

*Report to New Jersey Child Welfare Panel on the  
Representation of Parents in Child Welfare Cases*

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I. Introduction

This report emerged from a class-action lawsuit in federal court, Charlie & Nadine H. v. McGreevey, involving multiple aspects of New Jersey's child welfare system. The case was settled in June, 2003. The settlement required the state to develop a comprehensive reform plan, and impaneled the New Jersey Child Welfare Panel to approve the state's plan and both monitor and assist with its implementation. The state's reform plan, "A New Beginning: The Future of Child Welfare in New Jersey," was released on June 9, 2004, and shortly thereafter approved by both the Child Welfare Panel and the Federal District Court.

Among the state's commitments in "A New Beginning" is the following:

There will be an independent, expert assessment of and report on both (a) the quality of legal representation of parents, and (b) any legal conflicts of interest in the organizational structure, which report will also include recommendations for any changes deemed appropriate in either area (by February 2005). [footnote: To ensure requisite independence, the Child Welfare Panel will select the person or institution to conduct this analysis and will draft the scope of work by August 2004.] The state will have 45 days from the receipt of this report to develop a plan to address any and all issues the report may identify as warranting redress. [footnote: This plan will be subject to the review and approval of the Child Welfare Panel, which may designate elements of it legally enforceable. Failure to develop this plan will constitute substantial non-compliance with the settlement agreement.]

The Child Welfare Panel engaged Professor Martin Guggenheim of New York University School of Law to conduct this analysis. Professor Guggenheim, with the Panel's assent, asked Craig Levine, Senior Counsel and Policy Director at the New Jersey Institute for Social Justice, to partner with him on the project.

## II. Methodology & Acknowledgements

We began our work in August, 2004 and undertook an inquiry into the practices of parental representation that lasted from August 2004 through February 2005. In conducting our analysis, we met on several occasions with the leadership of the Public Defender's Office of Parental Representation (OPR)<sup>1</sup> and reviewed many documents they provided us. Before completing this report, we shared a working draft with the Office of the Public Defender. We received a lengthy written response to the draft and met with the Public Defender and the leadership of OPR to discuss our preliminary recommendations and conclusions. We thank this office and its leadership. The Public Defender herself was supportive of and cooperative with this project, and we thank her and her entire staff.

Early in our inquiry, we met with the Honorable Philip Carchman, Administrative Director of the Courts, and Jack McCarthy, Director of the Office of Trial Court Services, to seek the courts' cooperation and permission to interview some judges who preside over child welfare cases and to observe some court proceedings. Judge Carchman and Mr. McCarthy were very supportive, and recommended that we also seek the approval of the Justices of the New Jersey Supreme Court, in their administrative capacity. This permission was sought and granted. We thank the Justices of the Court and the Administrative Office of the Courts officials who supported this project. Most importantly, we thank the judges who took time from their busy schedules to share their thoughts and provide the benefits of their experiences and unique

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<sup>1</sup> When we began our inquiry, this office was known as the Parental Representation Unit or "PRU." For consistency and ease of reference, except where we are commenting on past practices, we will employ the recently adopted new name throughout our report.

perspectives. These judges, from vicinages throughout the state – northern, central, and southern; urban, suburban and rural – provided invaluable insight.

We also consulted with experts and practitioners from around the country, and thank them for their contributions to our work. Finally, we met with New Jersey attorneys who practice in this area, including several from Legal Services of New Jersey,<sup>2</sup> and we appreciate the time and cooperation they gave us.

As neither of us is an ethicist, we asked Professor John Leubsdorf of the Rutgers-Newark Law School, a nationally prominent ethicist, to review and opine on the ethical aspect of this inquiry: whether any conflict of interest inheres in New Jersey's unique structure by which both the parents and the children in child welfare proceedings are represented by the Office of the Public Defender (albeit by different units within the office). We thank him for his thorough, thoughtful work.

### III. Background & Context

The current arrangement by which legal services are provided for parents can be meaningfully evaluated and understood only in the context of history. Historically, New Jersey has had an unenviable record of ensuring the delivery of quality legal services to parents in child welfare cases. Thirty-one years ago, in 1974, New Jersey courts held for the first time that indigent parents in both Title 9 (child abuse or neglect) and Title 30 (termination of parental

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<sup>2</sup> Melville D. Miller, Jr., president of Legal Services of New Jersey, is a trustee of the New Jersey Institute for Social Justice. He played no role in the drafting of this report, the analysis, conclusions and recommendations of which are the authors'.

rights) proceedings have a constitutional right to free court-appointed counsel.<sup>3</sup> Unfortunately, the Appellate Division also held that parents are not constitutionally entitled to compensated court-assigned counsel, leaving the Legislature to determine whether, and in what amount, counsel should be paid for their services when representing parents in child welfare cases. The Legislature saw fit to authorize compensation for parents' lawyers only in Title 9 cases, leaving indigent parents in Title 30 proceedings who were facing the most drastic of all possible civil judicial outcomes -- permanent legal severance from their children -- the right only to be represented by uncompensated court-appointed counsel.

For nearly 25 years after the courts held that parents had a right to counsel in all child welfare cases, the Legislature declined to provide funds for lawyers in Title 30 proceedings. Efforts to secure compensation for all lawyers in child welfare cases were set back when the New Jersey Supreme Court ruled in 1990 that although "simple justice" required appointment of attorneys to represent indigent parents, state courts were without authority to demand that they be compensated because compensation was not constitutionally necessary.<sup>4</sup> In 1994, the Supreme Court went so far as to recommend that the Legislature provide funds for counsel in Title 30 proceedings.<sup>5</sup> In 1999, the Legislature finally heeded this call and added Title 30 proceedings to the cases for which parents are statutorily entitled to court-assigned, compensated counsel.

This is only one aspect of this regrettable history. The Legislature's reluctance to provide

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<sup>3</sup> Crist v. New Jersey Division of Youth and Family Services, 135 N.J. Super. 573 (App. Div. 1975), aff'g in part, rev'g in part, 128 N.J. Super 402 (Law Div. 1974).

<sup>4</sup> New Jersey Div. of Youth and Family Services v. D.C., 118 N.J. 388, 395 (1990).

<sup>5</sup> New Jersey Division of Youth and Family Services v. E.B., 137 N.J. 180 (1994); New Jersey Division of Youth and Family Services v. G.S., 137 N.J. 168 (1994).

quality counsel for indigent parents in child welfare cases was not limited to its decision not to compensate lawyers in termination of parental rights cases. When payment for counsel was provided, it was too low. From 1975 through 2004, the Legislature authorized only \$25.00 per hour for out-of-court work, and \$30.00 per hour for in-court work, in child welfare cases. Effective September 15, 2004, these rates rose to the current level of \$50.00 and \$60.00 per hour for out-of-court and in-court work, respectively. This substantial percentage increase still leaves New Jersey lagging nationally in paying a fair rate to qualified attorneys. In recognition of this, the rate is scheduled to rise to \$75.00 per hour in September 2005. The recent rate changes are a direct result of the settlement in Charlie & Nadine H. v. McGreevey (they were adopted in the reform plan mandated by the settlement). This record of a state's refusal to ensure "simple justice" for parents in child welfare cases places New Jersey among the worst states in the country. This disturbing record has harmed both parents and children whose future so often depends on the State's ability to help parents develop the capacity to provide safe and stable homes.

From 1975 through 1994, the responsibility for providing counsel for parents in Title 9 proceedings was legislatively assigned to the Office of the Public Advocate. Upon the elimination of the Office of the Public Advocate in 1994, the responsibility was legislatively transferred to the Office of the Public Defender. Since 1999, the Parental Representation Unit in the OPD has been responsible for overseeing the delivery of legal services to parents in all child welfare proceedings.

The current Public Defender, Yvonne Smith Segars, was appointed in 2002. It would be an understatement to suggest that she inherited a poorly designed arrangement for providing

highly skilled counsel for parents. Her office was using as many as 214 “pool attorneys” across the state (non-employee attorneys paid at the established hourly rates by the OPR to represent indigent parents entitled to court-assigned counsel in child welfare cases). From 1999 through early 2004, there were only a tiny number of full-time lawyers working in PRU, and these lawyers handled very few cases. The overwhelming percentage of parents were represented by pool attorneys. We have been informed that in the spring of 2003 – at the same time New Jersey child welfare deficiencies were receiving much media attention on account of the death of Faheem Williams and the Nadine H. settlement was being negotiated – the Public Defender initiated an inquiry that eventually determined that a staff attorney system had advantages over pool attorney representation.

Sometime in early 2004, the Public Defender developed a plan to transition to a predominantly staff attorney program for parental representation. As a result of these developments, when we began our investigation in the late summer of 2004 the parental representation picture was in transition. The Office of the Public Defender (OPD) had determined to increase its in-house staff of attorneys in the OPR and substantially to reduce its reliance on pool attorneys. The result has been a radical reordering of the attorney delivery system, now well underway, from an almost exclusive reliance on attorneys who served as independent contractors with the Public Defender to a primary reliance on full-time, in-house staff attorneys as the preferred lawyers for parents in child welfare cases.

This is reflected in the astonishing growth of the size of the OPR over the last several months. From a full-time staff of six attorneys in early 2004, the OPR grew to 39 attorneys by January 2005. We are told that this number will increase to 48 attorneys in the immediate future

and is expected to be as high as 56 attorneys before the end of the calendar year. New offices have recently opened in Newark, Atlantic City and Bridgeton to house parental representation attorneys, and as many as three others offices are schedule to open (in Jamesburg, Morristown and Trenton) by June 2005 (the attorneys hired for those offices have begun their work in temporary space). Several secretaries have recently been hired and other temporary staff borrowed from other OPD offices are providing support for attorneys.

