

**Respondent Parents' Counsel
Work Group**

**Final Report to the State
Court Administrator**

September 30, 2014

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Executive Summary

Respondent Parents' Counsel (RPC) in dependency and neglect cases (also known as "child welfare" or "child protection" cases) play a critical role in protecting the constitutional and other legal rights of parents, preserving family relationships, and providing complete, accurate, and balanced information to courts. In recognition of this critical role, the Colorado Children's Code affords parents who are respondents in a dependency and neglect case the right to counsel. § 19-3-202(1), C.R.S. 2014. The Children's Code also affords indigent respondent parents appointment of counsel at state expense. § 19-3-202(1).

Efforts have been made over the past decade to support and enhance the quality of parent representation in dependency and neglect cases. Former Chief Justice Mary Mullarkey convened an RPC Task Force in 2005 to assess training, compensation, practice standards, and models of representation for RPC and make recommendations to the Colorado Supreme Court and members of the General Assembly. This RPC Task Force commissioned the National Center for State Courts, the National Association of Counsel for Children, and the National Council for Juvenile and Family Court Judges to perform a needs assessment of respondent parent representation in Colorado. Final Reports of this Needs Assessment and RPC Task Force were published in 2007. Although some of the recommendations were implemented, many challenges faced by RPC, along with barriers to effective representation identified in these reports, remain.

In 2012-2013, Judges David Furman and Daniel M. Taubman had extensive meetings with employees of the State Court Administrator's Office and court personnel to address RPCs' continuing challenges and to offer suggestions for improving the quality of RPC appellate advocacy. These meetings led to a request for the General Assembly to fund a Respondent Parents' Counsel Coordinator position in the State Court Administrator's Office. The General

Assembly did so, and in 2013, this position was fully funded and a coordinator hired. These meetings also led to two state-wide training conferences for respondent parent appellate attorneys. During these meetings, a suggestion circulated that a Work Group be established to further analyze RPC representation in Colorado.

State Court Administrator Gerald Marroney established the Respondent Parents' Counsel Work Group in 2014 to analyze the current RPC program and recommend improvements. He charged the Work Group with issuing recommendations on the development of policies and procedures to address the following:

- Contract and evaluation processes
- Training requirements
- A complaint process
- Billing procedures.

He also charged the Work Group with evaluating the appellate process and making recommendations for improving the quality of appellate advocacy. Finally, he instructed the Work Group to analyze potential centralization of RPC administration.

While the Work Group developed its recommendations, the General Assembly took a significant step toward enhancing RPC representation through new legislation, which created the Office of the Respondent Parents' Counsel (ORPC). This legislation gave the Work Group the responsibility of recommending an operational structure for the ORPC by September 30, 2014. *See* § 13-92-101(3), C.R.S. 2014. In response to this legislation, the Work Group shifted its primary focus from analysis of the current RPC practice to analyzing various agency operational structures in this state together with parent representation models across the country. The intent

of this shift was to make recommendations for an operational structure best suited to resolve the ongoing concerns and challenges regarding respondent parent representation in Colorado.

The Work Group makes the following recommendations:

- 1) Centralize the oversight, administration, and support of RPC in a stand-alone agency similar to Colorado's Office of Alternate Defense Counsel.
- 2) The Colorado General Assembly should enact amendatory legislation to:
 - a) Establish a governing commission, comparable to that of the Office of Alternate Defense Counsel
 - b) Define the qualifications and responsibilities of a director of the ORPC
 - c) Clarify when RPC may be appointed
 - d) Extend implementation dates contained in the current ORPC legislation.
- 3) The ORPC should:
 - a) Adopt trial and appellate practice standards
 - b) Provide relevant, accessible, and role-specific training for all RPC and develop a mentoring program for new attorneys wishing to serve as RPC
 - c) Establish a compensation structure and rate that achieve parity among parties in dependency and neglect proceedings and that enable thorough and adequate preparation of cases
 - d) Improve RPC access to experts, investigators, social workers, and paralegals, and provide other forms of litigation support, including the establishment of a motions and brief bank, a resource library, and a listserv
 - e) Establish a formal process by which parents and other individuals may file complaints against RPC

f) Develop strategies to ensure the recruitment and ongoing availability of qualified counsel, support services, and resources for RPC in rural districts.

4) The State Court Administrator should continue the existing Appellate Subcommittee and Work Group to:

a) Study problems associated with transcript availability and petition format

b) Develop appellate practice guidelines

c) Determine whether recommendations for changes to existing Chief Justice Directives and Colorado Appellate Rules should be made to the Colorado Supreme Court.

This report constitutes the Final Report of the Work Group to the State Court Administrator. We first provide a brief history of Colorado's efforts to improve representation of parents in dependency and neglect proceedings. We then describe the Work Group's methodology and explain its recommendations.

