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Honorable Pat Ownbey
Chairman
Appropriations and Budget Subcommittee on Human Services
2400 N. Lincoln Blvd
Oklahoma City, OK 73105

Dear Chairman Ownbey:

I write on behalf of the American Bar Association to share our thoughts about high quality representation for all parties, including the child welfare agency, in child welfare cases. We commend you for conducting your interim study about models of representation for the Oklahoma Department of Human Services and hope we can be helpful.

The ABA is the world's largest voluntary professional organization, with nearly 400,000 members and more than 3,500 entities. Its members include attorneys in private firms, corporations, nonprofit organizations, and government agencies, as well as judges, prosecutors, defense attorneys and public defenders, legislators, and law professors and law students. The ABA is committed to advancing the rule of law and improving the administration of justice. For over a century, the ABA has advocated for the ethical and effective representation of all clients, including all parties (the child welfare agency, parents, and children) in child welfare cases.

As we discussed in our *Standards of Practice for Lawyers Representing Child Welfare Agencies* (ABA 2004, http://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.authcheckdam.pdf), there are two basic models of agency representation:

Agency Representation Model: Under this model, the agency attorney represents the agency as a legal entity, much the same as in-house counsel's role in representing a corporation. The attorney could be an employee of the agency or of another governmental body, or a private attorney with whom the agency/government contracts, but the agency is clearly the defined client. As such, the agency has the ultimate decision-making power, and the attorney should view his or her role as one that both represents the agency in court and provides advice and counsel on matters outside the courtroom. Some of the benefits of this model include:

- reliance on the agency's familiarity with a child and family in decision making;
- value placed on the agency's expertise in making decisions regarding the safety, permanency, and well-being of children and on the lawyer's legal expertise on legal matters;

- consistent decision-making and interpretation of laws;
- legal action supported by caseworker opinion, thus boosting caseworker credibility in court, for example, in deciding when to file an initial petition;
- the attorney is very familiar with the agency and its practices and policies; and,
- the attorney has the opportunity to provide legal counsel on individual cases as well as policy decisions.

One drawback to this model is that caseworkers may believe the attorney represents them personally rather than the agency as a whole. While in practice the respective interests often coincide because the caseworker is the voice for the agency in court, the agency attorney must clearly communicate that he or she represents the agency as an entity.

Prosecutorial Model: Under this model, an elected or appointed attorney (or the attorneys working for this individual), often a district attorney or county attorney, files petitions and appears in court on behalf of the agency, and represents the state or “the people” of the jurisdiction. This could mean the elected attorney may override the views of the agency in court. One positive aspect of this model is that the attorney may be more in-tune with the wishes and beliefs of the community and how the community feels about handling child welfare cases. Concerns with this model include:

- the agency is often the only party in court without an attorney speaking for it;
- the caseworker’s expertise may be ignored, as the attorney has the ultimate say;
- the attorney may be handling all the business for the community and therefore not be able to specialize in child welfare law;
- political agendas may play a large role in decision-making;
- the agency as a whole may not be getting legal advice on policy issues;
- the attorney’s personal beliefs about issues such as permanency rather than caseworker expertise dictate what will happen for a child; and,
- potential conflicts of interest may arise, such as when the prosecutor is pursuing a delinquency petition against a child who is in the agency’s custody or if there are criminal charges against a child's parent.

At the time these Standards were written, the expert drafting committee recommended adoption of the agency representation model. In the time since the Standards were published, the discussion in the child welfare community has become more nuanced and more focused on concrete outcomes for children and their families. There is a better appreciation today that children have more success in life when they are raised by their parents or if separation is necessary, then by relatives. We know much more about the impact of trauma on a child’s well-being, and we know that removal from family causes trauma. The child welfare agency should be expert on these important issues and their expertise must be relied upon when making decisions for children and families. It is for this reason that the ABA continues to prefer the agency representation model over the prosecutorial model.

Certainly some district attorneys are trained on these issues and can provide all of the information that judges need to make decisions, but it is essential that the voice of the agency is heard during that decision-making process. Judges must make decisions about removing children

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from their homes, placement concerns, and, ultimately, permanency decisions. Without hearing from the agency, as well as all parties and stakeholders in individual cases, judges cannot make the best decisions. Under either model, judges should receive all of the information they need, but the likelihood that this will occur is generally greater under the agency representation model.

The ABA strongly supports your effort to improve outcomes for children and their families, through your examination of agency representation. Should you have any questions or want additional information concerning our comments, please feel free to contact Bruce Nicholson, Senior Legislative Counsel (202-662-1769; bruce.nicholson@americanbar.org) or Mimi Laver, Director of Legal Education, Center on Children and the Law (202-662-1736; mimi.laver@americanbar.org). Thank you for consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman