IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Re: ADVISORY OPINION — CASE NO. 70,615

HRS NONLAWYER COUNSELOR

Reply to Objections to Proposed Advisory Opinion
From the Florida Bar Standing Committee
On The Unlicensed Practice of Law

BRIEF OF THE INTERESTED PARTY
FLORIDA LEGAL SERVICES, INC.

SONIA CROCKETT
CAROL HART GREGG
ARLENE HUSZAR
DEBORAH SCHROTH
BRENT R. TAYLOR
GUILENE THEODORE
HENRY GEORGE WHITE
CHRISTINA A. ZAWISZA

ATTORNEYS FOR THE INTERESTED PARTY

FLORIDA LEGAL SERVICES, INC.
226 West Pensacola Street
Tallahassee, Florida 32301
(904) 222-2151

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FAMILY/JUVENILE WORKGROUP
FLORIDA LEGAL SERVICES, INC.

The Family/Juvenile Workgroup of Florida Legal Services (FLS) is an interested party in this matter. FLS is a non-profit, state support center for the low-income legal assistance programs located throughout the state of Florida. These legal assistance offices provide general civil legal services to low-income persons. The Board of Directors of FLS consists of individuals whose professional and public activities impact upon youth and families; it includes educators, attorneys, social workers, and clergy. FLS' interest in this cause stems from its role as a statewide legal advocacy organization concerned with the problems and needs of Florida's poor children and families.

The Family/Juvenile Workgroup is a group of legal services attorneys from programs throughout the State, who are highly experienced lawyers. FLS has a particular interest in this Court's consideration of the Advisory Opinion as to HRS lay caseworkers. The programs associated with, and supported by FLS, have been active in state trial and appellate litigation involving issues confronting Florida's poor children and families. This litigation includes the removal of children from their homes and their placement in the care of HRS, on both a temporary and permanent basis. As a part of this litigation, attorneys for field programs supported by FLS have been actively involved in the representation of parents in dependency proceedings, in the preparation and execution of performance agreements, in judicial reviews and permanent commitment proceedings.

Litigation has included: Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977), aff'd in part and remanded, 618 F.2d 374 (5th Cir. 1980), aff'd in part and rev'd in part on reh'g en banc, 640 F.2d 599 (5th Cir. 1981), vacated and remanded, 458 U.S. 118, 102 S.Ct. 3504, 73 L.Ed. 2d 1380 (1982), rev'd and remanded 714 F.2d 512 (5th Cir. 1983), cert. den., 104 S.Ct. 735 (1984); Johnson v. Page, Civ. Action No. 78-569 CIV-J-M (M.D. Fla. 1984); In re A.B., 444 So.2d 981 (Fla. 1st DCA 1983); In re K.H., 444 So.2d 547 (Fla. 1st DCA 1984); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981); In re V.M.C., 369 So.2d 660 (Fla. 1st DCA 1979); In re A.Z., 383 So.2d 934 (Fla. 5th DCA 1980); Fruh v. HRS, 430 So.2d 581 (Fla. 5th DCA 1983); In re C.L.C., 440 So.2d 647 (Fla. 5th DCA 1983); In re C.T.G., 460 So.2d 495 (Fla. 1st DCA 1984); In the Interest of L.R.O. and A.W.O., 471 So.2d 111 (Fla. 1st DCA 1985); Thomas v. Hoppe, 493 So.2d 549 (Fla. 4th DCA 1986); Burk v. Department of Health and Rehabilitative Services, 476 So.2d 1275 (Fla. 1985); Gerry v. Department of Health and Rehabilitative Services, 476 So.2d 1279 (Fla. 1985); and In the Interest of B.W., 498 So.2d 946 (Fla. 1986).

Between 1982 and 1984, by invitation of the Chair of the House Committee on Health and Rehabilitative Services, FLS assisted in drafting the various proposals for legislative reform that resulted in the passage of Ch. 84-311, Laws of Florida. This major revision of Chapter 39, Fla.Stat., and § 409.168, Fla.Stat., had as its effective date October 1, 1984. FLS has also, by invitation, presented testimony before the legislature in matters concerning the removal of children from their homes, foster care, dependency and performance agreements.

More recently, staff attorneys from FLS participated with a coalition of childrens' and family advocates, the Florida Attorney General, the Department of Health and Rehabilitative Services and the Florida Guardian Ad Litem Program in a further revision of Chapter 39, Fla.Stat., which clarifies existing procedures and adds a new section on the termination of parental rights. The new law becomes effective October 1, 1987.

Staff attorneys from programs supported by FLS also serve on various state and local bar sponsored committees, most significantly the Juvenile Rules Committee of the Florida Bar, which, in 1984, proposed to this Court to complete revision of the Florida Rules of Juvenile Procedure. 462 So.2d 399 (Fla. 1985). Program attorneys also serve on the Florida Bar's Special Committee on the Needs of Children and on numerous local boards and committees impacting on child welfare issues. A legal services attorney has been appointed by the Secretary of HRS to serve on the Child Welfare Training Advisory Council, which was created by the 1985 Legislature to implement the Child Welfare Training Academies law, §402.40, Fla.Stat. (Supp. 1986).

FLS, through its associated attorneys, has delivered statewide training to educators, medical professionals, guardians ad litem, social workers, HRS caseworkers, and CLE-sponsored training to attorneys and bar associations regarding juvenile law and procedure. FLS supported attorneys have contributed articles to publications of the Florida Bar, see FLORIDA JUVENILE LAW AND PRACTICE (1980), and to the Nova Law Journal's special feature: PROFESSIONALS SERVING CHILDREN SUGGEST NEW DIRECTIONS FOR LEGISLATORS AND ADMINISTRATORS, 8 Nova Law Journal 299 (1984).

STATEMENT OF THE CASE

The Florida Department of Health and Rehabilitative Services [hereinafter HRS] sought an opinion from the Florida Bar Standing Committee on the Unlicensed Practice of Law [hereinafter the Committee] on the following question:

> Is the preparation of documents by lay counselors and the presentation of non-contested dependency Court cases by lay counselors, including the filing of documents, presentation of the case, request for relief and testimony of documents, presentation of the case, request for relief and testimony of counselors, the unauthorized practice of law?

This request was presented to the Committee as a result of an order issued by Judge William Gladstone in In the Interest of T.P. and D.C., Case No. 85-16019 FJ09 (Fla. 11th Cir. Ct.). In that order, Judge Gladstone found that HRS dependency counselors are engaged in the unlawful practice of law. HRS filed an appeal. (Case No. 86-2248, Fla. 3rd DCA). HRS agreed to dismiss the appeal when Judge Gladstone modified the order. Under the modified order, HRS is required to have affidavits of diligent search reviewed by counsel in HRS District 11.

The Committee took testimony and written comments from Judge Gladstone, HRS, State Attorneys and others. The Committee issued its proposed advisory opinion on May 29, 1987.

