August 16, 2018

Honorable Karen Peters  
Chair, NYS Commission on  
Parental Legal Representation  
parentrepresent@nycourts.gov

Dear Judge Peters and Parent Legal Representation Commissioners:

On behalf of the American Bar Association, I am responding to the Commission’s Notice of Public Hearing. The ABA commends you on your leadership on the New York State Commission on Parental Legal Representation and is in full support of the Commission’s important objectives. We submit the following comments for your consideration.

The ABA is a voluntary professional membership organization with more than 400,000 members, including attorneys in private firms, corporations, nonprofit organizations, and government agencies, as well as judges, prosecutors, defense attorneys and public defenders, legislators, law professors and law students. In addition to our membership, the ABA has several public interest entities staffed with professionals who direct projects in a variety of legal fields, including child welfare. One of the longest-standing ABA public interest entities is the Center on Children and the Law, which was founded more than 40 years ago and seeks to promote access to justice for children and families. The ABA Center on Children and the Law manages a diverse portfolio of projects across the country supported by the federal government, state public agencies and courts, philanthropic foundations, and the ABA. All of the Center’s projects are unified by two complementary goals: to improve legal representation and to improve the legal systems that impact children and families’ lives.

For the last twelve years, the ABA Center on Children and the Law has had the privilege of working with the Center for Family Representation, the Bronx Defenders, Brooklyn Defender Services, and the NYU School of Law Family Defense Clinic as they have worked tirelessly to improve parent representation in New York City. We are confident that the Commission will go a long way to furthering and improving these efforts for the entire State of New York.

High Quality Legal Representation for Parents

For more than a decade, the ABA Center on Children and the Law has partnered with other members of the legal community to define and implement models of high quality representation for parents in child welfare cases. For example, in 2006, the ABA adopted Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases. More recently, in 2017, as part of a collaborative project titled the Family Justice Initiative (FJI), the ABA Center on Children and the Law and several other organizations, including the Center for Family Representation in New York, developed Attributes of High Quality Representation for Children and Parents.
We focus on this important area of legal representation because there are fundamental liberty interests at stake for both children and parents and because family outcomes improve when all parties in child-welfare proceedings have high quality legal representation.

Historically, parents who are involved in the child-welfare system have received sub-par, and sometimes no, legal representation. Parent attorneys often have too many cases to manage, are paid an inadequate rate, have received little-to-no relevant training, have no professional support, and do not specialize in child welfare law. They do not have the capacity to provide out-of-court advocacy for their clients, even though out-of-court activity in child welfare cases is often the most relevant in helping to achieve positive outcomes. When lawyers are not able to attend meetings with the parent and child welfare agency, for example, the parent is often left with a case plan that is “cookie cutter” and not related to the issues the family faces. The result of inadequate representation is that children, and their parents, are traumatized by the experience of feeling powerless to shape their own family’s future, and families can be needlessly torn apart when reunification would have been possible.

By contrast, when parents do have high quality representation they are more likely to participate in their cases both in and out of court, receive case plans tailored to their specific needs, have more frequent and timely visitation with their children, and reunify with their children. The federal government recently cited similar findings when the Children’s Bureau at the U.S. Department of Health and Human Services issued a 2017 Information Memorandum calling for child welfare agencies and jurisdictions, including state governments and courts, “to work together to ensure that high quality legal representation is provided to all parties in all stages of child welfare proceedings.” As the memo explained, one of the most valuable aspects of high quality legal representation in child welfare proceedings is that it informs judicial decision-making by ensuring that judges receive the most accurate and complete information about the parties. High quality parent representation has also been linked with higher rates of reunification and lower entry into foster care. This is important because research has demonstrated that children “on the margin” (i.e., who could avoid foster care placement) have better lifetime outcomes when they are raised by their families of origin.

As you make clear in your Notice of Public Hearing, some of the most crucial elements needed to establish a system of high quality representation include reasonable caseloads, timely appointment, interdisciplinary support, and a strong oversight structure. We have provided greater detail on each of these elements below.

**Caseloads**

We recommend that attorneys representing parents in child welfare cases should have no more than 60 clients at a time. This recommendation derives from consultation with experts on this topic throughout the country.