Members of the Respondent Parents' Counsel Work Group

Experientially diverse professionals representing urban and rural jurisdictions comprised the twenty-nine -member Work Group. Members included appellate and trial court judicial officers; RPC; guardians *ad litem*; attorneys representing city and county social services departments; agency directors, including the directors of the Office of Alternate Defense Counsel and the Office of the Child's Representative; employees of the State Court Administrator's Office; judicial district administrators; and a staff attorney from the Colorado Court of Appeals:

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Thank you to the following people who assisted with the drafting of this report: Judge Karen M. Ashby, Laura Eibsen, Sarah Felsen, Judge David Furman, Amy Hendrickson, Jeff Koy, Pax Moultrie, Zepur Simonian, and Judge Daniel M. Taubman.

Respondent Parents' Counsel Work Group Final Report to the State Court Administrator

I. Brief History of Efforts to Improve Respondent Parent Representation

Efforts have been made over the past decade to support and enhance the quality of parent representation in dependency and neglect cases. A significant step in these efforts occurred in 2005, when former Chief Justice Mary Mullarkey convened a Task Force to examine the then-existing system of representation provided to respondent parents and to recommend reforms. This RPC Task Force commissioned the National Center for State Courts, the National Association of Counsel for Children, and the National Council for Juvenile and Family Court Judges to perform a formal Needs Assessment of RPC and to identify the challenges to effective representation of families in Colorado. This Needs Assessment¹ and the RPC Task Force's Final Report to the Chief Justice,² both published in 2007, identified the following barriers to effective representation by RPC:

- High caseloads
- Inadequate compensation
- Lack of support services and resources, including expert witnesses
- Lack of practical and RPC-specific training.

Noting that “permanent structural changes to oversight, compensation, and access to resources would greatly enhance RPC’s performance,” the RPC Task Force’s Final Report

¹ Needs Assessment Final Report (attached to this report as Attachment C).

² RPC Task Force’s Final Report (attached to this report as Attachment B).

recommended the creation of an independent office to centralize the recruitment, selection, oversight, payment, training, and representation support of RPC.³

Barriers to effective representation were also apparent at the appellate court level. In 2012-2013, Judges David Furman and Daniel M. Taubman had extensive meetings with employees of the State Court Administrator's Office and court personnel to address RPCs' challenges and to suggest improvements in the quality of RPC appellate advocacy. Discussions in these meetings focused on RPC's budget and pay structure and administrative models best suited to providing training and oversight. These meetings led to a request that the General Assembly fund a Respondent Parents' Counsel Coordinator position. The General Assembly did so, and in 2013, this position was fully funded and a coordinator hired. These meetings also led to two state-wide training conferences for respondent parent appellate attorneys—the first offered for appellate RPC in Colorado. Finally, these meetings led to the suggestion of creating a Work Group to further analyze RPC representation in Colorado.

State Court Administrator Gerald Marroney established the Respondent Parents' Counsel Work Group in January 2014 to analyze the current RPC program and recommend improvements. He charged the Work Group with issuing recommendations on the development of policies and procedures to address the following:

- Contract and evaluation processes
- Training requirements
- A complaint process
- Billing procedures

³ RPC Task Force Final Report, p. 12-14.

He also charged the Work Group with evaluating the appellate process and making recommendations to improve the quality of appellate advocacy. Finally, he instructed the Work Group to analyze potential centralization of RPC administration.

In the course of its meetings, the Work Group learned that, while there have been improvements since the 2007 Final Reports were published, challenges remain in the system of representation provided to respondent parents. These include:

- Judicial involvement in the selection and oversight of RPC, which undermines RPC independence
- Judicial involvement in the appointment and compensation of expert witnesses for RPC
- Inadequate RPC compensation
- The need to clearly allocate administrative and oversight responsibilities between individual judicial districts and the State Court Administrator's Office
- Inconsistencies regarding contracting and oversight of RPC among judicial districts
- Lack of access to supportive resources such as experts, investigators, social workers, and paralegals throughout the course of dependency and neglect proceedings

The Work Group also heard that rural judicial districts face unique challenges in obtaining the services of qualified counsel to serve as RPC. Often, these counsel are based in other districts and must travel long distances to appear in dependency and neglect cases because few local attorneys are interested in and/or qualified to handle this type of representation. This causes delay in setting and holding hearings in dependency and neglect cases.

Likewise, RPC who practice in rural districts face unique problems. The low number of dependency and neglect cases makes it difficult for these attorneys to devote a substantial part of

their practice to this area of law. Non-case specific responsibilities, such as uncompensated participation in judicial district meetings, also affect the willingness and ability of attorneys to practice in this area of law. To address these challenges and efficiently fulfill its charge, the Work Group established four subcommittees to determine the best policies for RPC representation in Colorado:

- 1) RPC contracts, training, evaluation, and complaints
- 2) RPC appellate representation
- 3) RPC billing and financial data
- 4) Organizational structures

In the course of its meetings, the Work Group also analyzed ways to increase the availability of qualified RPC in rural districts.

