The ABA recently published *Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders*. The book gives parent attorneys the knowledge and skills to ensure quality, consistent representation of parents in all stages of child welfare legal proceedings. The following article is an excerpt from the book. Look for more excerpts in future issues.

**First Steps in Representing a Parent Accused of Abuse or Neglect**
by Matthew Fraidin

**Building a Relationship with the Client**
The challenges of representing parents in child welfare matters start right away. Because most parents in the child welfare system have little income, most clients will not be privately retained, but instead will be assigned by court appointment. As a result, it is likely counsel’s first contact with a parent client will take place with a court hearing already scheduled and imminent. The client’s child might have been removed from her care with little or no warning. The child may have been placed in foster care, with caretakers unknown to the client and at a location unfamiliar to the child and kept secret from the client.

This may be the most stressful and difficult time in the client’s life. She may feel frightened about the whereabouts and condition of her child. She may be disoriented by the abrupt and punitive-seeming disruption to her family’s life. She may feel deeply humiliated at the harsh judgment of her parenting inherent in the state’s actions of initiating a dependency case or taking the child from her care. The emotional circumstances of this time, along with the likely time pressures of a looming court hearing, can largely define the beginning of the lawyer-client relationship, and will impact initial efforts by counsel on the client’s behalf. Sensitivity to the client’s experience and diligence in the early stages of representation can forge strong bonds with the client and set the stage for a constructive working relationship throughout the case.

The most important quality counsel can bring to the first meeting with the client who has experienced these events is empathy. What the client needs most at this moment in her life is a respectful professional who avoids prejudgment and shows respect by listening carefully to what she has to say and committing to work on her behalf going forward.

**Gathering Information about the Case and Client**
When a child has been removed from a parent’s care, or the agency seeks court approval to remove a child, courts typically must hold a “removal hearing” within 24 to 72 hours. Although statutory language varies from state to state, courts ordinarily must allow a child to remain in, or return to, his parent’s custody unless the agency proves the child is in “imminent” or “immediate danger,” or the equivalent. In many cases, counsel will be appointed to represent a client on the day the removal hearing is scheduled. This places counsel and the client in an extremely challenging situation. The results obtained in the initial “removal hearing” may establish the long-term course of the case itself. In many states, the longer children are in foster care, the less likely they will be returned home. This means counsel needs to work extremely hard on the case immediately.

(Cont’d on p. 86)
CASE LAW UPDATE

Father Lacked Right to Jury Trial in Termination of Parental Rights Proceeding

*In re M.F.*, 2016 WL 1261356 (Nev.).

The trial court did not violate father’s due process rights by denying his demand for a jury trial in a termination of parental rights proceeding. Neither the U.S. Constitution nor the Nevada Constitution guarantees a right to a jury trial in such proceedings. Furthermore, substantial evidence supported the trial court’s findings that termination of father’s parental rights was in children’s best interests.

The child welfare agency removed Jesus F.’s six children from his home due to drug use, safety concerns, and inadequate supervision. All six children were placed in protective custody in various out-of-home placements over the next four years. By the time the three older children reached the age of majority, the agency filed a petition to terminate the father’s parental rights to the three minor children.

The trial court denied the father’s demand for a jury trial, concluding the right to a jury trial in a parental termination proceeding is not guaranteed by common law, statute, or the Nevada Constitution. Following a bench trial, the trial court terminated the father’s parental rights. On appeal, the father argued the trial court erred in denying his demand for a jury trial, concluding it was in the minor children’s best interests to terminate his parental rights, and concluding that parental fault had been established.

While the U.S. Supreme Court has upheld the due process rights of parents in termination proceedings, it has not addressed whether due process requires a jury trial. Because parents have a vital interest in preventing the dissolution of their family, due process requires states to provide parents with fundamentally fair procedures in parental termination proceedings.

To evaluate whether a proceeding violates a parent’s due process rights, the U.S. Supreme Court applied the balancing test outlined in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), which weighs the private interest affected by the proceeding, the risk of error inherent in the state’s procedure, and the countervailing government interest. Because the father did not risk a loss of personal liberty in the termination proceeding, the court applied the Eldridge test to balance his interest in the companionship, care, and custody of his three children against the state’s interest in the welfare of the children, conservation of judicial resources, and the need for an accurate and fair outcome.

Because both parties had compelling interests, the court’s analysis focused on the risk that the procedures used would have resulted in an erroneous decision. It concluded the trial court’s decision to hold a bench trial as opposed to a jury trial posed only a minimal risk of an erroneous decision. A jury is not a required component of accurate fact-finding; the judge demonstrated familiarity with the rules of evidence and civil procedure as well as the legal standards of a termination action; and the court applied the clear and convincing standard of proof. The father was given notice of the proceeding, was provided competent counsel, and had the opportunity to confront and cross-examine the witnesses against him. He also retained the right to appeal from an adverse decision.

Furthermore, the court found the Nevada constitution similarly did not guarantee a right to a jury trial in termination proceedings. No termination of parental rights proceedings existed at the time of adoption of the state constitution in 1864, and since creation of termination actions in 1975, the legislature has not conferred the right to a jury trial in such proceedings.
Despite the opportunity to do so. The court found support from other jurisdictions for this conclusion, noting most states specifically prohibit a jury trial in termination of parental rights proceedings.

Finally, the supreme court found substantial evidence supported the findings that termination of parental rights was in the children’s best interests based on statutory presumptions for a child who has lived outside the home for 14 of any consecutive 20 months and the father’s failure to rebut the presumption because he could not show there was a reasonable possibility that he could provide for the minor children’s basic needs in a reasonable timeframe. Furthermore, substantial evidence supported the trial court’s findings on five separate grounds of parental fault and the court listed its reasoning with adequate specificity.

Case Plan Must Provide Accommodations for Disabled Parent to Meet Reasonable Efforts Requirement

In re Hicks/Brown, 2016 WL 1650104 (Mich. Ct. App.).

Child welfare agency failed to make reasonable efforts to reunify family in case involving young, cognitively-impaired mother. After mother relinquished custody of her two-month-old daughter to the agency and later lost custody of her newborn son, her case plan never included reasonable accommodations to provide her a meaningful opportunity to improve. Dependency proceedings lasted more than three years and agency was aware of the mother’s special needs. Absent reasonable efforts, agency failed to present clear and convincing evidence to support the statutory grounds cited in the termination of parental rights petition.

Psychological testing revealed that the mother of two children – a two-year-old daughter and a newborn son – was in the borderline range of intellectual functioning, and her other scores in verbal comprehension, perceptual reasoning, processing speed, and working memory were equally low. The mother lived with her own mother, who was also cognitively impaired. When she gave birth to her daughter, the mother had to find another place to live because her mother was living with a registered sex offender. The child welfare agency provided no services or assistance to the mother. Her daughter was taken into care when she declined placements with her grandmother in another state or a local family friend.

