

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
RE: ADVISORY OPINION
HRS NON-LAWYER COUNSELOR

_____/ CASE NO. 70,615

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ANSWER BRIEF OF THE
FLORIDA BAR STANDING COMMITTEE
ON UNLICENSED PRACTICE OF LAW
TO DEPARTMENT OF HRS RESPONSE

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The Florida Bar Standing Committee on the Unlicense Practice of Law ("UPL Committee") respectfully submits this answer to the "HRS Response" to the Report of the Supreme Court Committee on HRS Non-Lawyer Counselors ("Supreme Court Committee Report").

ARGUMENT

The UPL Committee had a representative among the 12 members of the Supreme Court Committee. We are aware that the Supreme Court Committee thoroughly investigated all aspects of the juvenile dependency system, to determine the causes of the delays and mistakes in the dependency process. As the Supreme Court Committee Report found, untrained, inexperienced HRS social workers are simply incapable of representing HRS in court, or preparing the important legal documents which govern the rights and responsibilities of the parties to a dependency case. As a result, children spend an average of 30 months in foster care before this supposedly temporary status is resolved. The human cost of this statistic is devastating to children:

Each of these procedural delays means a delay in a child's ability to settle into a home, to form or repair attachments to family and friends, and to resume the growth toward maturity that has inevitably been halted or stunted by the events that precipitated the state's intervention in the child's life. (Supreme Court Committee Report at 1)

As the Report further states, this impact on abused and neglected children "simply plants a time bomb that is likely to explode later in the form of abuse, neglect, delinquency or adult criminal behavior." (Id. at 1)

The Supreme Court Committee Report was unanimous in its finding that lack of legal representation of HRS causes harm to children. The Report unanimously urged this Court to ameliorate the harm by requiring legal representation of HRS at all stages of dependency cases. Based on these findings, and this Court's earlier ruling that HRS social workers are practicing law in dependency cases, there should no longer be any dispute. This Court should apply the rule that lawyers practice law; social workers do not.

This Court has never authorized non-lawyers to represent others in court proceedings in the Circuit Courts of this State. This Court does not authorize non-lawyers to give substantive legal advice or to draft complex legal documents for others. The harm currently inflicted on children because social workers are practicing law in dependency cases illustrates the reasons for this.

HRS asks this Court to make an exception for "uncontested" dependency cases. HRS is wrong. In many ways, the "uncontested" dependency cases require HRS legal representation even more than the contested cases. In a contested case, there will be at least

one other party to the proceedings questioning the validity of the HRS accusations of abuse and neglect, and the HRS recommendations for disposition. In an uncontested case, the court may not hear from any other participant, and must rely heavily on the recommendations of HRS. Untrained, inexperienced social workers are simply incapable of assuring the courts that proper notice has been given, that the allegations set forth in petitions and other pleadings are legally sufficient, that the permanent placement plans or performance agreements comply with complex statutory requirements, and that HRS has complied with all legal requirements prior to requesting termination of parental rights. The flood of dependency cases rushing through the courts require judges, of necessity, to rely on the representations of HRS that all legally required steps are taken in dependency cases. However, as all the evidence shows, social workers are simply incapable of giving reasonable assurances on these legal matters.^{1/}

^{1/} For instance, the HRS Response encourages its counselors to obtain consents by parents to an adjudication of abuse and neglect thereby making further proceedings "uncontested." The Supreme Court Committee Report properly observed that legal representation of HRS was essential at this stage of proceedings "to restrain the counselor from offering legal advice." (Supreme Court Committee Report at 28) The awful practice of HRS counselors obtaining waivers and consents from unrepresented parents must be stopped.

Moreover, the "contested" versus "uncontested" distinction is too simplistic. It ignores the fact that a case does not come to court at all unless it is contested -- there is a question of whether a child has been seriously abused or neglected, and whether it is safe for the child to remain at home. After adjudication there are always further issues -- whether the parents have been rehabilitated, and whether the child should be returned home or placed for adoption. The fact is, as the Supreme Court Committee Report recognizes, that every time a child is removed from the home, the case requires legal skills and expertise beyond the competence of a social worker, in order to assure the best outcome for the child, and the prompt resolution of the child's status. It is simply not true, as HRS now suggests, that the preparation of legal documents and the appearances in court in dependency cases are "ministerial" or so simple that untrained, inexperienced social workers should be authorized to perform these functions.

The HRS Response ironically complains of "frustration and apprehension when a new and untrained juvenile judge comes on the bench." HRS asserts that "many new judges flounder about because they simply do not know basic dependency law." (HRS Response at 4) This observation, by HRS, exposes the invalidity of its own position before this Court. Because of a 50% annual turnover rate in HRS social workers, these individuals are invariably "new

and untrained" and "flounder about because they simply do not know basic dependency law." The Supreme Court Committee Report explained the inevitable result:

As the system is arranged now, HRS counselors of necessity fail their clients in two ways. First they are made to assume the role of legal advocate for their clients; since counselors' experience and training have prepared them for social work and not legal practice, their clients suffer through inadequate legal representation. Second, the time invested by counselors in preparing inadequate legal cases is time that could far better be spent improving their performance of the social service vocation for which they are trained. (Supreme Court Committee Report at 37)

There is nothing in the Supreme Court Committee Report which can justify the perpetuation of this dangerous and tragic system. If ever the rules prohibiting the unlicensed practice of law should be applied, this is the time and place for their application.

