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Report of the Ethics and Professionalism Working Group

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Report of the Ethics and Professionalism Working Group

Cover Page Footnote

Members of the working group are Paula Galowitz (facilitator), Nanette Schrandt (reporter and author of this report), Geetha Gopalan (student secretary), Eileen Ain, Mary Jane Cotter, Judith Elkin, Lee Elkins, Bruce Green, Ann Higgins-D'Alessandro, Christopher Juge, Ann Moynihan, Iya Negra, and Carol Sherman.

REPORT OF THE ETHICS AND PROFESSIONALISM WORKING GROUP¹

CHARGE

What should the Conference recommend as ways professionals can empower parents to achieve justice within the child welfare system, and what changes in the various codes of ethics and professional practices could the Conference recommend that would support professionals to better achieve justice for parents?

INTRODUCTION

The facilitator and reporter framed the salient questions that fall under the above charge as follows:

- How do the respective codes of ethics in social work, psychology and law address professional responsibility in the representation of parents? How are they similar or dissimilar?
- How do the various codes of ethics address issues of confidentiality, the role of the professional, privilege, and the definition of “client?” Do the codes allow waivers of privilege in certain circumstances such as mandatory reporting of suspected child abuse or neglect?
- To what extent do the codes offer guidance with respect to, or give meaning to, “competent” practice?
- How do professional norms empower parents to achieve justice within the child welfare system?
- How do parents perceive the ethical codes and the way the codes impact professional behavior toward parents?

Before convening, the working group, the facilitator, and the reporter were provided copies of the relevant ethical codes,² statutes,³ and case law, as well as articles on ethics, interdisciplinary

1. Members of the working group are Paula Galowitz (facilitator), Nanette Schrandt (reporter and author of this report), Geetha Gopalan (student secretary), Eileen Ain, Mary Jane Cotter, Judith Elkin, Lee Elkins, Bruce Green, Ann Higgins-D'Alessandro, Christopher Juge, Ann Moynihan, Iya Negra, and Carol Sherman.

2. N.Y. Code of Prof'l Responsibility (1999); Code of Ethics (Nat'l Ass'n of Soc. Workers 1996); Ethical Principles of Psychologists and Code of Conduct (Am. Psychological Ass'n 1992).

3. N.Y. Soc. Serv. Law § 422 (McKinney 1992 & Supp. 2001).

collaboration, ethical dilemmas, and decision-making.⁴ One member of the group, pointing to the diverse backgrounds and different experiences of the members,⁵ suggested that situation-specific questions would help ground the discussion. Members responded with an extensive list of questions.

The working group's discussions were broad, touched on many concerns, and framed general and specific recommendations. The group examined the relevant professional codes and ethical dilemmas encountered by professional participants in the child welfare system. The group reviewed the roles, responsibilities, and ethical obligations of the judiciary, law guardians, attorneys representing parents and agencies, and treatment and social service providers. The discussion focused on parents' access to information about child protective services, Family Court, and legal services. The group discussed the confidentiality of treatment records and notes, related issues of "trust" for parents and treatment providers, and evidentiary rules that apply in Family Court, including the implications for testimony and the degree to which therapeutic interactions between parents and professionals were "exposable."⁶ The group moved on to define the necessary elements of interdisciplinary practice and proceeded to identify effective collaborative models for parent representation. The final report sets forth the consensus of the group on what should be done in the realm of ethics and professionalism to better achieve justice for parents in the child welfare system.

PREAMBLE

Children, parents, and families in child welfare proceedings are entitled to justice. Social workers, psychologists, and lawyers

4. Paul S. Appelbaum & Alan Rosenbaum, *Tarasoff and the Researcher: Does the Duty to Protect Apply in the Research Setting?*, 44 *Am. Psychologist* 885 (1989); Donald N. Bersoff, *Therapists as Protectors and Policemen: New Roles as a Result of Tarasoff?*, 7 *Prof'l Psychol.* 267 (1976); Donald Dickson & Elaine P. Congress, Council on Social Work Education, *When Social Work Ethics and Law Collide: Identifying and Navigating Conflicting Standards*, 2000 Annual Program Meeting 1; John Monahan, *Limiting Therapist Exposure to Tarasoff Liability: Guidelines for Risk Containment*, 48 *Am. Psychologist* 242 (1993); Ann Moynihan, *Ethics and the Multidisciplinary Team: A Difficult Mix*, 1 *Interdisc. Rep. on At-Risk Child. & Families* 49 (1998); Virginia C. Strand, *Children and Confidentiality: Imperatives, Implications and Need for Interdisciplinary Involvement*, 1 *Interdisc. Rep. on At-Risk Child. & Families* 65 (1998).