The Committee concluded that HRS dependency counselors are authorized to prepare, sign and file detention petitions, affidavits of diligent search and predisposition reports. Under the Committee's proposed opinion, HRS would be required to have lawyers prepare or supervise the preparation of all other

documents. Additionally, HRS counselors could not appear in court hearings without a lawyer.

POSITION OF INTERESTED PARTY

I. INTRODUCTION

> "...[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony - without hearing, without effective assistance of counsel, and without a statement of reason,..."

the United States Supreme Court pronounced in 1966 on the issue of juvenile transfer to adult criminal court for trial. Kent v. U.S., 383 U.S. 541, 554, 86 S.Ct. 1045, 1053-54, 16 L.Ed. 2d 84, 93 (1966). There is no longer any place in our system of laws for reaching a result of such tremendous consequences as the separation of child and family, potentially on a permanent basis, without equal ceremony. No longer are juvenile dependency proceedings the informal, non-adversarial hearings that HRS would have this Court believe. Nor should they be.

The testimony and briefs presented by interested parties characterize Florida's juvenile dependency process as a system in crisis. The Family/Juvenile Workgroup of Florida Legal Services does not dispute that characterization in any way. In fact, through documents provided in the Appendix and through its practical experience in various circuits throughout the State, the Workgroup can attest to the findings of the Standing Committee on Unlicensed Practice of Law that the system is in many ways in collapse.

In 1966, the United States Supreme Court was faced with a juvenile justice system in crisis. Provided with documentation and studies that the historical view of the juvenile court as a benevolent, informal, non-adversarial, rehabilitative father was not a reality, the Court was required to decide Kent vs. U.S.,

supra and In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1966).

The Court could have chosen to support and uphold the historical informality of juvenile proceedings. Yet the Court accepted the difficult challenge of affirming the importance of fundamental fairness and due process in the juvenile court context and decided that these cardinal principles were far more important. Thus formal hearings, access to social records, appointed counsel, sufficient advance written notice of time of hearing and charges, confrontation of witness, cross-examination, and freedom from self-incrimination are the legacy of Kent and Gault.

The occasion of HRS's request for a ruling on the question of the unlicensed practice of law by its social workers confronts this Court with an equal challenge. This is true not so much due to the narrow issue of unlicensed practice of law but because of the depth and seriousness of the concerns of all interested parties about a troubled juvenile system. Will this Court rule that informality and preservation of fiscal resources are laudable goals in 1987 to the extent that due process and proceedings based on law are not required? Or will it rule that it is too late in the day for decisions of such enormous consequences to be made without ceremony - without effective representation for all parties? Kent and Gault provide enduring wisdom to now guide this Court.

HRS asserts that this Court should be guided by 1950 Florida legislation creating juvenile courts and 1956, 1972, and 1973 revisions to that law. Major changes occurred in juvenile law in

the country since those dates. The inception of the juvenile court process in Illinois in 1899 led to Kent and Gault in the 1960's, to the Adoption Assistance and Child Welfare Act of 1980 and to Smith v. OFFER, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) and Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) in the 1980's. Major reforms have also occurred in Florida's juvenile law and practice since 1973. Up to 1980, there was a veritable dearth of Florida Supreme Court decisions interpreting Florida's policy on dependent children. Since 1980, there has been a steady stream of landmark decisions. See In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980); Burk v. HRS, 476 So.2d 1275 (Fla. 1985); Gerry v. HRS, 476 So.2d 1279 (Fla. 1985); In the Interest of R.W., 495 So.2d 133 (Fla. 1986); In the Interest of B.W., 498 So.2d 946 (Fla. 1986). Weekly editions of the Florida Law Weekly contain highly substantive legal interpretations of Florida's juvenile dependency laws.

The Florida Legislature has also been extremely active in developing juvenile dependency law since 1973. Major revisions to these laws were enacted in 1978, in 1984, and now again in 1987. Juvenile dependency legal practice has become a specialty - a matter of a huge body of state, federal, and constitutional law. To assume that a lay person can practice this law is folly, indeed.

Turning once again to Kent and Gault, it is extremely appropriate that this Court now substitute "juvenile dependency proceedings" wherever "juvenile delinquency proceedings" formerly appeared. As in Kent, HRS now argues that the purpose of Florida's juvenile dependency laws is rooted in social welfare

philosophy rather than in a body of law; that the juvenile division is engaged in a determination of the needs of the child, the family, and society rather than in fact-finding as to guilt; and that the State is parens patriae rather than prosecutor. Kent 383 U. S. at 554-55, 86 S.Ct. at 1054, 16 L.Ed. 2d at 93-94. The United States Supreme Court in Kent acknowledged that the State lacked the personnel, facilities and techniques to perform adequately as parens patriae, but heroically concluded these deficiencies were not "an invitation to procedural arbitrariness." Id. Neither are they here.

In Gault, the United States Supreme Court acknowledged the historical fallacy that the state, acting as parens patriae, saved juvenile proceedings from "conceptual and constitutional grief" by labeling these proceedings non-adversarial; by calling them "civil" rather than "criminal;" and by analogizing them, as HRS here does, to "equity" or "chancery" jurisdiction. Gault, 387 U.S. 16-17, 87 S.Ct. at 1438, 18 L.Ed. 2d at 539-40. But Gault emphatically rejected these old views. The Gault court stated:

> ...[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this system is - to say the least-debatable. And in practice, as we remarked in the Kent case, supra, the results, have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principal and procedure....The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts....The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have fre-

> quently resulted not in enlightened procedure, but in arbitrariness...."

387 U.S. at 17-19, 87 S.Ct. at 1438-39, 18 L.Ed. 2d at 540-41.

The Supreme Court in Gault faced deplorable statistics on children in need of care. This fact did not deter the Court from remarking that, "[n]either sentiment nor folklore should cause us to shut our eyes from such startling findings...." 387 U.S. at 21, 87 S.Ct. at 1440, 18 L.Ed. 2d at 543. The Court cited studies that informal procedures are an obstacle to effective treatment, 387 U.S. at 26, n.37, 87 S.Ct. at 1443, n. 37, 18 L.Ed. 2d at 545, n. 37 and undauntedly refused to acquiesce to a less than judicial juvenile court system.

HRS still would have this Court believe that Kent, Gault and its progeny, and all its teachings are nothing more than verbiage. Juvenile court is not a court, but merely a forum for discussion of the art of social work. FLS does not at all denigrate the profession of social work. But FLS does take the position that it is as equally inappropriate for HRS counselors in 1987 to attempt to do what lawyers do, as it would be for lawyers in 1987 to present themselves as expert social workers. Anything less would be a return to pre - Kent and Gault days and would do great public harm to the State, parents and children of Florida. The Supreme Court in Gault articulated for all times:

> "Under our Constitution the condition of being a boy does not justify a kangaroo court..."