Meanwhile, the General Assembly took a significant step toward enhancing RPC representation through new legislation, which created the ORPC. The Governor signed this legislation into law on May 29, 2014. This legislation recognized that RPC “play[] a critical role in helping achieve the best outcomes for children involved in dependency and neglect proceedings by providing effective legal representation for parents in dependency and neglect proceedings, protecting due process and statutory rights, presenting balanced information to judges, and promoting preservation of family relationships when appropriate.” § 13-92-101(1)(a), C.R.S. 2014. It also charged the ORPC with:

- “Making recommendations for minimum practice standards . . .”
- “Establishing fair and realistic state rates by which to compensate Respondent Parent[s] Counsel . . .”
- “Enforcing, as appropriate, the provisions of this section”

- “Working cooperatively with judicial districts to establish pilot programs, as appropriate, designed to enhance the quality of Respondent Parent[s’] Counsel at the local level; and”
- “Annually reviewing and evaluating the Office’s performance to determine whether the Office is effectively and efficiently meeting the goals of improving child and family well-being . . .”

§ 13-92-104.

The new legislation requires the formation of the ORPC by January 1, 2016. § 13-92-103. It also directs the Work Group to recommend its operational structure. § 13-92-101(3). This resulted in the Work Group shifting its primary focus from analysis of the current RPC practice to studying various agency operational structures within the state, as well as parent representation models across the country. The intent of this shift was to make recommendations for an operational structure best suited to resolve ongoing concerns and challenges regarding respondent parent representation across Colorado.

The following form the basis for the Work Group’s recommendations:

- The Work Group members’ experience and expertise
- Review of the 2007 Final Reports of the Needs Assessment and Task Force
- Information regarding other states’ administration of RPC, coupled with local practice throughout Colorado
- Consideration of national and state studies regarding RPC
- The language contained in § 13-92-101 *et seq.*

The Work Group, therefore, respectfully makes the following recommendations.

II. The Work Group's Recommendations

A. **Work Group Recommendation #1**: Centralize the oversight, administration, and support of RPC in a stand-alone office similar to Colorado's Office of Alternate Defense Counsel.

1) *The Work Group's Methodology*

The Work Group considered the feasibility, costs, and benefits of the ORPC merging into an existing agency in Colorado or being established as a stand-alone office. The Work Group also evaluated existing agency practices the ORPC could adopt under either scenario.

The Work Group analyzed the operational structures of the following agencies:

- **The Office of the Public Defender**—an agency that employs full-time attorneys who represent indigent persons in state criminal cases, § 21-1-101 *et seq.*, C.R.S. 2014.
- **The Office of Alternate Defense Counsel**—an agency that provides contract attorneys who represent indigent persons in state criminal cases when there are legal conflicts with Public Defender representation, § 21-2-101 *et seq.*
- **Colorado Legal Services**—an agency that provides a hybrid model of full-time employed and contract attorneys who represent indigent persons in an array of civil matters (and that is funded in part with federal dollars).
- **The Office of the Child's Representative**—an agency that provides a hybrid model of full-time employed and contract attorneys who represent the best interests of children in child protection cases, § 13-91-101 *et seq.*, C.R.S. 2014.

The Work Group also analyzed parent representation models in a number of states,⁴ paying specific attention to the State of Washington Office of Public Defense Parent Representation Program; the Detroit Center for Family Advocacy; the North Carolina Commission on Indigent Defense Services; the Arkansas Judiciary Parent Counsel Program; the Massachusetts Children and Family Law Division of the Committee for Public Counsel Services; and the Center for Family Representation in New York.⁵

In analyzing the operational structures of the various agencies, the Work Group considered the following:

- The degree to which each structure would promote independence of the ORPC
- The financial considerations involved in establishing and maintaining the ORPC
- The proposed governance and administrative functions of the ORPC
- Whether the structure would effectively ensure attorney accountability, oversight, and evaluation, including accommodation of a complaint process
- How each structure could promote training and litigation support for RPC
- The extent to which each model could provide legislative advocacy support to parents and RPC

⁴ See American Bar Association: Center on Children and the Law, *Summary of Parent Representation Models*. (2009).

⁵ Information regarding parent representation models in these states is available on the following websites: <http://www.opd.wa.gov/index.php/program/parents-representation>; <https://www.law.umich.edu/centersandprograms/pcl/cfa/Pages/default.aspx>; <http://www.ncids.org/>; <http://arjdc.org/content/parent-counsel>; http://www.publiccounsel.net/practice_areas/cafl_pages/civil_cafl_index.html; and <http://www.cfrny.org/>.