This substantial shift obviously has had an impact on the kind of inquiry we were able to conduct. Most of the newly hired attorneys were being interviewed and brought on board during our investigation. Moreover, by the time we began our inquiry, it was widely agreed that the pool arrangement should no longer be the primary means by which to represent parents. Thus, we were in the awkward position of not being able to evaluate the quality of representation by the new OPR in-house attorneys, who had just been or were being hired, even as it no longer made sense to spend much time evaluating the quality of the pool attorney arrangement. This also meant that to a considerable degree the expected benefits bringing the parental representation function in-house remain at the aspirational and predictive levels and were not subject to empirical review.

#### IV. Concerns About the Quality of Parental Representation

The Parental Representation Unit was established at OPD in 1999. It had the unenviable task of contracting with lawyers throughout the state who were willing to be assigned child welfare cases at the rate of \$30.00 per hour for in-court work. PRU was able to find as many as 214 lawyers throughout the state willing to work at these rates. Unsurprisingly, this legal

services delivery system proved to be inadequate.

A message heard repeatedly from judges and others interviewed is that the delivery of legal services for parents during this period, which extends even to now, has been unacceptable.<sup>6</sup> One widespread criticism is perhaps the most damning: lawyers often fail to meet or speak with their clients from one court appearance to the next.

Some respondents brought lists of criticisms of parents' lawyers. These lists, and the oral criticisms we also received, were strikingly similar. Pool attorneys do not meet with their clients between court appearances; they frequently only meet with their clients in the courthouse on the day of a proceeding; they do not prepare adequately for cases; they have no involvement in the administrative aspect of their cases; they do not seek to involve other professionals when necessary. This led every person interviewed strongly to support the plan to provide this function using full-time staff attorneys.

Our own random review of several dozen payment vouchers submitted by pool attorneys to OPR confirmed these criticisms. Only rarely did the vouchers indicate time spent on client telephone calls other efforts to meet with clients between court appearances. Observation of courtroom proceedings conducted in February 2005 also confirmed this. Attorneys were seen asking their clients the most basic questions (e.g., "Would you like to seek custody of the children?") *during* hearings, on the record, and appeared to have had no communication with them since the long-ago prior hearing.

We have little doubt that New Jersey's unwillingness to pay a reasonable rate to lawyers

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<sup>6</sup> Although we heard reports of some very able individual attorneys, these were exceptional.

for this work contributed to the inadequacy of the representation parents received during the time the PRU was responsible for coordinating and overseeing the pool attorney assignment system. But this does not mean that the PRU management had no responsibility. Throughout this period, PRU gave far too little thought to what kind of advocacy families in crisis require. The only direct step the office undertook was to conduct minimal training for the pool attorneys. But this training was inadequate because it was premised on an exclusively court-centered practice model.

The history of parental representation in New Jersey placed a premium on the lawyer's efforts where they may be least needed -- in the courtroom. The record is clear that from 1999 through 2004 pool attorneys engaged by PRU/OPR with rare exception did not attend Service Plan Reviews or any similar agency-based meetings concerning their clients. This point is not meant to repeat the criticism that the pool attorneys did not even perform the tasks that PRU expected from them. It is, instead, that the expectations of the administrators of the attorney-assignment system were insufficient.

Case plans are not self-implementing; without vigorous follow-up they can remain mere ink on paper. Even judicial orders frequently are not followed. We observed court hearings in which specific steps the DYFS caseworker had been ordered to take at the previous hearings, months earlier, either had not been taken or were taken only a day or two prior to the subsequent hearing. Our interviews revealed this to be a common occurrence. All this wasted time, with plans not implemented and necessary services not provided, harms parents and children significantly. This is particularly true for parents of children in foster care because parental rights are subject to termination if the case plan is not successfully implemented within a limited time.

Parents' attorneys must actively advocate, both in court and with the agency, for the effective implementation of their clients' case plans. In New Jersey today this rarely happens.

Despite laws that entitle parents to be accompanied to case planning and case review sessions by any person of their choice, including social workers or lawyers, it is rare in New Jersey for parents to attend such sessions with professional assistance. As a result, parents know only as much about their rights and the level of services to which they are entitled as agencies choose to tell them, which frequently is very little.

When the Legislature authorized payment for parents' counsel in Title 9 cases and, in 1999, in Title 30 cases, the OPD assumed that it would suffice to adapt its familiar criminal defense model to child welfare matters. In criminal cases, skillful work within the courtroom is often the key to success: while investigative work is important, cases can be won by creative motions to suppress evidence or deft cross-examination of a complainant or other witness.

In the child welfare field, this is often untrue. Successful reunification of foster care children with their parents (the initial permanency goal in all but the rarest cases) is accomplished infrequently by effective examination of witnesses in the courtroom. Rather, these results more commonly are achieved by creating and developing plans designed to keep children safely at home or to return them home as soon as can safely be accomplished, and by pushing hard for the plans' prompt implementation. These plans must be developed out of court, in conjunction with, but not constrained by any limitations of, the state's child welfare caseworker. If the lawyer has done his or her job effectively, in many cases the principal work to be done inside the courtroom is to present the plan to the judge, obtain judicial ratification, and advocate for timely implementation.

Lawyers for parents need to penetrate into the administrative world of agency practice and seek to influence case plans at the point they are being shaped. Both federal and state law require that within one month of a court order placing a child in foster care the agency with planning responsibility for the child must convene a planning meeting with the parents and the caseworkers. The conference sets the stage for all that follows and often is the determinant of whether parental rights will eventually be terminated. The conference will result in the development of a case plan specifying the responsibilities of the parents and the agencies. Lawyers have much to contribute to these meetings. By specifying the steps an agency must undertake to reunify a family, a lawyer can facilitate, and perhaps accelerate, the child's return home. If the plans remain vague or boilerplate, as they often do, agencies typically overlook or omit essential services.

Federal and state law also require that an agency conduct periodic case planning reviews. These reviews are essential to the success of reunification efforts. The case plan is supposed to be tailored specifically to the needs of the family, and adjusted as the family's circumstances change. Effective intervention by a lawyer can be instrumental in ensuring that a family receives the right amount and type of services. Leaving this choice to an overburdened agency too often results in insufficient services and an inappropriate reunification plan, making the eventual termination of parental rights far more likely.

Agencies commonly set a visitation schedule allowing parents to see their children in foster care for the minimum number of hours required by law, typically once every two weeks for two hours. When parents attend the first case planning session, they are rarely informed that they may request additional visitation. Yet visitation is recognized to be the key to reunification;

insufficient visitation frays familial bonds and makes termination of parental rights more likely. Lawyers can play an important role in increasing both the amount and frequency of visitation, thereby often shortening the amount of time a child spends in foster care by months or years and reducing the likelihood that parental rights will be terminated.

Parents' lawyers must also pay careful attention to their clients and be in regular contact with them. Parents need to understand what is likely to happen in their case in the foreseeable future. They need to know what others are saying about them and what they will need to do to regain the trust of the child welfare agency and the court. Parents' lawyers in child welfare cases cannot achieve sustained success without working closely with parents outside of court. An important responsibility of a parent's attorney in child welfare cases often involves delivering what can sound like the same message that the caseworker and the judge have already told the parent: complete your drug treatment program; cooperate with child welfare workers; finish the parenting skills class; etc. Commonly, unless parents do these things they will not achieve the results they want in court. But successful lawyers frequently must find a way to deliver this message so that it sounds and is received differently than when delivered by the state agency or even the judge. It must be empathic. It must be heard as being given because the lawyer cares about the client and wants the client to succeed. It must be based on a relationship of mutual respect and trust. This is not achieved easily or without sustained effort.

Most parents of children in foster care need specific services, such as counseling or housing. Yet agencies typically offer parents little help or guidance in obtaining these. Often a state agency hands a parent an address and sends the parent off to find another agency, make an appointment, and wend her way through a maze of confusing requirements. Lawyers and other

support personnel working with the parents can and must assist parents when agencies fail this way. This assistance can make the difference between children returning home promptly or spending years in foster care unnecessarily (and very expensively).

Lawyers, of course, cannot eliminate the severe and long-standing problems experienced by many families. But lawyers can insist that child care agencies do a better and more focused job of redressing these problems. There are dozens of ways in which a highly skilled and properly constituted legal defense team can prevent the need for placement in foster care in the first place or reduce the amount of time spent in foster care without endangering children.

All of this makes clear that excellent parental representation requires a multi-disciplinary approach. To be effective, a parent's lawyer must work as part of a team, together with social workers and other experts, to design and implement an appropriate plan to keep a family together. In the absence of lawyers working together with a team of other professionals, the task of successfully representing parents in these cases is exceedingly difficult and frequently doomed to failure. Nothing like such a system of parental representation has ever existed in New Jersey.

The current Public Defender should not be blamed for failings of her predecessors. It is clear that she inherited a system woefully inattentive to its needed role. But it remains true that, both before 2002 and since, PRU and OPR management have been responsible for the unsatisfactory legal delivery system they administered and took few steps to improve this system beyond seeking a higher hourly rate for the pool attorneys and, more recently, seeking to replace the pool attorneys with in-house staff.

Nor did the office play any apparent role in revealing and attempting to ameliorate the multi-faceted dysfunctionality of the state's child welfare system. Throughout the time that the

Office of Public Defender has been responsible for representing parents in child welfare cases, there is scant public record of criticism of any significant aspect of child welfare practice. We are unaware of any public criticism of the failings of the Division of Youth and Family Services (DYFS) to work diligently with families on preventive or reunification services, although the system, as has been widely acknowledged as a result of the Nadine H. case, was failing in all aspects of its responsibilities.

The planning documents OPD provided us did not evidence an intention to develop a broadly conceptualized, team-based model of representation, nor did our discussions with the office's leadership reflect such a goal. After meeting with the OPD and OPR leadership to discuss a draft of this report and considering the office's written response to the draft, we are satisfied that the OPR leadership now has the goal of developing a multi-disciplinary office that will focus some of its attention on out-of-court advocacy with DFYS and service providers. The OPR agrees on the need to adopt a team approach to assisting clients, to incorporate social workers and other forensic support staff into the parental representation model, to attend to counseling, mental health care and drug treatment needs of its clients, and to assure that necessary assistance related to housing, child care and parenting skills is being provided. It also agrees that lawyers for parents should become more involved in the agency process with DYFS, and should provide the direction necessary for clients to achieve the objectives in their case plans. Additionally, it agrees that having attorneys involved at the agency level can help prod DYFS to assist clients without delay, that courts similarly should be urged to prod DYFS to provide the services promised in case plans, and that attorneys for parents must educate their clients on how to be better advocates for their own rights, for example by requesting more

visitation time with their children than DYFS typically proposes.