The mother’s first service plan was not developed until her daughter had been in care 10 months, during which time no services had been offered. She was required to undergo a psychological evaluation, participate in therapy and parenting classes, visit her daughter for three hours each week, earn her GED, and find employment and a home. Pregnant with her second child, the mother moved between homes of various relatives. When she gave birth to her son, an aunt offered the mother and baby a home but the agency found the placement inappropriate. Her son was taken into care and placed with his sister.

More than three years after her son had been taken into care, during which time the child welfare agency provided no services appropriate for assisting a cognitively impaired parent, the agency filed a petition to terminate the mother’s parental rights. The petition stated she had never taken her GED, secured housing or income, or benefited from services so that she could safely parent her children.

The mother’s attorney had specifically expressed concern that the agency was not providing the services necessary to accommodate her disability, and continuously repeated her concerns. She requested the mother receive specialized services for the developmentally disabled, and the court ordered such services, but the case worker failed to ensure those services would be provided.

The appellate court relied on case law, federal and state statutes and regulations, and expert opinions to clarify what the trial court and the child welfare agency must do for a parent with a known or suspected intellectual, cognitive, or developmental disability. Neither the court nor the agency may just wait for the parent to assert his or her right to reasonable accommodations. Instead, the agency must offer evaluations to determine the nature and extent of the parent’s disability and secure recommendations for tailoring necessary reunification services.

The agency must also try to locate service providers with expertise helping the parent overcome obstacles to reunification. If no appropriate, local service provider exists, the agency must ensure the available service providers modify or adjust their programs to allow the parent an opportunity to benefit equal to that of a nondisabled parent. If it becomes clear the parent will only be able to safely care for his or her children in a supportive environment, the agency must search for potential relatives or friends willing and able to provide a home for the family. And if the agency does not fulfill these duties, the court must order compliance.

If there is a delay providing the parent reasonably accommodated services or if the evidence shows the parent could safely care for his or her children within a reasonable time if services were continued, the court would not be required to order the filing of a termination petition because the child has been in foster care for 15 of the last 22 months. If reasonable accommodations are made but the parent still fails to show he or she can safely parent the child, the court may proceed to termination. Likewise, termination does not need to be delayed if careful evaluation reveals no level or type of services could possibly help the parent safely care for the child. But that assessment cannot be based on stereo-
STATE CASES

Alabama


After parental rights of mother and father’s husband, who was child’s presumed father, were terminated, putative biological father brought action to establish paternity and for custody of child. Putative biological father lacked standing to seek adjudication of his paternity of child because he presented no evidence indicating presumed father did not persist in his presumed-father status through termination of parental rights proceeding.


Sufficient evidence supported trial court’s finding that father abandoned child, and thus child welfare agency was under no obligation to provide reunification services before terminating father’s parental rights. Child was removed from father’s home at age four months and was almost three years old at time of trial. Caseworker made multiple unsuccessful attempts to contact father, who never contacted caseworker about possibility of visitation.

Arkansas


Termination of mother’s parental rights to child was in child’s best interest. Mother had been incarcerated for one-third of child’s life. She committed another offense while case was pending and was sent back to prison with 2018 release date. Mother failed to maintain contact with child, and child had already been in child welfare agency custody for two years.

California

In re Nia A., 201 Cal. Rptr. 3d 424 (2016). DEPENDENCY, TRANSFER

Juvenile court improperly granted child welfare agency’s request to transfer case back to original county in which agency had filed petition against mother for failure to protect and inability to provide support for children. Agency employee’s attenuated relationship to children automatically triggered internal sensitive case protocol. Court could not transfer case unless it determined transfer would protect or further children’s best interests.

In re Mia Z., 201 Cal. Rptr. 3d 224 (2016). DEPENDENCY, NEGLECT

Evidence supported finding mother’s lack of parental supervision caused oldest child’s death and supported jurisdiction over two remaining children, despite mother’s claim child who was killed when metal gate fell on her while unsupervised outside would have been killed even if mother were present. Neglect was not that mother allowed child to play in alley unsupervised, but that she allowed three-year-old child to walk away unattended from family home.

Colorado

In re E.G., 368 P.3d 946 (Colo. 2016). JUVENILE DELINQUENCY, DUE PROCESS

As part of pretrial discovery, juvenile defendant sought access to private home that was scene of sexual assault. Rule of criminal procedure requiring prosecutor to disclose certain material information within his or her control did not provide basis for trial court to order access, nor did compulsory process, due process, or confrontation clauses of U.S. Constitution. Due process clause provided right of access only to favorable evidence in government’s possession or control, which private home was not.

Florida


Evidence was insufficient to establish child was at risk of imminent abandonment, abuse, or neglect after death of sibling as result of sudden infant death syndrome (SIDS) while co-sleeping, not abuse or neglect. Child was always observed to be in good health, clean, and in good care. Record did not show child was adversely affected by parents’ infrequent use of marijuana. Parents did not evade child welfare agency investigation, and messy hotel room was reasonable given parents’ financial circumstances and lack of housing.

Illinois


Defendant appealed conviction on two counts of predatory criminal sexual assault of child. Trial court’s findings on motion in limine to determine admissibility of mother’s and child advocate’s testimony about child’s allegations of sexual abuse complied with statute governing admission of child’s out-of-court statements about sexual abuse. Adequate foundation was laid for video and audio recordings of child’s interview with child advocate as substantive evidence.

Indiana

In re N.G., 2016 WL 1640294 (Ind.). TERMINATION OF PARENTAL RIGHTS, MENTAL HEALTH

Termination of mother’s parental rights to 11-year-old daughter and 8-year-old twin sons was supported by evidence of reasonable probability conditions existing at time children were removed would not be remedied. Mother failed to take her medications, and it was uncertain she was benefiting from cognitive therapy. Her thinking patterns had little or no benefit from therapy, and therapist testified she did not see change or progress in mother’s distorted thinking.

Maine

Adoption of Liam O., 2016 WL 1752957 (Maine). TERMINATION OF PARENTAL RIGHTS, BEST INTERESTS

Mother sought to adopt own child so she could seek termination of father’s parental rights in conjunction with adoption proceeding. Father had criminal history and verbally threatened mother while she was pregnant. Court must consider whether termination is in child’s best interest and may not consider whether termination will affect state’s financial interest related to child’s receipt of Temporary Assistance for Needy Families (TANF) benefits.

Missouri

In re L.M., 2016 WL 2339702 (Mo. Ct. App.). GUARDIANSHIP, PARENTAL FITNESS

In guardianship proceeding brought by great-uncle and great-aunt, evidence did not support finding that father was unfit, as required to overcome presumption that father was appropriate guardian of child. Great-uncle and great-aunt entered into consent judgment with father nine months before in which they agreed child’s best interests were served by father having joint custody, and guardian ad litem believed
father was not an unfit parent.