- Potential conflicts associated with each model and how conflicts could be addressed
- How each model would handle appeals and improve appellate advocacy and support for RPC
- The costs associated with incorporating the ORPC into an existing office

In assessing the feasibility of merging the ORPC into an existing agency in Colorado, the Work Group determined that Colorado Legal Services, the State Public Defender’s Office, the Office of Alternate Defense Counsel, and the Office of the Child’s Representative all had organizational strengths. In evaluating whether these strengths would contribute to the mission of the ORPC, the Work Group recognized the General Assembly’s conclusion that RPC play “a critical role in helping achieve the best outcomes for children involved in dependency and neglect proceedings” and that there be “an independent office to oversee the Respondent Parents’ Counsel.” § 13-92-101(1)(a), (2).

2) The Work Group’s Recommendation

The Work Group unanimously concludes that merging the ORPC into an existing agency would undermine the intent of the legislation set forth in section 13-92-101. In reaching this conclusion, the Work Group recognized legal, practical, and philosophical barriers precluding merger of the ORPC into one of these agencies. These barriers include:

- **Agencies lack subject matter expertise.** The State Public Defender’s Office and the Office of Alternate Defense Counsel lack expertise in dependency and neglect matters because they specialize in providing legal representation in criminal cases.
- **Agencies have legal and philosophical conflicts with the ORPC’s mission.** The director of Colorado Legal Services informed the Work Group that merging the ORPC

with his agency would create a fundamental, philosophical shift in the mission of his agency, which provides services to clients who do not have a constitutional or statutory right to counsel. The Office of the Child's Representative is charged with the unique role of representing the best interests of children in dependency and neglect proceedings. § 13-91-102(1)(a). Merging the ORPC with that office would create a fundamental conflict between the missions of the two agencies.

- **Ethical conflicts would arise for attorneys working in a merged agency.** Ethical conflicts of interest are likely to arise if the ORPC were to merge with the State Public Defender's Office, the Office of Alternate Defense Counsel, or the Office of the Child's Representative. The State Public Defender's Office and the Office of the Alternate Defense Counsel might represent respondent parents accused of domestic violence or other crimes. Such representation, including recommendations to enter into a plea bargain, might conflict with a respondent parent's interest in a dependency and neglect case. That would mean that these agencies would have to find an independent lawyer for either the criminal case or the dependency and neglect case, resulting in greater cost and inefficiency than having an independent agency.

If the ORPC were part of Colorado Legal Services, other conflicts could arise. Colorado Legal Services often represents victims of domestic violence. But, the ORPC would be responsible for providing attorneys to represent both parents in a dependency and neglect case. This could present conflicts of interest, requiring representation of the alleged abuser by a separate conflict office.

Merging the ORPC with the Office of the Child's Representative could also lead to conflicts. The interests of parents and children involved in dependency and neglect

cases are often adverse to one another. If the parents and children are represented by attorneys within the same agency this would create ethical conflicts in many circumstances.

- **A merged agency would diminish the importance of the RPC role.** Merging the ORPC into an existing agency, which already has a unique mission, would diminish the important role that RPC has in dependency and neglect cases.
- **The operational structure of existing agencies does not accommodate independent contractors.** Neither the Office of the Public Defender nor Colorado Legal Services has the infrastructure necessary to manage independent contracts. It is more cost efficient for the ORPC to provide contract RPC for indigent parents in dependency and neglect cases.

The Work Group concluded that a stand-alone office focused exclusively on parent representation in dependency and neglect cases would be the structure most appropriate to carry out the legislative intent of the ORPC. An independent stand-alone office should have its own governing commission, similar to that of the Office of Alternate Defense Counsel, and employ a director familiar with the unique demands of representing respondent parents in dependency and neglect cases. This structure will afford the ORPC the best opportunity to do the following:

- Ensure high-quality representation for respondent parents
- Make recommendations for minimum practice standards
- Establish fair and realistic state rates by which to compensate RPC
- Develop enforcement mechanisms for the ORPC
- Work cooperatively with judicial districts to establish pilot programs designed to enhance the quality of RPC at the local level

- Annually review and evaluate the ORPC's performance to determine its effectiveness and efficiency in improving child and family well-being.

A stand-alone office will also resolve many of the historical challenges embodied in the current system of representation afforded to respondent parents. For example, an independent stand-alone office will eliminate the need for judicial officers to be involved in the selection and oversight of RPC and in the appointment and compensation of expert witnesses for RPC. It will also foster consistent administrative and oversight practices across the state. Finally, a stand-alone office will be able to address the unique challenges faced by rural judicial districts in Colorado.

B. Work Group Recommendation #2: The Colorado General Assembly should enact amendatory legislation to accomplish the following:

- **Establish a governing commission, comparable to that of the Office of Alternate Defense Counsel**
- **Define the qualifications and responsibilities of a director**
- **Clarify when RPC may be appointed**
- **Extend implementation dates contained in the current legislation**

1) Establish a governing commission, comparable to that of the Office of Alternate Defense Counsel

The Work Group recommends that the legislature amend section 13-92-101 *et seq.* to establish a governing commission, comparable to that of the Office of Alternate Defense Counsel, found in section 21-2-101(2), C.R.S. 2014. (Legislation creating the Office of the Child's Representative Board was also patterned after section 21-2-101(2)). *See* § 13-91-104, C.R.S. 2014. Specifically, the Work Group recommends that a nine-member commission

consisting of no more than five members from the same political party govern the ORPC. In addition, the Work Group recommends that the members of the commission should be representative of each of the congressional districts in the state, and that the Colorado Supreme Court, in appointing the commission members, take into consideration place of residence, gender, race, and ethnic background.

The Work Group recommends that the commission include at least six attorneys, at least three of whom have experience serving as RPC. The Work Group urges that the Colorado Supreme Court consider appointing at least one former respondent parent as a commission member.

As with the provisions for the other two organizations, the Work Group recommends that members of the commission should serve four- year terms, except that of the members first appointed, five should serve for terms of two years. Such procedure will ensure that there are staggered terms.

To ensure efficiency in the commission selection process, the Work Group recommends that commission-member recruitment outside of the Denver metropolitan area begin as soon as possible. This recommendation is based on the assumption that finding diverse members necessary for this commission outside of metropolitan areas might be challenging.

Finally, the Work Group recommends that commission members should not currently be under contract with the ORPC, and that commission members not include current employees of the state or county departments of human services, current city or county attorneys, current judges, current magistrates, or current guardians *ad litem*.

The Work Group recommends that members of the commission be appointed by July 1, 2015.

The Work Group recommends that the ORPC commission appoint, and discharge for cause if necessary, a person to serve as the director of the ORPC. The Work Group also recommends that the ORPC commission work cooperatively with the director to provide governance and fiscal oversight of the general operating budget of the ORPC.

2) *Define the qualifications and responsibilities of a director*

The Work Group recommends that the legislature amend section 13-92-101 *et seq.* to define the qualifications and responsibilities of a director. Specifically, the Work Group recommends that the director of the ORPC have at least five years of experience as a licensed attorney and that he or she be licensed to practice law in Colorado as of the effective date of hire. The director must be familiar with the unique demands of representing respondent parents in dependency and neglect cases in Colorado.

The Work Group also recommends that the director devote him or herself full-time to the performance of his or her duties as director and not engage in the private practice of law.

The Work Group recommends that the director be hired by January 1, 2016.

3) *Clarify when RPC may be appointed*

The Work Group recommends that the legislature amend section 19-3-202(1), to state, “Nothing in this section shall limit the power of the court to appoint counsel prior to the filing of a petition for good cause.” This statute would then mirror section 19-3-203(1) (“Nothing in this section shall limit the power of the court to appoint a guardian ad litem prior to the filing of a petition for good cause.”). This amendment would allow the ORPC to support RPC attending pre-filing and preventative programs, such as team decision or family engagement meetings, to potentially lessen the costs associated with the formal adversarial process.

4) *Extend implementation dates contained in the current legislation*

The Work Group recommends that the legislature amend section 13-92-103(3) to provide that, as of July 1, 2016, all existing RPC appointments will be transferred to the ORPC, and that all new appointments after that date will be made by and through the ORPC.

The Work Group also recommends that the legislature expand section 13-92-101(3) to allow up to two years to transfer the contracts and bill-payment system from the state judicial department to the ORPC.

The Work Group makes these recommendations to allow sufficient time to appoint a commission, hire a director, and facilitate the smooth transfer of contracts to the new operational structure recommended above.

C. Work Group Recommendation #3: The Office of Respondent Parent Counsel

should:

- **Adopt trial and appellate practice standards**
- **Provide relevant, accessible, and role-specific training for all RPC and develop a mentoring program for new attorneys wishing to serve as RPC**
- **Establish a compensation structure and rate that achieves parity among parties in dependency and neglect proceedings and that enables thorough and adequate preparation of cases**
- **Improve access to experts, investigators, social workers, and paralegals, and provide other forms of litigation support, including the establishment of a motions and brief bank, a resource library, and a listserv**
- **Establish a formal process by which parents and other individuals may file complaints against RPC**
- **Develop strategies to ensure the recruitment and ongoing availability of qualified counsel, support services, and resources for RPC in rural districts.**

1) Adopt Trial and Appellate Practice Standards

Section 13-92-101(1)(c) requires that “a clear set of practice standards” be adopted for RPC. It is critical that standards be adopted for both trial and appellate RPC.

Practice guidelines were established for RPC in 2009 as part of Chief Justice Directive 04-05, as recommended by the RPC Task Force’s Final Report; however, more comprehensive guidelines, such as the North Carolina Performance Guidelines for Attorneys Representing Indigent Parent Respondents, should be considered. It is difficult to determine if Colorado’s current practice guidelines have impacted the quality of parent representation because the guidelines are voluntary and there has been little oversight to monitor compliance.

2) Provide relevant, accessible, and role-specific training for all RPC and develop a mentoring program for new attorneys wishing to serve as RPC

A standardized curriculum has been developed and provided regionally to RPC. As noted above, two appellate RPC training conferences have been provided. In 2014, a joint training conference for RPC and GALs was also provided. RPC who are involved with local Best Practice Court Teams have been afforded the opportunity to annually attend multidisciplinary conferences through Colorado’s Court Improvement Program.

The Work Group agrees with the rationale and recommendations concerning training in the RPC Task Force’s Final Report. Specifically, the Work Group recommends that RPC training should not only focus on the legal aspects of dependency and neglect law, procedure, litigation skills, trial advocacy and alternative dispute resolution, but should also include the psychosocial dynamics of child maltreatment and child development, the physical and mental health of family members, substance abuse, permanency, family dynamics, and available

services for parents in the community.⁶ The Work Group also recommends ongoing training that includes case law updates, the use of expert witnesses, parent-child visitation, treatment plans, and other issues that regularly arise in dependency and neglect cases. The Work Group determined that additional curricula for experienced RPC should also be developed.

The Work Group agrees with the Task Force's Final Report's recommendation urging the use of scholarships, distance learning opportunities, local training conferences, and regional statewide training delivery to ensure accessibility of training to all RPC. The Work Group also agrees with the Task Force's Final Report recommending that a mentoring system for new RPC be developed.⁷

Additional training regarding appellate litigation is also necessary.

3) Establish a compensation structure and rate that achieves parity among parties in dependency and neglect proceedings and that enables thorough and adequate preparation of cases

The Work Group agrees with the Task Force's Final Report that adequate compensation for RPC is an essential component of improving the quality of representation for respondent parents. The amount and structure of compensation may affect the number of attorneys willing to represent respondent parents, the experience and competence of such attorneys, and the amount of time RPC devote to any individual client. Currently, RPC in Colorado continue to be compensated by one of two methods: hourly payment or flat fees per case. The Work Group shares the concerns noted in the Task Force's Final Report related to the issue of compensation and its impact on the quality of representation afforded respondent parents.

⁶ RPC Task Force Final Report, p. 22.

⁷ Guidance for establishing a mentor program can be found through the Colorado Attorney Mentor Program discussed at C.R.C.P. 255(2).

The Task Force's Final Report identified several concerns with the flat fee compensation method, due to its adverse impact on developing and maintaining experienced RPC. These concerns include the following:

- The amount paid does not appropriately reflect the number of hours that RPC should spend on dependency and neglect cases, including frequent hearings over a period of years.
- Attorneys with expertise in dependency and neglect must carry high caseloads in order to maintain a practice emphasizing child welfare law. This affects the amount of time each attorney may spend on any individual client.
- The additional payment received once a motion to terminate is filed is inconsistent with best practices of conducting thorough and early investigations and frontloading services.
- Monitoring the amount of time attorneys spend on cases is difficult because attorneys are not required to track their time.
- Recruitment and retention of attorneys to represent parents are negatively impacted. The rate of pay discourages attorneys from entering and remaining in this area of practice.

These concerns continue.

Many judicial districts still use a flat-fee compensation structure. Under the flat fee model, RPC are paid \$1,125 and an additional \$1,262 if a motion to terminate parental rights is filed. Currently, attorneys who review discovery, engage in regular communication with their clients, file appropriate motions, attend case-related multi-disciplinary meetings, participate in contested court hearings, and engage in necessary case preparation are most likely doing so at a financial loss under a flat fee contract. Both the Needs Assessment and Task Force's Final Report criticized the flat-fee compensation structure as discouraging effective representation for

respondent parents.⁸ A meaningful workload study should be performed to assess the appropriate fee amount if a flat fee compensation structure is continued. Both the Office of Alternate Defense Counsel and the Office of the Child's Representative have abandoned the flat fee payment system and replaced it with hourly compensation (fee for service) on a statewide basis. The directors of those agencies have noted a consistent increase in the quality of representation provided to their respective clients.