We are not as confident, however, in the OPR's and OPD's understanding of what is necessary to develop a program such as this, or in their appreciation of how far from this goal they are today. In sum, we have questions about whether they will be able to achieve this goal. The office's history of inattention to this problem increases our uncertainty, as do the facts that as of March 2005 the office's staffing plan did not reflect the necessary team approach and there was not an adequate training plan.

Given the sorry history of child welfare practice and policy in New Jersey, it is essential that both the office responsible for representing parents and the office responsible for representing children be forceful, public voices of criticism and advocacy for reform and improvement. A critical finding of our investigation is that the OPD has not been that voice over the years it has been responsible for representing the real parties in interest in child welfare cases. This system-wide advocacy role is related to but separate from the individual-client advocacy we have thus far been discussing. Informed about the child welfare system by peering through two unique windows – thousands of representations of parents (even if conducted mainly by pool attorneys, the PRU leadership had oversight responsibility for such work) and thousands more representations of children – the OPD was uniquely well informed to have waved a red flag, on the state-wide level, that the child welfare system was, as has now been acknowledged by the State, failing.

Initially, we hypothesized that this failure to engage in a public dialogue for reform may have been the result of the structural tension created because the OPD is responsible for representing both children and parents, making it possible that the Public Defender was reluctant

to advocate for systemic reform that might appear to advantage parents over children or vice versa. (Effective systemic child welfare advocacy is in fact far less zero-sum than this simplistic dichotomy implies, and we do not mean to imply that anyone at OPD thinks otherwise.) As we pursued our work, it became clear that the OPD has failed publicly to engage in child welfare policy reform not because of any structural conflict but because the office regards such advocacy as inconsistent with its role as a member of the executive branch of government.

In its response to our draft report, the OPD explained that in seeking to have the parental representative play a system-wide advocacy role we were expecting actions from a governmental entity that are “more appropriate for a public policy advocate or lobbyist traditionally associated with non-governmental organizations or academic institutions,” and that the office discharges its responsibility to clients and to the public interest by limiting its focus to improving the delivery of legal services in individual cases and “provid[ing] comment with regard to legislative proposals that impact its clients or that fall within the scope of its duties, including representation of parents in Title 9 and Title 30 cases.” In light of the history of child welfare in New Jersey, more is needed from the offices with intimate knowledge of the system’s failings.

While OPR and OPD noted that the OPD is statutorily precluded from filing class action litigation, even if this is the case,<sup>7</sup> litigation is only one version of advocacy, and need not and probably should not be the predominant one. We were not provided any legislative testimony, public reports, op-ed essays, speeches, behind-the-scenes emails or other communications evidencing an effort by the OPD to improve the state’s child welfare system.

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<sup>7</sup> We have not researched this point exhaustively, but find no such preclusion in the OPD statute.

As already stated, members of the current administration of OPD and OPR cannot be blamed for the system they inherited. It was not of their design, and they now recognize that changes are necessary. Nonetheless, it remains the case that in the entire time that the OPD has been responsible for providing representation for parents, the office has only had three classifications for employees: attorneys, office support staff principally performing the role of secretary, and investigators (whose profile commonly is a former police or corrections officer). These investigators are well-versed only in a limited kind of forensic work encompassing such tasks as locating clients or witnesses, serving legal papers such as subpoenas, and taking statements from witnesses. Thus, the only full-time forensic aides that have been available to attorneys are incapable of performing the necessary tasks of advocating for parents outside of the courtroom. This staffing model, as the OPD agrees, is inadequate.

The Public Defender informed us her office is not responsible for the job categories provided to it by the Legislature. In addition, the Public Defender pointed to the state's civil service classification system as contributing to her inability to employ social workers and other appropriate personnel to work with lawyers in child welfare cases, explaining that the office is constrained to work within the employment categories provided to it. It is likely that these classifications are themselves a product of the court-centric, criminal defense model of representation. In criminal cases, an investigator who can track down witnesses and take proper statements from them is both a valuable and a sufficient aide to defense counsel.

But this type of practice is very different, and the limited set of job classifications is insufficient to do the job required. The PRU/OPR must be a multi-disciplinary office. We are informed that the OPD has attempted unsuccessfully to change the employment classifications,

and that the office attempts to employ the classifications creatively in support of its child welfare work. We applaud these efforts, but note that, for whatever reason, the outcome is unsatisfactory.

V. The Conflicts Question

The Child Welfare Panel specifically asked us to inquire into the propriety of the OPD being the home to both the OPR and the OLG. This section addresses that aspect of our inquiry. The New Jersey Legislature has authorized the Office of the Public Defender to provide representation for both children and indigent parents in abuse and neglect and termination of parental rights proceedings. Different offices within the OPD, with different lawyers, represent each group: the Office of the Law Guardian provides representation for children, and the Office of Parental Representation represents indigent parents.<sup>8</sup> As will be elaborated below, these offices operate independently of each other.

A. Overview of National Picture

An early important question we examined is whether OPD should continue to be responsible for both the law guardian and parental representation responsibilities. As part of this investigation, we surveyed legal service providers throughout the United States who represent parents in child welfare cases. We did this for three principal purposes. First, our own personal knowledge about the range of possible legal services delivery systems is necessarily limited and

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<sup>8</sup> The Office of Parental Representation operates in accordance with statutory mandates set forth in N.J.S.A. § 2A:158A-1 et seq., N.J.S.A. § 9:6-8.43a and N.J.S.A. § 30:4C-15.4. The OPR provides legal representation to indigent parents and guardians in Title 9 cases which allege child abuse and neglect and in Title 30 cases which seek to terminate parental rights. The Office of the Law Guardian operates in accordance with statutory mandates to provide legal representation of children in child abuse and neglect cases under N.J.S.A. § 9:6-8.21 et seq. and termination of parental rights cases under N.J.S.A. § 30:4C-15 et seq.

it made sense to us to learn what is going on throughout the United States. Second, we were interested in finding out how different offices are discharging their obligation to represent parents. We wanted to know, among other things, what kinds of support staff they employ to assist lawyers in their work. Finally, we were interested in hearing from heads of various offices what they thought about the work they do, what an ideal representation system would look like, and their reactions to New Jersey's arrangement of operating two independent legal services offices under the umbrella of a single Public Defender to provide both parents and children with lawyers in the same proceedings.

We undertook an informal phone survey of parent representatives and juvenile court administrators across the country. Altogether, we studied the delivery models in 21 localities in 17 states. In addition to telephone conversations, we read published reports about various service providers and reviewed state statutes and rules concerning parental representation. Finally, we spoke with a number of national offices, including the American Bar Association, the National Legal Aid and Defender Association and the National Council of Juvenile and Family Court Judges, which provided valuable context and helped shape our research.

Most court systems discharge their legal obligation to provide indigent parents with counsel when they are charged with child abuse or neglect or their parental rights are threatened through a combination of providers including public defenders, private law firms, non-profit agencies and solo practitioners. The overwhelming majority of the sites we contacted, however, use an institutional provider to deliver parent representation. Only four of the localities provide parental representation primarily through contracts with a panel of independent attorneys.

Our survey revealed that the most common provider of parental defense is an institutional

defender office. States vary widely in their use of such offices. Some, like New Jersey, have a statewide Public Defender. These include Maryland and Rhode Island. In many places, however, public defender offices are city-wide, not statewide. Chicago, Cincinnati, Portland (Oregon) and Seattle, for example, have appointed their city public defender offices to represent parents in child welfare cases.

In our inquiries, it quickly became clear that few in New Jersey consider it inappropriate for the OPD to house both units. When we raised the questions with various respondents, we sometimes were met with a certain degree of surprise, as the question had never occurred to them. The majority view of those with whom we met is that there is nothing substantively wrong with OPD housing both divisions. While not dispositive, this is relevant.

The reaction in New Jersey, however, stands in dramatic contrast to the reaction in our national survey. Almost every person we spoke with from around the country argued against having two offices under the single umbrella of the Public Defender represent parents and children in the same proceedings. This was true whether or not they thought the arrangement would be ethically permissible.

Of all the states we looked at, Vermont comes closest to the arrangement used in New Jersey through the middle of 2004. In Vermont, the state Public Defender uses in-house counsel to represent children and contracts with a panel of independent attorneys to represent parents. Like the New Jersey OPD, the Vermont Public Defender believes its arrangement comports with ethical rules and has been successful in avoiding any confusion in ideologies. But Vermont is highly critical of its reliance on pool attorneys to represent parents. The Public Defender there believes the arrangement has resulted in an inequitable legal services delivery system because

parents' attorneys receive less support, in terms of salary and support staff, than children's attorneys. The attorneys in Vermont with whom we spoke believe that this results in a disparity in the quality of representation offered parents as compared to that offered children.

B. Propriety of OPD Being Responsible for Both Law Guardian and Parental Representation

From the beginning of our work, we separated the inquiry of the propriety as a matter of legal ethics of different lawyers from the OPD representing children and parents in the same proceedings. An independent ethicist, Professor John Leubsdorf of the Rutgers-Newark Law School, was engaged to provide an opinion on this matter. Professor Leubsdorf was not asked to undertake an independent factual investigation of the circumstances under which the OPD operates the two offices. Instead, he was asked to obtain whatever information he deemed pertinent from the OPD and to provide an expert opinion on the ethical propriety of the arrangement, assuming the facts provided to be accurate.

