

*Law Office of the  
Pima County Public Defender*

February 21, 2020

Dear Attorney Ethics Advisory Committee:

Attached, please find our office's comments to Ethics Draft Opinion No. EO-19-0003. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Joel Feinman  
Pima County Public Defender

**THE NECESSITY FOR CONFIDENTIALITY PROTECTION OVER NON-LAWYER ASSISTANTS IN THE  
PUBLIC DEFENDER'S OFFICE:**

**A Comment to Arizona Ethics Draft Opinion No. EO-19-0003**

**I. INTRODUCTION**

The Arizona Supreme Court Ethics Advisory Committee recently published a draft opinion, open for public comment, regarding the ethical obligations of client confidentiality for non-lawyer assistants and mandatory reporting obligations. Under this draft opinion, a non-lawyer assistant (*i.e.* a social worker), is obligated by law to report physical injury, abuse, or neglect of a minor when the lawyer is not otherwise required to do so. It is the decision of the client whether to utilize the services of the social worker.

For the indigent defendants at the Public Defender's Office, who wish to use the resources of a social worker or other non-lawyer assistant, the mandatory disclosure requirement compromises the defendant's constitutional rights. Chiefly, it compromises the defendant's right to full and effective representation, right to make fully informed decisions on trial preparation and strategy, plea decisions, potential trial exposure, and infringes upon protections against self-incrimination. Additionally, the disclosure requirement compromises State's interest in protecting their Victim's Services Division.

The new disclosure requirement also has a profound and devastating impact on some of the alternative courts and resources utilized by indigent clients in Pima County. This includes defendants who are eligible for certain specialty courts such as mental health and drugs courts; as well as juvenile defendants and parents in our dependency units.

Because of this E.R. 1.6, which mandates confidentiality between lawyer and client relationships, must extend to non-lawyer assistants when employed or used for public defense.

## II. WHY NOT JUST FOREGO THE SOCIAL WORKER?

The inevitable retort to allowing E.R. 1.6 to extend to non-lawyers is that the defendant has the “option” of foregoing use of the non-lawyers services should the defendant believe that the mandatory disclosure requirements would be incriminatory. After all, the Ethics Draft Opinion itself suggests “*it is the decision of the client whether to utilize the services of the social worker.*”

However, this “choice” fails to consider the unique position an indigent defendant is placed in. It dismisses the integral function of the use of non-lawyer assistants in adjudicative decision making for indigent defense. This “choice” presents a false dichotomy where a defendant is forced to “choose” between utilizing the full panoply of resources in public defense services, and potentially incriminating themselves in the process, *or* foregoing the most effective means of public defense representation altogether. The use, or non-use, of non-lawyer assistants affects the two most important decisions a defendant makes: the decision to accept or deny a plea and the decision to testify. It also affects a whole host of the defendant’s constitutional rights. Finally, the mandatory disclosure rule unfairly favors the State in the utilization of non-lawyer assistants.

### **a. Affects plea decisions**

[The] voluntariness of a plea of guilty can be determined only by considering all of the relevant circumstances surrounding it. *Brady v. United States*, 397 U.S. 742, (1970) Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences. *Id.*

One of the most important decisions a defendant makes in the criminal process is whether to accept a plea agreement or go to trial. With the assistance of a social worker, the defendant may choose to take a plea because the social worker would uncover exculpatory information that could, can, and would mitigate their potential sentencing range. For example, the social worker

can uniquely evaluate the defendant's upbringing and socioeconomic circumstances that a judge must consider in determining potential sentencing. The social worker is also uniquely qualified to uncover evidence regarding the defendant's mental health, substance abuse, brain development, medical conditions, social development, and age factors.

If the defendant is required to forego effective mitigation evaluation, for fear of mandatory disclosure requirements, the defendant may not be able to determine all of the relevant circumstances that would affect their sentencing should they accept a plea agreement. Instead, the defendant may be pigeon-holed into trial because they have less mitigating information to present to the court upon sentencing. The lawyer is also provided less information to provide to the defendant when thinking about effective mitigation strategies and plea decision making without the assistance of a social worker.

**b. Affects the decision to testify**

An equally important right for the criminal defendant is their decision to testify in their own defense. In the Public Defender's Office, our non-lawyer assistants, such as our investigators and social workers, work arm in arm to assist in indigent defense. These investigators and social workers assist to prepare the defendant if and when they decide to testify. An already nerve wracking decision, that can and does affect the ultimate outcome at trial, can be further exacerbated by the potential inculpatory information that may be revealed through full and frank discussion of one's case.