5. Members of the group worked in foster care, adoption, and child protective services, and handled private child custody matters. The group included a national expert on legal ethics, a psychologist, a Family Court judge, clinical professors of law and social work, a doctoral student, a community activist, and several social workers and lawyers.

6. See N.Y. Fam. Ct. Act § 1046(a)(7) (McKinney 1999 & Supp. 2001) (stating that in any hearing regarding child abuse or child neglect under article 10 of the Family Court Act neither the privilege attaching to the psychologist-client relationship, or the social worker-client privilege, applies).

representing parents in child welfare are ethically and professionally bound to work zealously to ensure justice for those whom they serve, and to serve them competently.

As a matter of professionalism and ethics, the current form of representation for parents⁷ cannot continue. Competent representation for parents requires an interdisciplinary approach. In developing a strategy to provide adequate, comprehensive representation, there must be recognition that the legal, psychological, and social needs of the family are inextricably intertwined, and must be addressed through a timely, coordinated, interdisciplinary approach. It is essential that there be a duty of collaboration among professionals and that professionals recognize the limits of their competence and draw on the expertise of members of other professions.

EXPLANATION

The working group unanimously recognized the singular importance of forging a new model of interdisciplinary collaboration to better achieve justice for parents. Pervading the group's discussion was the perception that the current system of parent representation was seriously flawed, that incremental change was not sufficient to address widespread inequities, and that justice for children, parents, and families could not be achieved without fundamental reform.

I. RECOMMENDATIONS

A. Developing Standards for Interdisciplinary Professional Services

1. Organizations that set codes of conduct and standards of practice for the legal, social work, and psychology professions should collaborate in the development of proposed standards to guide professional participants in the child welfare system. These standards should recognize that members of different professions should work collaboratively and serve the legal, social, and psychological needs of families. These standards should recognize the principle that members of different professions should respect the responsibilities and ethical duties of other professions. Judges, lawyers, and other professional participants in child welfare services should also recognize the principle of avoiding harm and lessening harm to children and families involved in the child welfare system.
2. Each organization that sets ethical codes and standards of practice for the legal, social work, and psychology professions should ensure that its code and standards of practice address the issues that arise from interdisciplinary representation.

7. "Parents" includes extended family members and other caretakers, except foster parents.

3. The National Association of Social Workers Code of Ethics ("NASW Code") is the primary source of ethical guidance for social workers. The NASW Code does not address professional responsibilities of social workers in relation to forensic social work—that is, the application of social work to questions and issues relating to law and legal systems. The NASW Code should be amended to include a forensic section.

EXPLANATION

Each profession has ethical and practice parameters that guide and inform members of that profession. The working group agreed that mutual respect for the standards of the judiciary, lawyers, and mental health and social service professionals is an essential foundation on which to build a truly effective collaborative model. Professionals working in the child welfare system should be familiar not only with their own ethical obligations, but those of other professionals as well. A complicating factor is that many of the individuals who are responsible for the direct provision of services to families within the child welfare system (i.e., casework staff employed in the public and private sectors) are not obligated to adhere to an ethical code.

The working group found that interdisciplinary collaboration receives little or no attention in codes of conduct for psychologists, social workers, and lawyers. The code for psychologists does, however, address "professionalism" in forensic activities,⁸ and is unique in advising psychologists to take reasonable steps to avoid harm or minimize harm "where it is foreseeable and unavoidable" to those with whom they work.⁹ The working group recommended that the principle of avoiding or minimizing harm also be adopted as a guiding principle in the practices of social work and law. Guidance on working with families in the public child welfare system is not found in any of the codes. The group recognized the difficulty in amending professional codes, and proposed instead the development of a new interdisciplinary code to guide collaborative practice.

B. Effective Interdisciplinary Work

Providing effective legal, social, and psychological services to families requires the collaboration of members of different professions with specialized training.

4. Representation of parents unable to afford a lawyer in Family Court proceedings should be provided by a non-profit, legal assistance agency with specially trained lawyers and social workers as well as other clinical and investigative support.

8. Ethical Principles of Psychologists and Code of Conduct § 7.01 (Am. Psychological Ass'n 1992).

9. *Id.* § 1.14.

5. Competent representation for parents in Family Court proceedings requires an interdisciplinary approach, including lawyers, social workers, psychologists, support services, and other organizational support.

6. Members of the lawyer panel assigned under the provisions of article 18-B of the County Law, who currently represent parents in child welfare matters, are not afforded adequate resources, including adequate access to the expertise and collaboration of those in other professions. Further, such lawyers are not afforded adequate compensation to ensure that they will provide competent and zealous representation as required by standards of ethics and professionalism. In light of the inadequacy of resources, the current system of representation for parents must be reformed or replaced.

7. As part of their representation duties, lawyers for parents should talk directly with caseworkers from the Administration for Children's Services ("ACS"), New York City's public welfare agency, and voluntary agencies, who deliver services to parents and children. The New York Code of Professional Responsibility permits such communication "on the subject of the representation," provided the lawyer for the parent has the prior consent of the lawyer representing the caseworker.¹⁰ Arguably, the code also permits communication between lawyers for parents and caseworkers without such prior consent. Because of the multiple parties involved and the need for direct communication on a regular basis, ACS, in consultation with other legal professionals, should develop a protocol that allows lawyers for parents to speak with ACS and other agency caseworkers regarding service planning issues. The protocol should be detailed and identify the specific areas lawyers for parents and caseworkers are permitted to discuss, including, but not limited to, how the parent is doing, services being provided to the family and those which are not.

EXPLANATION

The working group grappled with the question of how to frame the issues concerning the inadequacies of the current system of parent representation. While not intending to call into question the integrity, competence, or expertise of individual lawyers, the group made a very strong statement regarding the current systemic failure to ensure adequate representation. The working group agreed that parents are often at a disadvantage in court because their representatives do not have up-to-date information or lack the capacity to present "alternative" plans to the court. This results from a variety of factors such as insufficient resources, lack of access to specialized expertise, inability to attend agency planning conferences, and reluctance of

10. N.Y. Code of Prof'l Responsibility DR 7-104 (1999).

caseworkers to share information. Reassessing the way parent representation is provided will go a long way in rectifying such systemic deficiencies. The working group felt strongly that representation of parents unable to afford a lawyer in Family Court proceedings should be provided by a non-profit, legal assistance agency with specially trained lawyers, social workers, and other clinical and investigative support.

The working group also discussed contact between parent lawyers and child welfare agency staff. A procedure to guide communications between caseworkers and parent lawyers (or an agent of the lawyer such as a social worker) needs to be established. ACS already has developed a protocol to guide communications between law guardians of children and caseworkers. This protocol can serve as a model demonstrating a means to bridge the communication gap between caseworkers and lawyers representing parents.

C. Scope of Professional Services

8. Public funding should be expanded to ensure that the scope of representation provided to parents includes “wrap-around” legal assistance to address representation regarding related issues such as housing, welfare, medical coverage, etc.

9. Lawyers for all parties and social workers in child welfare matters should take steps to ensure that necessary proceedings in all forums regarding services and foster care placements are initiated, court orders for specific services to parents are obtained, including visitation, and orders requiring services to parents are followed and enforced.

10. The Legislature and courts should ensure that parents in child welfare matters have continuity of representation throughout Family Court periodic review proceedings, in related proceedings such as those under article 78 of the New York Civil Practice Law and Rules, and in the trial and disposition of an appeal.

EXPLANATION

The working group urged that parents be provided with legal representation that continues throughout the pendency of a case (including representation through any permanency hearing). Presently, in New York, lawyers are assigned to represent parents beginning at the trial or “fact-finding” stage through the remedial or “dispositional” stages of a child protective proceeding. When parents return to court for subsequent status reviews or permanency hearings, a lawyer (not necessarily the same lawyer who provided the previous representation) will be assigned to their case. The new lawyer may not be informed or fully aware of significant intervening events such

as decisions made at agency conferences that may impact, or even alter, court orders. While the group agreed that it is the obligation of agency staff to ensure compliance with court orders, parents also should have access to continuity in representation during critical periods in between court appearances. In addition, the scope of representation for parents should include access to assistance with other civil legal matters that directly affect the ability of parents to plan for their children, such as housing issues, benefits payments, and medical coverage.

D. Informing and Educating Parents

11. Professional participants and parents should clarify, develop, and use a common vocabulary to understand and specify their roles and their various relationships in child welfare matters. General and multi-purpose role labels such as “client” should be replaced or avoided when possible.

12. The Family Court and agencies coming into contact with families should make available in written form a “road map” showing the various professionals involved, delineating the roles of the professionals, and explaining the respective limits of confidentiality so that parents know the parameters as early as possible.

13. The Family Court should provide parents who are involved in the court process with immediate access to an orientation/training session that includes information on the court process, the rights and responsibilities of parents, the various professionals involved, and their roles and other key issues. Agencies working with families involved in the Family Court process also should make this information and training available. Public funding should be provided for these training sessions.

14. Public funds should be allocated for the creation of a community-based public awareness campaign to educate parents about the New York City child welfare system. The campaign should address parents’ rights and responsibilities such as what to do if child protective services knocks on your door, what to expect from case conferences and court hearings, and other key areas.

15. Lawyers representing parents in child welfare matters, and other professionals involved in delivering services, should provide complete information to parents about the benefits and risks of participation in services (such as counseling, preventive services, etc.), whether the services are court-ordered or not. Professionals involved in providing such counseling and treatment services and their employing agencies should ensure that there are criteria for the proper maintenance of confidential treatment notes and records. Treating professionals and their employing agencies have a further obligation to inform and fully disclose to parents the nature and limits of the professional’s and agency’s obligation of confidentiality.

including procedures for obtaining the parent's informed consent prior to release of confidential information.

EXPLANATION

Another concern the working group identified as requiring immediate attention was the provision of information to parents regarding: (1) service options; (2) the limits, risks, and benefits of specific referrals for services; (3) the court process; (4) the child welfare process; and (5) agency expectations. The failure of professional participants to provide necessary information in an accessible and consistent fashion is endemic; it contributes to the community's negative perception of child welfare and legal services, and negatively impacts the ability of parents to achieve justice. Professionals should disseminate educational information to parents about the child welfare and legal processes at every stage of their involvement. Information should be provided in the principal language of the recipient, orally and in writing, using clear and simple terms. Professionals should provide, as early as possible, specific information about the scope of their services and their ethical obligations, particularly with regard to confidentiality and limitations on confidentiality. The expectation that many different professionals assume responsibility for the provision of educational information to parents does not in any way relieve or minimize the importance of the role of lawyers in providing such information as an integral part of legal counseling. The collective goal should be to empower parents and create educated consumers.

E. Confidentiality and Disclosure

16. Legislation should be proposed to ensure that in Family Court proceedings a therapist would not be compelled to testify about confidential treatment notes and records or to turn over records, unless the court finds upon in camera review that the need for the evidence outweighs the harm to the therapeutic relationship. In the interim, all parties, including the court and child welfare agencies, should be sensitive to the need for the confidentiality of treatment records and notes and not routinely order or request that such records be subpoenaed.

EXPLANATION

The working group engaged in considerable discussion before arriving at a consensus on this recommendation. One member of the group saw this proposal as potentially weakening the court's ability to compel witnesses, who might have relevant information, to testify, and felt instead that current mechanisms to protect parents' interests in privacy and confidentiality were sufficient. Another member raised

concerns that this recommendation might represent a shift in perspective, prioritizing parents' rights to confidentiality over the safety of children, thereby limiting the ability of the child protective agency to assess accurately whether a child was neglected or abused. Others expressed concern that disclosure of confidential information upon an in camera review could interfere with therapy and the therapeutic relationship. The group agreed that a careful balancing of interests that weighed the probative value of the testimony or records or notes to be produced, the impact of disclosure on the therapeutic relationship, the harm to the parent, and the availability of the information from alternative sources, needed to occur. This balancing approach is consistent with the NASW Code of Ethics that advises social workers to request the "court [to] withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection."¹¹

