Findings

This subcommittee report addresses concerns that the appearance of non-lawyer DHS caseworkers in some proceedings might be perceived as the unauthorized practice of law.

1. Regulation of the Practice of Law

The discussion about unlawful practice of law and representation in childhood dependency proceedings necessarily begins with clarity about what branch of government has the power to regulate who represents parties.

Article III, Section 1 of the Oregon Constitution provides:

The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

As a separate branch of government, the judicial branch possesses certain inherent powers necessary to ensure the courts’ functioning. In Oregon, “[n]o area of judicial power is more clearly marked off and identified than the courts’ power to regulate the conduct of the attorneys who serve under it.”1 Although the Oregon Supreme Court has acknowledged its inherent power to regulate the practice of law, it has also recognized that the legislature has the power to regulate “some matters which affect the judicial process.”2 The Court held that, “[t]he limits of legislative authority are reached, however, when legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions.”3

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2 Id.
3 Id.
The heart of the judicial process is the ability to control judicial proceedings and the parties that appear in front of the court. After all, the court’s power to control who appears before it is “an essential part of the judicial machinery with which it is entrusted by the constitution[.]”

Except in limited circumstances, a person who wants to represent others before a court must be an active member of the Oregon State Bar. Others may not do so without court permission; for instance, out-of-state attorneys who seek to appear before a court must apply to appear pro hac vice.

Although individual parties may appear pro se to represent themselves, the state must generally appear through an attorney. Oregon statutes require that “[a]ny action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state or a party that is not a natural person appears by attorney in all cases, unless otherwise specifically provided by law.” Under most circumstances, the Attorney General is the legislatively mandated attorney for the state. An exception to this legislative requirement is in place for the Department of Human Services (DHS) in dependency proceedings. Temporary legislation passed in 2014 and extended by Senate Bill 222 in 2015 currently provides that DHS “may appear without the Attorney General at: (1) Any hearing held after the hearing required under ORS 419B.305 has been held; and (2) Any proceeding where the district attorney represents the state, provided the positions of the department and the state are not in conflict with respect to issues raised for consideration or determination in the proceeding.” This Legislation sunsets in 2017.

Determinations about who should represent the state (e.g. the Attorney General or a District Attorney) are within the purview of the Legislature. Decisions about who is qualified to appear and represent others before a court are within the purview of the Judiciary. Attempts to legislate who is qualified to appear and represent others before a court may lead to determinations that “unduly interfere with the judicial department in the exercise of its judicial functions.”

There are significant benefits to the Judiciary determining what individuals are qualified to represent others in court. In particular, the court is able to impose standards on parties who appear before it and does so in order to regulate the practice of law and

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4 Id.
5 ORS 9.160.
6 UTCR 3.170 (Pro Hac Vice Admission of out-of-state attorney).
7 ORS 9.320 Necessity for Employment by an Attorney (emphasis added).
8 ORS 180.060 Powers and Duties of Attorney General ((6) The Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state)
9 Oregon Laws 2014 Chapter 106 (HB 4156).
10 See e.g. ORS 180.060 (outlining circumstances under which Attorney General shall represent the State); State v. Coleman, 131 Or App 386, 886 P2d 28 (1994) (holding that district attorney’s use of two assistant attorney generals to prosecute case did not violate separation of powers).
11 Ramstead v. Morgan, 219 Or at 399.
protect the public. For example, to be admitted to the Oregon State Bar and have the right to appear and represent others in Oregon courts, a person must pass a bar examination administered by the Board of Bar Examiners to demonstrate basic competence, as well as a character and fitness evaluation. Once admitted, all attorneys must comply with the Oregon Rules of Professional Conduct, which are promulgated by the court. The Oregon State Bar, as an instrumentality of the judicial department, administers an attorney disciplinary system to enforce compliance with the rules. The Bar also administers a mandatory continuing legal education program for Oregon attorneys so that they maintain basic competence. For these reasons, decisions regarding the lawful or unlawful practice of law or a determination that representation in court by a non-attorney is appropriate fall within the purview of the Oregon Supreme Court, through its rules.

2. Defining the Practice of Law

Currently in many counties in the state Department of Human Services ("DHS") employees draft and file dependency petitions and some write orders and judgments. Additionally, pursuant to the statues described above, caseworkers across the state frequently appear in court without counsel. This subcommittee has been tasked with assessing which of these actions, if any, when taken by Oregon DHS employees, who are not represented or supervised by counsel, constitute unlawful practice of law.