If a defendant chooses to utilize investigators or social workers (both non-lawyer assistants), they will have a leg up on potential information that could be used in cross-examination. The defense attorney can assist the defendant in that preparation. However, if the defendant chooses to forego those resources (for fear of retaliation under the mandatory reporting statute), the defendant's decision to testify would be compromised. Additionally, the social worker provides a unique lens in the full scale evaluation of a defendant's competency to

fully assist in their defense *and* whether they are competent to make such the decision about testifying at all.

**c. Affects the State as well as Defense**

In the context of the utilization of non-lawyer assistants, the County Attorney's Office has had these resources at its disposal for 40 years.<sup>1</sup> The Victim Services Division at the Pima County Attorney's Office assists victims at crime scenes and at court hearings, providing support for crime victims and guiding them through the criminal justice system. However, the change in this ethical rule could affects victims in the County Attorney's office just as much as it would affect criminal defendants. This ethical rule requiring social workers to be mandatory reporters could also prevent victims from getting services if they are fearful of additional allegations of abuse, neglect, or criminal charges.

Additionally, defendants at the public defender's office who are fighting for their constitutional rights have their abilities to express the full details of their case jeopardized by mandatory disclosure requirements. If a defendant wishes to utilize non-lawyer assistants, the defendant is forced to be careful about what they say or forego the use of the non-lawyer assistant all together.

**III. Mandatory Disclosure and an Indigent Defendant's Constitutional Rights**

The new mandatory reporting statute would jeopardize many of the defendant's constitutional rights in direct violation of the Federal supremacy clauses. The Supremacy Clause of the Constitution of the United States, Article VI, Clause II, establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "supreme Law of the Land," and thus take priority over conflicting state law. The reporting statute violates a defendant's 5<sup>th</sup> amendment protections against self-incrimination, their due process rights, and the Equal Protection clause.

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<sup>1</sup> <https://www.pcao.pima.gov/victimservicesdivision.aspx>

This is directly antithetical to the preemption doctrine. The preemption doctrine derives from the Supremacy Clause of the Constitution which states that the "Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding." This means of course, that any federal law--even a regulation of an ethics committee--trumps any conflicting state law. *See e.g. Pennsylvania v. Nelson* 350 U.S. 497 (1956).

**a. 5<sup>th</sup> Amendment Protections against Self Incrimination**

The Fifth Amendment to the U.S. Constitution creates a number of rights relevant to both criminal and civil legal proceedings. In criminal cases, the Fifth Amendment guarantees the right to a grand jury, forbids "double jeopardy," and protects against self-incrimination. The Arizona Constitution Art. II § 10 provides that no person shall be compelled in any criminal case to give evidence against himself. Additionally, the privilege against self-incrimination should be interpreted liberally in favor of those to be protected. *Wohlstrom v. Buchanan*, 180 Ariz. 389, (1994).

By revealing to their lawyer the details and life circumstances of the defendant's case, in the process, they place themselves at risk of self-incrimination. Should information get relayed to a non-lawyer assistant through the course of representation, the defendant faces not only the charge(s) that require initial representation, but may face subsequent charges that manifest as a result of the mandatory reporting statute. This abridges the defendant's 5<sup>th</sup> amendment fundamental protection against self-incrimination, Art. II § 10, and is unconstitutional. Therefore, E.R. 1.6 must extend to non-lawyer assistants when preparing for a defense.

**b. 6<sup>th</sup> Amendment Right to Counsel**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. CONST. AMEND. VI. *See also* ARIZ. CONST. Art. II § 24. *See also Strickland v. Washington*, 466 U.S. 668, (1984) (Proper standard for attorney performance is that of reasonably effective assistance.)

Non-lawyer assistants are an arm of the Public Defender's Office. By extension, they work to defend and prepare a defendant's case. The defendant's right to prepare their defense and work most effectively with their attorney is impeded under the mandatory reporting statute. There exists a general sense of distrust and lack of confidence when the attorney is forced to tell their client that, should they choose to effectively utilize all the resources available to them, they may implicate themselves in an additional crime. Because the non-lawyer assistants of the public defender's office, are by nature utilized for criminal defense, they must be afforded the same level of client-confidentiality as owed to the defendant by their lawyer. To deny this right destabilizes the defendant's 6<sup>th</sup> amendment right to effective assistance of counsel.

