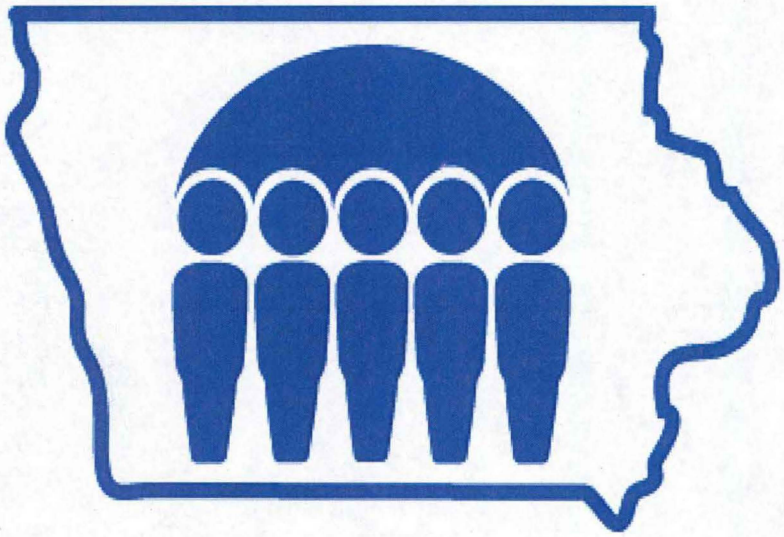
Iowa Department of Human Services



Summary of Charge From House File 608

December 2011

Report to the Iowa General Assembly on the Role of the County Attorney in Representing the Department of Human Services in Juvenile Proceedings under Chapter 232

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Background

The Study Committee on the role of the County Attorney in representing the Department of Human Services in juvenile proceedings under Chapter 232 was convened in September of 2011 pursuant to Iowa Senate File 482, Division VIII, Section12:

"The department of human services shall consult with representatives of county attorneys, the office of attorney general, and other stakeholders in performing a review of the role of the CA in representing the department of human services in juvenile proceedings under Chapter 232. The review shall include the issues addressed in House File 608, introduced by the committee on judiciary of the house of representatives during the 2011 Session, and other issues identified by stakeholders."

The Study Committee conducted five meetings facilitated by Fred Van Liew. The Committee was comprised of twelve members, ten of whom were attorneys. The Committee included a former Justice of the Iowa Supreme Court, a former Judge of the Iowa Court of Appeals, a faculty member of the University of Iowa Law School, two faculty members of the Drake University Law School, the President of the Iowa County Attorney Association, the Chief of Staff of the Office of the Iowa Attorney General, and the Iowa Citizens' Aide / Ombudsman. Six of the committee members, in addition to the facilitator, have served as prosecuting attorneys.

Division VIII, Section 12 of Senate File 482, requires that the Department of Human Services report: " . . . the results of the review along with findings and recommendations to the chairpersons and ranking members of the joint appropriations subcommittee on health and human services and of the committees on judiciary of the senate and house of representatives, and the legislative services agency on or before December 15, 2011."

The Study Committee commenced its work on September 15, 2011, and met for the fifth and final time on November 14, 2011. The Committee was diligent in its mandate to consider without bias the interests of the three principal entities most effected should H.F. 608 be enacted by the General Assembly, i.e. the Iowa County Attorney Association (ICAA), the Iowa Department of Human Services (DHS), and the Office of the Iowa Attorney General (AG). The Committee, in its deliberations, was also sensitive to the interests and needs of children under the custody of DHS and the impact that HF 608 might ultimately have on their safety.

Iowa House File 608

H.F. 608 is a bill that relates to County Attorney (CA) duties when representing DHS in juvenile court. Before considering the impact of the passage of H.F. 608, it is important to review the most significant changes that would be made to existing legislation.