The HRS Response is almost entirely a rehash of arguments HRS made to this Court in 1987 prior to the Court's opinion. This Court has already found that the preparation of the legal documents and appearances in court at issue are the practice of law. The Florida Bar re Advisory Opinion HRS Non-Lawyer Counselor, 518 So.2d 1270, 1271-72 (Fla. 1988). This Court has already rejected, as irrelevant, statutory "authorization" for the practice of law in the courts in dependency cases. Id. at 1272. This Court has already ruled that the juvenile rules do

not authorize non-lawyer counselors to represent HRS in dependency cases. Id. at 1272. The HRS arguments to the contrary are untimely, and incorrect.

HRS also previously raised in this Court the unusual argument that since parents are not constitutionally entitled to appointment of counsel in dependency cases, it would "upset the balance" to require HRS to have counsel. This strange argument made no sense when presented to this Court two years ago, and makes no more sense today. HRS brings these cases. HRS is the petitioner, seeking to remove children from the home and to require parents to be rehabilitated or lose forever their parental rights. As the petitioner, HRS has the duty to prove its case, to carry out all of its statutory duties and to see to it that the time limitations for shelter care and foster care are not exceeded. HRS has not been able to carry out its duties because social workers are unable to perform these legal functions in court. The "balance" is already upset. Only with legal representation can HRS properly bring and pursue these cases.

Moreover, it has never been grounds to authorize an unlicensed practice of law in the courts of this State that the opposing party is appearing pro se. Rather, the Rules Regulating the Florida Bar, which prohibit the unlicensed practice of law, are premised on the long established view that "limiting the

practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." E.g. The Florida Bar v. Moses, 389 So.2d 412, 417 (Fla. 1980). The Supreme Court Committee Report plainly demonstrates that HRS must be represented by counsel in order to "protect . . . the public from incompetent, unethical, or irresponsible representation." Id.

One of the more imaginative arguments in the HRS Response is the complaint that if this Court rules that legal representation of HRS is required, and if HRS cannot pay for it, then its counselors would face criminal charges of unlicensed practice of law by appearing in court, and HRS would no longer send its counselors to court -- thereby forfeiting Federal funds. (HRS Response at 10-11) HRS has apparently forgotten that these proceedings arose in the first place because HRS sought an advisory opinion on whether its counselors were committing the unauthorized practice of law. Presumably, HRS knew that when it sought an advisory opinion from this Court it would have to comply with this Court's ruling. It is unseemly at best for HRS now to attempt to blackmail this Court for a favorable ruling by threatening not to comply with an adverse ruling.

Equally appalling is HRS' seeking in this Court to inject the political process into these proceedings, by telling this Court it cannot afford to hire counsel for its social workers,

and that the legislature "might not fund" the cost of legal representation for HRS. This argument is wrong for several reasons. Such an argument should play no part in this Court's determination of the factual and legal issues in these proceedings. HRS, in even urging a ruling on this basis seeks to establish a truly frightening precedent that an issue of law should be decided by speculation over the legislative and political process.

There is, of course, no assurance that the legislature will fund the cost (estimated by HRS at \$4.5 million) for supplying counsel in "uncontested" cases. It can equally be said that the legislature might not fund the \$3.5 million cost of the "compromise" now advocated in the HRS Response. This matter is, as always, beyond the ability of this Court to determine. It is not, however, beyond the ability of this Court to influence:

The Committee believes that the promulgation of an opinion by the Supreme Court will lead to the legislative changes and funding increases that would make a new uniform statewide system of representation for HRS an effective tool in the State's effort to protect the children of Florida from further harm. (Supreme Court Committee Report at 25)

When this Court required legal representation of indigent individuals charged with crimes subject to a jail sentence, it had no "assurance" that the cost of that representation would be paid for by the legislature. This was, however, no reason to

withhold a ruling on that legal issue. Political arguments should be made in a political forum, not in a court of law.

When HRS takes abused or neglected children into its custody, at the outset of a dependency case, it will often be obligated to pay for medical or surgical treatment of those children. HRS could not tell this Court that it has decided that its social workers, lab technicians or orderlies will henceforth perform surgery on abused and neglected children in foster care, because "the legislature might not fund the cost of hiring doctors." The HRS contention in this case is no different.

It is far from clear that the cost savings to HRS from reducing the length of time abused and neglected children spend in foster care will not offset the added cost of legal representation of HRS. (See Supreme Court Committee Report at 24.) However, even if HRS were correct, that its expenditures will go up by \$4.5 million, with no offsetting cost savings, as a result of an opinion by this Court, this Court should still adopt the recommendations of the Supreme Court Committee Report.^{2/} Abused and neglected children come into the system, never having

^{2/} The additional \$7 million cost estimate for HRS to provide counsel in contested cases is totally irrelevant to these proceedings, as even the HRS Response admits. (See HRS Response at 6 -- "that is not an issue here.") The State Attorneys Office currently is obligated to provide that legal representation, and it is unnecessary for this Court to order HRS to substitute for the State Attorneys Office in those cases.

committed any offense, and helpless to protect their own interests. It is a continuing tragedy that the State inflicts further harm on these children when they languish in shelter care and foster care long beyond the maximum time permitted by federal and state statutes.

CONCLUSION

The recommendations of the Supreme Court Committee Report will help improve the dependency system. We urge the adoption of that Report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was furnished to all addressees on the attached Service List by mail this 31st day of March, 1989.



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