### **c. 14<sup>th</sup> Amendment Equal Protection**

Section I of U.S. Const. Amend. XIV states "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" Art II § 13 of the Arizona Constitution states "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong *to all citizens* or corporations."

The Equal Protection Clauses of both the state and federal constitutions generally require that all persons subject to state legislation shall be treated alike under similar circumstances. *State v. Russo*, 219 Ariz. 223, 196 P.3d 826 (Ct. App. 2008).

A potential argument against allowing E.R. 1.6 to extend to non-lawyers is that the defendant need not fear self-incrimination if the nature of their case does not require mandatory reporting. However, this implicates a number of the Office defendant's equal protection rights. The Public Defender's Office does not choose which cases it represents. The office represents the full spectrum of criminal defenses from simple possession to child abuse to First Degree Murder. The defendant's right to representation should not be compromised purely because of the nature of their offense.

To deny the defendant the ability to discuss their case with non-lawyer assistants, is to deny their equal protection and due process rights under the law. There is no level of scrutiny that exists for classifying defendants differently merely because of the nature of the allegations against them.<sup>2</sup> The mandatory reporting obligation forces the Public Defender's Office to discriminate between offenses; which is a violation of the Equal Protection Clause.

#### **IV. *Mandatory Disclosure Requirements in Specialty Courts, Juvenile Courts, and Dependency Cases***

##### **a. Specialty Courts**

Pima County has wonderful alternative programs and resources available to its members in our justice system that successfully rehabilitate them back into our community. Among them are Drug Court, the Drug Treatment as an Alternative to Prison (DTAP) program, and Mental Health Court.

Drug Court and DTAP provide criminal defendants with opportunities for treatment and counseling to assist the catalyst to their arrest: substance abuse. Drug Court is a probationary

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<sup>2</sup> Barring perhaps selectively carved out capital cases. See *e.g. Gregg v. Georgia*, 428 U.S. 153 (1976). (requiring additional aggravating factors for the State to impose a sentence of death.)

program that ensures defendants are participating in treatment. The DTAP program enables drug addicted criminal defendants to plead guilty to an offense and then enter a residential, therapeutic community treatment system for three years as an alternative to a prison sentence. This program begins with three months of in-patient, residential drug treatment followed by wraparound recovery support services managed by a resources specialist, including transitional housing, literacy services, higher education, job training and placement services, and counseling, accompanied by drug testing, probation monitoring and regular court hearings. The Pima County Attorney's Office states that DTAP saves money, saves lives, and reduces crime.<sup>3</sup>

These programs save Pima County taxpayers thousands, if not millions, of dollars that it would cost to incarcerate, prosecute, and take these folks to trial. Pima County has recognized that the best course of action for these individuals is not to place them in our criminal justice system through the traditional route; but instead provide tailored treatment.

Naturally, the success of specialty courts requires a set of skills not taught in American law schools. A criminal defense attorney can work diligently and successfully on a mental health eligible or DTAP client regarding the legal aspects of their case, however they are not trained on how to navigate the unique challenges and behavioral concerns that social workers learn through their training and education. The ability to pursue treatment through specialty courts is compromised by a defendant's fear about the mandatory disclosure requirements.

A defendant seeking the resources of counselors and social workers, employed to assist in their case as they navigate one of Pima County's Specialty courts, cannot openly discuss all issues that may arise with their children or familial circumstances if they are fearful of self-incrimination. Worse still, the defendant may conceal or hide information from their attorney or their non-lawyer assistant if they are informed that they may be reported if they disclose compromising information. This encourages recidivism, incarceration, and relapse.

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<sup>3</sup> <https://www.pcao.pima.gov/documents/DTAP%20Brochure%20FINALupdate%202.14.17%20moh.pdf>

**b. *Juvenile Courts and Dependency Units***

The Juvenile Division is responsible for the defense of delinquent and incorrigible children between ages eight and eighteen.

