

Honorable Colleen McNally  
Presiding Juvenile Court Judge  
Maricopa County Juvenile Court  
Chair, Committee on Juvenile Courts  
C/O Caroline Lauth-Owens  
Administrative Office of the Courts  
1501 W. Washington, Suite 128  
Phoenix, Arizona 85007  
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ARIZONA SUPREME COURT

In the matter of: )  
 )  
PETITION TO ADD RULE 40.2, ) Supreme Court No.  
DUTIES AND RESPONSIBILITIES OF )  
APPOINTED COUNSEL FOR PARENT )  
REPRESENTATION )  
\_\_\_\_\_ )

**I. Background and Purpose of the Proposed Rule Amendments and New Rules.**

The Arizona Supreme Court established Juvenile Rules of Procedure Rule 40.1, effective January 1, 2012, which provides Duties and Responsibilities of Appointed Counsel and Guardians Ad Litem to promote higher quality representation for children in care and to bar the appointment of untrained or poorly trained court-appointed representatives for children.

The Duties and Responsibilities of Appointed Counsel and Guardians Ad Litem are the result of several workgroups that began the work dating back to 2002. In 2009 and 2010, focus turned to drafting standards that would eventually be implemented through Administrative Order and Court Rule, rather than simply best practice standards. Through direction of the Committee on Juvenile Courts (COJC), the Court Improvement Advisory Workgroup was ultimately tasked with developing the standards. Rule 40.1

Duties and Responsibilities of Appointed Counsel and Guardians ad Litem was adopted on September 1, 2011, with an effective date of January 1, 2012. While discussions took place during that time regarding establishing standards for parent representation in dependency cases as well, the COJC agreed to move forward with standards for child representation and to address standards for parent representation once the child representation standards were adopted and implemented.

On September 26, 2013, the Dependent Children's Services Division, through the Court Improvement Advisory Workgroup, hosted a multidisciplinary summit entitled: *Hearing Their Voices: A Discussion about Parent Representation*. The results from the summit discussion were then used as a foundation for discussion by the Ad Hoc committee of the Court Improvement Advisory Workgroup, which was later assembled and tasked with developing standards for parent representation.

The Ad Hoc committee first met on January 25, 2014 and was composed of The Honorable Brenda Oldham, Chair (Juvenile Court Judge, Pinal County and now the Presiding Juvenile Court Judge in Pinal County), The Honorable Richard Weiss (Juvenile Court Judge, Mohave County), Ruel Barrus (Public Defender's Office, Mohave County), Eileen Bond (Private Practice, Yavapai County and Pro Tem Judge, Yavapai County), Brooke Gaunt (Office of the Legal Defender, Maricopa County), Laura Giaquinto (Attorney General's Office and now a Commissioner in Maricopa County), John Gilmore (Private Practice, Pima County), Maria Hoffman (Arizona Senate CPS Constituent Services Consultant and now Arizona Senate DCS Constituent Services Consultant), Joanne McDonnell (Deputy Ombudsman, Arizona Ombudsman Citizens' Aide), Bill Owsley (Office of the Legal Advocate, Maricopa County), John Phelps (Chief Executive

Officer and Executive Director, Arizona State Bar), and Joseph Ramiro-Shanahan (Private Practice, Maricopa County).

The Ad Hoc committee's work continued until a draft set of standards was ready to present to the Committee on Juvenile Courts (COJC) which occurred on May 22, 2014. On May 22, 2014 the COJC unanimously approved "sending the parent representation standards draft out for comment and move on to AJC for further action". The comment period was opened from June 16, 2014 – July 31, 2014.

After seeking and reviewing comments on the standards, the Ad Hoc Work Group reconvened and modified the draft standards. The standards were then presented again to the COJC on February 12, 2015 at which time they were adopted to be used in attorney training and were forwarded to the Arizona Judicial Council to consider supporting their implementation as Standards through an Administrative Order and supporting the filing of a rule petition to have them implemented through Court Rule. The standards were also vetted through the Superior Court Presiding Judges and then presented to the Arizona Judicial Council (AJC) on March 26, 2015. The AJC approved the attorney standards for parent representation supported their implementation through Administrative Order and eventually Court Rule. The standards became effective through Administrative Order on July 1, 2015.

## **II. Pre-Petition Distribution and Comment.**

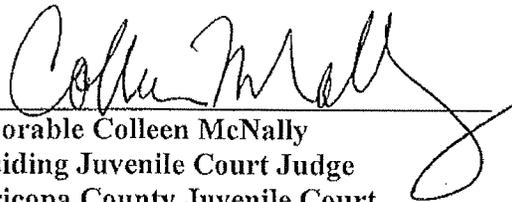
The proposed standards were widely distributed for comment from June 16, 2014 through July 31, 2014. (Please see Appendix A for distribution list.)

**III. Contents of the Proposed Rule Amendments and New Rules.**

The proposed new rule establishes Duties and Responsibilities for attorneys representing parents in Dependency cases. (Please see Appendix B for complete text of the proposed rule.)

The proposed rule is attached as Appendix B.

RESPECTFULLY SUBMITTED this 27 day of NOV 2015.

By   
Honorable Colleen McNally  
Presiding Juvenile Court Judge  
Maricopa County Juvenile Court  
Chair, Committee on Juvenile Courts

## **“APPENDICES”**

# Appendix A

## Distribution List

1. General notice to all AZ Lawyers via ELegal
2. State Bar of AZ Board of Governors
3. AZ State Bar Sections:
  - Juvenile Law Section
  - Family Law
4. AZ State Bar Committees:
  - Professional
  - Ethics
  - CLE
  - MCLE
5. AZ Attorney General's Office
6. Child and Family Protection Division Appeals Team Office
7. Maricopa County Bar
8. Pima County Bar
9. Maricopa County Public Advocate
10. Office of Maricopa County Public Defender
11. Office of Legal Advocate
12. Office of the Legal Defender
13. Maricopa County Contract Attorneys
14. Pima County Contract Attorneys
15. Coconino Juvenile Defense Attorneys
16. Mohave Juvenile Defense Attorneys
17. Pinal Juvenile Defense Attorneys
18. Yavapai Juvenile Defense Attorneys
19. Court Appointed Special Advocates
20. Foster Care Review Boards
21. Court Improvement Website
22. Arizona Ombudsman-Citizens' Aide Office
23. Arizona Senate CPS Constituent Services Consultant

## Appendix B

### Rule 40.2 Duties and Responsibilities of Appointed Counsel for Parent Representation

- A. The attorney must promptly identify any potential and actual conflicts of interest that would impair his or her ability to represent the parent. The attorney must, if necessary, move to withdraw. An attorney must not accept more cases than he or she can ethically handle.
- B. The attorney must inform the parent of the attorney's role and ethical obligations, including the concepts of privilege and confidentiality.
- C. The attorney must review the allegations of the dependency petition and explain to the parent the nature of the proceedings including terminology, timelines and courtroom protocol, his or her legal rights regarding the dependency action, various parties and participants associated with the action, ways that the parent can affect case outcomes, consequences of the parent not attending hearings, and possible consequences of being placed on the DES Central Registry.
- D. The attorney must explain all requirements outlined in the case plan and court orders.
- E. The attorney must, as required, participate in discovery, file pleadings, subpoena witnesses, provide the parent with disclosure and court documents and develop the parent's position for each hearing. The attorney must ensure the court is notified when an interpreter is needed. If a parent is incarcerated, the attorney must ensure that the proper notice or motion is filed with the court in order for the parent to participate in the hearing.

The duties of the attorney include advocating for appropriate services for the parent and explaining the procedural and substantive status of their case.
- F. The attorney must communicate with the parent before the preliminary protective hearing, if possible or soon thereafter. The attorney must establish procedures for regular communication with a client. Prior to every substantive hearing, the attorney must communicate with the parent and must reply to communications from a client in a timely manner.
- G. Attorneys must be familiar with the child and public welfare systems, and community-based organizations serving parents and how services are accessed. Examples of such services are behavioral health, substance abuse treatment, domestic violence services, developmental disability, health care, education, financial assistance, counseling support, family preservation, reunification and permanency services.

Attorneys must be familiar with the substantive juvenile law. Attorneys must stay abreast of changes and developments in relevant federal and state law and regulations, Rules of Procedure for the Juvenile Court and case law. Attorneys

must complete an introductory six (6) hours of court approved training prior to their first appointment unless otherwise determined by the presiding judge of the juvenile court for good cause shown and an additional two (2) hours within the first year of practice in juvenile court. All attorneys must complete at least eight (8) hours each year of education and training specifically on juvenile law and related topics such as child welfare policy and procedures, substance abuse and addiction, mental illness and treatment options, psychological evaluations (how to read), domestic violence, the effects of trauma, cultural awareness, social issues surrounding families involved in the dependency process, motivational interviewing, child and adolescent development, (including infant/toddler mental health), the effects of parental incarceration, the Indian Child Welfare Act, parent and child immigration issues, the need for timely permanency, and other training concerning abuse and/or neglect of children. Some or all of this training and continuing education may qualify as mandatory Continuing Legal Education under State Bar of Arizona requirements.

