in all aspects of case planning*. If parents are not effectively engaged, agencies will too often fail in their efforts to either reunify children with their parents or to achieve another permanency goal for the children.

Effectively engaging with birth parents around this work has been a particularly elusive goal for child welfare agencies. Birth parents like Maria are often skeptical and mistrustful of the intent of the agency to help them get their children home, particularly when the agency has just removed their children from their care. Birth parents may be resistant to forming trusting relationships with caseworkers and may be reluctant to comply with services. Additionally, birth parents face a host of complicated legal and socio-emotional needs that require a significant amount

of time to address, which few caseworkers can provide, given high caseloads, sometimes limited skills and administrative responsibilities. In many jurisdictions, caseworkers are only expected to meet with parents once each month. Predictably, parent engagement remains a strong barrier to child welfare agencies achieving the outcomes they desire for children.

A new and perhaps surprising tool has emerged to assist child welfare agencies to better engage parents and achieve improved outcomes for children—*multidisciplinary parent representation*. Legal offices across the country are providing birth parents with the assistance of a team consisting of a lawyer, social worker and a parent mentor to help guide them through the complexities of a child welfare case. Rather than obstructing child welfare agencies from accomplishing their goals, these multidisciplinary teams are instead furthering agency goals by reducing unnecessary removals of children from their homes, achieving greater rates of reunification and expediting permanency for children – the same outcomes agencies are required to seek by federal law. Initial data from these programs demonstrate the dramatic impact that this type of parent representation can have on outcomes for children.

This article will explore the challenges facing child welfare agencies in engaging parents, suggest how multidisciplinary parent representation can assist them in reaching their goals and encourage child welfare agencies to prioritize strengthening parent representation in their jurisdictions.

Lack of Parent Engagement Undermines the Ability of Child Welfare Agencies to Accomplish Their Goals.

Unlike other types of legal disputes, child welfare proceedings are unique in two major respects. First, at the outset of the case, in most instances all parties in a child welfare case share the same goal: to reunify children with their families. The Constitution of the United States presumes that the interests of children are best served when they are safely cared for by their birth parents.¹ Consistent with this presumption, both federal and state laws not only mandate that child welfare agencies keep children in their homes absent evidence that it would be “contrary to the welfare of the child” but also require agencies to make “reasonable efforts” both to prevent children from being removed and if removed, to expedite the child’s return

back home.² Agencies’ internal policies also reflect the primacy of reunification as their chief goal for those children who are removed from their parents. Thus, in nearly every child welfare case, all parties are legally obligated to work toward the same outcome for the child.

Second, child welfare cases are unique because the legal disputes primarily center on resolving what will happen in the future, as opposed to adjudicating historical facts. Most other legal disputes involve a contest over what happened in the past. Did the defendant rob the bank? Did the company breach the contract? Did the employer discriminate against the worker? Once the

historical facts are settled, the only remaining question is what the precise punishment or remedy will be for the offense. After that, the case is concluded. Neither the court, nor the parties, has an ongoing need to work together within the context of the case.

Child welfare cases are different. In many, the question of what happened in the past plays a minor role in the case. Parents often admit that they have neglected or abused their children in some way, but these admissions do not resolve the case. They simply mark the beginning of the next phase of the case, which often lasts months, if not years. And in this phase, the focus is entirely forward-looking. What should happen in the future? How will the court and the parties work together to return the child home safely? What services will be offered? When will the child be able to return home? Until that happens, how will visitation be structured and the child's needs best be met? Given the parties' shared goal of returning the child to his or her parents, the parties must work together to ensure that this will happen.

But it is not enough for the professionals to work together. A crucial requirement for achieving reunification is engaging parents to remain actively and constructively involved in their child welfare case and in their children's lives. Studies have repeatedly shown that when child welfare agencies are able to work effectively with birth parents, outcomes improve for children.³ Effective engagement involves making parents meaningful partners in case planning, providing them with a voice in the decision-making process and sharing with them the information they need to successfully advocate for themselves and their children.⁴ When this type of engagement occurs, parents are far more receptive to accepting services from child welfare and related agencies.⁵ Additionally, parents who engage with child welfare agencies are more likely to feel hopeful, openly acknowledge problems and become motivated to change.⁶ Unsurprisingly, the U.S. Department of Health and Human Services has observed that “[s]uccessfully involving family members in case planning may be the most critical component for achieving outcomes in child welfare practice.”⁷

Yet, despite the consensus about the importance of engaging parents, the goal remains elusive. Recent federal child and family service reviews concluded that every state failed in this area, finding that agencies only involved parents and children in roughly 50 percent of cases.⁸ The federal reviews also found that only 19 states met the national standard for reunifying children with their parents.⁹ In only approximately 50 percent of all child welfare cases do agencies successfully reunify children with their parents.¹⁰

Child welfare agencies struggle to engage parents for a number of reasons.