Other jurisdictions, primarily in rural areas, use the hourly method of compensation. Even though the hourly rate was increased for this fiscal year from \$65 per hour to \$75 per hour, challenges remain. According to the Needs Assessment Final Report, overhead (malpractice insurance costs, office staff, office space, telephone, Internet, etc.) easily consumes a large percentage of the current hourly rate; thus, most attorneys gross, at most, less than half the hourly rate per hour, pre-tax.⁹ Some RPC contacted during jurisdictional visits during the Needs Assessment, indicated that they accept RPC appointments, knowing that doing so will result in a financial loss to their office.¹⁰

Other compensation models might be effectively employed in different jurisdictions based on a district's unique needs. It is expected that pilots of various compensation models, such as regional offices or annual contracts for attorneys in rural districts, might be considered.

However difficult it is in Colorado to quantify the financial benefits of improving representation for respondent parents, the experiences of states such as Washington and New

⁸ Id., p. 25-28; Needs Assessment Final Report, p. 34-38.

⁹ Id., p.35.

¹⁰ Id.

York have demonstrate that better-supported advocacy for parents in dependency and neglect cases leads to positive financial impacts and improved outcomes for children and families.¹¹

4) *Improve access to experts, investigators, social workers, paralegals, and provide other forms of litigation support, including the establishment of a motions and brief bank, a resource library, and a listserv*

The Task Force's Final Report noted the following:

- RPC had difficulty obtaining expert witnesses and/or consultants at any stage of a case other than termination of parental rights proceedings, experienced significant delays in obtaining reimbursement for discovery costs, and were not reimbursed for witness fees and service of subpoena costs.¹²
- The majority of experts and consultants whose opinions inform dependency and neglect cases are employed or compensated by county departments of social services, and their testimony and assessments risk being tainted by each department's financial restraints, policy concerns, or particular philosophy.¹³

These barriers negatively-impact RPC representation because an independent assessment of allegations against a parent, assessment of a parent's need for services, and the appropriateness of a treatment plan are sometimes required. For example, experts may be necessary to assess the appropriate level and type of treatment for a parent; to evaluate the attachment between a parent and a child; or to testify regarding the cause of injury in an alleged non-accidental injury adjudicatory trial. Access to experts influences parity and fairness in proceedings. Although

¹¹ See Mark Courtney and Jennifer Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, PARTNERS FOR OUR CHILDREN AT THE UNIVERSITY OF WASHINGTON DISCUSSION PAPER, VOL:1 ISSUE: 1, February 2011. See also Center for Family Representation 2012 Annual Report at 10.

¹² RPC Task Force Final Report, p. 31.

¹³ *Id.*, p. 31.

RPC may request court approval to experts and other consultants in limited circumstances, no other party is so restricted.

The Public Defender and Alternate Defense Counsel Offices provide such resources to attorneys in their respective agencies through an internal, consistent and centralized approval process. City and county attorneys and guardians *ad litem*, through their own centralized, internal processes, also have access to such resources.

The procedures in place to allow RPC access to experts and other consultants create real and apparent conflicts and influence the quality of RPC representation. When the court, the ultimate fact-finder and arbiter of the issues in a case, is involved in deciding whether to allow the development of evidence and/or a particular defense for one party to the dispute, the court's objectivity is compromised. Relatedly, a perceived conflict exists in some districts regarding the appropriate management of judicial district funds when it comes to approval of and payment for necessary experts for parents. The Needs Assessment found inconsistency among judicial districts and individual judicial officers concerning if, when, and to what extent, they will approve access to expert witnesses and other consultants.¹⁴ Many judicial officers believe they may not appoint such experts before a petition to terminate parental rights has been filed. But, the early assistance of experts and consultants may lead to the resolution of some cases prior to filing a motion to terminate parental rights, which may result in better outcomes for both parents and children. The lack of uniformity regarding expert appointments means parents across jurisdictions may not receive the same quality of representation.

Other states' models assuage concerns about the cost of providing experts, consultants, and other litigation support. Washington State's model of parent representation shows that

¹⁴ Needs Assessment Report, p.44-46.

increased access to expert witnesses and other consultants for RPC leads to improved outcomes - shorter time in care for children and earlier, more effective treatment interventions for parents. Therefore, although the initial payment for an expert or other litigation support may require increased costs during the early stages of a case, such payment may reduce overall costs per case.¹⁵

The Washington State and New York models demonstrate that appropriate litigation support can reduce costs: for example, social workers and paralegals, paid lesser hourly rates than RPC, could undertake numerous tasks, such as attending team decision meetings and other multi-disciplinary staffings.

The centralization of the approval process for paying experts, investigators, and court costs and litigation support similar to the OCR or ADC will create statewide consistency in representational quality, improving outcomes for families and children, increasing efficiencies, and reducing overall costs.

