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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.
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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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8 RESPECTFULLY SUBMITTED this 3rd day of May, 2016.

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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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