

OFFICE OF THE PUBLIC DEFENDER
MARICOPA COUNTY

JAMES J. HAAS
Public Defender

January 28, 2020

To: Attorney Ethics Advisory Committee
From: James J. Haas
Re: EO 19-0003

The Maricopa County Public Defender's Office requests the Attorney Ethics Advisory Committee (AEAC) consider this comment in reaching it's final opinion in EO 19-0003.

A.R.S. §13-3620(A)(1) requires certain listed professionals, including social workers¹, to report child abuse or neglect when the professional has learned of the abuse or neglect "in the course of treating a patient." The AEAC's Ethics Opinion 19-0003 concludes that when a lawyer employs one of these listed professionals to assist in the representation of a client, the attorney must advise the client that the non-lawyer assistant could be obligated by law to report child abuse or neglect learned in the course of that representation. The AEAC further concludes that the client must then decide whether the representation should include assistance from the listed professional.

This directive is overbroad and reflects an inaccurate application of the law. While a client advisement as described in the AEAC's draft opinion is necessary if or when a lawyer retains a social worker to treat a case-involved person, such an advisement should not be required when a social worker is hired to perform non-treatment work as a non-lawyer assistant.

It would significantly chill the attorney-client relationship, and potentially limit the quality of representation a client receives, if a lawyer was obligated to advise a client that non-lawyer assistants may be subject to the mandatory reporting laws when, in fact, they are not. The type of information that must be obtained by lawyers and their assistants in developing defenses or mitigation in a client's case is highly sensitive and often extremely painful for clients and their families to discuss. A relationship of trust, with legally accurate assurances of confidentiality, is paramount to obtaining this critical information.

¹ A social worker is broadly defined in A.R.S. § 36-501(44) as " a person who has completed two years of graduate training in social work in a program approved by the council of social work education and who has experience in mental health."

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Downtown Justice Center • 620 West Jackson, Suite 4015 • Phoenix, Arizona 85003
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It is common practice for criminal defense attorneys to hire medical professionals, behavioral health professionals, and social workers to assist in preparing the defense of a case. In fact, the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases mandates the inclusion of a mental health professional as a member of the defense team.² Persons with social work training, who may or may not maintain their state licensing, are commonly hired to work as “mitigation specialists” by criminal defense attorneys for assistance in both capital and non-capital cases.

The Maricopa County Public Defender’s Office currently employs 26 mitigation specialists, nearly all of whom hold a bachelors or higher degree in social work, psychology, or other behavioral health related field and 4 of whom maintain an active social work or therapy license. The primary role of the mitigation specialist is to obtain a client’s social history information through interviews of the client, client’s family and collateral sources, obtain medical and educational records, recommend mental health related experts that could provide additional insight into the client’s circumstances, and to ultimately draft a report for the lawyer that can be used in plea negotiations or sentencing arguments. Mitigation specialists may also locate treatment services in the community to assist in securing the pre-trial or post-conviction release of a client. This work is done at the direction of the attorney to further the legal representation of the client. These non-lawyer assistants do not engage in treating the defendant or any other case-involved person. They do not provide therapy, counseling, or medication to the client or other case-involved persons.³

In addition to social workers, the Maricopa County Public Defender’s Office routinely retains medical and mental health professionals in various non-treatment capacities to assist in preparing the defense of a case. For example, psychologists and psychiatrists may be retained to assess a defendant’s mental health status, administer psychological testing, suggest diagnosis, and consult on case-related matters. Physicians and nurses may be retained to assess alleged victims’ or defendants’ injuries and provide opinions to the lawyer about the cause of those injuries. These medical and mental health professionals, while using their professional training and expertise in the course of the client’s legal representation, are not tasked with providing treatment to clients or other case-involved persons. Furthermore, the Public Defender’s Office may employ paralegals, secretaries, clerks or other non-lawyer assistants who have social work or behavioral health backgrounds but, as with the social workers employed as mitigation specialists, are hired to perform duties that do not fall within the ambit of A.R.S. § 13-3620(1).

² “ The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” (2003 ABA Guidelines 4.1(2)).

³ Neither A.R.S. § 13-3620 nor A.R.S. § 32-3251 define the term “treatment” but § 32-3251(10) does distinguish “treatment” from other functions a social worker may perform (“Practice of Social Work means the professional application of social work theories, principles, methods and techniques to: (a) Treat mental, behavioral and emotional disorders. (b) Assist individuals, families, groups and communities to enhance or restore the ability to function physically, socially, emotionally, mentally and economically. (c) Assess, appraise, diagnose, evaluate and treat individuals, couples, families and groups through the use of psychotherapy.”).

The current draft of the AEAC's EO 19-0003 suggests that a lawyer would always need to advise a client about the disclosure "risks" of working with any non-lawyer assistants who also meet the qualifications of those professionals listed in A.R.S. § 13-3620(1), even if the services provided by the non-lawyer assistants are not within the scope of A.R.S. § 13-3620's reporting requirements. Taking the draft opinion to its logical conclusion, a lawyer who hires a data entry clerk holding a degree in social work would be obligated to inform the client that the clerk may be mandated to report abuse learned from the client's file, and the lawyer may then be required to screen that clerk from performing any clerical work on that client's case.

This is obviously not what the committee intends.

A lawyer's compliance with ER 5.3 and ER 1.6 is best maintained not by misadvising clients about the applicability of A.R.S. § 13-3620 but, rather, by discussing the mandatory reporting requirements with the listed professional prior to their employment by the lawyer. If the non-lawyer assistant's interpretation of the law is such that they believe they are obligated to report abuse learned while performing non-treatment work on a client's case, the lawyer can choose not to employ that applicant or, if employed, can then make the appropriate advisements to the client about the lack of confidentiality.

To avoid confusion about the applicability of ER 1.6 in the context of A.R.S. § 13-3620's reporting requirements, the AEAC's opinion should clarify that advising clients of mandatory reporting obligations exists only when non-lawyer assistants are hired *to provide treatment* to a client or other case-involved persons, and that lawyers must continue to take reasonable steps as required by ER 5.3 to ensure that non-lawyer assistants working in *non-treatment* capacities maintain confidentiality pursuant to ER 1.6.

Sincerely,



James J. Haas

Maricopa County Public Defender