387 U.S. at 28, 87 S.Ct. at 1444, 18 L.Ed.2d at 546.

II. POSITION ON THE COMMITTEE OPINION

A. SUPPORT FOR COMMITTEE OPINION.

This proceeding commenced with a request from HRS for an advisory opinion from the Standing Committee on Unlicensed Practice of Law. The Committee issued an advisory opinion, filed with this Court on May 29, 1987, stating that the activities of HRS counselors, which included the preparation of legal documents, the presentation of a case in court and testimony of counselors, constituted the "practice of law" and was thus prohibited under Florida law.

HRS has filed objections to the advisory opinion stating that either the activities of its counselors do not constitute the "practice of law" or, if they do, that this Court should adopt rules of court which specifically authorize the functions of its lay counselors in Juvenile Court.

FLS requests this Court to reject the objections of HRS and to affirm the advisory opinion of the Committee. FLS submits that the practices of HRS lay counselors, whether in "contested" or "uncontested" cases, constitute the practice of law for which there are no constitutional or statutory exemptions from the requirement of representation by a lawyer. Further, FLS urges this Court not to adopt rules allowing lay counselors to represent HRS in any court proceeding.

In urging this result, FLS wants to be clear that it does not take the position that the use of paralegals, non-lawyer mediators, and simplified pro se forms in other forums should be discouraged. Its position is based solely on the activities

undertaken by HRS lay counselors in a court of law on behalf of an agency of the State of Florida.

B. OBJECTION TO CERTAIN CONCLUSIONS OF LAW.

FLS supports the position taken by the Standing Committee on the Unlicensed Practice of Law. It must except, however, to two of the Committee's Conclusions of Law. Neither are dispositive of the issue at hand, but they are erroneous statements of the law.[1]

C. SUGGESTION OF NEED FOR ADDITIONAL STUDY.

There is a larger issue raised by the record and the briefs: the crisis in Florida's juvenile justice system and the

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[1]. FLS takes the position that the Rules of Civil Procedure apply to proceedings in the juvenile division whenever the Juvenile Rules of Procedure are silent on any detail. HRS's brief at page 28-29 correctly states the relationship of the Juvenile Rules to the Civil Rules.

FLS disagrees that courts may not order HRS to provide specific prescribed treatment for children and parents. The Committee cites a 1974 case for its position that the courts have limited power over HRS. Florida's juvenile laws, however, have undergone extensive revision since 1974 and the case law has also changed. Courts are now empowered by § 39.002 (6), Fla. Stat. (1985) to provide effective treatment to children; by § 39.407, Fla. Stat. (1986) to order medical, psychiatric, and psychological examination and treatment; by § 39.408, Fla. Stat. (1984) to determine the appropriateness of services provided to the child; and by § 409.168, Fla. Stat. (1984) to review the social and other supportive services to be provided to the child.

It is also incorrect to state that courts may not direct HRS to place a juvenile in a particular place. In the Interest of K.A.B., 483 So.2d 898 (Fla. 5th DCA 1986) cites only old law as authority for its decision. It does not analyze any revisions to Florida's juvenile laws that occurred since 1980. Section 409.168, Fla. Stat. (1984), for example, requires the Court in its performance agreement review to examine HRS's description of the type of out of home placement for a child and the appropriateness of that placement.

lack of sufficient financial resources to solve these problems.[2] This Court need not address these issues in order to reach a decision on the unlicensed practice of law.

But should this Court choose to delve further and to explore the extent to which the judiciary is able to adequately implement Chapter 39, § 409.168 and related laws given current resources, this Court might want to take additional testimony, appoint a Study Commission, or appoint a special master. Such review would fall within the Chief Justice's duties as chief administrative officer for the Florida judicial system. Section I, B., The Supreme Court of Florida, Manual of Internal Operating Procedures (1981).

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[2]. Numerous reports and studies in Florida have documented similar problems: HRS, Administrative Review of the Issues Related to the Death of a Child In a Treasure Island Foster Home (September 1985); HRS, Report on Emergency Shelter and Foster Care by Special Departmental Task Force (September 1985); Clearinghouse for Human Services, Recommended Strategies for Change (September 1985); Governor's Constituency for Children, Preliminary Report to Governor Bob Graham on Focus of Florida's Child Welfare Study and Issues for Immediate Action (February 1986); Governor's Constituency for Children, Florida's Children: The Next Decade, (Preliminary Report, 1986; Final Report, 1987); HRS, Children's Services at the Crossroads (January 1987).

National studies and reports have addressed social services delivery systems as well as the need for judicial monitoring. Edna McConnell Clark Foundation, Keeping Families Together: The Case for Family Preservation (1985); National Center for Youth Law, Draft Protocol for Judges (1987); National Center for Youth Law, Draft Protocol for Child Welfare Agencies (1987); ABA, National Legal Resource Center on Child Advocacy and Protection, Reasonable Efforts to Prevent Foster Placement, A Guide to Implementation (2nd ed. 1987); ABA, National Resource Center on Child Advocacy and Protection, Reasonable Efforts, A Manual for Judges (1987); ABA, National Resource Center on Child Advocacy and Protection, Reasonable Efforts: A Report on Implementation by Child Welfare Agencies in Five States (1987) [includes the state of Florida].

STATEMENT OF THE FACTS

FLS has noted above its objection to HRS's characterization of the history of the juvenile court system and the conclusion that this history dictates informality and non-adversarial proceedings. FLS finds no errors in the rest of HRS' Statement of Facts.

FLS respectfully requests that it be allowed to supplement the record through materials contained in the Appendix. Appendix Tab B contains HRS Manual sections evidencing the written legal guidance provided to HRS counselors. Appendix Tab C contains examples of pleadings gathered by Family/Juvenile Workgroup members from throughout the State. They illustrate the extent to which HRS counselors do the work attorneys do.

Appendix Tab C also contains examples of form orders in use by the 11th Judicial Circuit. Attorneys normally prepare orders to assist the Court. With the availability only of lay counselors, the Court does not get this assistance and resorts to incomplete, pre-printed forms. Courts, however, are required by law to make specific findings of fact and conclusions of law in each case. § 39.409 (3), Fla. Stat. (1985); Fla. R. Juv. P. 8.650 and 8.780 (i); In the Interest of C.S., 503 So.2d 417, 418 (Fla. 1st DCA 1987).

Appendix Tab D contains an excerpted transcript from the Thirteenth Judicial Circuit. The Court refused to hear Motions for Change of Placement improperly noticed for hearing by HRS lay counselors. "If you want previously entered orders or the status changed, it's not going to by by little love notes between the

department and the judge," the Court emphasized. Appendix Tab D, p. 15.

These supplemental facts support the findings of the Committee.

ARGUMENT

I.

THE ACTIVITIES OF HRS COUNSELORS CONSTITUTE THE PRACTICE OF LAW AND THERE ARE NO CONSTITUTIONAL OR STATUTORY PROVISIONS PERMITTING SUCH LAY REPRESENTATION

In parts I and II of its Objections, HRS essentially argues three points:

1. The activities of its counselors are not the "practice of law" because they do not represent a "separate party" to the dependency case; or,

2. Even if the counselors do represent a "separate party", the counselors really represent, and appear on behalf of, HRS "pro se"; or,

3. Even if the counselors do act as attorneys, the dependency process is a "special statutory procedure" which permits HRS counselors to practice law in the Juvenile Courts of Florida.