Attorneys must provide the presiding judge of the juvenile court with an affidavit of completion of the six (6) hour court approved training requirement prior to or upon their first appointment as attorney or guardian ad litem for a parent after the adoption of these standards unless a waiver of this requirement has been obtained from the presiding judge of the juvenile court in which the appointment is to be made. The affidavit of completion must include a list of courses including the name of the training, the date of the training, the training provider and the number of hours for each course.

All attorneys must file annually an affidavit with the presiding judge of the juvenile court certifying their compliance with this section. Such affidavit must be filed concurrently with the affidavit of compliance with State Bar MCLE and must include a list of courses including the name of the training, the date of the training, the training provider and the number of hours for each course.

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2 Arizona Bar Membership No. 014871  
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8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

10 PETITION TO ADD RULE 40.2,  
11 ARIZONA RULES OF PROCEDURE  
12 FOR THE JUVENILE COURT

Supreme Court No. R-15-0040

**Comment of the Arizona Public Defender  
Association in Response to Judge  
McNally's Request to Add Rule 40.2**

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15 Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Arizona Public  
16 Defender Association (APDA) submits its Comment regarding the Petition to Add Rule  
17 40.2 of the Arizona Rules of Procedure for Juvenile Court filed by Judge Colleen McNally,  
18 R-15-0040. APDA is an Arizona non-profit corporation comprised of public defense  
19 offices and programs throughout the State of Arizona. The primary purposes of our  
20 organization include improving the quality of legal representation of indigent people who  
21 face the loss of liberty or the right to parent, and ensuring a just legal system. Our offices  
22 defend the overwhelming majority of individuals who are involved in a Title 8 dependency  
23 or severance actions.  
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26 Proposed Rule 40.2, Rules of Procedure for Juvenile Court (the proposal), has been  
27 requested by Judge Colleen McNally of Maricopa County. The proposal should be denied.  
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1 According to Judge McNally’s petition, the proposal was open for comment for six weeks,  
2 from June 16, 2014 to July 31, 2014. However, based upon some of the comments, it  
3 appears that the original proposal subsequently was modified. The modified version of the  
4 proposal was not made available for comment prior to being adopted by the Committee on  
5 Juvenile Courts. Furthermore, it is unknown whether the Committee on Juvenile Courts  
6 and the Arizona Judicial Council were made aware of opposition to the proposal.  
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9 As attorneys licensed to practice law by the State Bar of Arizona, our ethical duties  
10 are codified in the Rules of Professional Conduct promulgated by the Arizona Supreme  
11 Court. Failure to ethically and zealously represent a client can result in a complaint for  
12 misconduct, pursuant to Ethical Rule (ER) 8.4. After conducting an investigation, the State  
13 Bar of Arizona may discipline an attorney for failing to meet the obligations and duties  
14 owed to a client. Penalties range from a reprimand to disbarment, pursuant to Rule 46 of  
15 the Rules of the Supreme Court of Arizona. The additional guidelines contained in the  
16 proposal are unnecessary and a duplication of duties and responsibilities already owed to  
17 all clients.  
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20 The proposal mirrors existing guidelines for child representation. However, adults  
21 do not require the same safeguards as children. Adults are not inhibited from expressing  
22 their dissatisfaction with their counsel. In dependency cases, it is not uncommon for a  
23 parent to request new counsel when the parent believes his or her needs or position is not  