F. Judicial Role and Responsibilities

17. The Family Court judiciary should establish a special training academy to assist judges to better understand and evaluate expert evidence. The academy should be staffed by professionals from all relevant disciplines, with a curriculum to include: family dynamics, child development and related research issues; early intervention services; culture, race, ethnicity, gender, issues of poverty, economic class, and their impact on the delivery of child welfare services; and clinical treatment methods and their relative merits within the framework of the child welfare system.

18. As provided by section 124 of the Family Court Act, in making appointments to the Family Court bench, the Mayor of the City of New York should select individuals who are specifically qualified by reason of character, personality, tact, patience, and common sense.

19. Family Court matters should be heard and reviewed by judges trained in Family Court matters. The Family Court should continue to explore ways to reduce fragmentation and provide continuity and consistency in case management of family disputes; however, Family Court matters should not be consolidated with Criminal Court matters, nor should they be heard or reviewed by Criminal Court judges.

20. The Family Court administration and judiciary have an obligation to reduce adjournment and delays and the overall amount of time a party waits to be heard in court. These adjournments and delays have serious and long-term deleterious effects on the parent-child relationship. The court administration and judiciary should place top priority on the development of a calendar system that prioritizes the hearing and disposition of article 10 cases.

11. Code of Ethics § 1.07(j) (Nat'l Ass'n of Soc. Workers 1996).

EXPLANATION

The working group agreed that access to appropriate expertise and sensitization to the complex problems facing families are essential prerequisites for judges sitting in the Family Court. The working group endorsed continuing education and training for judges on a wide range of social and psychological issues. The group discussed the purpose of such training, concluding that Family Court judges should not see themselves as, nor should they be expected to be, "experts." On the contrary, the objective of the proposed training is to ensure that judges appropriately identify the need for expert testimony and have the tools to evaluate such testimony. Training judges on issues such as public benefits, housing, immigration, and education was also recommended. The group strongly endorsed the recommendation that the members of the Family Court judiciary be specifically qualified and selected based on their interest and experience in working with the issues before the court. Discussion also focused on the importance of a "family friendly" Family Court, with top priority given to a reduction in the overall time a party must wait to be heard in court. The group was mindful of the child's sense of time and the impact of lengthy separations from parents caused by placement in foster care. The group felt strongly that delays are very costly to the child's well-being and significantly impair the ability of parents to obtain a fair resolution. The group expressed concern with a recent trend in New York City indicating that criminal court judges hear *both* civil and criminal charges in certain types of child protective cases (including domestic violence cases). Since this might result in resolution of the civil child protective matters within the criminal justice system, the working group noted the importance of having the civil aspects of child protective cases decided by Family Court judges.

G. Role and Responsibility of Government and Social Service Agencies

21. Given the abrogation of the therapeutic privilege in Family Court article 10 proceedings, in order to ensure the greatest possible confidentiality for communications by a parent to a therapist, child welfare agencies should take steps to ensure that professionals who perform initial assessment and evaluation functions are separate and different from those professionals who counsel and treat parents.

22. As matters of professionalism and ethics, judges, lawyers, social workers, psychologists, and other professional participants in child welfare matters are not only required to perform duties competently within the framework of the Family Court Act and Social Services Law, but they also have a duty to take proactive steps to ensure that meaningful assistance to families in crisis is provided; that adequate resources are made available to public and private agencies; and that sufficient resources are provided for these services.

23. Foster care agencies should encourage and facilitate attendance at service plan reviews by parents, the child placed in foster care (if the child is ten years or older), the child's law guardian, and counsel for, or a representative of, the parents. Service plan reviews are administrative case conferences held to review the family service plan for children in foster care. Reviews take place within the first ninety days following the preparation of the plan, and at least every six months thereafter.¹² A social worker working with the parent's lawyer is the ideal representative for the parent at service plan reviews. If the parent's lawyer will be attending, the lawyer should put the foster care agency on notice.