Employing this methodology, Professor Leubsdorf wrote two letters to the Public Defender and received two written responses which answered most of the questions he posed. Based on those answers, Professor Leubsdorf provided us with his formal opinion in a letter dated January 27, 2005 (attached hereto as Attachment A). It is Professor Leubsdorf's opinion "that the current system for representation of children and parents through separate branches of the OPD is in most respects consistent with the standards applicable to New Jersey lawyers, but that certain changes are necessary to obtain complete compliance."

Professor Leubsdorf compared the OPD operation OPD with the New Jersey Rules of Professional Conduct (RPCs) and relevant caselaw. Making clear that no definitive ruling has

been provided by binding authorities in New Jersey, Professor Leubsdorf concluded that it is not improper “for an OLG lawyer to represent a child in the same case in which an OPR lawyer represents that child’s parents.”

Professor Leubsdorf concluded that New Jersey does not require that the OPD be regarded as a single firm for conflicts purposes involved in the representation of clients. Professor Leubsdorf is satisfied that “[t]here is no significant danger that confidential information of OLG lawyers will be shared with OPR lawyers, or vice versa.” Moreover, because “[a]ll decisions of the Office of the Public Defender concerning the representation of indigent parents in particular cases shall be made by staff who have no actual involvement with the day-to-day legal representation being provided by the Law Guardian Program” (N.J.S.A. § 30:4C-15.4(c)(3)), it is his judgment that the OPD can continue to operate both the OLG and the OPR. He notes that in light of the separation between the OPR and OLG “a reasonable client should be no more distrustful of representation by either office than in any other situation in which private individuals are represented by lawyers from offices sponsored by the government.”

Professor Leubsdorf makes several recommendations for change in current practice, which we endorse. He recommends that the practice of listing the name of the Public Defender in the list of counsel making appearances, at both the trial and appellate levels and on briefs, is improper and should cease. Moreover, Professor Leubsdorf considers it improper for the Public Defender’s name to appear on briefs filed by OLG or OPR lawyers even when only one party is represented by one of these offices. He notes that there is no need for the Public Defender’s name to be used in conjunction with the operation of either the Office of the Law Guardian or the Office of Parental Representation. The “preferred means of identification would be ‘Office of

the Law Guardian (or, as the case may be, Office of Parental Representation) of the Office of the Public Defender” and should be used not only in formal papers filed in court but also on “stationery, brochures, and premises.”

Professor Leubsdorf also recommends certain steps that should be followed by both the OLG and the OPR when lawyers switch from one office to the other. Lawyers who switch offices should “not (without informed consent) represent a client in any matter substantially related to a matter in which that lawyer formerly represented another client if that client’s interests are materially adverse to those of the present client.” He defines “substantially related” to include cases involving “another child of the same parent, or if the same person was a client in one matter and a witness in another.” He recommends that the entire office be disqualified from representing a client in a case substantially related to one in which the newly transferred lawyer had primary responsibility for the matter in the previous office, unless “the lawyer is timely screened from any participation in the new matter” and “the former client receives prompt written notice.”

Professor Leubsdorf believes that the OLG and the OPR should consider themselves to be independent firms with “adequate procedures to ensure, for example, that possible conflicts are reviewed by lawyers other than those directly involved, and that any screening of disqualified lawyers under RPC 1.10( c) is adequately implemented.” He was uncertain whether written conflicts and screening procedures already exist. If they do not, he recommends that this be remedied.

Professor Leubsdorf also addressed the process that is appropriate when there will be an appointment of pool counsel because of conflicts or other ethical problems that preclude

representation by an OLG or OPR lawyer. Recognizing that “pool counsel may be designated and paid by the same office (whether it is OLG or OPR) that is itself forbidden to represent the child or parent in question,” Professor Leubsdorf recommends certain protections. He recommends that clients represented by pool counsel be asked to give informed consent when a pool attorney is assigned to the case and that the pool attorney should explain to the client that the attorney will be acting independently of any other office but will be submitting vouchers for remuneration to whatever office is responsible for such payment. As a further protection, he recommends that “any OLG or OPR lawyers who are themselves disqualified from representing the client in question . . . should not participate in selecting or paying pool counsel. Moreover, OLG or OPR personnel who review pool counsel’s fees and disbursements should not use their power to approve and disapprove to revisit counsel’s strategic decisions during the representation.” We adopt Professor Leubsdorf’s recommendations.

## VI. Recommendations

### A. Remove OPR from the Office of the Public Defender

We recommend that the parental representation function be removed from the OPD for three principal, related reasons: (1) The OPD believes it is not permitted to perform the role of advocate for system-wide child welfare improvement; (2) Although the OPD is now rhetorically committed to a robust model of parental representation in individual cases, we are not confident that it is in a position to do all it must to achieve this goal; and (3) The constraints imposed by the state personnel classification system are significant. We have identified the following potential alternatives:

Legal Services of New Jersey (LSNJ) has earned a reputation that would make it an appropriate organization to organize and house the parental representation effort. We were very favorably impressed with the commitment and depth of understanding of the LSNJ lawyers who represent parents. They possess a passion and a commitment to representing parents that is essential to the development of a first-rate parental defender organization. They also understand on a deep level why only a multi-faceted, team model of representation can be successful in this context. It is likely (though we did not research this point) that LSNJ already represents numerous parental child welfare respondents in cases involving housing, public benefits, domestic violence or other case types within their mandate. With offices in 20 of 21 counties, LSNJ is an organization with statewide reach, and it has both a long history and a strong presence in the cities and neighborhoods that produce disproportionate shares of child welfare cases. Finally, LSNJ's position and well-established practice as a leading non-governmental advocate for the poor would suit it well to the system-wide child welfare advocacy that is essential to this role, particularly at this moment in New Jersey's history.<sup>9</sup>

If it is determined that this function must remain within state government, we offer the following suggestions. If the Office of the Public Advocate is revived (this possibility having been under political consideration for some time), this could be an appropriate home for the parental representation function. The Office of the Public Advocate was initially established precisely to fill a role that the OPD is unable to fulfill: advocate for substantial reform of public-

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<sup>9</sup> LSNJ would appear to be the only organization that exists today that could perform this function at the high level necessary. We are not in a position to evaluate all the potential complications inherent in moving government positions to a private sector institution, but hope that they not be deemed preclusive.

sector systems. The Office of Parental Representation could be constituted either as a division of the Office of the Public Advocate or as a quasi-independent office “in but not of” the Public Advocate (a familiar institutional arrangement in New Jersey state government).

If it is desired that the parental representation function remain within state government but the Office of the Public Advocate is not revived in the near future, we then would recommend that a serious evaluation of potential options be undertaken. This should include housing the function in an independent office “in but not of” another Cabinet office, perhaps the Department of the Treasury, with that office serving as a fiscal pass-through but not exercising programmatic, staffing or budgetary oversight.

If the primary parental representation function is moved from the OPD, we would expect that some of the lawyers recently hired by OPR, about whom we have heard generally good things, would be asked to work for the new organization. We also recommend that the existing OPR, within the OPD, become the back-up institutional legal services provider, for the conflicts cases. According to OPR, approximately one-third of their cases involve multiple respondents and require at least a second attorney.<sup>10</sup> The OPR thus would keep a substantial number of the lawyers it has recently hired and assign them to cases with multiple respondents with conflicting

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<sup>10</sup> This percentage appears to be distributed unevenly across the state. In our investigation, we heard much higher estimates of the percentage of multi-respondent cases in some vicinages.

interests.<sup>11</sup> This would reduce substantially the need for continued reliance on pool attorneys.<sup>12</sup>

Once there are two institutional parental representatives, we further recommend that representation of the “principal” respondent – typically the mother – in each conflicts case be either by random assignment or alternation between the two institutions, so both institutions develop experience representing both “principal” and “secondary” respondents and could support and learn from each other in these overlapping but somewhat distinct roles.

B. Remove OLG from the Office of the Public Defender

It is not clear that our charge from the Child Welfare Panel encompasses the Office of the Law Guardian. But our work led us to learn a certain amount about its functioning and to reach certain conclusions, so we present these findings and recommendations:

Initially, our focus on the OLG’s practice was limited to the question of a potential conflict of interest with the OPR. We questioned, for example, OLG’s failure to criticize the quality of lawyering the PRU and OPR were administering (as counsel for the children in the same proceedings, OLG staff attorneys had extensive exposure to the limitations of parental representation) and wondered whether its silence was the product of any conflict of interest (an unwillingness to criticize another unit of the OPD). When we turned our attention to the failure of the OPD to act as a voice for system-wide child welfare reform, we also came to question the

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<sup>11</sup> How this would work in practice, and how the primary and secondary institutional offices would partner more generally (for example, on training and the assignment of cases and clients), should be addressed by the detailed parental representation plan we recommend below.

<sup>12</sup> Cases with more than two respondents (for example, a mother and the fathers of her several children) are not uncommon. For these cases, we would recommend that a pool of private attorneys be maintained to serve as the third (or more) parental counsel in a case. The pool attorneys should receive the same training as the attorneys employed by the primary and secondary institutional parental defenders.

failure of OLG to have taken up this role. OLG is an older entity within the OPD and has a longer record of working in child welfare matters. It has had in-house staff attorneys – a more direct source of information regarding the child welfare system’s functioning than the pool attorneys on whom the OPR until recently relied -- at least since 1997. Its failure to develop a substantial public voice for child welfare reform raises even more serious questions than does the OPR’s failure.

We now understand that the OLG is constrained to the same degree as the OPR from performing this important function. To the extent that the advocates for parents and children in child welfare matters are both constrained as a consequence of being part of the OPD, which understands itself to be significantly precluded from taking up the systemic advocacy role, the wisest solution is to assign the responsibilities of representing both children and parents elsewhere.

If the loss of the parents’ advocates’ voice in public critique of child welfare has slowed reform efforts, the absence of the children’s advocates’ voice is even more harmful. Public criticism of the inadequate legal services delivery system for parents by the lawyers for these parents’ children could have added an important dimension to the debate. One of the principal reasons a state would invest more in legal services for children than for parents is the belief that the parents are presumptively blameworthy and undeserving of this kind of government “largesse,” and that the state is wiser allocating more resources to children’s representation. It is disturbing that of the three parties to child welfare legal proceedings – children, parents, and the State – only parents lacked an institutionalized law office in New Jersey until 2004. This is reflective of an unarticulated sense by the public that respondents in child welfare proceedings

are generically classifiable as unworthy “child abusers” (though serious child abuse is involved in only a small subset of child welfare cases, the majority of which allege neglect). This negative view of parents who become respondents in child welfare cases means they often are seen as less deserving of adequate legal representation than even criminal defendants.

There could be no stronger voice to repudiate this thinking – which is both inaccurate and harmful to the vast majority of *children* involved in child welfare cases – than that of the office responsible for representing the children. When the parents’ advocates argue against this they are perceived as self-serving. Focusing on the harm the arrangement inflicts on children has the potential to change the nature of the debate. Law guardians serve their clients best by striving to obtain high quality lawyers for their parents to maximize the likelihood of each case being resolved properly so children who can safely be returned to their families are returned as promptly as possible.

But this critique runs deeper than the absence of the OLG as a voice for the improvement of parental representation. As with the OPR, the critique runs to the more global project of child welfare system reform. While it is important, for the reasons previously discussed, that the office representing parents develop a robust public voice for reform, it is doubly so for the office representing the children. It is an incontrovertible fact that the children’s representatives will always, as a result of the clients for whom they speak, have more influence in the public square and the halls of politics than will the parents’ representatives. The absence of the OLG’s voice from the child welfare reform process in New Jersey in recent years is thus doubly lamentable.

The Office of the Child Advocate (OCA) would be a natural home for the OLG. This idea was suggested by a number of people, including at least one in the OPD. The possibility for

synergies are significant: The presence in the OCA of the lawyers who represent thousands of children annually would provide the OCA's systemic child welfare monitoring and reform efforts with an in-house source of grounded information. And the knowledge that individual law guardians had direct access to an oversight office with investigative authority, a bully pulpit and the right to litigate systemic issues should enhance their efforts to get the Division of Youth and Family Services to provide necessary services in individual cases.

C. Require a Detailed Plan for Parental Representation & Establish an Advisory Board

We think it essential that a detailed plan for parental representation be developed, subject to the review and approval of the Child Welfare Panel, which then should designate its key elements as court enforceable. Given the unsatisfactory state of parental representation today and the low political priority placed on parental representation both around the country and in New Jersey, the need for this measure of accountability cannot be gainsaid. The plan should address all the issues raised in this report, including but not limited to the team staffing model, staffing ratios and hiring plans with timetables, the training program, the ethics issues raised by Professor Leubsdorf, and the issues discussed below. In short, it should be a comprehensive and detailed plan encompassing all aspects of the parental representation function.

The plan should be drafted by the primary institutional provider of parental representation, working in consultation and cooperation with the secondary institutional provider. We have recommended that the primary institutional provider no longer be the OPD. Because it is unknown whether New Jersey will adopt this recommendation, or if it does whether the function will move to LSNJ or elsewhere, it is impossible to know which institution will be

responsible for developing this plan. Because of this, it is also impossible to make a firm recommendation as to when the report should be completed and submitted to the Child Welfare Panel. We thus recommend that the Panel attend to these questions, and set aggressive but reasonable deadlines for the appropriate institution to meet.

So long as OPR continues to have responsibility for administering the legal services delivery system for parents, an Advisory Board, chaired by a compensated expert, should be established.<sup>13</sup> The OPD has hired talented lawyers to lead the OPR, but they lack significant experience in parental representation. The Advisory Board should have at least a two-year mission to advise the administrative heads of OPR on how to conceptualize and discharge its responsibilities.<sup>14</sup> Its members should include leaders from Legal Services of New Jersey,<sup>15</sup> the Office of the Child Advocate, and the Association for Children of New Jersey.

The Advisory Board should also include several prominent citizens (both lawyers and, possibly, non-lawyers) who are committed to robust parental representation and systemic child

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<sup>13</sup> Should another institution become the primary parental defender, we recommend that the Child Welfare Panel at that time consider whether that institution, by virtue of its experience and expertise in this area, would benefit from such an Advisory Board, and if so that the Panel require that such a board be developed. Certainly if the function were to move out of the OPD and become a free-standing office of state government, for example in but not of the Department of the Treasury, such a board would be necessary. If the function were to move to LSNJ, which has a deep understanding of the issues involved and is well established as a strong advocacy voice, the answer would be less self-evident.

<sup>14</sup> We see no reason why this Advisory Board should not become a permanent part of New Jersey's legal landscape, and numerous advantages to it being so. In forming the board, we urge the OPR to think big, perhaps inviting leading national experts to serve for at least the initial, crucial years.

<sup>15</sup> Should the Advisory Board itself be called upon to consider the question of the role of LSNJ in providing parental representation, the LSNJ representative would need to recuse herself.

welfare reform, even if they lack expertise in this precise area. This is to help raise the profile of parental representation on the political level. To develop and maintain both a strong political voice on behalf of parents and resources adequate to the legal task, the primary parental defender will need additional political support.<sup>16</sup> To imbed the Advisory Board in the state's political firmament, consideration should be given to establishing this body statutorily, with members appointed by appropriate persons including the Governor, the legislative leadership, the Child Advocate, the Chief Justice of the Supreme Court, the President of the State Bar Association, and perhaps the directors of organizations such as LSNJ, the Association for Children of New Jersey, and the Statewide Parent Advocacy Network. Whoever appoints them, the initial membership, including the designation of the chair(s), should be subject to the Child Welfare Panel's approval. The Advisory Board should assist in developing the detailed parental representation plan herein recommended, should formally sign off on it upon completion, and thereafter should approve an annually updated, public strategic plan for the office.

The initial plan should begin with a mission statement and a delineation of the office's purpose and goals. This is an important first step. It should address the central question of what staff positions should be added to assist lawyers on their cases, and should include strategies for gaining approval for the hiring of these positions.

The plan also should address three important matters concerning the assignment of cases for parental representation. The first concerns the timing of such assignments. We are pleased with the OPR's plan to begin its so-called OSCAR (Order to Show Cause Attorney

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<sup>16</sup> In the event that one person cannot be found who fulfills both goals of the Advisory Board – substantive expertise in parental defense and significant prominence in the New Jersey bar – perhaps the idea of co-chairs could be considered.

Representation) program as soon as the regional offices are opened. This will provide counsel when DYFS lawyers initially apply for an order to show cause, which is how most child welfare legal proceedings begin. Reducing delays in the initial assignment of cases and appearing in court with a parent at the first hearing would be a significant improvement over current practice. It is important that parents be represented in child welfare cases as early as possible. Earlier assignment of counsel should accelerate the judicial review of removals, allowing for court-ordered returns of children, when appropriate, within days of the removal. In those cases in which return of the children to their parents is not feasible, attorneys would be in a position to help find suitable relatives, family friends, or others known to the child to serve as substitute caretakers.<sup>17</sup>

While we are very supportive of earlier assignment of lawyers to their clients, we are troubled by one aspect of the arrangement the OPR uses when accepting a new case. Under New Jersey law, courts must make a determination of a parent's indigency before the OPR is authorized to represent them. Under current practice, OPR lawyers require that parents sign certain documents – particularly the so-called “5A” form – in order to receive representation. According to the OPD, N.J.S.A. § 2A:158A-17 mandates that the OPD effectuate a lien whenever the value of legal services provided exceeds \$150. Once a client signs the 5A form, a lien can be placed on her assets to ensure that the state is reimbursed for its provision of legal services. As we understand it, income-eligible persons are not legally required to sign the form

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<sup>17</sup> The state's child welfare reform plan commits DYFS to doing this. But given the deep mistrust of DYFS in many communities where child welfare cases are common, it is likely that attorneys with an unalloyed alliance with the parental respondents may be in a better position, by virtue of the clients' trust, to implement it.

in order to receive a court-assigned lawyer. The question thus arises of what counsel should tell a potential client when first meeting them: that they must sign the form or that they have a right not to? OPR's current practice, as we understand it, is not to inform clients that they may decline to sign the form and still receive representation. We are concerned that this practice treats clients deceptively and may have an adverse impact on the attorney-client relationship. This practice raises ethical questions and deserves careful attention by the Advisory Board.<sup>18</sup>

Another set of issues regards the continuing use of the pool attorneys. The OPR's current plan for assigning counsel for parents continues to rely heavily on the pool attorneys. The major difference between the recent past and the present plan is that pool attorneys will be used when

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<sup>18</sup> There appears to be another important issue emerging regarding the right to counsel for parents. In "A New Beginning" the state committed itself to ending the practice of accepting voluntary placements of children into foster care. The Panel and federal District Court approved this change, and voluntary placements under N.J.S.A. § 30:4C-11 have ceased in DYFS's four "Phase I" vicinages (Camden, Essex, Mercer and Passaic) and are scheduled to cease statewide by September 30, 2005. Among the reasons the State took this step, we believe, is that when children were placed voluntarily into foster care they tended to "drift" for long periods of time without moving toward permanency. This results in significant part from the fact that when children are placed voluntarily their parents do not have a right to counsel, so there is no institutional force urging the State to move the case forward, both legally and programmatically. While we have not researched the matter in detail, we are informed that in those vicinages where the State has ceased accepting voluntary placements there has been a marked increase in cases filed against parents under N.J.S.A. § 30:4C-12, frequently when the state does not think it has a factual basis to proceed under Title 9. 4C-12 authorizes placement of a child in foster care for up to six months, under a lower burden of proof than Title 9, and does not include a right to counsel. In addition to losing one's children (for up to six months), parental respondents under 4C-12 are subject to lifetime listing in the State's child abuse registry, significantly restricting their employment prospects in several sectors. Subjecting parents to such results without providing them a right to counsel seems to us both wrong and undermining of what the State was trying to achieve by eliminating voluntary placements. We would respectfully suggest that the Child Welfare Panel look into this matter (perhaps by asking the Administrative Office of the Courts or the Office of the Attorney General for statistics, to see whether and to what extent 4C-12 filings may have increased), and that the OPD, Department of Human Services, and other interested parties consider joining to urge the Legislature to add the right to counsel to 4C-12 proceedings (and, in case voluntary placements ever should be revived, to 4C-11 proceedings as well).

OPR lawyers are unable to accept an assignment because of a conflict of interest, as in multiple respondent cases.

Careful attention should be paid to the provision of first-rate representation to all parental respondents in child welfare cases. To the extent that pool attorneys will continue to be used in conflicts cases, it is important to investigate how many of the old pool attorneys should continue representing parents, in light of the many criticisms of their performance, and to implement a meaningful evaluative tool.<sup>19</sup> Those who remain should participate in a multi-disciplinary practice model and in training equivalent to that provided staff attorneys. We reiterate our recommendation that parental representation be housed in two institutions, because of the frequency of conflicts cases; this would reduce the need for the pool – which even with increased training and support will never be as good as institutional representation – to a desirable minimum.<sup>20</sup>

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<sup>19</sup> The combination of less demand for pool attorneys as the function becomes increasingly institutionalized and the significant increase in pool rates should make it possible, with careful evaluation, substantially to increase the performance level of the pool.

<sup>20</sup> Having two institutional representatives would reduce the frequency of another troubling practice of which we were informed. When parties move or for other reasons, the venue of a case can be transferred from one vicinage to another. While this does not happen in an enormous number of cases, neither is it a rarity. Legally, the case continues uninterrupted, as jurisdiction is statewide. But in such circumstances, pool attorneys frequently announce that they only represent parents in county X, not county Y, so will no longer be participating in the case. (We were informed that they do this without either their client's permission or leave of court, raising ethical questions.) This requires the parent to be assigned a new attorney in the new vicinage, which both undermines the continuity of representation and slows down the case's progress. By contrast, lawyers from an institution with offices all over the state could in such circumstances transfer the case to a colleague from the same institution (when the new county is too far away for the initial lawyer to keep the case), thereby both reducing the ethical concerns and increasing the likelihood that the new lawyer would quickly be provided with the case file and other relevant information and that the case would proceed without delay.

## VII. Conclusion

The New Jersey child welfare system, including the means by which parents are to be represented, is in the midst of a radical overhaul. Given the disappointing history, the changes underway can only be viewed as positive and hopeful. Certainly, the catalyst for change has been the lawsuit that led to this report. There is much to praise about the OPD's efforts over the past two years. Many fine lawyers have been hired, and we accept that the office now shares the goal of high quality representation as set forth in this report.

But the OPD has little to show by way of persuading the Legislature to make important changes in child welfare. There is not a record of a tradeoff sacrificing public critique of terrible child welfare practice in exchange for successful, quiet advocacy inside government. The OPD has been unable even to change the hiring arrangements for its office. Its efforts to hire non-attorney personnel who have any human services educational or professional training have succeeded, to the extent that they have, only by creatively maneuvering around restrictions the office has been unable to have lifted. The OPD was unable to have the rates paid to pool attorneys increased. The record is largely devoid of gains from internal advocacy that would offset the absence to the citizens of New Jersey – particularly its most vulnerable children and families – of a robust public critic and advocate in this crucial area.

Our recommendation to remove both functions from the OPD is based on the structural restrictions that attach. The office must provide parents the type of individual representation they require and must influence system-wide child welfare policy and practice. The current arrangement precludes both these possibilities. It must be corrected.

Respectfully submitted,

Martin Guggenheim  
Craig Levine

Dated: May 2005

***APPENDIX A***

JOHN LEUBSDORF  
333 CENTRAL PARK WEST  
NEW YORK, N.Y. 10025

January 27, 2005

Professor Martin Guggenheim  
Clinical Law Center  
N.Y.U. Law School  
245 Sullivan Street  
New York, NY 10012

Re: Child Welfare Panel

Dear Professor Guggenheim:

In response to your letter of October 20, 2004, I am providing in this letter my opinion as to the propriety as a matter of legal ethics of different lawyers from the Office of the Public Defender (OPD) in New Jersey representing children and parents in the same child welfare proceeding. In brief, I believe that the current system for representation of children and parents through separate branches of the OPD is in most respects consistent with the standards applicable to New Jersey lawyers, but that certain changes are necessary to obtain complete compliance.

In obtaining the facts needed to answer the question you asked, I have been assisted by Public Defender Segars, who has responded to my two letters of inquiry in some detail. Because you have copies of her letters, I will not attach copies of them here. I appreciate the Public Defender's courtesy and, having no other source of facts, rely on her responses in what follows. In some instances, further detail would have been helpful, but time constraints prevented my seeking it.

1. By way of introductory outline, I will summarize the administrative structure out of which the issues of professional responsibility arise. The New Jersey legislature has authorized the OPD to provide representation for children and indigent parents in proceedings for the termination of parental rights (N.J.S.A. 30:4C-15.4) and in child abuse proceedings (N.J.S.A. 9:6-8.21(d), 9:6-8.23, 9:6-8.43). Lawyers who work in the Office of the Law Guardian (OLG) provide representation for children, and different lawyers who work in the Office of Parental Representation (OPR) represent indigent parents. By statute, decisions concerning the representation of indigent parents "shall be made by staff who have no actual involvement with the day-to-day legal representation being provided by the Law Guardian Program" (N.J.S.A. 30:4C-15.4(c)(3)). In some instances, for example when conflicts of interest bar representation of

a child or indigent parent by an OPD lawyer, representation is provided by outside “pool counsel,” who are lawyers approved by the OPD and local court and paid through the OPD.

(A) *Preliminary Matters*

2. The question you have asked must be resolved in the light of the New Jersey Rules of Professional Conduct (RPCs). Although statutes and precedents bear on that resolution, I have found no decisive legislative or judicial authority squarely on point, as I will now explain.

The legislature has directed the OPD to provide representation for children and indigent parents, but it has not provided detailed instructions as to how this is to be done, except for the requirement quoted in paragraph 1 above that those making decisions as to parental representation shall have no involvement with representation by the Law Guardian Program. Certainly, the legislature has not indicated that standards other than the RPC should apply to the OLG or OPR. On the contrary, at least with respect to the representation of criminal defendants, the OPD and its lawyers must “adhere at all times to the standards and level of performance established by the Supreme Court of New Jersey in the execution of its duty to supervise the practice of law” (N.J.S.A. 2A:158A-13). In any event, because the Supreme Court has the exclusive power to regulate the practice of law, the legislature could not validly alter the standards laid down in the RPC. See *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546 (1993).

So far as I can determine, no New Jersey appellate court has passed on the validity under the RPCs of the OPD’s system of providing representation to children and indigent parents. I do not regard the Supreme Court’s comment that “In some cases OPD may be representing the child or children involved, thus requiring the provision of outside counsel for the parents” (N.J. Div. of Youth & Family Services v. E.B., 137 N.J. 180, 186 (1994)) as resolving that representation of parents by OPR lawyers is always forbidden when OLG lawyers represent the children. Nor has the Advisory Committee on Professional Ethics appointed by the Supreme Court pursuant to Rule 1:19 passed on the practices of the OPD in question. This is not to deny that there are relevant court and Advisory Committee decisions, to be considered below—only that those decisions do not consider the very issues to be discussed here.

I do not consider as conclusive *In re Guardianship of Jayla Madera and Amber Atkins*, Super. Ct., Chancery Div.-Family, Atl. County, No. FG 01-23-01A (May 24, 2002), which the Public Defender has brought to my attention. That decision rejected a challenge by an OLG lawyer representing children to the representation of a parent by an OPR lawyer. But the Court’s analysis was brief, the affidavits submitted by each party emphasized the independence of the two offices, and no appeal was taken. If indeed there were a conflict, a reasonable observer might well fear that the conflict vitiated the adversariness with which the issue was argued to the Court. Most important, an unreported trial court decision should not be taken as definitively resolving the issue.

3. Although OPD lawyers are state employees, the provisions of the RPC applicable to them are those governing lawyers in general, rather than those concerning “a lawyer employed by a public entity” (RPC 1.8(k)) or a lawyer serving as “government lawyer or public officer or employee of the government” (RPC 1.11) or a lawyer for a governmental organization (RPC 1.13(f)). “The primary duty of” OPD lawyers and pool counsel “shall be to the individual defendant, with like effect and to the same purpose as though privately engaged by him and without regard to the use of public funds to provide the service” (NJSA 2A:158A-11); see *State v. Davis*, 366 N.J. Super. 30, 40 (App. Div. 2004)(pool attorney’s clients are the defendants, not OPD). Similarly, client communications with OPD lawyers and pool counsel are “fully protected by the attorney-client privilege to the same extent and degree as though counsel has been privately engaged” (NJSA 2A:158A-12). Although this language appears to be directed at OPD lawyers representing criminal defendants, the same principle applies to OPD lawyers in cases concerning child abuse or termination of parental rights. See *N.J. Division of Youth and Family Services v. T.C.*, 251 N.J. Super. 419, 435-36 (App. Div. 1991).

4. Likewise, the RPCs applicable to other lawyers also apply to OLG lawyers who are serving as law guardians. A law guardian is “an attorney . . . designated under this act to represent minors in alleged cases of child abuse or neglect and in termination of parental rights proceedings” (N.J.S.A. 9:6-8.21(d); see also N.J.S.A. 30:4C-15.4 (b, c), also referring to law guardians as representing children). The function of a child’s law guardian in a child abuse or neglect proceeding is “to help protect his interests and to help him express his wishes to the court” (NJSA 9:6-8.23(a)). A law guardian from the OLG, I assume, performs these functions by himself or herself, without retaining another lawyer to do so. As an attorney representing a child, an OLG law guardian thus owes that child all the usual duties of a lawyer to a client. As a guardian, such an attorney may have unusual powers to make decisions on behalf of the child. See *In re M.R.*, 135 N.J. 155 (1993). But he or she remains subject to the RPCs governing such matters as confidentiality and conflicts of interest.