Many caseworkers are overworked and lack the experience or the time to spend with parents, who often present complicated legal and emotional issues and carry a deep history of trauma.¹¹

A caseworker's ability to engage parents is also impeded by their conflicting roles. Caseworkers often make decisions that result in the separation of the family. They then must work to reunify the same family they helped to separate. Additionally, if the parent fails to make progress on his or her service plan, then the same caseworker tasked with reunifying the family may simultaneously seek to terminate that parent's rights. Thus, understandably, many parents find it very difficult to trust caseworkers.

As a result of these and other dynamics, parents often feel disrespected, excluded from the decision-making process and “helpless and confused in an overly adversarial system.”¹² They may refuse to share information with their caseworkers and typically do not view agencies as partners.¹³ Rather, they view caseworkers as authority figures mandating what they must do and watching to see if they comply, exactly the sort of dynamic that undermines the goals of child welfare agencies.¹⁴ So long as this dynamic remains, child welfare agencies will not achieve the best outcomes for children.

Effective engagement involves making parents meaningful partners in case planning, providing them with a voice in the decision-making process and sharing with them the information they need to successfully advocate for themselves and their children.

Inadequate Parent Representation Throughout the Country Impedes Child Welfare Systems' Efforts to Engage Parents.

Unfortunately, inadequate parent representation only exacerbates the struggles faced by child welfare agencies to engage parents.

Consider this reality for Maria, the parent described earlier. Before her initial shelter care hearing, she is not greeted by an attorney. Instead, she waits alone outside of the courtroom. When the clerk calls her case, she remains motionless until the clerk tells her to come forward. The judge instructs her that the individual standing beside her is her lawyer. And for the next 10 minutes, a conversation occurs between the lawyers and the judges, none of which Maria comprehends. The clerk then announces a date for the next hearing, and Maria is abruptly hustled out of the courtroom. Just like that, the court has determined that her children remain in foster care. She doesn't know for how long.

She is confused. She is scared. She may not have seen her daughter for days. And her anger intensifies.

Over the next few weeks, her phone calls to her new attorney go unanswered, as do her many questions about what is happening with her daughter. When her caseworker approaches her and asks

her to discuss her case plan and engage in services, Maria shuts down. Yet, the clock dictating when her parental rights will be terminated continues to tick at a steady, rapid pace.

This is the reality faced by many parents in the child welfare system. While most states, but not all, provide parents attorneys in child welfare cases, they have failed to ensure that parents receive adequate legal representation.¹⁵ Consequently, parents' lawyers are underpaid, overworked and inadequately trained.¹⁶ They carry high caseloads. They lack access to experts from other disciplines, like social workers, investigators and parent partners. Rather than spending their time engaging with their clients or advocating for them at important agency meetings, they too often move from hearing to hearing, simply helping to process a case from one stage to the next.

National child advocacy groups have lamented the inadequacy of parents' counsel for many years. For example, a 2005 report by the American Bar Association described parent representation in one state as falling "disturbingly short of standards of practice."¹⁷ Yet, systems have largely failed to respond to this outcry. Although significant reforms have occurred in some jurisdictions to strengthen legal representation in criminal matters, parent representation has received scant attention. But in maintaining the status quo of inadequate parent representation, systems are contributing to the isolation and frustration experienced by parents, further leading to their disengagement with the system.

Child welfare agencies have recently employed a number of innovations to improve their ability to engage parents, including convening team decision-making meetings,¹⁸ employing parent mentors to help parents navigate the system and connecting birth parents and foster parents to ensure that parents remain involved in raising their children even when children are not in their care. But they have yet to recognize the link between strong parent representation and parent engagement. The next section discusses how multidisciplinary parent representation can serve as an important tool to engage parents and reach common goals.

Inadequate parent representation only exacerbates the struggles faced by child welfare agencies to engage parents.



Multidisciplinary Legal Representation Can Be an Effective Tool to Engage Parents.

Consider this alternate reality for Maria. While waiting anxiously in the hallway in front of the courtroom prior to the commencement of her initial shelter care hearing, she is greeted by three members of her new legal team— an attorney, a social worker and a parent mentor. Recognizing her anxiety, her team takes Maria to a private meeting room, where they explain their role, their undivided loyalty to her and their legal obligation to keep their communications confidential unless given Maria's permission. The team also tells Maria about what will happen next in the case, what they will be asking for and what they expect the child welfare agency to request. But most importantly, the team gives Maria a chance to tell her story and to tell them exactly what she wants for herself and her child. Maria has never been given the chance to do this. After the meeting, Maria takes a deep breath and enters the court hearing feeling less angry and more willing to listen to and work with everyone on her case. She feels more willing to engage with the system, knowing that advocates presenting her perspective are on her side and will support her. She also knows that she can rely on her team to advocate for her on an ongoing basis.

Across the country, multidisciplinary parent representation practices, like the one described above, are emerging and place parent engagement at the core of their work. These offices provide parents with the assistance of a team made up of an attorney, a social worker and a parent mentor to help them navigate the child welfare system. Each partner plays a crucial role in helping the parent feel supported and engaged.

The attorney provides quality legal representation to the parent, both inside and outside the courtroom. He or she meets with the client, investigates the facts of the case, counsels the client about the various options and possibilities, advises on what is likely to happen and then zealously advocates for the parent based on the client's goals. The attorney also works with the other players in the case, such as the caseworkers and the children's attorneys, recognizing the need to collaborate around planning for the child and family, while also understanding that there may be times where issues need to be aggressively litigated in the courtroom. Importantly, the attorney, who may be better able to access current information about the family, investigates the

facts of the case and shares relevant information with both the agency and the court to ensure that all players have an accurate understanding about what transpired prior to the filing of the petition. This stands in stark contrast to the typical practice seen across the country.

The social worker on the multidisciplinary team is able to connect with the parent in ways that the agency caseworker cannot because she, unlike the agency caseworker, has undivided loyalty to the parent. Thus, she is able to have honest conversations with the parent about the parent's strengths and challenges and can then work with the parent to find resources to address identified problems. She has more time than the caseworker to locate effective services in the community and then can work closely with the client to access them. The social worker also communicates regularly with the agency caseworker, accompanies the client to agency meetings and ensures that the client's voice is heard.

Finally, the parent mentor, who herself successfully navigated the child welfare system to reunify with her child, provides emotional support to the parent so that her energy can be used productively in service of the legal proceeding. The parent advocate also discusses ways for the parent to productively engage with the system and helps to ensure that the legal team—along with the other players in the system—effectively engage with the parent. The parent advocate provides a consistent reminder to all the stakeholders about the need to tailor the intervention to address the family's identified needs.

Although this new model of parent representation is just emerging, initial data demonstrates the dramatic impact it can have on outcomes for children. For example, the Center for Family Representation (CFR) in New York City,¹⁹ which represents parents using multidisciplinary legal teams, prevented the need for foster care for many children, reduced the length of stay of other children and reduced the rate of children re-entering the system. Data tracked since 2007 demonstrate that more than 50 percent of children of CFR clients avoid foster care placement altogether.²⁰ Where foster care cannot be avoided, the median length of placement for children of parents served by CFR is just

five months compared with a citywide average of nearly a year.²¹ Preliminary data also indicate that children of parents served by CFR re-entered the foster care system after their case was closed at a rate of approximately 1 percent, compared with a statewide foster care re-entry rate of 15 percent.²² Judges working with CFR's multidisciplinary teams noted that because CFR attorneys knew the facts of their cases better and proposed solutions to the court, court orders were better tailored to meet the needs of families.²³

CFR's services are also cost-effective. They cost approximately \$6,500 per family over the entire life of the case, a sum that is vastly less expensive than a single year of foster care for a single child, which can range from \$25,000 to \$60,000 dollars per year, depending on a variety of factors including where and in what kind of setting the agency places the child.²⁴ ***Thus, for every child prevented from entering foster care, or for every child whose length of stay is reduced by months, the system can save thousands of dollars.*** In fact, since 2007, CFR services have saved the foster care system more than \$30 million.²⁵

The Washington State Office of Public Defense (OPD), which also provides parents with multidisciplinary legal representation, has achieved similar outcomes.²⁶ During a three-year pilot period, data showed that there was an 11 percent increase in the reunification rate in counties served by OPD.²⁷ Data also demonstrated that there was a 104 percent increase in the adoption rate and an 83 percent increase in the guardianship rate in the counties served by OPD, demonstrating that this new model improves all types of child welfare outcomes.²⁸ Researchers found that the increased reunification rate resulted in children spending one less month in foster care; the increased adoption and guardianship rates meant that permanency was accelerated by approximately one year.²⁹ Commentators observed that, as a result of OPD's work, "[p]arents are more willing to engage in services and work with their agency caseworkers, so there are fewer terminations. When families cannot reunify, OPD attorneys advise clients about adoption with contact and guardianship possibilities, and work to negotiate those outcomes."³⁰ Thus, even when reunification may not be possible, multidisciplinary parent representation allows and supports parents to be fully engaged in planning for other options for their children.³¹

The initial data suggest that multidisciplinary parent representation can dramatically improve parent engagement, supporting parents to be partners in the child welfare system's

efforts to help children, and in doing so, improve outcomes for children. More research must be done to demonstrate the effectiveness of these multidisciplinary models, but the unfortunate reality is that this type of legal representation is rare. Instead, the inadequate parent representation that is prevalent often serves as a major impediment to engaging families, and therefore undermines the goals of child welfare agencies.

This is precisely why child welfare agencies must take the lead in creating awareness and advocating for a better system of representation for parents. Child welfare leaders are keenly aware that even children who need to be separated from parents suffer and that agencies must work diligently to reunify children safely with their parents. And child welfare leaders are aware of the research on poor outcomes of children in foster care, especially those children who age out of the system without ever having achieved permanency, and thus they want to see parents succeed. In short, good child welfare leaders are not interested in adversarial relationships with parents and their attorneys, but instead are interested in ensuring that children—and their parents—get the assistance they need.

Good child welfare leaders are not interested in adversarial relationships with parents and their attorneys, but instead are interested in ensuring that children—and their parents—get the assistance they need.

A Call to Action

At its best, parent representation can be an effective tool in helping to ensure that all voices are heard in the court process and that parents work in partnership with the child welfare system to jointly plan for the well-being and safety of their children. At its worst, ineffective parent representation can lead to the further isolation parents experience and can impede the innovative efforts being made by agencies. In short, child welfare agencies must seize this opportunity to assist families by supporting and investing in this needed service.

What does it mean for agencies to invest in parent representation? At a minimum, agencies must begin to speak out about the importance of parent representation and how effective parent representation promotes many of the same outcomes sought by agencies, including successful permanency for children. When parent representation offices are advocating for increased funding, child welfare agencies should be allies in their efforts, explaining to legislative bodies how effective advocacy for parents is not tangential to ensuring children's safety and well-being, but is, in fact, crucial to a well-functioning child welfare system.

Nationwide, there are models of child welfare agencies advocating for quality representation for parents. For example:

- In Allegheny County, Pennsylvania, the child welfare agency provides **direct funding** for the representation of parents.
- In the District of Columbia, the Child and Family Services Agency has used **Title IV-E waiver funds** to support legal advocacy for parents prior to the filing of the petition.
- In Cuyahoga County, Ohio, the child welfare agency initiated a campaign to strengthen parent legal representation and the **Ohio Supreme Court** has agreed to fund a parent representation pilot, expected to start in the spring of 2016. These efforts reflect but a few of the ways in which child

welfare agencies can take the lead to address this important issue.

Think back to Maria's story and how the quality of legal representation can affect the trajectory of Maria's case. And think about whether child welfare systems will be able to achieve the best outcomes possible if parents like Maria do not receive adequate legal representation, and therefore, do not fully engage with the system. That is the question before us. And that is the call to action child welfare agencies must answer.

At a minimum, agencies must begin to speak out about the importance of parent representation and how effective parent representation promotes many of the same outcomes sought by agencies, including successful permanency for children

Endnotes

1. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753-754; 102 S. Ct. 1388; 71 L. Ed. 2d. 599 (1982).
2. See 42 U.S.C. § 671(a)(15); 42 U.S.C. § 672(a)(2)(A)(ii).
3. Rice, K. & Girvin, H. (2014). Engaging families, building relationships: Strategies for working across systems from a social exchange perspective. *Advances in Social Work*, 15(2), 306–317; *Family Reunification: What the Evidence Shows*. (June 2011). Child Welfare Information Gateway; Cheng, T.C. (2010). Factors associated with reunification: A longitudinal analysis of long term foster care. *Children and Youth Services Review*, 32(10), 1311–1316.
4. Rice & Girvin (2014); Gladstone, J. et al. (2012). Looking at engagement and outcome from the perspectives of child protection workers and parents. *Children and Youth Services Review*, 34(1), 112–118; *Family Reunification: What the Evidence Shows*. (June 2011).
5. Cheng (2010).
6. Gladstone et al. (2012).
7. *Engaging Families in Case Planning*. (September 2012). Child Welfare Information Gateway.
8. Ibid.
9. *Family Reunification: What the Evidence Shows*. (June 2011).
10. Ibid.
11. *The Family Engagement Inventory: A Brief Cross-Disciplinary Synthesis*. (August 2014). Child Welfare Information Gateway.
12. Darlington, Y., Healy, K. & Feeney, J. (2010). Challenges in implementing participatory practice in child protection: A contingency approach, *Children and Youth Services Review*, 32(7)1020–1027.
13. *Family Reunification: What the Evidence Shows*. (June 2011).
14. Darlington et al. (2010).
15. For an overview of the ways in which states are inadequately providing parent representation, see Sankaran, V. (2011). No harm, no foul? Why harmless error analysis should not be used to review wrongful denials of counsel to parents in child welfare cases. *South Carolina Law Review*, 63(1), 13–41.
16. See, e.g., Minnesota Judicial Branch. (November 2008) *Report of Children's Justice Initiative Parent Legal Representation Workgroup to Minnesota Judicial Council*, available at <http://www.leg.state.mn.us/docs/2009/other/090151.pdf> (noting that “[t]here is no statewide funding and no standards of practice for attorneys representing parents.”); Outley, A. (2004). *Representation for Children and Parents in Dependency Proceedings*, available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=49014 (noting that almost three-fourths of court-improvement specialists believed that attorneys for parents were not adequately compensated); Giving overmatched parents a chance [Opinion]. (June 17, 1996). *New York Times*, A14, available at <http://www.nytimes.com/1996/06/17/opinion/giving-overmatched-parents-a-chance.html> (observing that “parents are generally stuck with harried court-appointed lawyers who are juggling many cases, and who often show up unprepared and late for hearings.”); Appellate Division First Department Committee on Representation of the Poor. (2001). *Crisis in the Legal Representation of the Poor*, available at http://www.courts.state.ny.us/press/old_keep/1ad-rep-poor.shtml (writing that “[a]s a result of shamefully low rates of compensation of assigned counsel, lack of resources, support and respect, inadequate funding of institutional providers, combined with ever-increasing caseloads, New York's poor are too often not being afforded the ‘meaningful and effective’ representation to which they are entitled.”).

17. *Michigan Court Improvement Reassessment*. (2005). Muskie School of Public Service & ABA Center on Children and the Law, available at http://muskie.usm.maine.edu/Publications/cf/MI_CourtImprovementProgramReassessment.pdf. The report further noted that parents reported that “their attorneys do not return phone calls or provide parents with their phone numbers, do not explain what is going on in their cases, do not give parents a chance to tell their side of the story at court hearings, and make deals without consulting them. Parents describe talking to their attorneys for only a few minutes before their hearings.”
18. The Annie E. Casey Foundation has played a pivotal role in spreading team decision-making across the country. See The Annie E. Casey Foundation. (2002). *Involving the Family and Community in Child Welfare Decisions*, available at <http://www.aecf.org/resources/team-decisionmaking-involving-the-family-and-community-in-child-welfare-dec/>, for more information about this work.
19. More information about the Center for Family Representation is available at <http://www.cfrny.org>.
20. See Center for Family Representation. *Our Results*, available at <http://www.cfrny.org/about-us/our-results/>.
21. Center for Family Representation. *Our Results*.
22. Thornton, E. & Gwinn, B. (2012). High-quality legal representation for parents in child welfare cases results in improved outcomes for families and potential cost savings. *Family Law Quarterly*, 46(1), 139–154.
23. Thornton & Gwinn (2012).
24. Thornton & Gwinn (2012).
25. Center for Family Representation. *Our Results*.
26. More information about the Parent Representation Program at OPD can be found at <http://www.opd.wa.gov/index.php/program/parents-representation>.
27. Thornton & Gwinn (2012). p. 147.
28. Thornton & Gwinn (2012). p. 147.
29. Thornton & Gwinn (2012). p. 147.
30. Thornton & Gwinn (2012). p. 148.
31. In Part I of this Series, the article detailed outcomes of several multidisciplinary efforts, including the Detroit Center for Family Advocacy, which provides multidisciplinary parent representation prior to the filing of a petition. Not one of the 112 children served by the Center during its three year prevention pilot period entered foster care. For more information about this prevention model, see Sankaran, V. S. & Raimon, M. L. (2014). *Case Closed: Addressing Unmet Legal Needs & Stabilizing Families*. Center for the Study of Social Policy, available at <http://www.cssp.org/reform/child-welfare/Preventive-Legal-Representation.pdf>.

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STRATEGY BRIEF

STRONG FAMILIES

How does **high-quality legal representation for parents** support better outcomes?

Quality legal representation in court is an essential safeguard to ensure that pertinent information is conveyed to the court, all parties' legal rights are well protected, and the wishes and needs of all parties are effectively voiced. In turn, this helps judges make the best, most informed decisions possible in every case.

However, parents facing the potential loss of their children in dependency courts across the country are not afforded the same universal right to counsel as defendants in criminal proceedings. Access to representation for parents involved with the child welfare system who cannot afford to hire a private attorney varies from state to state — and the quality of that representation, when provided, varies even more.

In December 2018, the Children's Bureau [revised its Child Welfare Policy Manual](#) to permit Title IV-E agencies to claim administrative costs for attorneys to provide legal representation for children and their parents. This [policy change](#) makes new entitlement funding available to support all jurisdictions in offering parents legal representation in dependency hearings, and/or improving the quality of that representation in accordance with best practice.



How does high-quality legal representation for parents support better outcomes?

According to the Children’s Bureau, this change is intended to help ensure that reasonable efforts are made to prevent removal, that parents and youth are engaged in case plans, and that timely efforts are made to finalize permanency plans for children. [Research in multiple states](#) further highlights the importance of quality legal representation for parents, suggesting that it has the potential to support:

- More timely [permanency](#) (including reunification, adoption, and guardianship).
- Increased parental engagement and perceptions of fairness.
- More individualized case plans and better access to services.
- More frequent and timely family visitation.
- Better judicial decision-making.
- Cost savings for child welfare agencies due to reduced time in foster care.¹

High-quality representation

Due to the unique and complex nature of dependency cases, **interdisciplinary representation** is considered to be the best way to deliver high-quality representation. Teams commonly include attorneys, social workers, and [parent mentors/advocates](#), but also may include professionals with expertise in substance abuse treatment or other legal matters affecting families, such as domestic violence, education, delinquency, employment, or housing concerns.

CORNERSTONE ADVOCACY

Developed by the Center for Family Representation in New York City, [Cornerstone Advocacy](#) is an approach that can be used by any parent’s attorney to support family reunification. It involves intensive advocacy during the first 60 days of a case in four areas:

- **Visiting arrangements** for children and their parents that are as frequent and long as possible, and closely mimic family life.
- **Placements** that support a child’s connection to family and other important relationships.
- **Services** that address a parent’s and child’s strengths and needs.
- **Conferences and meetings** that provide opportunities for parents and older youth to meaningfully participate in their case planning.

Other characteristics of effective representation include the following:

- **Attorneys as unfailing advocates for their clients.** Positive outcomes can sometimes be achieved through mediation or other non-adversarial means, and lawyers must also be prepared to use all available legal tools — including motions and appeals — to protect and advocate for parents’ rights. Parents are naturally more likely to engage and open up

Parents’ attorneys are the best friends child welfare agencies don’t know they have.

— MARTIN GUGGENHEIM
CO-DIRECTOR, FAMILY DEFENSE CLINIC, NEW YORK CITY

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to representatives who they perceive to be fully dedicated to their goals.

- **Legal advocacy beyond the courtroom.** In foster care cases, what happens outside the courtroom is often more important than what occurs in court. It is especially critical for parents to be supported at child welfare agency meetings. Effective representation helps shape effective service plans by more accurately identifying the needs of families and ensuring that services are tailored to them.

These tenets of effective attorney practice are supported by the following system characteristics:

- **Attorney support and accountability.** The American Bar Association [Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases](#) cover hiring, training, and supervising parent attorneys, in addition to encouraging courts to establish uniform standards and hold attorneys accountable for compliance.
- **Specialized attorney training.** In addition to being experts in family law, parents' representatives must be well informed about the [impact of trauma](#) on parents' behavior and decision-making, as well as [systemic bias](#) and the ways that racial, social, and cultural differences may impact the attorney/client relationship.
- **Representation early in the case.** In some jurisdictions, representation may be appointed as late as the first permanency hearing or, in rare cases, the hearing to terminate parental rights. To

be most effective, parent representatives must be available to their clients at the very first hearing, if not before.

- **Reasonable caseloads and compensation.** Although the numbers will vary by jurisdiction, the American Bar Association [Indicators of Success for Parent Representation](#) recommend maximum caseloads that provide adequate capacity to handle all cases through appeal, if necessary, and rates that are sufficient to support an attorney's practice while adhering to this cap.²

Jurisdictional examples

Washington state was the first jurisdiction to provide access to multidisciplinary representation for all indigent parents in dependency cases statewide.³ The program began in 2000 with a pilot in two counties, which followed an [audit by the state Office of Public Defense](#) that found the previous system of county-funded representation resulted in vast inconsistencies across the state, significantly lower spending on parent representation than agency representation, and fundamental quality concerns, including a high continuance rate due to the size of caseloads carried by parents' attorneys.

Based on successful [evaluations of the pilot](#), which showed increased quality and significant savings outpacing costs of the program overall, the state Legislature gradually expanded authorization to additional counties until the Parents Representation Program (PRP) went statewide in July 2018. For the

You don't need to wait for a statewide effort — or to be an institutional provider — to take a step toward the highest level of effective legal representation. As a sole practitioner, having a parent mentor on the team goes a long way toward achieving an interdisciplinary focus.”

— MIMI LAVER,
DIRECTOR, LEGAL REPRESENTATION, AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW

How does high-quality legal representation for parents support better outcomes?

PRP, individual contract attorneys are carefully selected, trained, paid a good monthly rate, and capped at 80 active dependency and termination cases per full-time caseload. In return, attorneys with full caseloads agree not to carry other types of cases. The program delivers equal justice to all indigent parents across the state in about 9,350 ongoing cases.⁴

The program is based on [standards of representation](#), with five regional attorney managers overseeing the attorneys and offering additional technical expertise. Monitoring includes a client complaint system and regular review of court records to ensure attorneys are filing motions, avoiding continuances, requesting experts, and otherwise following practice standards.

At their discretion, attorneys refer many clients — usually those struggling most with engagement — to program social workers and/or parent mentors for additional support. Attorneys also have access to litigation experts in areas such as parenting plans, medical assessment, and home studies to support unbiased judicial decision-making.