New Jersey
Trial court’s denial of mother’s request to reopen record after one-day bench trial in child dependency proceeding and before trial judge issued decision, in order for mother to testify, deprived mother of procedural due process she was constitutionally entitled to before termination of her parental rights. Decision created risk of deficient narrative, and allowing mother to testify would have imposed only minimal burden on proceedings.

New York
Child, by his mother and natural guardian, brought action against nonprofit social services agency that placed him in two foster homes, seeking recovery for alleged physical and sexual abuse in homes. Appellate court found agency lacked knowledge or notice of alleged abuse, thereby precluding its liability for injuries. All procedures and protocols were followed before approving homes, and child was referred by agency for evaluation for aggressive behavior before abuse allegations. Child was referred for treatment after abuse was revealed.

To establish parents are and will continue to be unable to provide proper and adequate care for child by reason of mental illness, evidence must include testimony from appropriate medical witnesses detailing how parent’s mental illness affects present and future ability to care for child. Psychologist testified both mother and father suffered from multiple mental health disorders, had not shown improvement, and were unable to provide proper care for child.

North Carolina
In re M.S., 2016 WL 1569162 (N.C. Ct. App.). DEPENDENCY, STANDING
Fourteen-year-old girl testified stepfather sexually molested her when she was between nine and 13 years old. Mother, who did not believe child’s allegations, and stepfather appealed adjudication of child as dependent. Stepfather lacked standing to appeal order because he did not meet statutory requirement that he be court-appointed guardian ad litem, county department of social services, party who unsuccessfully sought termination of parental rights, or child’s parent or custodian.

Ohio
State v. Barker, 2016 WL 1697911 (Ohio). DELINQUENCY, INTERROGATION
As applied to juveniles, statutory presumption that electronically recorded custodial statement is voluntary violates due process. Inherently coercive nature of custodial interrogation heightens risk that suspect will be denied Fifth Amendment privilege against self-incrimination because custodial interrogation can undermine will to resist and compel suspect to speak. Risk is even more acute when juvenile is subject of interrogation.

South Carolina
State v. Legg, 2016 WL 1584132 (S.C.). ABUSE, TESTIMONY
Defendant in child sex abuse trial was not deprived due process right to fair trial when videotaped forensic interview of alleged victim was played before jury. Defendant extensively cross-examined alleged victim about prior inconsistent statements given during videotaped interview and argued those inconsistencies damaged minor’s credibility during closing arguments.

Texas
Evidence did not support determination two-year-old child’s best interest was served by terminating father’s parental rights. Although parents were involved in physical altercations caused by mother’s drug problem, and father could have returned from Mexico to exercise parental duties over child, no evidence suggested child’s needs would go unmet if he lived with father. Father was served with petition only one month before rights were terminated, and child welfare agency made no effort to offer services to father or assess his home.

Virginia
Child welfare agency did not have statutory duty to provide rehabilitative services to mother for trial court to terminate her residual parental rights to daughter. Agency was not required to again provide services that had already been provided in another state and were clearly not successful. Thirteen-year-old daughter’s testimony directly stated her desire to be adopted by foster family.

Vermont
State v. Graham, 2016 WL 1729593 (Vermont). ABUSE, SUPERVISION
As school-year employee not under contract, defendant in sexual exploitation of minor case was not in position of supervision over student during summer break between contracts. Statute required supervision to be at time of sexual act. Defendant’s sexual contact with student during summer break therefore did not constitute sexual exploitation of minor.

Washington
In re A.D., 2016 WL 1562252 (Wash. Ct. App.). TERMINATION OF PARENTAL RIGHTS, TESTIMONY
In termination of parental rights proceeding, mother’s exclusion from courtroom during son’s testimony about witnessing father sexually assault sibling and describing how mother’s mental illness impacted him and his older sister did not violate mother’s right to due process. Trial court permitted mother’s attorney and guardian ad litem to remain in courtroom during child’s testimony and provided breaks so attorneys could confer with parents and prepare cross-examination.

FEDERAL CASES

Fifth Circuit
United States v. Copeland, 2016 WL 1741616 (5th Cir.). ABUSE, SEX TRAFFICKING
Defendant was convicted of sex trafficking 15-year-old runaway girl. Sex trafficking of children statute imposed strict liability regarding defendant’s awareness of victim’s age if defendant had reasonable opportunity to observe victim. Elimination of intent requirement with regard to victim’s age, thus imposing strict liability, did not violate defendant’s due process rights.
Uncovering accurate information/expanding the focus

The agency’s knowledge of the family is almost always limited to a discreet event—a snapshot of a family’s (and child’s) life. The more one looks only at the state’s depiction of the child’s experience, the stronger the claims for the state will seem. Because the state has initiated a dependency case, we can be certain the state has drawn negative inferences from an event or series of events in the child’s life. The state’s investigation may have generated inaccurate facts, however, causing the conclusions—for example, that a child is in danger—to be wholly mistaken. The state’s inferences also may be rooted in misinterpretation of facts, or facts taken out of context. Counsel’s job is to uncover accurate information and expand the focus beyond the incident or condition on which the state may be focused with a broader perspective that places the situation in a more complete context. Counsel needs to get to know the circumstances of the family well beyond what the agency knows.

Securing petition and documents

As soon as the appointment is made, counsel should secure the petition and supporting papers. Counsel should request all documents be provided to the court. Counsel should also ask the agency for all records it possesses about the client, such as services provided to satisfy the state’s “reasonable efforts” requirement, see 42 U.S.C. § 672 (2014), and any school, medical, or other records collected by the agency investigating the parent and her family.

In addition, counsel should seek any available information that will help her learn more about the client and the overall situation. Substantial information may be available in the courthouse. For example, counsel should search for files of cases involving the client in such matters as landlord-tenant proceedings, divorce and child custody, domestic violence, criminal, and prior dependency proceedings. Counsel should also search for cases involving other individuals who may be included in the case, including the other parent, a caretaker, relative, or friend.

When counsel obtains these files, she should review them and photocopy whatever seems relevant. They may contain information that will support the client’s case. For example, in a case alleging “failure to protect,” domestic violence case files may contain evidence of past efforts the client made to keep a batterer at bay. Counsel may also uncover harmful information, such as a parent’s past criminal activity. Counsel must know this history to avoid being blindsided later in the case when the agency reveals it for the first time.

Obtaining information about child’s removal

If the child was removed, counsel should find out where the child has been placed, how to contact the child’s caregiver, and any other information about the child’s current condition. Although the caseworker may be reluctant to share such information, jurisdictions vary on the amount of information a parent has a right to know about these matters. This information is often of great interest to the parent who is worried about her child’s well-being.

Meeting potential caregivers

Among the earliest tasks counsel should perform almost immediately after a child has been removed is to meet with the client and all potential substitute caregivers the client suggests. With their permission, counsel should consider visiting their home and taking photographs and video footage to be used as persuasive evidence that the child can be safely placed there. In some jurisdictions, courts have the power to direct the particular placement resource for the child; in others, this is the agency’s responsibility. In either case, counsel will usually want to seek the agency’s agreement first, seeking court intervention only if necessary.

When the agency has a policy to defer such placements until certain background checks are completed, counsel should take all steps necessary to accelerate the process, including securing the forms and helping fill them out with the parent or proposed caregiver. Treat the matter as the emergency it is; every day a child is separated from a parent matters.

Securing placement with a recommended placement resource

When the court or agency is reluctant to place the child with a recommended resource, counsel should take steps to persuade them. This requires some investigation and trial prep-like steps. Get the names of people—including doctors, teachers, and day care providers—who can attest to the proposed resource’s strengths and capability to take good care of children, speak with them, and share the information with the agency or court. Arrange a prompt meeting with the resource or bring her to court to testify.

The Client Interview

The First Meeting

As soon as counsel has the client’s telephone number or other contact information, arrange a meeting. To the extent possible in light of time constraints, counsel should meet with the client in a quiet and private location. In many instances, counsel may have no choice but to meet in the courthouse’s hallway, and may have as little as a few moments to talk before the initial hearing.

When this is the case, counsel should consider whether to seek to delay the hearing until counsel has had adequate time to meet with and assist the client to participate meaningfully in the court appearance. Depending on the allegations and counsel’s sense of the need for preparation, the costs of putting the hearing off for a day or more may be outweighed by the benefits. Counsel’s role is to help the client assess the pros and cons of a decision to proceed immediately or to seek a delay. Some parents will be
willing to wait until their odds are strongest. Others will regard any delay as too costly. This decision may have significant short- and long-term consequences for the client, and should be made by the client after the lawyer has provided information and assisted with the client’s decision-making process.

Building Rapport
Starting on the right foot
The quieter the setting for a first meeting with a client, the better. This is an important meeting for the client. It is not easy to build rapport and trust in a rushed meeting, but counsel must try. Counsel should consider the likely stress the client is experiencing and ask in what ways counsel can help by meeting with the client. What is the client most likely feeling? What are her immediate needs? One can never know without meeting her. But counsel can anticipate that the client may be scared, feeling alone, full of questions, as starters.

Use this meeting to address the client’s immediate needs, postponing other components of the meeting for a few minutes. Ask how the client is holding up. Explain what is going on in the case and what lies immediately ahead. Clarify your role and aspirations for the case. You will need to elicit facts from the client, but that does not require starting with them.

Acknowledging client experiences with legal system
Clients may be suspicions of the justice system and of lawyers, perhaps having had negative past experiences. Clients may know that lawyers commonly are appointed by the judge before whom the lawyer and client will appear, and are paid by the court for which the judge works. They may be wary that a lawyer’s own interest in procuring future case appointments will restrain the lawyer’s advocacy. And clients may quickly learn counsel has preexisting relationships with other child welfare system professionals, such as the state’s attorney, caseworker, judge, and court staff.

Establishing client loyalty
Accordingly, it is important for counsel to assure the client that it is to her that counsel is solely responsible, and that counsel’s loyalty to the client is unequivocal. State this directly. Build a strong relationship with the client by listening to her actively and nonjudgmentally. One easy way to distinguish oneself from the many others who may have interviewed the client in connection with the case is to make statements and ask questions reflecting favorable assumptions about the client’s parenting and her contributions to the community.

Counsel should consider the likely stress the client is experiencing and ask in what ways counsel can help by meeting with the client. What is the client most likely feeling? What are her immediate needs?

Explaining the Initial Hearing
Be sure to explain the decisions the court will make at the preliminary hearing. Depending on the jurisdiction, it may decide whether to authorize the petition, finding there is probable cause to believe there are grounds for the petition. Second, if the court authorizes the petition, the court will then decide where the child will live while the case proceeds.

Eliciting Case Information
Explaining the decisions to be made at the initial hearing will provide a useful frame for the lawyer’s efforts to gather factual information about the case. Counsel should acquire basic factual information about the case and advise the client on the decisions the client must make immediately. Counsel will want to know how to contact the client between court appearances.

Gathering essential facts
Some information about the case can be postponed to a second meeting with the client. Depending on the allegations in the petition, counsel may want to know immediately how the family became involved with Children’s Protective Services, any previous family involvement with the courts or the agency, whether the family currently receives services, and whether the child has special needs. Other times, some of these inquiries can be postponed, with the predominant focus placed on avoiding the child’s placement in a nonrelative foster home.

Gathering information based on the allegations
In preparing for the aspect of the hearing relating to the sufficiency of the petition, the contours of the interview will be determined largely by the allegations. Carefully review the charging document and other paperwork setting forth the agency’s concerns. There may be no grounds on which to challenge the petition on its face, in which event a detailed “retrospective” inquiry into the merits of the petition should ordinarily be postponed, especially when there is limited time for the interview.

In that circumstance, the main focus of the interview will be on the “prospective” issue of the child’s safety going forward. If the agency is seeking the child’s removal or continued placement, it must prove the child cannot be maintained safely in the parent’s home. Counsel should interview the parent about information supporting the claim the child can be safely kept at home.

Exploring parental placement conditions
Assuming the parent wants the child home, counsel should explore whether the parent will accept conditions for the placement, such as random drug testing or in-home reunification assistance. If the parent is not alleged to be the active wrongdoer, will she help enforce a court order requiring the
other parent to leave the home? Is the parent willing to take the children to services such as counseling and medical appointments? Counsel should explain that the court may be more willing to return the child with such conditions in place and that accepting them does not require admitting to any wrongdoing. The question of whether the petition can be sustained is saved for later.

**Exploring placement alternatives**

Counsel should also discuss the parent’s options if the court does not immediately return the child to the parent’s custody, especially other placement possibilities that the parent considers more acceptable than foster care. There is a federal mandate to place children in the “least restrictive (most family-like) and most appropriate setting available and in close proximity to the parents’ home. . .” 42 U.S.C. § 675 (2014). Placing children with an adult caregiver suggested by the parent falls solidly within this mandate, the purpose of which is to impose a placement least likely to disrupt the child’s life. In light of this federal mandate, and likely counterparts in counsel’s state statute, regulations, and case law, counsel should prepare to argue that the burden lies heavily on the party opposing the parent’s recommended resource to show why the placement is too dangerous to allow.