#### (B) *Vicarious Disqualification*

5. Is it improper for an OLG lawyer to represent a child in the same case in which an OPR lawyer represents that child’s parents? For the following reasons, I conclude that it is not, with qualifications set forth later in this letter.

6. The answer to the question I have asked depends on whether the two lawyers are considered to be “associated in a firm,” and hence subject to vicarious disqualification under RPC 1.10. Clearly, it would violate RPC 1.7 for a single lawyer to represent both a parent and a child in a case in which the parent is charged with abuse of that child or in which termination of the parent’s rights is sought. RPC 1.10(a) imputes the conflict of interest of a lawyer to other lawyers associated in the same firm. The reasons for this imputation are, in brief: the possibility that confidential information of one lawyer will be shared with others in the firm; the common interests that lawyers in a firm may share; and the impact on public confidence in the integrity of

the bar, which could be impaired if one lawyer could do what his or her partner could not. See, *e.g.*, *State v. Bellucci*, 81 N.J. 531 (1981); Restatement of the Law Governing Lawyers § 123, Com. b.

An organization such as the OLG, the OPR or the OPD can, depending on the factual circumstances, constitute a “firm.” Under the definition in RPC 1.0(c), “firm” means “a lawyer or lawyers in a law partnership . . . or other association authorized to practice law; or lawyers employed in a legal services organization . . . .” Even lawyers sharing office space can in some circumstances constitute a firm subject to imputed disqualification. See Kevin H. Michels, *New Jersey Attorney Ethics* 529-32 (2004 ed.)(discussing authorities). Authorities from other states disagree about whether a public defender’s office constitutes a firm for conflicts purposes, or whether the appropriateness of vicarious disqualification should rather be determined on a case by case basis. See, *e.g.*, *Asch v. State*, 62 P.3d 945 (Wyo. 2003)(using second approach but citing cases on both sides); Restatement of the Law Governing Lawyers § 123, Com. d(iv) and Reporter’s Note (using first approach but citing cases on both sides).

New Jersey adopted the second, case by case approach in *State v. Bell*, 90 N.J. 163 (1982). *Bell* upheld the representation of two criminal codefendants by two OPD lawyers. It reasoned that lawyers in the OPD lacked the financial incentive in each others’ clients that exists in a private, for profit firm, that the circumstances failed to demonstrate even a potential conflict of interest or significant likelihood of prejudice to either defendant, and that an across the board disqualification rule would needlessly deprive defendants of representation by competent public defenders. See also *State v. Muniz*, 260 N.J. Super. 309 (App. Div. 1992)(OPD lawyer could represent murder defendant although another OPD lawyer, no longer with the OPD, had represented victim in unrelated matter, provided that defendant gave informed consent). But the *Bell* court also ruled that the normal practice should be the representation of codefendants by pool counsel, or as a second best by deputy public defenders from another county; that the court should explore any proposed representation of codefendants by OPD lawyers to detect potential conflicts; and that representation of codefendants by lawyers from the same OPD office could occur only with guidelines in place to guaranty confidentiality.

7. The facts here are distinguishable from those in *Bell* in several important ways. On the one hand, in many cases there will be not just a potential but an actual conflict between the interests of children and their parents in a child abuse or termination of parental rights proceeding. Some children, moreover, may lack the capacity to give informed consent to any conflict. On the other hand, the OPD lawyers representing children and parents do not work in the same office as in *Bell* but in separate offices, to wit, those of the OLG and OPR. In such instances of separate offices, there is authority for allowing simultaneous representation when the office arrangements are such as to show that the three dangers against which vicarious disqualification guards are absent. Advisory Committee on Professional Ethics, Op. 241 (1972)(lawyers from two offices of legal services agency may represent opposing spouses in matrimonial dispute when the offices, though under the same board, are otherwise separate); Op. 440 (1979)(students in law school clinics may both prosecute and defend juvenile proceedings

when clinics, although subject to the same director having purely administrative responsibilities, are otherwise separate); see ABA Informal Op. 1309 (1975).<sup>21</sup> It is therefore appropriate to consider whether those dangers are present here.

(a) There is no significant danger that confidential information of OLG lawyers will be shared with OPR lawyers, or vice versa. The Public Defender's letter to me states that the OPR and OLG are housed in separate locations with separate files, phone lines and computer systems, and that they have separate investigative, secretarial and managerial staff, and of course also different lawyers. So far as confidential information is concerned, they thus seem entirely analogous to two different private law firms. As already noted, the statute requires that representation of indigent parents shall be provided by "an internal administrative unit . . . independently from the Law Guardian Program staff" and that "All decisions of the Office of the Public Defender concerning the representation of indigent parents in particular cases shall be made by staff who have no actual involvement with the day-to-day legal representation being provided by the Law Guardian Program" (N.J.S.A. 30:4C-15.4(c)(3)). Each office makes its own decisions about matters of general policy, such as legal principles that the office's lawyers will advance when appropriate, and about whether to appeal court judgments.

(b) An OPR lawyer will derive no financial benefit from the success of an OLG lawyer and therefore has no financial incentive to subordinate the interests of her own client to those of an opposing OLG client; and the reverse is also true. Indeed, because neither the OPR nor the OLG recovers fees for their lawyers' services, such financial incentives are lacking even within each office. The *Bell* Court relied on precisely this factor in allowing two lawyers from the same OPD office to represent codefendants in some cases. See 90 N.J. at 168. The promotions and salaries of a lawyer in the OLG or OPR are supervised by managers in that lawyer's office, with review by the Public Defender. Because the Public Defender is not a member of either office (but see paragraph 9 below), there is no reason for a lawyer in either office to expect her decisions to favor the clients of the other office.<sup>22</sup> It is conceivable that lawyers might moderate their adversarial vigor when facing lawyers from another branch of the OPD, but this does not seem more of a threat than the possibility that a lawyer in private practice might slacken off when facing a powerful opposing firm or a law school classmate; and this possibility has not been thought to require disqualification. I assume that in unusual cases, such as those in which it is appropriate for a lawyer to challenge the competence or ethics of an OPD lawyer, the OLG or OPR will arrange that the challenging lawyer is pool counsel rather than another OPD lawyer.

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<sup>21</sup>Because New Jersey's Advisory Committee on Professional Ethics is appointed by the New Jersey Supreme Court, and that Court may and sometimes does review the Committee's Opinions, those Opinions have some precedential authority. See Rule 1:19; *Higgins v. Advisory Committee*, 73 N.J. 123 (1977).

<sup>22</sup>I assume that the Public Defender, like the administrator in *Advisory Committee on Professional Ethics*, Opinion 440 (1979), "exercises no control over the assignment or handling of cases, nor does [s]he have access to the office or files of either unit."

(c) Assuming that OPR and OLG lawyers are properly identified as such (see paragraph below), it should not be necessary to worry that clients will become suspicious of them because of the fear that lawyers from one office are in cahoots with lawyers from the other. The likelihood of such suspicions should be appraised from the perspective of a reasonable client. See *In re Advisory Committee on Professional Ethics Opinion 621*, 128 N.J. 577 (1990); Kevin H. Michels, *New Jersey Attorney Ethics 347-58* (2004) (discussing the history of the “appearance of impropriety” doctrine in New Jersey, and its apparent elimination by the 2004 amendments to the RPCs). Granted the separation between the OPR and OLG that I have been describing, a reasonable client should be no more distrustful of representation by either office than in any other situation in which private individuals are represented by lawyers from offices sponsored by the government. See *Bell*, 90 N.J. at 168 (using similar reasoning).

8. I therefore conclude that, subject to the qualifications discussed below, it does not violate the RPCs for an OLG lawyer to represent a child in the same case in which an OPR lawyer represents that child’s parent, even when the interests of child and parent conflict.

#### (C) *Other Issues*

9. In reported cases in which an OLG or OPR lawyer represents a child or parent, the name of the Public Defenders appears in the list of counsel, and presumably on the briefs filed by the OLG or OPR lawyer. I believe that this practice is improper, and that it could undermine the propriety of representation by both OLG and OPR lawyers in the same case.

In those cases in which both OLG and OPR lawyers represent children and parents with conflicting interests, the practice places the Public Defender in a conflict of interests forbidden by RPC 1.7 unless all clients have given informed consent. Under New Jersey practice, pleadings, motions and briefs are to be signed by the attorney of record (Rule 1:4-5). The signature of an attorney on a paper constitutes a certificate that the attorney has read the paper and that it has legal and factual support, and the attorney is subject to sanctions should that not be the case (Rule 1:4-8). The appearance of the Public Defender’s name on briefs of conflicting parties thus indicates that she represents both parties, which should not happen. If in fact the Public Defender does not mean to make the certifications states in Rule 1:4-8, the use of her name among those of counsel is at the least misleading.

Even if only one party in a case is represented by an OLG or OPR lawyer, inclusion of the Public Defender’s name on that party’s brief or other paper threatens the division between the OLG and the OPR on which my conclusion in paragraph 8 above depends. If the Public Defender is being represented to be cocounsel with an OLG lawyer in some cases and cocounsel with an OPR lawyer in others, she has in effect constituted herself a member of both the OLG “firm” and the OPR “firm.”<sup>23</sup> There is authority that when a lawyer is a member of two

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<sup>23</sup>This assumes that the OLG and OPR each constitutes a “firm” within the meaning of the

otherwise separate firms, those firms are considered as a single firm for purposes of vicarious disqualification. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). If this were to happen in this instance, OLG and OPR lawyers could not represent conflicting parties in any case, even if the Public Defender's name was not used in that particular case.

There is no need for the Public Defender's name to appear on briefs for purposes of identification. Counsel could adequately convey their institutional affiliation by following their names by some such identification as "Office of the Law Guardian (or, as the case may be, Office of Parental Representation) of the Office of the Public Defender. "Office of the Public Defender" is the statutory title of the OPD (N.J.S.A. 2A:158A-3) and therefore the most appropriate designation of the agency in which OLG and OPR lawyers work. And it is the "Office of the Public Defender" rather than the Public Defender as an individual that is authorized to provide representation in proceedings for the termination of parental rights (N.J.S.A. 30:4C-15.4(c)). An identification such as I have described should therefore be used on court papers, and also on OLG and OPR stationary, brochures, and premises if that is not already being done.