Unlike most adult criminal cases, which are heard by a jury, juvenile cases are adjudicated by a judge with the ultimate goal of rehabilitating a juvenile offender in a manner that also ensures public safety. There is no mandatory sentencing for juvenile crimes. Many first time offenders may be eligible for pre-filing diversion programs, which may include consequences such as community service, letters of apology, or behavioral and cognitive classes.<sup>4</sup>

Because the primary objective of the juvenile court is rehabilitation, the juvenile defendant works closely with social workers and other non-lawyer assistants to get them back on track. Most juveniles in the system encounter familial issues and abuse. If communication between the juvenile and non-lawyer assistant is subject to the mandatory reporting statute, there is a grave chance a juvenile will conceal information necessary to assist in their rehabilitation. Many non-lawyer assistants visit these children in detention. These individuals are critical to the discovery of vital information relating to the juvenile defense. The non-lawyer assistant gathers information necessary for the lawyer to determine what resources and services to connect the juvenile with to aid in their rehabilitation. If the relationship between non-lawyer assistants and juvenile defenders is jeopardized, the juvenile is unable to receive the best proper assistance to rehabilitate themselves before they become adult offenders.

Similarly, the Pima County Public Defender Dependency Unit assists in aiding members of the Tucson community with unique issues within the family. The Dependency Unit represents parents who have temporarily lost custody of their children to the Department of Child Safety (DCS) due to allegations of abuse or neglect, as well as parents who are facing termination of

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<sup>4</sup> <https://www.maricopacountyattorney.org/165/Juvenile-Division>

their parental rights either through a private action or at the request of DCS. The Dependency Unit provides representation to parents from the initial stages of a DCS case until the case has concluded either through reunification of the family or other means. It is the goal of the Dependency Unit to provide thorough legal representation to assist our client's navigate the dependency process and achieve the best possibly outcome for their family. In an effort to provide holistic representation to parents, and by extension families, the Dependency Unit works with social workers to provide direction and advice to parents who are working DCS case plans to regain custody of their children.

This includes identifying appropriate services such as drug/alcohol counseling, individual therapy, parenting classes, and community resources for jobs and housing. It is necessary for the social workers, and non-attorney staff, to obtain background information, current status, and details related to the allegations and issues that led to DCS becoming involved with the family. This information sometimes contains details that need to be kept confidential, but are still necessary to assisting the client in identifying and obtaining the appropriate services. If the social workers and non-attorney staff are unable to receive any and all information related to the allegations, including those specifically relating to child abuse, then they are unable to fully assist the client and determine if the services being propose and offered by DCS are sufficient to remedy the issues that are affecting the family.

The attorneys in the Public Defender's office simply do not have enough time to provide the full array of services that non-lawyer assistants can provide. The mandatory reporting statute affects the current ability of mitigation specialists and social workers to assist these clients. The client should be able to have full and frank discussions with social workers and have the expectation that the utilization of these services are not going to result in a report to law enforcement or DCS. The current Ethics Opinion issued by the Arizona Supreme Court allows for no such discretion.

V. *Balancing of Government Interest in Mandatory Disclosure vs. a Defendant's Constitutional Rights*

a. **State Interest in Mandatory Disclosure Statute**

The purported purpose of A.R.S. § 13-3620, which governs the mandatory reporting requirements, is to report suspected instances of child abuse or neglect. See A.R.S. § 13-3620 (A.) The statute accounts for specific members of the public who either supervise or care for children, as their primary occupation, or other equally paternal role such as a doctor or dentist. Certainly, one would not argue that if a child's physician had suspected abuse to the child, it would be in the child's best interest for the physician to make a report to the appropriate authorities.

However, the same duties of disclosure do not apply when the defendant is seeking an independent evaluation from a social worker when marshalling his own defense. The non-lawyer assistant is not indebted to the interest of the child, in any particular adult defense case. Instead, the non-lawyer assistant should and does serve the best interests of the defendant. Additionally, compromising a defendant's constitutional rights through a mandatory ethical rule is an unpersuasive argument because other departments and agencies are better equipped to protect the child's interest. If the statute requires the parent's counselor to disclose if the parent admits to abusing their child, there are other parties who protect the safety of children, such as the Department of Child Safety. It does not follow that the Court should employ a mandatory ethical rule that governs disclosure when there are already existing agencies that do not similarly compromise the defendant's constitutional rights.

b. **Weighed against Defendant's Interest**

As stated at length previously, the State's interest in the mandatory reporting statute does not outweigh concepts of fundamental fairness and due process of law for the indigent criminal defendant. By requiring non-lawyer assistance to turn the Office's defendants in for potential

crimes committed under the mandatory reporting statute, the defendant's constitutional rights and ability to fully and effectively prepare their defense is intrinsically compromised. Because of this, E.R. 1.6 must extend to non-lawyer assistance when employed or utilized for the preparation of Public Defense.