**Giving priority to relative/kin placements**

There is also a federal mandate to prefer placing children with relatives over others when children enter foster care. See 42 U.S.C. § 671(a)(19) (2014). Identify relatives, friends, and others who could care for the child temporarily. When considering them, counsel should tell the parent that the court will want to know such things as the proposed caregiver’s prior criminal or child protective history, the family’s resources, and the proposed caregiver’s previous involvement in this child’s life.

**Addressing parenting time**

Counsel should also address parenting time with the client. What type of parenting time would the client like? Where should the visits take place? How frequently should they occur? If parenting time must be supervised, does the client know someone willing to supervise the visits and can pass the agency’s background checks? When evaluating all these things, counsel should help the client develop creative solutions and assess the pros and cons of the available options.

Often, the agency has little evidence of abuse or neglect. When that is the case, it may be wisest for the client to remain relatively unforthcoming, to avoid assisting the state in building the case against her.

**Advising Parent Who is Not the Subject of a Court Proceeding**

Counsel may be contacted by a parent who is under investigation by the local child welfare agency, but who is not the subject of a court proceeding. The parent may seek to retain counsel for help navigating the investigation process hoping to avoid the child’s removal and the filing of a court case. This section discusses factors to address when helping the client decide how to respond to the investigation.

Typical issues parents face in these circumstances include a request by the investigating agency to:
- inspect the home,
- interview the parent or a child or the child’s siblings,
- authorize the release to the agency of confidential educational or medical records,
- agree to a “safety plan,” and
- grant a relative or friend temporary custody of the child.

Although the parent cannot be compelled to do any of these things without a court order, the parent may believe she has no choice but to comply.

The lawyer’s role at this stage is to counsel the client about whether and to what extent to cooperate with the agency’s investigation. Because child services agencies typically have unchecked power to remove a child in emergency circumstances, without judicial review for 24 hours or more, a lawyer counseling a parent considering the most effective response to a child welfare investigation must help the client navigate a hazardous passage.

On one hand, a parent who provides information to the state inadvertently may provide sufficient grounds for concern about the child that causes the removal. On the other hand, the agency may believe a parent who refuses to participate in the investigation, or who limits her participation, may be hiding evidence of maltreatment and demonstrating a consciousness of guilt; in response, the agency may remove the child. Just as the parent must avoid providing the state evidence that gives cause for the child’s removal, the parent needs to know the agency may remove a child because the parent refuses to provide information. In either event, the first opportunity to persuade a court to order the child’s return home may not occur until the “removal hearing” several days later. In the interim, the parent and child may experience fear, disorientation, shame, and trauma. Moreover, when judicial review does take place, the parent’s likelihood of success is unpredictable and may be poor in jurisdictions in which judges are known to “rubber-stamp” removals.

**Considering agency’s knowledge of abuse**

The client’s decision about how much to cooperate should take into account what the agency already knows or likely knows. Often, the agency has little evidence of abuse or neglect.
When that is the case, it may be wis- est for the client to remain relatively unforthcoming, to avoid assisting the state in building the case against her. For example, many investigations are undertaken in response to a report conveying an anonymous source’s concern or suspicion about the parent’s treatment of her child.

The agency’s contact with the parent may well be the first step in the agency’s investigation. Under these circumstances, the agency has little evidence that the parent maltreated her child or that the child is at risk of maltreatment. A parent who cooperates unreservedly with the investigation may provide the agency with information that it otherwise would not have acquired but may be construed in a worse light than the parent anticipated. Many practitioners report that facts alleged in petitions commonly were obtained through statements made by parents during the early investiga- tion—without which there would have been no basis to file a petition.

Nature of allegations
The client’s decision may be influ- enced by the gravity of the agency’s concern. When parents do not know why they are being investigated, it may be appropriate for the parent to cooperate, at least enough to learn the nature of the allegations. Counsel may then advise whether the client should cooperate further, weighing the incon- venience and indignity of compliance against the risk that the agency worker will file a petition.

When the allegations against the client are very serious, or supported by substantial evidence already possessed by the agency, it may be damaging for the parent to provide additional information and support for its con- cerns, such as by admitting to actions or omissions alleged by the agency. When grave or inflammatory allega- tions have been made, such as sexual abuse, a client’s admission to involve- ment or culpability may limit her ability to have the child returned home, to have visits during placement, or to defeat the charges at trial. The agency is likely to ignore or find unpersua- sive explanations of her conduct, even when bolstered by mitigating or con- textualizing information. When the agency seems likely to remove a child and the chances of defeating that effort seem poor, counsel should shift the focus to finding a trusted relative or friend to take temporary custody of the child. This may assure the agency of the child’s safety and encourage it not to file a petition in court.

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Advising Parent Whether to Exercise Privilege against Self-Incrimination
The Fifth Amendment to the Constitution protects against self-incri- mination. See U.S. Const. amend. V. (“No person . . . shall be compelled in any criminal case to be a witness against himself.”). A witness in any case, including a civil child protection case, may decline to testify to avoid provid- ing information that might incriminate him- or herself. The court can make an adverse inference against a parent who declines to testify, even when the reason for declining to testify is to avoid self-incrimination. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

Risks/rewards of testimony
In counseling a client about whether to testify in a child welfare proceeding, a lawyer must help the client balance the potential risks and rewards associated with the options available to the client. On one hand, the client may testify to important factual informa- tion about the child welfare case that could exonerate her, or explain or provide context for her actions. In addition, she may feel unjustly maligned by the child welfare proceeding and want an opportunity to tell her side of the story.

Testifying may provide the client with a sense of control or influence over the proceedings. However, the lawyer must inform a client that self- incriminating testimony can harm not only the client’s interests in the im- mediate proceedings but can also ex- pose her to collateral criminal charges where abuse or neglect has been al- leged. In helping the client balance all of these important concerns, the lawyer should seek to understand the client’s motivations, one or more of which may be in tension with others.

Court’s perception of truth
Finally, it is counsel’s duty to help a client understand that a judge may not believe the client (no matter how truthful her testimony may be) even where other considerations mitigate in favor of the client giving testimony. Where necessary, the lawyer should explain to the client that this is so regardless of the merits of the choices she has made as a parent, and that a fact-finder’s perception of the truthfulness of the witness may be informed by personal or subjective biases, even where the testimony is true. There may be other ways—apart and aside from adducing the client’s in-court testimony—for counsel to empower the involuntary party to child welfare litigation.

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The headlines tell the story:

Pasadena youth group home sued for teen’s alleged abuse¹
Family sues Carrick youth home over son’s injuries²
Foster mom sues group home operator over alleged sex abuse³
Lawsuit against children’s group home describes sex crimes⁴

Attorneys who represent group homes face many challenging situations. For attorneys who represent children or families in litigation against group homes, many issues may arise. When defending a group home in litigation, the practitioner must be aware not only of the common law negligence issues that arise, but also the statutory and regulatory framework governing routine issues.