10. There have been a few instances in which a lawyer has worked at different times in both the OLG and the OPR, although none of these is recent. Because I do not have detailed information about these, and because the relevant RPCs were amended in 2004, I will not try to appraise whether the OLG and OPR have always acted properly in such situations, but will rather set forth the applicable requirements that should now be followed should such a situation occur.

(a) The lawyer in question may not (without informed consent) represent a client in any matter substantially related to a matter in which that lawyer formerly represented another client if that client's interests are materially adverse to those of the present client. RPC 1.9(a). A matter might be substantially related if, for example, it involved another child of the same parent, or if the same person was a client in one matter and a witness in another. On the assumption—discussed in part (c) below—that the OLG and OPR should each be treated as a "firm," the same result follows even if the lawyer did not personally represent the former client so long as the representation of that client occurred while the lawyer was with the previous office and the lawyer acquired confidential information about that representation, for example by attending a conference at which cases were discussed. RPC 1.9(b). I did not inquire as to what the OLG and OPR have done or would do when matters are substantially related, or when the lawyer acquired confidential information without representing the client, and therefore received no information about this.

(b) Again on the assumption that the OLG and OPR should each be treated as a "firm," the vicarious disqualification provisions of RPC 1.10(c) require that every lawyer in the new office of the lawyer in question is disqualified in any matter in which the lawyer would be disqualified, unless: (1) the lawyer did not have primary responsibility for the matter in the

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vicarious disqualification rule, RPC 1.10. For discussion of this assumption, see paragraph below.

previous office; and (2) the lawyer is timely screened from any participation in the new matter and receives no part of the fee for it (the latter requirement having no application to the OLG and OPR, which receive no fees); and (3) the former client receives prompt written notice. The information I have received from the Public Defender leaves it unclear whether notice has been given to former clients (as to which I had specifically inquired), or just to the lawyer's former office.

(c) Although I have assumed that the OLG and OPR each constitutes a "firm" for disqualification purposes, the *Bell* case puts that assumption in doubt. There, as already mentioned, the Court concluded that two OPD lawyers could represent two criminal codefendants even though similar representations by two lawyers from the same private firm would not be allowed absent court permission pursuant to Rule 3:8-2. The Court emphasized that the OPD differs from a private firm because its lawyers lack a shared economic interest in the firm's clients. 90 N.J. at 167-70.

In my opinion, it would not be safe for either the OLG or the OPR to regard itself as other than a firm, except perhaps in rare cases. First, the *Bell* case does not apply "should the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice." 90 N.J. at 171. In *Bell* itself, the codefendants pursued parallel strategies and were unable to suggest how the conflict could have affected either lawyer's behavior.<sup>24</sup> Second, inquiring whether *Bell* permits representations otherwise prohibited would require a case by case inquiry that might well be inconvenient, as would be the implementation of "guidelines in place to guarantee confidentiality and restrict access to individual files." 90 N.J. at 174. Third, *Bell* held that use of outside pool counsel should be the norm, and that the use of two OPD lawyers would require Court approval under Rule 3:8-2. 90 N.J. at 173-74. Fourth, *Bell* can be considered as primarily a criminal procedure case dealing with whether convictions should be vacated because of inadequate assistance of counsel, rather than (or at least more than) a professional responsibility case about how lawyers should behave. It does not cite the applicable professional rules (which at the time it was decided were found in the Model Code of Professional Responsibility), though it does cite some Advisory Committee Opinions construing them, and it focuses on when prejudice from joint representations should be presumed, an issue that presupposes that a trial has already occurred and that the issue is whether the defendants are entitled to have it set aside. I therefore believe that the rules the OLG and OPR should follow are those discussed in parts (a) and (b) above, which proceed on the assumption that the OLG and OPR each constitutes a "firm" for purposes of disqualification.

(d) Assuming that the OLG and OPR adopt the correct conflict of interest rules, they should also have adequate procedures to ensure, for example, that possible conflicts are reviewed by lawyers other than those directly involved, and that any screening of disqualified lawyers

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<sup>24</sup>State v. Muniz, 260 N.J. Super. 309 (App. Div. 1992) does not broaden this holding: it involved a prior representation unrelated to the pending case by a lawyer who had left the OPD before the pending case reached the OPD, and the Court allowed the representation only if the defendant gave informed consent.

under RPC 1.10(c) is adequately implemented. RPC 1.0(l) and 1.10(f) require “appropriate written procedures” whenever a firm enters a screening arrangement.<sup>25</sup> The Public Defender states that the OPD has procedures and policies in place to review and resolve potential conflicts and that it performs screening when appropriate, but did not mention any written memos, reports or opinions dealing with conflicts in response to my inquiry about such documents except by a reference to the Superior Court decision discussed in paragraph 2 above. In my opinion, the OLG and OPR should have written conflicts and screening procedures if they do not already.

11. When conflicts of interest or other ethical problems preclude representation by an OLG or OPR lawyer, the obvious remedy is the appointment of pool counsel, as authorized by statute in these and other situations. See N.J.S.A. 2A:158A-7(c), 9:6-8.21(e), 30:4C-154.(c)(3); *New Jersey Division of Youth and Family Services v. E.B.*, 137 N.J. 180, 186-88 (1994).

This in turn leads to potential problems, since pool counsel may be designated and paid by the same office (whether it is OLG or OPR) that is itself forbidden to represent the child or parent in question. I conclude that, so far as I know, the current procedures of the OLG and OPR adequately deal with these problems, but because I am not aware of the details of those procedures I will note some steps that they should provide for (and perhaps already do).

The Public Defender informs me that the OLG and OPR each has its own pool of pool counsel, with no lawyer serving in both pools. Each office also has its own administrative attorneys and managers who review pool counsel’s fees and disbursements, ordinarily at the end of the case. These administrative attorneys and managers have no direct responsibility over any aspect of the client’s representation.

The RPC most applicable to this practice is RPC 1.8(f), which provides that “a lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the lawyer-client relationship; and (3) information relating to representation of a client is protected as required by RPC 1.6” This RPC applies, for example, when a lawyer is paid by a client’s parent, employer or insurer, or by a law reform organization. See Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 *Rev. Litig.* 585 (1997). And although RPC 1.8(f) directs itself to the lawyer receiving compensation, in this instance pool counsel, an OLG or OPR lawyer obviously should not knowingly assist pool counsel in violating the rule (RPC 8.4(a)). I will therefore analyze the OPD’s practices concerning pool counsel under RPC 1.8(f).

(a) I did not ask whether clients represented by pool counsel are asked to give informed consent, and will therefore say only that they should be. Because many of these clients are indigent, they will have little choice other than to consent if they wish to be represented; but that

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<sup>25</sup>On the requirements for such a procedure, see ABA Model Rules of Professional Conduct, rule 1.0, Comment [9] (as added in 2002); Note, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 *Geo. J. Leg. Ethics* 291 (1998).

is so in many instances where representation is paid for by a third party.

(b) RPC's requirement that there be no interference by a payor with the paid lawyer's independence of professional judgment or the lawyer-client relationship is echoed by RPC 5.4(c) and reinforced by authorities establishing that the lawyer owes the full duties of a lawyer to the client, and that the payor is not a client. See N.J.L.A 2A:158A-11, 12, 13 (duties of criminal defense counsel provided by OPD); *In re Haft*, 98 N.J. 1 (1984)(similar); *In re Education Law Center, Inc.*, 86 N.J. 124 (1981)(duties of lawyer provided by public interest organization); *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325 (1980)(duties of lawyer provided by insurer).

As described by the Public Defender, the arrangements for pool counsel seem to comply with these requirements, depriving OLG and OPR personnel of any direct control over the representation. It is possible that pool counsel will wish to please OLG and OPR personnel in order to be appointed again; but this possibility is present in many third party payor situations and does not by itself give rise to a forbidden conflict of interest, granted that the main interest of the payor office is itself in the effective representation of clients. See *State v. Davis*, 366 N.J. Super. 30 (App. Div. 2004)(pool criminal defense attorney not disqualified by conflict of interest even though he himself is currently suing OPD which is simultaneously providing him resources).

Of course, any OLG or OPR lawyers who are themselves disqualified from representing the client in question (see paragraph 10(a)) should not participate in selecting or paying pool counsel. Moreover, OLG or OPR personnel who review pool counsel's fees and disbursements should not use their power to approve and disapprove to revisit counsel's strategic decisions during the representation. At the same time, the OLG and OPR do have an obligation not to dispense government funds improvidently, and this warrants consideration of whether pool counsel have unreasonably protracted the hours devoted to the case for which they seek reimbursement. See Restatement of the Law Governing Lawyers § 134(2). When clients are asked to give informed consent to representation by pool counsel (see paragraph (a) above), the implications of this review should be explained to them, at least in cases in which pool counsel are used because the OLG or OPR is itself disqualified from representing the client.

(c) The New Jersey Supreme Court has construed broadly the requirement that information relating to a client's representation receive full protection even when a third person is paying for the representation. *In re Advisory Opinion No. 544*, 103 N.J. 399 (1986) held that even the names of clients should not be disclosed to institutional payors. That particular holding is inapplicable here—the OLG and OPR already know the names of pool counsel's clients, because they were involved in designating counsel in the first place—but the underlying principle applies. This poses problems for the review of pool counsel's fees and disbursements, which can hardly be done without knowledge of some information about the case. In most cases, however, inspection of documents filed in court or served on the opposing party—documents which are not confidential—should suffice for intelligent review. OLG and OPR personnel should not ask for

any other, confidential information without obtaining the client's consent.

I hope that this discussion responds adequately to your questions. Please let me know if you would like further explanation or discussion. A copy of my resumé is attached to this letter.

Sincerely,

John Leubsdorf