The Family Justice Initiative is a collaborative between the ABA Center on Children and the Law, the Center for Family Representation in New York, the Children’s Law Center of California, Casey Family Programs and child welfare lawyers from around the country. The goal of this initiative is to ensure that **every child and every parent has high quality legal**
representation when child welfare courts make life changing decisions about their families. To provide guidance to the field, the Quality Subcommittee of the FJI studied Practice Standards and research from Pennsylvania (see PENNSYLVANIA STATE ROUNDTABLE REPORT, LEGAL REPRESENTATION: A CALL TO ACTION (2015)), and talked to practitioners on the committee to make the recommendation that full-time parents’ attorneys should have no more than 60 clients at any given time. Committee members realized that this number may be aspirational in most parts of the country, but that lawyers who represent more than that number of clients are unable to provide high quality representation. Lawyers with more clients are unable to do the necessary out of court advocacy to provide effective counsel. They are unable to form relationships with clients in which the client trusts the lawyer and believes the lawyer has a true duty of loyalty to him or her. Most attorneys in Washington, Colorado, and Oregon, for example, have fewer than 60 cases and have found they are able to spend quality time with clients outside of the courtroom. The Director of the Committee for Public Counsel Services in Massachusetts is working to bring caseloads well below 60 for all attorneys representing children and parents in the state.

In addition to the number of cases a lawyer has, the committee discussed compensation as well. The committee stated that policymakers must:

Ensure parents’ and children’s attorneys’ compensation rates are adequate for the attorneys’ practice, accounting for overhead and other costs borne by private professionals. At a minimum, parents’ attorneys’ and children’s attorneys’ compensation should be equal to county or child welfare agency attorneys’ compensation, and consistent with other publicly-funded attorneys’ compensation, including criminal defense attorneys.

In addition, to ensure that attorneys are fairly compensated for their work, parents’ and children’s attorney pay should be structured as follows:

1. Salaried, with benefits, as part of an independent law office specializing in representation of children and/or parents;
2. Hourly pay, at a reasonable rate, with the same hourly rate for both in-court and out-of-court work;
3. Caps on pay per case or flat fees on a per case basis are not recommended as they can act as a disincentive for attorneys from meeting the individual attorney attributes.

We strongly recommend that as your Commission moves forward in deciding the best way for parents in New York to be represented, you ensure their lawyers have manageable caseloads and are fairly compensated.

Timely Appointment

Parent attorneys should be appointed before the first hearing in a case, preferably before a child is removed from his or her home. There should never be a circumstance in which a parent walks into a courtroom without counsel. In far too many jurisdictions, parents do not meet their lawyer until the day of an adjudicatory hearing, which can be 30-90 days after their child was removed.
This practice results in children remaining out of the family’s care for longer than necessary, visitation that does not meet the child’s needs to remain connected to his or her parent, and placement with strangers rather than kin. When the lawyer is appointed in advance of the first hearing, lawyer and client can have an initial meeting to discuss the parent’s wishes about the child returning home, living with kin the parent identifies, service needs for parent and child, and other issues important to the parent. The lawyer can be prepared at the imminent risk hearing to represent the parent’s wishes and plans for the child. Appointment before the first hearing can result in a client who understands the case, can engage in services sooner (if they are necessary), and children who are returned home, safely and sooner.

Several other national organizations have taken similar positions on this topic. For example, in 2017 the National Center for State Courts, Conference of State Court Administrators stated that courts should explore options to ensure “the legal representation of children and parents in all child protection cases and at every stage of the case.” Similarly, the National Council of Juvenile and Family Court Judges (NCJFCJ) cited research on the importance of “early and effective representation” in the NCJFCJ Enhanced Resource Guidelines issued in 2016.

Retired Family Court Judge Leonard Edwards has also written extensively about the importance of early appointment of counsel for parents from a judicial perspective in a 2012 article titled “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment.” As Judge Edwards describes, having counsel present at the initial hearing ensures that parents are better able to understand and participate in the proceedings, ensures that the judge receives important information, and helps to facilitate future contact with the parent.