Lawyers who periodically advise group homes or serve as corporate counsel must have a keen understanding of the unique issues that may arise by and between employees, managers, executives, directors, health care practitioners, contractors, regulators, law enforcement and public and private funding sources.

Group home operators are involved in different legal relationships that make them vulnerable to litigation. Long ago, when group homes were seen as charitable, they could avoid liability to some extent. They could avoid vicarious liability for the negligent acts of social workers, psychologists, psychiatrists, educators, and others affiliated with them by arguing that such caregivers were technically independent contractors.

Today, group homes are no longer immune from general liability, nor are they viewed as facilities in which independent practitioners come and go. In many cases, group homes advertise themselves as comprehensive settings and secure clients through sophisticated marketing. Therefore, many believe they should be held accountable for serious infractions that occur within their domains.

Types of Liability

Liability ordinarily arises from two types of failures that can occur in a group home: neglect and abuse.⁵

- Neglect tends to result from unintentional wrongdoing, such as errors, omissions and oversights.⁶ For example, a group home may be responsible for neglect when a non-ambulatory resident is placed in a chair out of doors initially to enjoy the day, but who suffers a serious sunburn when allowed to remain in the sun for too long. Neglect can also include denial of care or delayed care. Another example: a resident may suffer a fall, and an unskilled or improperly trained worker may conclude the fall was minor only to later discover a serious injury resulted.⁷ Neglect can also involve failing to protect a resident from self-injury or injury by another resident.

- Abuse tends to occur less often and ordinarily involves some degree of intent.⁸ For example, sexual contact with a minor in a group home setting is strictly forbidden, and any such contact constitutes abuse.⁹ Despite these prohibitions, sexual misconduct continues to occur in some group homes.¹⁰ When a child has a mental condition or disability that makes interaction challenging, frustrated and poorly trained workers may react or attempt to control behavior with abuse.¹¹ Any time a group home worker engages in physical management of a resident, an abuse charge may result.

A corporation can be both directly or vicariously liable for injuries arising from abuse and/or neglect.

Direct corporate liability

Direct corporate liability arises from the failure of the corporation through its executives, managers or governing body, to observe statutes, regulations, industry standards, and norms. For instance, the corporation might negligently hire an individual who is unqualified to provide direct care, and/or subsequently fail to provide adequate training. Or, a corporation may inadequately monitor a home or the workers at the home who provide direct care. When a failure occurs that is directly attributed to something the corporation negligently did or did not do, direct corporate liability will result.

Vicarious liability

Vicarious liability refers to holding one party liable for the acts of another based solely on the legal relationship between the two. This type of liability is loosely based on principles of agency where the principal is held accountable for the actions of the agent, even though the principal did not necessarily authorize or direct the agent.

There are three general areas of vicarious liability:

- Respondeat superior¹² liability arises from a direct employer/employee relationship.
- Apparent authority¹³ (sometimes
Implied authority occurs when conduct by the principal authorizes the agent even though there is no agreement or other express authority of the agent to act. This can occur when the agent acts on behalf of the principal, and the principal fails to object.

Nondelegable duty
Although each state has its own regulatory scheme that applies to group homes, the principles underlying statutory regulation are similar regardless of the jurisdiction. Some jurisdictions require an administrator or caregiver with particular qualifications to serve as the single point of contact and responsibility for operating the home. Others impose regulations listing what a group home must provide. Thus, while the day-to-day tasks associated with operating the home are often delegated to employees, the duties and responsibilities of complying with state law are often prescribed by statute and nondelegable. Although an administrator need not be present at the home all the time, responsibility will always remain with the administrator or licensee for compliance with all licensing regulations, unusual incident reporting, recipient rights reporting, and quality assurance.

Advice for Attorneys
Ensure good corporate governance
The first line of defense against being sued is for an attorney to ensure a group home’s board of directors and its administrators adhere to sound corporate structures and policies of governance. In today’s demanding regulatory environment, the board and its administrators must be sure to nail down the basics. This means being familiar with and knowing how to apply the group home industry’s "standards of care." One example: properly documenting all actions enacted at board meetings. This helps provide evidence that directors have exercised their fiduciary duties.

Another example is establishing an active safety committee or quality assurance committee. This can help a group home defend against certain negligence allegations. If the committee was aware of and considered a safety issue and concluded there was no hazard, this may be evidence showing due diligence. In some jurisdictions, quality assurance committees or activities are privileged, shielding a committee’s good-faith attempt to investigate and remediate a specific problem. This privilege allows an investigation to proceed with candor and diligence without concern that the data or results of the investigation will be used against the company in court.

Know what kind of insurance is needed
It is imperative that administrators, be they public, private, for-profit, or nonprofit, understand the difference between different types of insurance. Most group homes, as well as the companies that operate them, will require comprehensive commercial liability insurance with numerous added provisions and services. If the company employs or contracts with health care professionals (nurses, doctors, social workers, physical therapists, occupational therapists, nutritionists, etc.), professional liability insurance may be required. If the home has a means of transporting residents, or even if workers take residents to and from appointments or local restaurants and stores, commercial auto liability coverage may be needed.

Insurance for the governing board is a distinct and separate type of liability insurance that most companies elect to purchase. This allows board members peace of mind knowing that if they are sued as a consequence of their governance activities, their private assets will not be jeopardized. There are numerous specialty insurers and agents that offer comprehensive plans tailored to group homes and other human services corporations. It is important to consult a qualified insurance professional before finalizing insurance decisions.

Understand the scope of agreements with funding sources
Corporate leadership must understand the scope of the insurance and liability obligations they may be required to accept when contracting with agencies that pay for services they provide in their homes. Many agencies, both public and private, that fund the services provided in group homes require the home to defend and accept responsibility for lawsuits from that care. Thus, when faced with a lawsuit, it is not unusual for a funding agency to tender the defense and request the group home to defend and accept responsibility for any verdict or settlement. If a tender is unreasonably rejected, the group home could potentially be shouldered with the burden of covering both the liability and the defense of the agency.

Many agreements between agencies and group homes require the group home to designate its funding agency as an additional insured or additional named insured, which can confer the benefit of a defense and indemnity on the agency as an insured under the applicable policy.

Evaluate client satisfaction with the group home
When an injury occurs in a group home, some families or clients feel compelled to sue, not because of the injury that was sustained, but because of how the home’s employees handled the situation.
home, some families or clients feel compelled to sue, not because of the injury that was sustained, but because of how the home’s employees handled the situation. If the overall communication between the home and family has been ineffective or inadequate, this leaves a prospective plaintiff feeling that the home is unsympathetic. Overall client satisfaction, especially regarding communication, and regardless of the home’s effectiveness as a treatment milieu, may help lower the risk of being sued.

Conclusion
Managing a group home that cares for children involves many complexities at every stage. From governance to administrative compliance, from licensing to direct care, every activity is carefully calculated to ensure children receive the best care in the safest environment. Liability occurs when this focus is lost. A clear understanding of the bases for liability is important to delivering optimum care in the group home setting.

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endnotes
5. See, e.g., MCL 330.1722 (Michigan); Fla. Stat. § 415.102(16).
8. See, e.g., California Penal Code Section 11164-11174.3 et seq.; Fla. Stat. § 827.03.
9. In New York, for example, a caregiver abuses a child when he or she “commits or allows to be committed a sexual offense against the minor.” N.Y. Soc. Serv. Law section 412(1) (McKinney 2006); Fam. Cut. Act section 1012(e).
14. Ibid.
15. See, e.g., Michigan Licensing Rules for Family and Group Child Care Homes R 400.1901(f) & (r).
17. In some states, recipient rights or similar patient advocacy organizations are created or authorized by statute. They most often investigate allegations of neglect and abuse, suggest administrative penalties, and sometimes advise providers how to remediate violations. See, e.g., MCL 330.1755 et seq.; Ca. W&I Code, Section 5370.2
18. See, e.g., Wis. Stat. § 181.1601(1).

(In re Hicks/Brown, cont’d from p. 83) types or assumptions or an unwillingness to make the required effort to accommodate the parent’s needs.

In this case, the agency did not fulfill its responsibilities and the trial court failed to recognize that failing. The mother’s case plan did not match her abilities. She would likely never be able to read and comprehend the contents of a GED exam, hold down a job, or live independently. A service plan that ignored these realities was simply unreasonable and not individually tailored to her needs. The court acknowledged the mother might be unable to overcome the conditions that brought her children into care. However, reunification services were inadequate. As a result, the court vacated the termination order and remanded the case for reconsideration after the mother was provided necessary individualized services.
Spring 2016 is a special time for families and the professionals who support them. During the month of May, we recognized National Foster Care Month with the theme “Honoring, Uniting, and Celebrating Families.” June is National Reunification Month. While we hope every day is one in which the child welfare system shows how it values families and their strengths, shining a national spotlight on parents for these two months reminds us where our priorities should be all year long.

According to the Adoption and Foster Care Analysis and Reporting System, reunification is, by far, the permanency option achieved by the most children in the child welfare system. Research has shown that children who are raised by their families have the best long-term outcomes; therefore, we have a true motivation to return children home as quickly as it is safe to do so. For many families, this is not an easy process. However, when a child is returned home, whether in May or June or any time of the year, it is cause for celebration.

National Reunification Month began in 2010 as a single day—June 19 (during Father’s Day weekend). It started as a collaboration among a number of national organizations, including the ABA Center on Children and the Law, Casey Family Programs, National Association of Counsel for Children, the National Council of Juvenile and Family Court Judges, the National Center of State Courts, the Foster Care Coalition, Rise magazine, and Judge Connie Cohen from Iowa. These groups joined together to let States know that reunification is important and worthy of celebration. In 2012, the initiative’s leaders decided to focus on June as Reunification Month.

Since 2010 the following guiding principles have remained central:

- Reunification with family is the preferred outcome for children who must be removed from their homes and placed in foster care.
- For most children in foster care, reunification with their family is their best option for a permanent and loving home.
- Every year, thousands of children are successfully reunified with their families.
- All children need the care, love, security, and stability of family unity—including parents, siblings, grandparents, and other extended family members—to provide a solid foundation for personal growth, development, and maturity.
- Reunification takes work, commitment, and investment of time and resources by parents, family members, social workers, foster parents, service providers, attorneys, courts, and the community.

One special aspect of the month was the 2012 addition of honoring Reunification Heroes from around the country. These heroes are parents, lawyers, and case workers who have gone above and beyond in the reunification process. They were nominated by peers, interviewed by ABA staff, and highlighted on the Reunification Month website (http://ambar.org/nrm) as well as on the ABA’s Parent Attorney listserv. In 2015, we had a record 11 heroes honored. Nominations are open for 2016 heroes, and the ABA hopes to top last year by honoring many more Reunification Heroes.

Another important part of Reunification Month is the state and local events that will happen in June. At least 25 states have conducted at least one event over the last few years, and most of these have held multiple events. The celebrations ranged from picnics honoring families, to rallies on the steps of State capitols, to substantive forums. For example, each year New Jersey picks an important topic like housing and visitation, creates a video about the topic, and holds a forum for stakeholders during June.

Similarly, the Family Defense Center in Chicago has hosted a celebration for the past 5 years in which parents who were involved in the child welfare system share their stories and discuss ways to improve the experience for families. To see a description of past events and to register your celebration, see the Reunification Month website.

Reunification Month, at its core, is about ensuring a focus on keeping children with their families. While we highlight this initiative during June, children and families rely on us all to focus on reunification all year round.

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You work in a legal services office that receives funding from a government agency. As part of the agency’s annual audit, it has asked you for information about the types of cases you have been handling.

They have also asked you for information about the demographics of your clientele including client identity.

Can you turn over this information to the agency?

In the legal aid context, ABA ethics opinions have consistently stated that legal services organizations’ clients’ identities are considered to be confidential and may not be revealed to third parties without the client’s consent. These opinions have considered the question in different contexts including the disclosure of information to nonlawyer supervisors, outside auditing agencies and to the legal services agency’s governing board of directors.

Other types of information, including the types of cases handled and general statistical information, may be disclosed so long as it is carefully redacted so as not to reveal client identity.

ABA opinions on this topic have been issued under all three of the ABA national standards for professional responsibility, the 1908 Canons of Professional Ethics, (withdrawn in 1969) the Model Code of Professional Responsibility (withdrawn in 1983) and the current Model Rules of Professional Conduct.

Of course, particularly where the disclosure of client identity would likely be detrimental or embarrassing to the client, or if the client requests that his or her identity remain confidential, client identity has been considered to be a client confidence in not just the legal aid context but in all other areas of practice as well. For more information on this general topic, see the March 2014 Eye on Ethics article, “What’s the Big ID?”

Perhaps because of the unique nature of legal aid agencies’ relationships with funding agencies and the resultant pressures on them to disclose information in exchange for funding support, client identity as confidential client information has been a frequent topic of discussion in ABA, state and local bar association ethics opinions.

Opinion 96-399 recognized that the identity of LSC clients is a client confidence that may not be revealed without client consent.