Each of these arguments is without constitutional, statutory or case law foundation. The activities of HRS counselors in uncontested[3] dependency cases clearly constitute the practice of law

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[3]. Throughout its brief HRS has attempted to differentiate the legal activities of licensed attorneys from the legal activities of lay counselors by distinguishing between the type of dependency hearing. The "legal activities" of the two are, in and of themselves, not different; just that the lawyers appear in "contested" cases and the lay counselors in "uncontested" cases. In addition to the uncertainty of establishing when "uncontested" ends and "contested" begins [see testimony of Judge William Gladstone, April UPL Hearing Transcript], FLS submits there is no foundation for allowing lay representation merely because the opposing party does not contest the matter at some point. The activities which make up the "practice of law" simply do not depend on whether an opposing party agrees or disagrees with the other side's position. What determines whether any particular act or practice constitutes the "practice of law " emanates from the relationship between the representative and the client. Whether there is a opposition is not relevant.

for which there are no provisions for the representation by lay persons.

All parties to this proceeding accept State ex rel The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963), as the standard for determining what is the "practice of law." In that case this Court stated

> In determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

140 So.2d at 591; accord, The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1191 (Fla. 1978). HRS argues that none of its counselors' activities fall within this definition, or, if they do, that there are statutory exemptions which preclude Sperry's application to the HRS counselors.

A. HRS COUNSELORS REPRESENT A "SEPARATE PARTY" IN A DEPENDENCY PROCEEDINGS.

HRS' first objection to the Committees' Proposed Advisory Opinion is that lay counselors are not representing a

"separate party"[4] to the proceeding, rather they are "acting on behalf of the agency." [HRS Brief at p. 18]

Clearly, HRS cannot argue that the Department is not a legal "separate party" to a dependency proceeding. Not only do they concede that the agency is a "separate party" to the proceeding (HRS brief at 18 and 19), they must do so as the Juvenile Rules specifically include the Department as a party whenever it files a petition. Fla. R. Juv. P. 8.540.

Rather, HRS argues that the lay counselor and HRS are one in the same, thus allowing the counselor to appear, on behalf of the agency "pro se", rather than as a representative for a "separate party".

The counselor and HRS are not, however, one and the same. The counselor, in fact, has no independent standing in the dependency proceeding. If the counselor should leave the job, no substitution of party is required under Fla. R. Civ. P. 1.260 (d). Instead HRS remains, as it always had from the commencement of the proceeding, the real party at interest.

The nature of HRS as the "real party in interest" in the dependency process can be seen by reference to § 20.19, Fla. Stat.

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4. The Department attempts to modify the standard of Sperry by redefining the word "person" to mean "separate party". [HRS Brief at p. 18] If HRS is intending to imply that litigation is required before the definition of "practice of law" is applicable, then they are in error. The definition of the "practice of law" includes not only the conduct of litigation, it embraces much more; it includes any acts, either in court or out of court, which determine or defend the rights of clients. Fowler v. Wirtz, 236 F. Supp. 22, 31-32 (S.D. Fla. 1964), rev'd on other grounds, 372 F.2d 315 (5th Cir. 1966). This Court has included such non-courtroom activities as giving advice, The Florida Bar v. Mills, 410 So.2d 498 (Fla. 1982) and the preparation of legal documents, The Florida Bar v. Turner, 355 So.2d 766 (Fla. 1978) as "practicing law".

(1985). In this section, which creates the structure and functions of the Department of Health and Rehabilitative Services, the Florida Legislature has charged HRS with the responsibility to:

> (c) Prevent or remedy the neglect, abuse or exploitation of children ... unable to protect their own interests [and]
>
> (d) Aid in the preservation, rehabilitation and reuniting families.

§§ 20.19 (1)(c) and (1)(d), Fla. Stat. (1985). This statutory language makes plain that it is the Department which represents the interests of the state in Juvenile Court. The counselor, on the other hand, represents the Department in its attempt to fulfill its statutory duties.

A factual situation similar to the role played by HRS counselors arose in The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). In that case a labor relations specialist carried on much the same activities which an HRS counselor performs. The specialist filed written pleadings, presented evidence and made decisions affecting the legal rights and obligations of his client. In characterizing the nature of these activities, this Court stated that the specialist did "... not seriously contest the fact that he represented the [Escambia County School] Board's interest in an adversarial administrative proceeding". Id at 415.

Another example of the relationship of the HRS counselor to the Department can be seen in the Professional Ethics of the Florida Bar Opinion 87-2 (1987). In that opinion the Professional Ethics Committee addressed the issue of whether an attorney may communicate with the hospital staff who provide professional or direct care services to hospital patients when a case involving

the patients is in litigation. The hospital in question is a state mental facility operated by HRS. In denying the attorney the right to talk to the hospital staff without the consent of the agency's counsel, the Committee stated that the general rule denying communication with corporate employees and agents also applies to governmental departments and agencies. The definition of "organization", applicable to corporate parties, also applies to government agencies, thus making officers, agents and other employees, whose statements or acts may be imputed to the agency, representatives of the agency.

In a dependency proceeding no counselor acts in an individual capacity; each acts in a representational relationship on behalf of HRS.[5] Here, HRS can not seriously question that its counselors represent the agency in dependency proceedings.

B. HRS MAY NOT PROCEED "PRO SE" IN THE CIRCUIT COURTS OF FLORIDA.

HRS next argues that, even if the lay counselors do act in a representational capacity, they are employees of the Department, and therefore, the Department is really appearing "pro se" in dependency cases. HRS further argues that it may act through lay counselors because the Legislature has not prohibited this practice.

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5. The only reported decision involving the participation of a lay social worker/counselor in a welfare case was issued by the New Jersey Committee on Professional Ethics. In its opinion, the Committee held that in testimonial hearings the counselor "represented the welfare department" and though the counselor could appear in administrative hearings, the counselor could not represent the welfare department in court proceedings. New Jersey Comm. on Professional Ethics, Formal Op. 580 (1986) [Attached as Appendix A].

This argument is fraught with numerous errors. In the first place, an artificial entity can not appear in a court of law "pro se." In Florida an appearance "pro se," which is defined to mean "in his own proper person", is limited to the appearance of "natural" persons. § 454.18, Fla. Stat. (1985); Kahn v. Milon, 332 So.2d 149, 150 (Fla. 3d DCA 1976). Artificial entities, entities which are created by law, require representation by an attorney, Magnolias Nursing and Convalescent Home v. Dept. of HRS, 428 So.2d 256, 257 (Fla. 1st DCA 1982); Angelini v. Mobile Home Village, Inc., 310 So.2d 776, 777 n. 1 (Fla. 1st DCA 1975) as a "... corporation is not a person entitled to conduct its own defense ..." Southeast Associates, Inc. v. First Georgia Bank, 362 So.2d 967, 967-68 (Fla. 1st DCA 1978).