24 being advocated. The judge has the ability to grant or deny the parent’s request.  
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1           Furthermore, all participants in the courtroom have an ethical duty to report  
2 behavior they believe violates the ethical rules, pursuant to the Rules of Professional  
3 Conduct, E.R. 8.3, and Arizona Code of Judicial Conduct, Rule 2.15. A judge has the  
4 ability to inquire if the parent has any concerns and address those concerns. The Assistant  
5 Attorney General, the Guardian ad Litem and the other parent’s counsel have a duty to  
6 inform the court or the State Bar if they believe a parent is not being adequately  
7 represented. The judicial system places an ethical obligation on its members to hold one  
8 another accountable, thus protecting the clients.  
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11           Although the proposal contains a skeleton outline of the duties an attorney owes to a  
12 parent client, the proposal does not provide clear guidance and ignores the duties of a  
13 Guardian Ad Litem for a parent. (While the introductory paragraph suggests that the  
14 guidelines apply to Guardian Ad Litem for parents, the guidelines never address the role  
15 of a parent Guardian ad Litem.)  
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18           Section A requires an attorney to promptly identify potential and actual conflicts of  
19 interest, and not accept more cases than the attorney can ethically handle. The Rules of  
20 Professional Conduct, ER 1.7 and 1.9, address conflicts of interest involving current and  
21 former clients. The ethical rules are clear: an attorney may not represent an individual  
22 whose interest would be adverse to a current client or former client. It is the duty of every  
23 attorney to perform a conflict check before accepting a client, regardless of the area of law  
24 practiced.  
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1           The Rules of Professional Conduct address the number of cases an attorney may  
2 handle. Ethical Rule 1.3, Comment 2 states that, “[a] lawyer's work load must be  
3 controlled so that each matter can be handled competently.” Licensed attorneys are  
4 obligated to take only as many cases to which they can devote sufficient time and  
5 resources. Should an attorney take too many clients, the attorney is subject to State Bar  
6 discipline.  
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9           Section B of the proposal states that an “attorney shall make clear to the parent the  
10 attorney’s role and ethical obligations,” but does not define the role or the ethical  
11 obligations. Who determines if the attorney has fulfilled an obligation? How will the  
12 court ascertain if the attorney fulfilled an obligation without asking the attorney or client to  
13 violate attorney-client privilege. The Rules of Professional Conduct, E.R. 1.6, prohibit an  
14 attorney from revealing information obtained from a client.  
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17           Ethical Rule 1.4 describes the ethical obligation owed by the attorney to the client.  
18 The rule requires attorney to provide the client with information sufficient to enable the  
19 client to participate intelligently in decisions concerning the objectives of the  
20 representation and the means by which they are to be pursued. (Comment 5 to Ethical  
21 Rule 1.4). In order for an attorney representing a parent in a dependency matter to comply  
22 with ER 1.4, the attorney would have to discuss the petition, allegations, client’s rights,  
23 pleas, court hearings, services, possible dispositions and the Arizona Department of Child  
24 Safety (DES) Central Registry. The parent determines whether to contest the allegations in  
25 the petition, in order to make an informed decision the attorney will have to provide the  
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1 parent with all relevant material to facility the decision. A parent’s attorney is focused  
2 upon assisting the client in achieving the goals, and never upon shortchanging the client.  
3