ABA Formal Opinion 96-399
Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients when Such Funding is Reduced and when Remaining Funding is Subject to Restrictive Conditions (1996) is the most recent ABA ethics opinion to discuss whether a lawyer can disclose client identity to third parties. This opinion was issued in response to legislation pending in 1996 that would have among other things mandated certain disclosures about Legal Services Corporation (LSC) clients to outside agencies. Part of this proposed legislation would:

...prohibit a legal services lawyer from filing a complaint or otherwise pursuing litigation, or engaging in pre-complaint settlement negotiations with a prospective defendant, unless (a) the plaintiff is identified by name in any complaint filed; and (b) a written statement is prepared and signed by the plaintiff that enumerates the particular facts known to the plaintiff on which the complaint is based. This mandated written statement is to be kept on file by the legal services office for review by any agency that may audit the activities of the LSC. ABA Formal Opinion 96-399 at p. 17

Opinion 96-399 recognized that the identity of LSC clients is a client confidence that may not be revealed without client consent. The opinion addressed the LSC lawyer’s ethical obligations under the legislation’s disclosure requirements to both present and future clients. In the case of existing clients, the opinion stated that the lawyer would need to consult with them regarding the new disclosure requirements and advise them of the possibility that they may not be able to proceed anonymously. The opinion stated:

The requirement that lawyers receiving LSC funds reveal their clients’ identities may be applied to matters where an existing client is proceeding with pre-complaint negotiations, has decided to petition a court to proceed anonymously, or where permission to proceed anonymously has already been granted. This will raise some difficult ethical issues.

The lawyer must, of course, consult with existing clients concerning the new disclosure requirements, the fact that it may now be more difficult for the client to proceed anonymously with an LSC-funded lawyer, the client’s
right to refuse either to reveal his identity or to seek the required injunction, and the consequences of each available course of action to the client. ABA Formal Opinion 96-399 at page 18.

With regard to future clients, the opinion stated:

The proposed legislation may erect a higher standard for proceeding anonymously than is generally applied. If the legal services lawyer believes this to be true, the lawyer must advise a prospective new client that he may more easily proceed anonymously if represented by a non-LSC-funded lawyer. ABA Formal Opinion 96-399 at page 18.

See also Utah Opinion 96-07 (1996), Michigan RI-252 (1996) and Pennsylvania 98-25 that were issued in response to the same LSC legislation.

Disclosure: Non Lawyer Supervisors
ABA Formal Opinion 95-393 Disclosure of Client Files to Non Lawyer Supervisors (1995) addressed the question of the extent to which lawyers in an elder care office can disclose client confidences to nonlawyer supervisors. The headnote to the opinion states:

A lawyer employed in a government elder care office may disclose to a nonlawyer supervisor information relating to the representation if such disclosure will help to carry out the client’s representation. If it will not be so used, disclosure is permissible under Rule 1.6 only if the client has expressly consented to it after consultation. In the absence of such consent the lawyer may disclose data from client files only in a way that does not compromise the confidentiality of any particular client’s data or permit the client to be identified or the data to be traced to that client.

Disclosure: Outside Auditors
ABA opinions have been issued on the topic of the extent to which legal services lawyers can disclose client confidences to outside auditors. Informal Opinion 1081 (1969) involved the question of whether it was proper for a legal services organization to allow the general accounting office to examine client files in order to determine the types of cases handled, the results obtained and whether income eligibility requirements were being met. The opinion analyzed the question under Canon 37 of the 1908 ABA Canons of Professional Ethics. The legal services organization proposed to release client intake and case disposition forms to the auditors, while blocking out all references to client names. The committee found this to be permissible. See also Informal Opinion 1287 (1974).

ABA Informal Opinion 1394 (1977) considered whether a legal services organization could permit a state agency to conduct audits of its files in order to evaluate the quality of legal services provided. The committee stated:

It is our opinion that staff lawyers for a legal services agency would not meet their obligations under Canon 4 if they permitted inspectors from outside the agency to examine files relating to client matters, when the files contain confidences and secrets within the meaning of DR 4-101, in the absence of the client’s understanding consent and waiver after full disclosure.

Legal services organizations can, however, reveal information to the extent necessary to determine the types of cases handled, the results obtained, whether income eligibility requirements are being met and whether the board’s policies are being followed so long as the client’s identity is not disclosed. See ABA Formal Opinions 324 and 334 and Informal Opinion 1081 (1969).

ABA Informal Opinion 1443 (1979) considered whether a legal services program funded by the Legal Services Corporation (LSC) could hire its own outside auditor to examine its client trust fund accounts to determine whether the program is in compliance with LSC client trust fund account regulations. The audit would be conducted according to LSC guidelines, and the final audit report would be made available for public inspection. The committee stated that even though information contained in a lawyer’s trust fund account could be considered to be client confidences or secrets, participation in such an audit program would not necessarily be improper, so long as client confidences and secrets were not disclosed to the program’s policymaking or governing board without client consent, and that steps were taken to preserve the client’s anonymity. The opinion concluded as follows:

...(S)uch an audit does not necessarily entail a violation of professional responsibilities to clients...(S)taff lawyers or legal services programs should not disclose confidences and secrets of a client in the absence of understanding consent of the client, and that, in disclosing to the program’s policymaking or governing boards information about clients and cases, the lawyers should follow procedures to preserve clients’ anonymity.

See also New Jersey Ethics Opinion 700 (2006) (organization that represents individuals infected with HIV may not disclose personal information to public funding source), Philadelphia Bar Opinion 2006-4 (2006) (absent informed consent, nonprofit legal services office may not provide client list to outside list enhancement service); and New York State Bar Opinion 718 (1999).
Disclosure: Governing Board of Directors

Legal services lawyers may not reveal client confidences to legal services offices’ governing boards of directors without client consent. See ABA Formal opinions 324 (withdrawn by Formal Opinion 334) (1974) and 334 (1974) as discussed in ABA Formal Opinion 95-393:

[W]e stated in Formal Opinion 334 (1974) that the rule requiring lawyers to preserve client confidences limits the extent to which a legal services office may allow its activities to be examined and administered:

Formal Opinion 324 held that without causing a violation of DR 4-101(b)(1) or EC 4-2 and 4-3, the board of directors of a legal services office could require staff lawyers to disclose to the board such information about their clients and cases as was reasonably necessary to determine whether the board’s policies were being carried out. Procedures to preserve the anonymity of the client approved in Informal Opinions 1081 and 1287 should be followed. It should be noted, however, that the information sought must be reasonably required by the immediate governing board for a legitimate purpose and not used to restrict the office’s activities, and that in many contexts a request for such information by a board may be the practical equivalent of a requirement. Hence a legal services lawyer may not disclose confidences or secrets of a client without the knowledgeable consent of the client. ABA Formal Opinion 95-393 (1993) at page 4.

Legal aid clients are entitled to the same confidentiality protections that are extended to clients who have retained lawyers from the private bar. When responding to requests for information from legal aid funding sources or any other outside agency, absent client consent lawyers should be careful to avoid disclosing information that could potentially reveal their clients’ identity.

As always, for further information on this topic, check the local rules of professional conduct, ethics opinions and case law of the jurisdiction. Your state or local bar association may also be able to help.

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