A study by Partners for Our Children at the University of Washington reviewed the permanency outcomes for 12,104 children who entered court-supervised out-of-home care in Washington for the first time between 2004 and 2007. It found **higher permanency rates and shorter times to permanency** in PRP counties than in counties where PRP was not operating, and the positive association between PRP and permanency held true whether the child exited foster care to reunification, adoption, or guardianship.⁵

New York City has contracted with **interdisciplinary law offices** (ILOs) since 2007 to represent parents charged in child abuse and neglect cases throughout most of the city.⁶ These offices seek to address parents' needs both in and out of court. To do that effectively, they employ parent advocates with lived experience as well as social workers to help lawyers, agencies, and the court better understand parent needs. The ways these professionals work together depend on each family's unique situation — parent advocates may be called on when a team is struggling to engage a discouraged client, for example. The offices also have access to other legal specialists to assist with immigration, benefits, criminal, housing, or other concerns.

Both an ILO attorney and a panel attorney are assigned at the time of a family's first court appearance. While credentialed panel attorneys bill the city for unlimited hours at a set rate, ILOs are paid upfront via contract, making cost more predictable. The ILOs pay their staff both salary and benefits, and provide additional support through overhead, administration, training, and intensive supervision. ILOs have found that this model is attracting more talented young lawyers to the field of parent representation, as well as MSWs and others with expertise in social services.

A few examples illustrate the unique benefits of this model:

- After noticing that a new client lacked a stroller for her newborn, a parent advocate working in an ILO was able to secure a stroller for her within

When I started this work, there was almost never a parent or another parent's attorney, or in fact anybody speaking for parents in meetings. Now it would be unthinkable not to have parents participating. We have seen so many positive changes in the understanding and attitudes of judges and the department.”

— JOANNE MOORE
DIRECTOR, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE
FOUNDER, PARENTS REPRESENTATION PROGRAM

How does high-quality legal representation for parents support better outcomes?

two hours because a local charity already had arranged for the office to have strollers on hand.

- ILO offices sometimes represent clients who give birth while their older children are in foster care. ILOs are able to be present while their clients are interviewed in the hospital, attend child safety conferences, and begin working on cases even before the agency files for removal. In many of these cases, the ILO has been able to persuade the agency that the newborn can remain safe with the mother and should not be placed in foster care, or the ILO has been successful in challenging the agency's decision to remove the child.

Recently, New York University School of Law, Action Research Partners, and Casey Family Programs completed the [largest-ever study of parent representation in dependency court](#), tracking outcomes for 9,582 families and 18,288 children during a four-year period. The study compares outcomes for families represented by ILOs with those of similar families represented by panel attorneys. Key findings include:

- Children placed in foster care were **safely returned to their families about 43 percent more often in the first year** when their parents were represented by an ILO.
- Children's **time in foster care was reduced by nearly four months** during the study period when parents were represented by ILOs.
- Reduced time in foster care represents **up to \$40 million in potential annual savings** in foster care board rates.
- Children were **just as safe** with ILO representation. They were no more likely to experience a subsequent substantiated report of maltreatment.

A number of other jurisdictions have followed Washington and New York City's examples in recent years. **Colorado** established an [Office](#)

[of Respondent Parents' Counsel](#) in 2016 to work with the state's judicial districts to establish uniform, high-quality legal representation. Improved reunification outcomes in **Sandoval County, N.M.**, which employs multidisciplinary parent representation, has prompted the state to explore expansion of the model. In addition, **California, New Mexico, Michigan, Louisiana, Oregon, Texas, Delaware, and Mississippi** are committed to utilizing a multidisciplinary model and/or lowering attorney caseloads to improve legal representation for both parents and children.

Resources to support implementation

States have considerable flexibility in how they implement the recent [Title IV-E policy](#) change depending on the current status of parent representation in their jurisdiction.⁷ For example, the funds could be used to:

- Provide every parent with an attorney at or before the initial hearing, in jurisdictions where clients currently may not be provided a lawyer until their case approaches termination of parental rights.
- Hire additional attorneys, in jurisdictions where average caseloads are much higher than recommended, so that attorneys can work in a more high-quality way with clients.
- Create a workgroup to review and adapt American Bar Association model standards of practice in state-specific ways.
- Pilot or expand interdisciplinary representation by hiring social workers and/or parent mentors to support attorneys.
- Explore opportunities to provide pre-petition representation, helping families to resolve ancillary legal issues before they reach the point of removal.

A number of resources are available to support implementation of high-quality legal representation, including:

How does high-quality legal representation for parents support better outcomes?