4 Section D of the proposal states that an “attorney must explain all requirements  
5 outlined in the case plan and court orders.” Section D presupposes that a parent is required  
6 to follow the whims of DCS. However this is an erroneous assumption. Often, parents do  
7 not agree with DCS regarding cookie cutter family-reunification services. The court, and  
8 not DCS, decides which family-reunification services are required. Therefore, while a  
9 parent must follow court orders, a parent is not obligated to cow tow to every capricious  
10 DCS demand.  
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13 Moreover, the proposal impermissibly shifts DCS’s duties to the parent’s attorney.  
14 Section D of the proposal requires the attorney to “clearly explain all requirements  
15 outlined in the case plan.” However, DCS determines which agencies and service  
16 providers they will utilize to fulfill the requirement. Each agency and service provider has  
17 their own rules and requirements. Section G of the proposal requires the attorney to be  
18 familiar with the community-based organizations serving parents and how services are  
19 accessed. One can only assume that, because DCS has not been able to timely refer  
20 parents to appropriate services, that the responsibility is now being shifted to parents’  
21 counsel. However, knowing which services are available in the community will do little to  
22 assist the parent. Service providers require referrals from DCS. Furthermore, DCS will  
23 not recognize services not predicated upon DCS referrals.  
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1 Section E of the proposal contains a laundry list of actions an attorney must take in  
2 order to competently represent a client. Ethical Rule 1.1 already requires a lawyer to  
3 utilize legal knowledge, skill, thoroughness and preparation to represent a client.  
4 Thoroughness and preparation necessitates the lawyer develop the parent's case through  
5 the discovery, filing of motions and subpoenaing of witness and documents. Moreover,  
6 Ethical Rule 3.4 (c) prohibits a lawyer from knowingly disobeying an obligation under the  
7 rule.  
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10 Section E of the proposal further states an attorney must advocate for appropriate  
11 services for the parent. The requirement that an attorney advocate for appropriate services  
12 violates ER 1.2, Scope or Representation and Allocation of Authority between Client and  
13 Lawyer. ER 1.2(a) requires a lawyer to abide by a client's decisions concerning the  
14 objectives of representation. Furthermore, the preamble to the Arizona Rules of  
15 Professional Conduct states, "[a]s advocate, a lawyer asserts the client's position under the  
16 rules of the adversary system." Counsel for a parent may only advocate for those services  
17 that the parent is requesting. An attorney may not substitute their opinion regarding  
18 services.  
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22 Ethical Rule 1.4, entitled Communications, clearly delineates attorneys' ethical  
23 obligations to clients regarding communications. Rule 1.4 requires attorneys to (1) consult  
24 with their clients regarding means by which the clients' objectives are to be met, (2) keep  
25 the client reasonably informed about the status of their case, (3) promptly comply with  
26 request for information, and (4) inform the client of any circumstance that requires their  
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1 informed consent. In order for an attorney to know how to proceed regarding the issue of  
2 dependency, visitation, services, placement, guardianship and severance, the client and  
3 must communicate in advance of the hearing. A competent and diligent attorney will  
4 return phone calls and emails, and communicate with the client in advance of each hearing.  
5 However, many of the conversations regarding Report and Review Hearings are fruitless,  
6 because DCS rarely provides the report more than forty-eight to twenty-four hours in  
7 advance of the hearing.  
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10 Section F of the proposal requires the attorney to establish procedures for regular  
11 communication with the client. Communication between a client and the attorney should  
12 be based upon the needs and wants of the client, and not an arbitrary procedure that may  
13 not meet the needs of the client. Many dependency/severance clients are homeless, and  
14 thus communication procedures need to be flexible to meet the needs of the client.  
15 Further, some clients not want unsolicited contact with their attorney. Parents have so  
16 little power in the dependency system that an attorney should not intrude into a client's  
17 private life without an invitation. Ethical Rule 1.4 of the Rules of Professional Conduct  
18 sufficiently safeguards the responsibility of an attorney to have communications with a  
19 client.  
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23 Furthermore, the State Bar of Arizona requires members to complete fifteen hours  
24 of continuing legal education a year. With the exception of Professional Responsibility,  
25 the State Bar does not mandate the courses an attorney must take. However, attorneys  
26 often seek out courses in their area of practice. Attorneys select courses that increase their  
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1 knowledge and level of expertise. The introductory course described in the proposal may  
2 not meet the needs of the participants. Moreover, it may lull some attorneys into a  
3 misconception that by taking the course they are qualified to represent parents in  
4 dependency cases. The majority of attorneys who practice in juvenile court have dedicated  
5 far more than six hours mandated by the proposal to learning the law, relevant cases and  
6 process of dependency matters.  
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9       Lastly, mandating all attorneys to take a specific introductory course in order to be  
10 appointed to represent parents is outside of the court's authority. The court has the ability  
11 to determine if an individual is indigent and appoint counsel. However, in many  
12 jurisdictions, including Maricopa County, the responsibility for assigning an attorney to a  
13 case lies with the indigent representation offices and the Office of Contract Counsel. The  
14 independent indigent representation law offices determine who is competent to represent  
15 parents in dependency matters. The offices are able to take into consideration the  
16 attorneys' experience and education, thus ensuring only competent attorneys are appointed.  
17 Many of the offices provide in-house training. Moreover, the Arizona Public Defender's  
18 Association provides two conferences a year that offer courses on dependency law.  
19 Parents' attorneys have the ability to learn from very experienced attorneys in the field.  
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23       The court has over stepped its role by promulgating the Best Practice Guidelines for  
24 Parent Representation and requesting Rule 40.2. All attorneys who practice in Arizona  
25 must comply with the Ethical Rules of Professional Responsibilities. An attorney who is  
26 not in compliance may be reported to the State Bar and appropriately disciplined.  
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1 Furthermore, the proposal is arbitrary and capricious because it applies only to those  
2 attorneys who are court appointed. Privately-retained attorneys are completely exempt  
3 from all requirements of the proposal. There is no logic in this. Either all parents'  
4 attorneys require unnecessary and duplicitous regulations, or none do. APDA respectfully  
5 request Proposed Rule 40.2 not be adopted.  
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7  
8 RESPECTFULLY SUBMITTED this 3rd day of May, 2016.

9  
10 /s/ Christina Phillis  
11 Christina Phillis  
12 On behalf of APDA

13 Electronic copy filed with the Clerk of the  
14 Supreme Court of Arizona this 3rd day of  
15 May, 2016.  
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