5) Establish a formal process by which parents and other individuals may file complaints against RPC

When a complaint is made about an RPC's performance, there is currently no uniform, transparent, objective and readily understandable process for receipt of the complaint or for its resolution. There is wide variability in local procedures for selecting RPC and receiving and investigating complaints regarding their performance. Accountability for RPC is therefore inconsistent across the state. The only perceived accountability, except for those complaints that rise to the level of a referral to the Office of Attorney Regulation Counsel, is the contract renewal process and payment processing.

¹⁵ NORTHWEST INSTITUTE FOR CHILDREN AND FAMILIES DEPENDENCY AND TERMINATION PARENTS' REPRESENTATION PROGRAM EVALUATION REPORT 2005 at 12-14 and 16-17.

Although in some districts, judicial officers and court personnel take an active role in handling complaints and in selecting attorneys qualified to serve as RPC, many districts have not established any formal complaint procedure. Even in districts that do formalize a complaint process, the Needs Assessment identified possible reluctance on the part of parents to complain to the presiding judge about an attorney in a pending case.¹⁶ The lack of consistency in complaint processes is unfair to RPC as they often do not know how to effectively respond to a complaint once it is made. Respondent parents currently have no meaningful way to give feedback about their perception of RPC representation. Inconsistency, then, significantly limits the level of accountability and oversight in measuring the quality of RPC representation and RPC adherence to contract requirements.

Uniform, easily accessible, and understandable complaint filing and resolution procedures should be implemented.

6) Develop strategies to ensure the recruitment and ongoing availability of qualified counsel, support services, and resources for RPC in rural districts

The Work Group recommends that recruitment of and training for RPC in rural districts be a priority of the ORPC. Rural districts are well-suited to be pilots for various representation models which may not be feasible in or well-suited to urban areas. These may include a staff office model serving several judicial districts within a particular region of the state, or contracting with RPC on a full- and/or part-time annual contract basis rather than case-by-case.

¹⁶ Needs Assessment Report, p. 48.

D. Work Group Recommendation #4: The State Court Administrator should continue the existing Appellate Subcommittee and Work Group so they may continue to:

- **Study problems associated with transcript availability and petition format**
- **Develop appellate practice guidelines**
- **Determine whether recommendations for changes to existing Chief Justice Directives and Colorado Appellate Rules should be made to the Colorado Supreme Court**

As noted above, the State Court Administrator charged the Work Group with evaluating the appellate process and making recommendations to improve the quality of RPC advocacy in this area. In its initial meetings, the Appellate Subcommittee determined that appeals in dependency and neglect cases pose a number of challenges for appellate RPC. For example, Colorado Appellate Rule 3.4 requires that a petition on appeal be filed within an expedited timeframe. This means that appellate RPC often must file a petition on appeal before a court reporter has had time to prepare transcripts of hearings relevant to the ruling being appealed. Case law mandates that RPC must file a petition on appeal, if requested by the parent, even if counsel determines the petition has no meritorious issue.¹⁷ Further, the format for a petition on appeal required under Colorado Appellate Rule 3.4 differs significantly from the format required for a traditional appellate brief. This appears to hamper the ability of appellate RPC to advance meaningful appellate arguments.

The Work Group's deadline for the creation of a Final Report, and its shift in focus occasioned by the ORPC legislation, prevented the Appellate Subcommittee from making any substantive recommendations. With additional time, the Appellate Subcommittee will be able to

¹⁷ *A.L.L. v. People in the Interest of C.Z.*, 226 P.3d 1054 (Colo. 2010).

determine whether recommendations for changes to existing Chief Justice Directives and Colorado Appellate Rules should be made to the Colorado Supreme Court. The diverse composition of the Appellate Subcommittee also affords it a unique opportunity to develop appellate practice guidelines, similar to Michigan's Child Welfare Appellate Guide,¹⁸ which will enhance the work of appellate RPC. Additional time is needed to develop these guidelines. The Work Group, therefore, recommends that the State Court Administrator continue the Work Group and existing Appellate Subcommittee for a period of six months so they may continue to address these matters.

Conclusion

The Work Group believes that the Colorado legislature's creation of the ORPC will significantly improve the systems that serve Colorado's children and families by focusing on the important role of parents and their attorneys. The Work Group believes that implementing these recommendations will provide due process and parity for families faced with the severity of this level of state intervention, in which the parent-child relationship may be terminated. Recognizing RPC's critical role and increasing their training and support will ensure Colorado continues to improve dependency and neglect proceedings for children and families.

Respectfully submitted this 30th day of September, 2014.

¹⁸<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/ChildWelfareAppellateGuide.pdf>.

Attachments

- A. Senate Bill 14-203
- B. 2007 Respondent Parents' Counsel Task Force Final Report
- C. 2007 Statewide Needs Assessment Final Report