RESOURCE	DESCRIPTION
Information Memorandum 17-02	The Children's Bureau's overview of the importance and benefits of quality parent representation.
National Alliance for Parent Representation	Protects the rights, dignity, and integrity of families involved in the child welfare system by pursuing justice through effective legal, legislative, and policy advocacy. The Alliance is a project of the American Bar Association Center on Children and the Law, with investments from Casey Family Programs and a national steering committee of legal experts.
Family Justice Initiative (FJI)	Unites professionals from around the country to ensure that all children and parents have high-quality legal representation when courts make life-changing decisions about their families. The Initiative is a collaboration of the American Bar Association Center on Children and the Law, Children's Law Center of California, and the Center for Family Representation.
Attributes of High-Quality Legal Representation for Children and Parents in Child Welfare Proceedings	FJI's description of the fundamental attributes for quality legal representation for parents and children in child welfare proceedings.
Research on Legal Representation Program Outcomes	FJI's ongoing work to determine whether the FJI model of legal representation positively impacts outcomes for parents and children.
American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases	Drafted with input from practicing parents' attorneys and child welfare professionals, these standards acknowledge the challenges of day-to-day practice while promoting consistent, high-quality representation.
Interim Report to Chief Judge DiFiore	New York State's Commission on Parental Legal Representation recently released its initial findings and recommendations.

- 1 A summary of research can be found in the U.S. Department of Health and Human Services, Children's Bureau. (2017). ACYF-CB-IM-17-02: High Quality Legal Representation for All Parties in Child Welfare Proceedings. Retrieved from <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>. Also see <https://doi.org/10.1016/j.childyouth.2019.04.022>.
- 2 Family Justice Initiative. Attributes of High-Quality Legal Representation for Children and Parents in Child Welfare Proceedings. Retrieved from <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2019/01/FJI-Attributes-Fact-Sheet.pdf>.
- 3 Information in this section is adapted from interviews with Joanne Moore (April 17), Michael Heard (April 4), Brett Ballew (April 4), and Rob Wyman (April 17).
- 4 Personal communication with Joanne Moore, June 19, 2019.
- 5 Courtney, M. E., & Hook, J. L. (2012). Evaluation of the impact of enhanced parental legal representation on the timing of permanency outcomes for children in foster care. *Children and Youth Services Review, 34*(7), 1337-1343.
- 6 Information in this section is adapted from an interview with Susan Jacobs and Martin Guggenheim, March 28, 2019.
- 7 Information in this section is informed by an interview with Mimi Laver, American Bar Association Center on Children and the Law, April 29, 2019.

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PUBLIC COMMENT 4



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To: Attorney Ethics Advisory Committee

From: Chris Phillis - Director, Public Defense Services
Rosemary Pena-Lynch – Director, Legal Advocate
Sherri McGuire Lawson – Director, Legal Defender
Sabrina Ayers Fisher – Director, Public Advocate

Re: Proposed Ethics Opinion 19-0003

Date: 02/05/2020

The Attorney Ethics Advisory Committee's Ethics Opinion 19-0003 is overly broad, misstates the law and hinders an attorney's ability to competently and zealously represent a client. The AEAC's ethics opinion requires an attorney to advise a client that the social worker, mitigation specialist or other para-professionals assisting with the client's case may be a mandatory reporter and therefore the client should be wary of providing members of the defense team with any information that could be a reportable offense. This opinion places an attorney in an impossible position of gaining the client's trust while advising the client not to trust members of the attorney's team.

The AEAC inaccurately interprets A.R.S. §13-3620(A)(1) to require all individuals who are a physician, physician assistant, behavioral health professional, nurse, psychologist counselor or social worker to be mandatory reporters. However, the statute clearly states that the medical and behavioral professionals must learn of the possible abuse or mistreatment *while treating* the client. Medical and behavioral professionals who are members of a defense team are not retained to provide treatment. The professionals are utilized to gather mitigation, create a treatment plan and locate services to assist the client.

The AEAC's proposed opinion will negatively impact attorneys representing clients in juvenile court. Attorneys in juvenile court represent children charged with delinquent acts or parents involved in dependency, severance or guardianship cases. Attorneys representing youth often rely on mitigation specialists, many of whom have a degree in social work, to assist in finding programs that will promote the rehabilitation of the youth. The mitigation specialist and minor client must discuss the minor's behavior to locate appropriate services to rehabilitate the youth. Youth who are advised that the

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mitigation specialist may be required to report conduct considered abusive are not likely to speak with the mitigation specialist and therefore less likely to receive rehabilitative services.

Parent's attorneys employ social workers, many who have prior Department of Child Safety experience, to assist parents locate services in the community to address the issues that necessitated the removal of their children. A multi-year study conducted by Casey Programs found that parents who receive the assistance of an attorney, social worker and parent advocate were reunited with their children an average of four months sooner than those who only received the assistance of an attorney. Attorneys who are unable to employ social workers to assist parents locate vital services due to justifiable ethical concerns will hinder the reunification of the family. The separation of a child from his/her parents is a traumatic event. The longer the child remains out of the home, the longer the child must endure the trauma of separation.

AEAC's Ethics Opinion 19-0003 as written will negatively impact the children and families involved in delinquency and dependency cases. Minors and parents after hearing the chilling advisement of their attorney regarding social workers, will forego the possibly life altering assistance. Minors will not receive the services to facilitate their transformation from mischievous youth to responsible adults and children will remain adrift in the foster care system.