Some jurisdictions, including New York City and Detroit, Michigan, have piloted programs in which lawyers are appointed prior to a child’s being removed from his or her home. This is a best practice, and one the Commission may choose to institute. In these jurisdictions, the legal team can assist the client in resolving non-child-safety issues such as housing, education, and domestic violence so that the child can remain safely at home.

**Interdisciplinary Model of Representation**

Interdisciplinary models of parent representation are those in which the legal team includes an attorney, a social worker, and a parent mentor. In 2006, when the National Alliance for Parent Representation began as a project run by the ABA Center on Children and the Law, there were fewer than a handful of jurisdictions using an interdisciplinary model of representation. Twelve years later, 23 states have implemented some version of this model, in at least one court or county. New York City continues to be a leader in the field on how to best serve clients under this model. In the ensuing years, research has begun to demonstrate that having a representation team for parents results in more timely and safer reunifications, clients who are more engaged in the process, clients who are better able to maintain the bond with their children through quality family time/visitation, and clients who participate in services that are appropriate for their individual cases and therefore more likely to provide the support and information the parent needs for the long term success of the family.
While the details of how the interdisciplinary model is structured may be different in certain counties, there is no doubt that this model provides the highest quality of representation for parents and leads to the best outcomes for families. Teaming social workers and parent mentors with lawyers is a practice that is spreading across the country and should be replicated throughout all of New York.

Your Commission has an advantage implementing this model throughout the state because the leaders of this innovative and effective practice serve as members of the Commission. These practitioners regularly provide training, technical assistance, and support to colleagues across the country who are working to implement this model because of the benefits it has for families. We strongly recommend working with these leaders to replicate the model in other parts of New York State. However, we know that just because a practice works well in New York City, it may not be easy to implement in some counties. We have learned that, in addition to the ways institutional providers in New York City have implemented this model, there are variations in other jurisdictions that have proven effective in non-urban areas. For instance, in Washington and Oregon, some social workers are on contract with the State Public Defender to work with solo practitioners who represent parents. While we favor the New York City model for most of the state, the Commission will have to consider the most efficient and effective ways of enhancing representation in rural counties. We urge you to take on that challenge and consider reviewing the work of colleagues outside of the state.

Oversight Structure

Finally, we recommend the Commission implement a statewide oversight structure of parent representation that increases the support and accountability for all counties, while not unduly restricting those counties that are already providing excellent representation for parents. We recommend assigning oversight responsibilities to one state-level entity that works closely with providers in each county to implement the Commission’s reform agenda. This statewide office should be charged with creating and enforcing Standards of Practice; helping to increase the number of lawyers who specialize in this practice; overseeing equitable caseloads and compensation; spreading the interdisciplinary model; and providing consistent training across the state. Each of these elements is essential to high quality legal representation.

These tasks could logically fall to the New York State Office of Indigent Legal Services, which has begun to play a leadership role in child welfare, or a new entity could be created. Either way, it is important that the oversight role is clearly articulated and the entity has independence from the judicial branch. There are several different models that other states use to provide oversight. We welcome the opportunity to provide additional information about options the Commission could explore.

Child welfare cases are fundamentally different from other civil family cases and criminal cases. They involve the most serious state intervention into the rights of a family. Separating a child from his or her parents causes harm and trauma and should only occur when the safety of the child is compromised. Unfortunately, too often families are torn apart in circumstances falling far short of a safety concern. The parent’s legal team must be well trained and supported to ensure children do not enter foster care for reasons such as poverty. The parent’s legal team
should spend time assisting the parent outside the courtroom and can benefit significantly from having social workers on the legal team. Parents’ lawyers play a unique and essential role in ensuring families thrive, and it is for these reasons we support your work and offer our assistance. The families in New York will benefit from your efforts to improve the legal representation they receive.

We appreciate your consideration of these comments prepared by our Center on Children and the Law. If you have any questions, please do not hesitate to contact Prudence Beidler Carr, Director, ABA Center on Children and the Law, 202-662-1740 or Prudence.beidlercarr@americanbar.org.

Sincerely,

Thomas M. Susman