While this Court has not yet ruled on the status of a governmental entity as a "person" for "pro se" representation, there is no reason to exempt a state or local government or agency from the requirement that it appear in a court of general jurisdiction through an attorney.[6]

But even if this Court would allow an agency to appear "pro se," the Florida Legislature has already foreclosed that option to the Department.

The Florida Constitution of 1968 created an Executive Branch, headed by a Governor, Art. IV, §1, Fla. Const. and

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[6]. In the only Florida decision concerning this issue, the Fifth District Court of Appeals held that the Housing Authority of the City of Orlando, a governmental corporation, is not a "person", thus requiring representation by an attorney. Quinn v. Housing Authority of the City of Orlando, 385 So.2d 1167 (Fla. 5th DCA 1980); c.f., Professional Ethics of the Florida Bar Op. 87-2 (1987) [government agency treated as a corporation for purposes of R. Reg. Fla. Bar 4-4.2 (1987), communications to an adverse party.

Executive Departments to carry out the duties and functions of the Executive Branch, Art. IV, §6, Fla. Const.

The Legislature, which is required to establish the duties and functions of each Executive Department, §§ 20.02 and 20.04, Fla. Stat. (1985), created HRS as one of several such departments. The enabling legislation, codified at §20.19 Fla. Stat. (1985), declared HRS' purpose to be the "... delivery of all health, social and rehabilitative services afforded the state to those citizens in need of assistance". § 20.19 (1)(a), Fla. Stat. (1985). It did not grant HRS the power to appear in court "pro se."

The Florida Constitution also created a Cabinet which includes the Attorney General as the "state's chief legal officer." Art. IV, §4 (c), Fla. Const.; United States v. Domme, 753 F.2d 950, 956 (11th Cir. 1985); Thompson v. Wainwright, 714 F.2d 1495, 1500 (11th Cir. 1983) [chief legal officer of the executive department].

The Attorney General, who has been charged to "... perform the duties prescribed by the Constitution of this state and also perform such other duties appropriate to his office as may from time to time be required of him by law or by resolution of the Legislature", § 16.01 (2), Fla. Stat. (1985) (emphasis added), has been specifically delegated the responsibility to represent executive branch departments in their legal matters. The Legislature has provided that,

> [t]he Department of Legal Affairs shall be responsible for providing all legal services by any department unless otherwise provided by law...[and] shall appear in and attend to, in behalf of the state, all suits or prosecu-

> tions, civil or criminal or in equity, in which the state may be a party in the Supreme Court and district courts of appeal ... [and] ... in any other courts of this state.

(combining §16.015, Fla. Stat. [1985] with §§16.01(4) and (5), Fla. Stat. [1985]) (emphasis added).

Thus, the Attorney General is mandated to provide all departmental legal representation unless the Legislature enacts specific exemptions in another statute. Except for those parts of Chapter 39 which call for representation by the State Attorney, HRS may not appear in court without an attorney from the Department of Legal Affairs.

C. DEPENDENCY PROCEEDINGS ARE NOT "SPECIAL STATUTORY PROCEEDINGS."

In its final objection to the Proposed Advisory Opinion, HRS argues that the dependency process is a "special statutory proceeding." If the proceedings are so classified, the

> ...form, content, procedure and time for pleading in all special statutory proceedings shall be prescribed by the statutes governing the proceeding...

Fla. R. Civ. P. 1.010 (emphasis added). The argument continues by claiming that Chapter 39 grants the power to lay counselors to appear in Juvenile Court to represent the Department.

FLS adopts the arguments and reasoning of the Committee to the effect that Chapter 39 and the Rules of Juvenile Procedure do not authorize lay representation in court. FLS further argues that even assuming that this Court should declare Chapter 39 a "special statutory proceeding", HRS' position is still fatally flawed.

HRS relies upon Fla. R. Civ. P. 1.010 as the foundation for its house of cards. But by its own terms, the Rule grants to the Legislature the ability to define the "form, content, procedure and time" for each special statutory proceeding. Nowhere does the rule delegate to the Legislature the ability to determine who will carry out these special statutory proceedings. In those statutory subjects which have been determined to be special statutory proceedings, Gonzalez v. Babcock's Home Furnishings Center, 343 So.2d 7 (Fla. 1977) (Chapter 78, Florida Statutes: replevin); Berry v., Clement, 346 So.2d 105 (Fla. 2d DCA 1977) (Chapter 83, Florida Statutes: landlord/tenant), the Legislature did not oust the judiciary from determining who can practice in the judicial proceeding.

Nothing in Chapter 39 explicitly allows lay counselors to perform the functions of an attorney. Instead, HRS tortures the Juvenile Rules and Chapter 39 to argue every "implication" of permission for lay counselors. Such an interpretation violates basic rules of statutory construction.

Statutes and rules are meant to be read so they will comply with a valid constitutional construction. E.g., State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985); Peoples Bank of Indian River County v. State of Florida, 395 So.2d 521, 524 (Fla. 1981). Indeed, it must be presumed that the Legislature would not knowingly adopt an unconstitutional act. Wright v. Board of Public Instruction, 48 So.2d 912, 914 (Fla. 1950).

In the case before this Court, there is agreement that the Florida Supreme Court has exclusive jurisdiction to regulate the practice of law before courts of law in Florida. Art. V., §

15, Fla. Const.; § 454.021 (2), Fla. Stat. (1985); The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). There is further agreement that the Legislature can regulate which lawyers may appear on behalf of the state and, unless it specifically states otherwise, it has chosen the Department of Legal Affairs to represent all executive departments in the state and Federal courts. § 16.015, Fla. Stat. (1985). HRS argues, however, the Legislature's enactment of Chapter 39 has, by implication, exempted HRS lay counselors from the strictures of Art. V, § 15, § 454.021 (2) and § 16.015.

Any time the Legislature passes a law there exists the general presumption that it passes the statute with the knowledge of prior existing laws. State v. Dunmann, 427 So.2d 166, 168 (Fla. 1983). As such, repeal of these existing laws by implication is not favored. Id at 168. As this Court stated in Dunmann,

> [T]he enactment of a statute does not operate to repeal by implication prior statutes unless such is clearly the legislative intent. An intent to repeal prior statutes or portions thereof may be made apparent when there is a positive and irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes.

Dunmann, 427 So.2d at 168 [citing State v. Gadsden County, 63 Fla. 620, 629, 58 So. 232, 235 (1912)].