EXPLANATION

The working group addressed the pivotal role and responsibility of government and social service agencies in supporting professionalism in the child welfare system and achieving justice for parents. The working group recommended that agencies take steps to ensure that professionals who perform initial assessments and evaluations are separate and different from those professionals who counsel and treat parents in order to better protect family privacy and confidentiality.¹³ The working group urged lawyers, social workers, psychologists, and other professional participants in child welfare matters to become advocates for children and families, ensuring that adequate resources are dedicated to assistance aimed at keeping families together and averting foster care placement.

The working group agreed that meaningful parent participation in early case conferencing could significantly enhance outcomes for families and discussed the key role that a parent advocate could play in that process. Case conferences are scheduled throughout the life of a case at regular intervals and significant event points. For parents with children in foster care, one type of case conference, the service plan review, is an opportunity between court dates for all parties to come together in a non-adversarial setting to exchange information and discuss the family's progress, needs, services, and future plans. Agencies are required to notify the parents and foster children, ten years or older, of their right to attend such conferences.

Parents are entitled to bring their attorneys or other representatives to the service plan review. The working group discussed the impact that a lawyer's attendance at the service plan review could have on the process. Some members felt strongly that the agency should have the opportunity to adjourn the service plan review to arrange for the agency attorney to be present upon notice that the parent attorney

12. N.Y. Soc. Serv. Law 409-e (McKinney 1992 & Supp. 2001).

13. See *supra* section 16 (stressing the importance of preserving the confidentiality and privacy of family treatment records and notes in the context of court proceedings).

would be attending. Others felt that once parents notified the agency that an attorney would accompany them to the meeting, the agency was required to go forward with the meeting as scheduled. Others objected to placing a burden on parents to notify agencies regarding the participation of their attorney. As its final recommendation, the working group recommended that the parent attorney notify the agency directly regarding attendance at the service plan review.

In the proposed interdisciplinary model of parent representation, parents would have access to a social worker as part of their legal team.¹⁵ The social worker could attend the conference with the parents, assess the plan, and advocate on behalf of the family. This approach avoids those issues that may be raised in connection with the participation of a lawyer, such as notifying the agency in advance so that agency counsel is also present, and prevents the conference from becoming a deposition, a concern voiced by foster care agencies.

II. QUESTIONS FOR FURTHER STUDY

24. Should there be exceptions to mandated child abuse and neglect reporting requirements for certain identified licensed or certified professionals providing therapeutic psychological treatment to parents, based on factors that consider the impact of the report on the present treatment of the parent and the existence of imminent harm or risk to the child?

25. Should a social worker or other professional employed by, or working with, a lawyer representing a parent in a child protective proceeding be exempt from mandated child abuse or neglect reporting law requirements?

The working group agreed that mandatory reporting, and its implications for legal representation, were at the heart of much of the discussion on interdisciplinary collaboration. The list of persons and officials required to report suspected child abuse and neglect continues to grow and includes, among others, any physician, mental health professional, social services worker, psychologist, or substance abuse or alcoholism counselor.¹⁶ Attorneys, with the exception of district attorneys and assistant district attorneys, are not mandated reporters.¹⁷ Currently, a number of legal organizations which employ social workers consider social workers to be exempt from reporting requirements under the theory that they are employees of the attorney, and thus, disclosures of suspected child abuse and neglect are subject to the attorney-client privilege. Some working group

15. See *supra* sections 4-7 (suggesting that social workers and other professionals should work together with parent attorneys as part of an interdisciplinary approach to better serving parents on child welfare concerns).

16. N.Y. Soc. Serv. Law § 413.

17. *Id.*

members recommended that the Legislature change the laws to offer professional treatment providers discretion in reporting. Considerable discussion ensued on the “standard” juncture at which a report might be required (e.g., immediate and real physical harm versus a suspicion of possible harm). The working group agreed that a much more extensive and focused debate was necessary before formulating specific recommendations. Among the many questions to examine are whether the mandatory reporting statute discourages parents from obtaining services and whether the statute is overbroad as applied at present. Accordingly, the working group refers these questions for further study.

Notes & Observations