Case law extensively addresses what constitutes the practice of law. The Oregon Supreme Court has not provided a comprehensive definition of the practice of law but has used the following general definition: "any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties[]." The Court of Appeals has stated that the practice of law is the "exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance." A number of specific acts have been determined to fall within the practice of law. Further, and of particular relevance, in a footnote in State ex rel. Oregon State Bar v. Lenske, the Court stated that a lawyer may employ non-lawyers to do any task except counsel clients about law matters, engage directly in

13 ORS 9.220.
14 Id.
15 ORS 9.527 et seq.
16 ORS 9.112.
19 See, e.g., Oregon State Bar v. Wright, 280 Or 693, 696, 578 P2d 1238 (1978) (Drafting of pleadings, briefs, wills, contracts, and other legal instruments); State ex rel. Oregon State Bar v. Lenske, 284 Or 23, 31, 584 P2d 759 (1978) (Counseling clients about law matters and appearing in court or in formal proceedings as a part of the judicial process); In re Morin, 319 Or 547, 563, 578 P2d 393 (1994) (Advising clients on legal decisions specific to the clients and using discretion in selecting legal documents to meet the clients’ needs); In re Devers, 328 Or 230, 974 P2d 191 (1999) (Negotiation on behalf of a client); In re Devers, 328 Or 230, 974 P2d 191 (1999) (Drafting a settlement agreement or reviewing drafts on behalf of a client); In re Devers, 328 Or 230, 974 P2d 191 (1999) (Accepting pleadings and discovery requests on behalf of a client).
20 Supra, 284 Or at 31.
the practice of law, appear in court or appear in formal proceedings as a part of the judicial process, so long as the lawyer takes the non-lawyer’s work, vouches for it, and becomes responsible for it.

Based on existing case law, the Board of Governors of the Oregon State Bar has defined the unlawful practice of law to include:

“the practice of law, as defined by the Oregon Supreme Court, in Oregon, by a person who is not an active member of the Oregon State Bar and is not otherwise authorized by law to practice law in Oregon; or (2) holding oneself out, in any manner, as authorized to practice law in Oregon when not authorized to practice law in Oregon.”

3. Conclusion

If the Task Force ultimately recommends that DHS has full representation (where attorneys represent, advise and appear in court with DHS at every court hearing), then the UPL subcommittee believes that it would greatly minimize the risk of unlawful practice of law by DHS employees. However, if this is not the ultimate decision of the task force, then the UPL subcommittee provides the following recommendations as presented below.

Recommendations

**Recommendation #1:** Should the Task Force ultimately recommend something less than full representation for DHS (where for example, DHS continues to appear without legal counsel at court hearings or where the appearance is limited to certain types of court hearings) the following bundle of recommendations should be implemented to prevent the unlawful practice of law by DHS employees:

a) In order to prevent unlawful practice of law by DHS employees all petitions, orders, and judgments must be prepared by an attorney or, if prepared by a non-attorney, the attorney must review, and adopt the non-attorneys work by signing the document to be filed with the court.

Preparing legal documents and presenting them to the court are actions that have been determined to be the practice of law. The court has, however, found that non-lawyers can engage in these practices, so long as the lawyer takes the non-lawyer’s work, vouches for it, and becomes responsible for it to the client. Thus, requiring attorneys to prepare or review and certify petitions, orders, and judgments should prevent the unlawful practice of law.

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21 Oregon State Bar Bylaws § 20.1(C).
b) In order to prevent unlawful practice of law by DHS employees, employees who appear in court without an attorney should be sworn in as either a fact witness or, where proper foundation has been established, an expert witness and present testimony in this role pursuant to the rules of evidence. Non-attorneys cannot appear in court to advocate on behalf of a client entity without engaging in the unlawful practice of law. Swearing DHS employees in as witnesses clarifies their role in the courtroom, allows for relevant information to be reported to the court, and provides parameters around the information DHS employees present to the court that should prevent the inadvertent unlawful practice of law.

c) In order to prevent unlawful practice of law by DHS employees, employees who appear in court without an attorney should not make legal arguments, cite to legal authority, or advocate for a legal position. It is paramount that DHS employees understand that it is their role to provide evidence grounding in facts and expert social work opinions based on facts and not directly apply the facts to the law or provide legal arguments. Caseworkers should be counseled about these restrictions and judges should, as necessary, make in the moment decisions that guide DHS employees practice and to the extent possible prevent the inadvertent unlawful practice of law.

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22 While this may address the UPL issues, this would not address the DHS employee’s ability to be able to respond to cross-examination by other parties’ attorneys or understand the implications of their sworn testimony. This also creates inconsistencies statewide as certain courts do not follow the same model of questioning the agency and do not wish to take on the role or assume that responsibility.

23 While this may address the UPL issues, this would require that DHS employees rely on other parties to lay the foundation for the DHS employee to testify as an expert.

24 While this may address the UPL issues, this does not, however, alleviate the concern that the DHS employee may not understand the implications of what to report or how the evidence they are providing may be questioned by the other parties’ attorneys, either at the hearing or on appeal.