In the case before this Court there is no evidence whatsoever in Chapter 39 that the Legislature intended to repeal the mandates of §§ 454.021 (2) and 16.015. If Chapter 39 is read consistent with §§ 454.021 (2) and 16.015, then the functions assigned to the "authorized agents of the Department", "to perform duties and exercise powers pursuant to this chapter", § 39.01 (5),

Fla. Stat. (1985), must be social service functions [see §§ 20.19 (1)(a), (c) and (d), Fla. Stat. (1985)] or services in assistance to or support of attorneys. Any other reading of Chapter 39 voids Chapters 454 and 16 and negates the Constitutional authority granted the Florida Supreme Court in Art. V, § 15.

II.

THIS COURT SHOULD NOT ADOPT ANY RULE WHICH WOULD ALLOW HRS LAY COUNSELORS TO CONTINUE THEIR CURRENT FUNCTIONS IN DEPENDENCY CASES.

In the event this Court finds that the activities of HRS counselors constitute the unauthorized practice of law, HRS requests the Court to establish rules which would allow lay counselors to continue their current functions in dependency proceedings. In making this request, HRS argues that legalization of the status quo is warranted because:

1. These is no public harm in the current system;

2. Even if there is some harm, use of lawyers will not resolve the problems, and

3. There simply are not sufficient resources to pay for the additional attorneys necessary.

As advocates for parents and children, FLS submits there is much harm done to the public under the current system; that harm will continue until attorneys are retained to practice before the court on behalf of HRS; and that money can be obtained to administer a fair and compassionate dependency process.

A. THE CURRENT SYSTEM CAUSES HARM TO THE FAMILIES AND CHILDREN IN THE DEPENDENCY SYSTEM.

The Department's argument is straightforward. The Florida Legislature, through Chapters 39 and 409,[7] has not created a judicial process to enforce legal rights but rather a social work system to protect the best interests of the child. (HRS brief at 31). The use of lay counselors in dependency cases promotes the achievement of these ideals while attorneys hinder the process (Id.). Consequently, the public is better protected from harm through the use of well trained HRS lay counselors (HRS brief at 41).

Instead of assuming a set of facts consistent with its position, HRS, in asking this Court to deviate from the norm of requiring licensed attorneys, should provide proof that there is no harm to the public. From the record before this Court just the opposite conclusion can be reached.

Despite its claim that the public is best protected by a "well trained HRS dependency counselor," such counselors do not exist in sufficient numbers to protect the legal rights of children and families in crisis. Betsy Webb, Program Supervisor, Children, Youth and Families, HRS, Tallahassee, testified that "legal training" for counselors is not even taught in the standard HRS 80 hour pre-service training program (AR-42) [Ms. Webb testified at the UPL Committee hearing on April 3, 1987]. Instead, legal procedure and practice is learned "on the job" (AR-

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7. Section 409.168, Fla. Stat. (1985) was repealed in the 1987 legislative session. The substantive content of § 409.168 was amended into Chapter 39 to create a new Part IV, Children in Foster Care [§ 39.45 et. seq., Fla. Stat. (1987), Ch. 87-289, Laws of Fla.].

42 and AR-138). For its "on the job" training program, HRS provides its lay counselors three manuals for information on the critical subjects of legal procedures [Protective Services Supervision and Treatment, HRSM 175-7 (1985) and Dependency and Delinquency Intake, HRSM 210-1 (1985)] and judicial review of performance agreements [Foster Care for Dependent Children, HRSM 175-12 (1982)].[8] The longest of the legal materials is approximately ten pages. As Ms. Webb stated, "this still is not enough...our [legal] training is not even bottom level..." (AR-138).

And in the face of this meager training, HRS acknowledges the very high turnover rate among the lay counselors (HRS brief at 21-22), which only compounds the magnitude of the actual and potential harm to children and families. Without adequate legal training[9] and without experienced, long-term staff,

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[8]. Copies of the relevant pages for each of these three manuals is found at Appendix B.

[9]. The Department refers to the creation of the Child Welfare Training Academies, § 402.40, Fla. Stat. (Supp. 1986), as a means to assure adequate legal training for lay counselors. The training will be required of all dependency program staff, § 402.40 (4), Fla. Stat. (Supp. 1986), and will be of five weeks duration which will allow more extensive training on judicial issues. [HRS Brief at p. 46] While the more than doubling of the current training is laudable, this amount of additional education will not correct the deficiencies. The child welfare system is a complex legal system. [See the arguments of FLS at Part II (B)]. As the National Council of Juvenile and Family Court Judges recognized, the juvenile and family courts should not be the "training ground" for inexperienced attorneys or judges. Deprived Children: A Judicial Response 73 Recommendations, The National Council of Juvenile and Family Court Judges (1986). What is required for competent legal representation is the successful completion of appropriate training and adequate experience. Id at p. 15 [Recommendation 14]. This curriculum would include a "... general understanding of child development and treatment resources, as well as specific legal skills and knowledge of relevant

HRS can give no assurance that its lay counselors are thoroughly versed in the elements of fundamentally fair procedures. As James Smart, Assistant State Attorney for Dade County, Juvenile Division, stated, "[The counselors] go ahead and do a case as they see fit it should be done and they don't have the case reviewed by an attorney." [Mr. Smart testified at the May UPL hearing, MR-11]

The record, and Florida appellate cases, demonstrate the harm which can arise when counselors "do a case as they see fit". HRS does not meet its time schedules [AR:86-87], poorly drafted pleadings are filed [facts in UPL Advisory Opinion], pleadings are filed in cases which are clearly contested or for which HRS claims attorneys are always used,[10] counselors fail to give proper legal notice to parents for hearings [AR-142 and White v. Department of Health and Rehabilitative Services, 483 So.2d 861, 862 (Fla. 5th DCA 1986) (J. Cowart concurring)], counselors seek continuances of legal proceedings [HRS brief at 39], counselors obtain ex parte orders from courts [White, 483 So.2d at 862], HRS case workers offer testimony about which they have no actual knowledge [In the Interest of S.J.T., 475 So.2d 951, 952-53 (Fla. 1st DCA 1985)], counselors advise parents to give children up for adoption in violation of performance agreement and law requiring reunification efforts [In the Interest of T.S., 464 So.2d 677, 681 (Fla. 5th DCA 1985)], counselors fail to file current predisposition report

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statutes, cases [and] court rules ..." Id. What is required of attorneys and judges should to be required of lay counselors. The proposed Child Welfare Training Academies can not replicate the preparation lawyers receive from three years of law school and Continuing Legal Education courses.

[10]. See Appendix Tab C and Tab D.

[White, 483 So.2d at 866-67 & 867 n.8], counselors prepare performance agreements without attorney participation [HRS brief at 26]; and counselors keep children in foster care without either a signed performance agreement or move for a permanent placement plan [T.S., 464 So.2d at 683].

A prime example of the harm to parents caused by lay counselors is raised in HRS' brief at page 10. By offering a waiver of counsel to the parents, and then presenting the waiver to the court, lay counselors are doing what the Florida Code of Professional Conduct would prohibit an attorney from doing and what Sperry considers the "practice of law".

The explanation of a legal form, such as the waiver of counsel, by a person responsible for the recommendation as to whether to preserve or break-up a family, creates the appearance that the unrepresented parent is receiving legal advice from a person who is not a disinterested party. This service involves the explanation of the parents' due process right to counsel, an important legal right. Not only does the protection of the parents' rights require a knowledge of constitutional law beyond that possessed by the average person, the explanation is being given by a person who represents interests in conflict with the parent, a practice prohibited by the Florida Rules of Professional Conduct. R. Reg. Fla. Bar 4-4.3 (1987).

Each of these examples evidences errors made by lay counselors in the judicial system. The result of each error is delay; loss of time. And time and separation are the two largest obstacles to the successful reunification of foster children with their natural parents. As Justice Robert Smith stated in In the

Interest of A.B., 444 So.2d 981 (Fla. 1st DCA 1983), "time is an inexorable influence in [dependency] cases ..." 444 So.2d at 996, for the length of separation contributes to the alienation of the child from the parent. Id. See also, Garrison, Why Terminate Parental Rights?, 35 Stan. L. Rev. 423 (1983), which details the problem of "foster care drift" and its effects on the diminished possibility of a foster child's reunification with the natural parent, and Edna McConnell Clark Foundation, Keeping Families Together: The Case for Family Preservation (1985), which describes the need for home-based family services to prevent untimely separation of a child from its parents.

The ultimate harm to the system caused by the unlicensed practice of law is the risk of error of a wrong result. The unschooled lay counselor cannot know the multitude of legal issues in the adjudication, disposition, judicial review and termination of parental rights proceedings sufficiently to ensure the requisite fair procedures to avoid the risk of error. And yet the risk of error of a wrong result is an anathema in our constitutional scheme of fundamental fairness. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). FLS does not suppose that attorneys will be free of errors. No attorney can cure that problem. But attorneys can more likely reduce the frequency and magnitude of errors in a judicial proceeding than can poorly trained and inexperienced lay counselors. Lawyers, not lay counselors, will protect the public from harm in dependency cases.

B. LAWYERS WILL HELP THE DEPENDENCY PROCESS.

Consistent with its request to legalize the use of lay counselors is HRS' claim that attorneys will not help the system. Because they believe Chapter 39 to be a social service scheme, HRS states the use of lawyers will neither improve the system nor protect the public (HRS brief at 22). Indeed, the lawyers may go so far as to hinder the dependency process. (HRS brief at 31). Consequently, HRS turns its argument on its head by stating that lay counselors ought to practice law because there is no evidence that lawyers will protect the public more than the counselors in judicial proceedings.

FLS agrees the injection of lawyers into a social service delivery system may not improve that system. But HRS and its counselors are not here dealing with such a system. They are facing a judicial system. Contrary to the HRS claim that the legislature did not create "a judicial process to enforce legal rights" (HRS brief at 31), that is exactly what the Florida Legislature did. One of its stated purposes in creating Chapter 39 is,

> [t]o provide procedures by which the provisions of law are executed and enforced as will assure the parties fair hearings at which their rights as citizens are recognized and protected.

§39.001(2)(d), Fla.Stat. (1985); see also, the federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) [codified at 42 U.S.C. §§ 671-676], which mandates a case review system for states to be eligible for foster care maintenance payments, 42 U.S.C. § 671 (16). It is within this context that FLS submits that lawyers, whether advising a

client, preparing legal documents or appearing in court, will be superior to lay counselors.

One of the most important reasons for the preference of an attorney over a lay counselor is the complexity of the dependency proceeding. The advocate has to be academically and experientially competent in state and federal constitutional, statutory and regulatory laws. This means the attorney must know and understand Chapters 39, 409 and 415,[11] and the federal Adoption Assistance and Child Welfare Act of 1980. This would also include Florida administrative regulations and various HRS manuals. Further, the attorney has to apply the Florida Rules of Juvenile Procedure, Civil Procedure and Judicial Administration and be skilled in the areas of interviewing, counseling, evidence and trial practice. Of equal importance is the advocate's ability to interrelate each of these statutes and rules. Often the choice made by an attorney at a given stage of the proceeding has consequences at a later date, see, White v. Department of Health and Rehabilitative Services, 483 So.2d 861, 865-67 (Fla. 5th DCA 1985) (J. Cowart concurring), which can affect the vital legal interests of the client.

In addition to the statutory and regulatory law, advocates in dependency cases must know of the laws' interpretations by the Florida Supreme Court and the Florida District Courts of Appeal. Since 1985 , this Court has issued important decisions

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11. The complexity of the dependency process will be increased when the new termination of parental rights bill, H.B. 1408 becomes effective on October 1, 1987. The new law, Ch. 87-289, Laws of Fla., repeals much of current § 39.41, Fla. Stat. (1985) and creates a new Part V, Termination of Parental Rights, § 39.46, et.seq., Fla. Stat. (1987).

in Burk v. Department of Health and Rehabilitative Services, 476 So.2d 1275 (Fla. 1985) [mandatory performance agreements]; In the Interest of B.W., 498 So.2d 946 (Fla. 1986) [parental rights of incarcerated prisoners]; and In the Interest of R.W., 495 So.2d 133 (Fla. 1986) [declaration of the unconstitutionality of § 39.41 (1) (d) 1.d, Fla. Stat. (1983)]. Added to these cases are the dozens of opinions from the District Courts of Appeals.

The sum of the above recitation is that the entire dependency process, from initial intake to final termination of parental rights, is a complex social services and legal process. In order to protect the due process rights of children and parents and to ensure that each receives a fair hearing, the Legislature has developed a scheme which requires the expertise and talents of both social workers and attorneys. If family reunification is to have any meaning at all, then each of the two professions must practice those skills which they are best qualified to deliver.

Despite the growing complexity of the dependency process, HRS surmises that "...it is highly unlikely [lawyers] will have any training in the dependency process." (HRS brief at 21). The Department provides no data to support this proposition. Perhaps because they cannot. More than ever before attorneys are taking an interest in family law in general, and juvenile justice in particular. Law schools provide courses in childrens' rights, continuing legal education programs are focusing on such issues and the Florida Bar has sections or committees on Family law,

Juvenile Rules and the Legal Needs of Children.[12] As a result, there are many dedicated members of the Florida Bar working as State Attorneys, HRS attorneys, attorneys for legal aid and legal services offices, and as members of the private bar who devote a substantial portion of their professional careers to the representation of children and families.

And the presence of these attorneys in the juvenile justice system points out an issue heretofore overlooked by HRS. Whether under the now-inapplicable Florida Code of Professional Responsibility or the current Florida Code of Professional Conduct, Chapter 4, Rules Regulating the Florida Bar (1987), an attorney is both an advocate and an officer of the court. As an officer of the court, an attorney is required to treat the opposing party and the Court with candor. This means the attorney must not fail to inform the court of all material facts, Rule Reg. Fla. Bar, 4-3.3 (a)(2) and legal authorities, whether favorable or unfavorable, Rule Reg. Fla. Bar, 4-3.3 (a)(3); Newberger v. Newberger, 311 So.2d 176, 176-77 n.1 (Fla. 4th DCA 1975), so that the court is better able to make a fair and accurate determination of the matter before it.

These same rules of professional conduct do not apply to lay counselors. This is not to say that lay counselors would

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12. The experience of the Florida Bar replicates that of the national efforts of lawyers to become prepared in the law of children. As an example, the American Bar Association has created the National Resource Center for Child Advocacy and Protection. The Center produces a number of publications including Ratterman, Reasonable Efforts: A Manual for Judges (1987), Reasonable Efforts to Prevent Foster Care Placement: A Guide to Implementation (2d ed. 1987) and the ABA Juvenile and Child Welfare Law Reporter, a monthly summary of significant juvenile cases.

deceive the court. It is only to state that counselors are trained as social workers. Attorneys, by training and professional ethics, know to make all efforts which will ensure the fair proceeding envisioned by § 39.001 (2)(d), Fla. Stat. (1985). As such they are better able to represent the interests of any client in court, including the Department.

For the above stated reasons, attorneys are better suited to represent the Department in Juvenile Court. Because of their professional training, experience and ethics, lawyers ought not be displaced by lay counselors from the representation of parties in dependency cases by the adoption of a Court rule.

C. HRS HAS THE AUTHORITY TO REQUEST FUNDS TO EMPLOY ADDITIONAL ATTORNEYS OR TO MANDATE THE LEGISLATURE TO PROVIDE THE NECESSARY FUNDS

The final argument put forth by HRS for the promulgation of a new rule is predicated on the perceived lack of sufficient resources to fund the additional attorney positions necessary to provide counsel for HRS in all dependency cases. HRS fears the Florida Legislature will never provide an adequate appropriation to meet the need.

This argument is raised prematurely. At this juncture HRS has not requested funds for this purpose so it cannot be sure that the legislature would deny its request. Further, the claim that what funds might become available would be drawn from existing social service programs is also speculative. The Department, to avoid the mandate of this Court to require attorneys in every dependency case, raises the spector of impoverished citizens of Florida losing governmental benefits by assuming the

legislature will avoid its constitutional and statutory duties. Even assuming, however, that the legislature would knowingly fail to fund the necessary attorneys, HRS is not without recourse to acquire the additional funds.

It is well recognized that the legislature is supreme in its legislative functions. State ex rel. Davis v. Stuart, 97 Fla. 69, 86, 120 So. 335, 341 (1929). Consequently, the legislature cannot be compelled to exercise its legislative prerogatives. Dade County Classroom Teachers Associations v. Legislature, 269 So.2d 684, 686 (Fla. 1972) [hereinafter Dade County].

But the power of the Legislature is not without limits. The legislature may not exercise any lawmaking authority which either expressly or impliedly conflicts with either the Florida or Federal Constitution. E.g., Armistead v. State, 41 So.2d 879, 882 (Fla. 1949); 10 Fla. Jur. 2d Constitutional Law § 152 (1979). The legislature may not alter or contract the provisions of the Constitution. State ex rel. West v. Butler, 70 Fla. 102, 124, 69 So. 771, 777 (1915). This Court has recognized that one of the exceptions to the separation-of-power doctrine is in the area of constitutionally guaranteed or protected rights. Dade County, 269 So.2d at 686. While it is the primary duty of the legislature to provide for the ways and means to enforce such rights, in the absence of appropriate legislative action, it is the responsibility of the courts to do so. Id. Citing with approval Marbury v. Madison, 1 Cranch 137, 5 U.S. 137 (1803), this Court went on to state:

> ... the courts have not hesitated to accomplish by judicial fiat what other divisions of government have

> failed or refused to do in protecting, implementing or enforcing constitutional rights.

Dade County, 269 So.2d at 687. Thus where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements. Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla. 1978).

The authority of the judiciary to compel the legislature to act includes the authority of the judiciary to compel the legislature to appropriate and expend funds. This is especially true when the judicial function at issue is the safeguarding of fundamental rights. Rose, 361 So.2d at 137.

Though the issue before this Court is phrased in terms of the use of lay counselors in court, one of the underlying considerations is the effect that use will have on the fundamental rights of individuals in the dependency process. This Court has long recognized a constitutionally protected interest in the natural parents in preserving the family unit and in the raising of one's children. In the Interest of D.B. and D.S., 385 So.2d 83, 90 (Fla. 1980); In re Guardianship of D.A. McW, 460 So.2d 368 (Fla. 1984). The unique role of the family in American society thus means that it has received both procedural and substantive due process protection. Smith v. Organization of Foster Families, 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14, 33-34 (1977). If parents and children are to receive the due process to which they are entitled, § 39.001 (2)(d), Fla. Stat. (1985), then the legislature is required to fund those judicial functions which safeguard fundamental rights. If the legislature fails in its responsibility, then the judiciary has the inherent power, and

duty, to compel such funding as will ensure fair hearings for all the parties involved. Rose, 361 So.2d at 138 citing In re Salary of Juvenile Director, 87 Wash.2d 232, 250, 552 P.2d 163, 173 (1976) [Inherent power to be exercised only after established methods have failed or an emergency has occured].

While the allegation of a lack of funding is, at this time, purely speculative, the choice of lay counselors or attorneys should not depend on the availability of resources. The fundamental right to a fair hearing controls. If lawyers are required to assure the provision of fair hearings to all parties, then funding will be mandated for that purpose.

CONCLUSION

The Department of Health and Rehabilitative Services has not presented any compelling reasons to legalize the appearance of lay counselors as attorneys in uncontested cases in dependency cases. The Family/Juvenile Workgroup of Florida Legal Services, therefore, respectfully requests this Court to accept the Proposed Advisory Opinion of the Unlicensed Practice Committee and to declare activities of the counselors as the unauthorized practice of law.

Respectfully submitted,

BY Brent R. Taylor

BRENT R. TAYLOR
Florida Legal Services, Inc
226 West Pensacola Street
Tallahassee, Florida 32301
(904) ~~222-2151~~ 656-0440

BY Carol Gregg

CAROL ~~HART~~ GREGG
Florida Legal Services,Inc.
226 West Pensacola Street
Tallahassee,Florida 32301
(904) ~~222-2151~~ 656-0440

CERTIFICATE OF SERVICE

I, CAROL HART GREGG, Attorney for Florida Legal Services in the above-entitled cause, hereby certify that I have served a copy of the foregoing Brief of the Interested Party together with Appendix by hand delivery on this 20th day of July, 1987 to: B. ELAINE NEW, Esq., Assistant General Counsel, State of Florida Department of Health and Rehabilitative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301; and by mail to ROBERT M. SONDAK, Paul, Landy, Beiley, and Harper, P.A., 200 Southeast First Street, Miami, Florida 33131.

Carol Gregg

CAROL ~~HART~~ GREGG