- Iowa Code Section 232.71C would be amended to require the CA to continue to assist DHS in the filing of CINA petitions but not require the CA to assist DHS in the furtherance of the action subsequent to the filing of a petition;
- Iowa Code Section 232.90 would be amended to require the CA to represent "the state" in a CINA proceeding and would strike the existing provision requiring the CA to represent DHS in such a proceeding;
- Iowa Code Section 232.90 would be amended to define "state" to mean the general interest held by the people in the health, safety, welfare, and protection of all children living in the state;
- Iowa Code Section 232.90 would be amended to strike the provision presently allowing the AG to represent DHS if a dispute arises between the CA and DHS in a CINA proceeding;
- Iowa Code Section 232.112 would be amended to remove DHS from the list of persons identified as necessary parties to a termination of parental rights (TPR) proceeding and, instead, adds DHS to the list of persons who are entitled to notice of the proceedings;
- Iowa Code Section 232.114 would be amended to require a CA to represent "the state" in a TPR proceeding and would strike the existing provision requiring a CA to represent DHS in a TPR proceeding;
- Iowa Code Section 232.180 would be amended to require the CA to represent "the state" in a voluntary foster care placement proceeding and would strike the existing provision requiring the CA to represent DHS.

In summary, if H.F. 608 is enacted the legislation would remove DHS as a party in Chapter 232 actions and eliminate representation of DHS by the CA or any other attorney.

Position of the Iowa County Attorney Association

It is the position of the ICAA that its main objective in sponsoring H.F. 608 is to restore the CA's role as the independent voice of "the People" in CINA and TPR prosecutions. The ICAA asserts that if its goal is to be accomplished, DHS either has to have its own in-house counsel, if it is to remain a party, or must no longer be a party. By severing the attorney-client relationship between CAs and DHS, the ICAA argues that H.F. 608 offers the only solution to the structural, ethical, and statutory problems that CAs face in representing DHS.

While the ICAA concedes that H.F. 608 eliminates the status of DHS as a party, it asserts that H.F. 608 leaves intact the current authority, duties, and responsibilities of DHS to pursue any action deemed necessary for the safety and best interest of a child, all with the continued assistance of CAs. According to the ICAA, H.F. 608 also preserves the current rights and obligations of DHS to investigate, report, and make

recommendations to the court, and DHS's rights of notification and the opportunity to be heard.

The following chronology, presented by the ICAA to the Study Committee, outlines how the ICAA arrived at its position that ethical conflicts of interest generally exist for CAs in their role of representing DHS in juvenile cases:

From the enactment of Iowa Code Chapter 232 in 1978 to 2007, it has been the duty of CAs to represent the State of Iowa in CINA and TPR proceedings. In representing "the State" in both juvenile and criminal proceedings, CAs are the legal representative of their electorate, i.e. "the People."

With the addition of subdivisions (2) to Sections 232.90 and 232.114 in 1989, CAs have also been required to represent DHS. For nearly 30 years, all participants in CINA and TPR proceedings [judges, guardian ad litems (GAL's), attorneys for parents, CAs, the AG's office, DHS, juvenile court officers (JCO), and clerk of court] recognized and acknowledged that "the State" and "DHS" are two separate, distinct, independent entities, with potentially divergent interests and recommendations. No one working in juvenile court equated "DHS" with "the State."

While CAs understood that the addition of subdivisions (2) in 1989 created a dual role of representation, CAs did not believe that the addition of subdivisions (2) created an attorney-client relationship between the CA and DHS. After all, the General Assembly anticipated that disagreements between CAs and DHS over what course of action to take in a case might occur, and provided in subsections (2) that DHS could in those instances request representation by the Attorney General. In rare cases of such disagreement, the practice statewide became that the Attorney General might appear on behalf of DHS, and the CA would then remain in the case to represent the State/People. Or, the CA would simply present the differing recommendations of both the State and the Department to the court. Such would certainly never have become the practice if any had understood that the addition of subdivisions (2) in 1989 created an attorney-client relationship between CAs and DHS.

The ICAA believes that the Iowa Supreme Court's 2007 ruling in In re A.W. radically changed the role of the CA in CINA and TPR proceedings.

By ruling that the State of Iowa appears in CINA and TPR proceedings through DHS, that DHS is therefore the "client" of the CA in CINA cases, and that CAs therefore do not have the right to exercise their independent judgment of the state interest, but must instead advocate only the position of their client DHS in a CINA proceeding, the Court created an attorney-client relationship where none existed before.

According to the ICAA, the A.W. ruling has resulted in three consequences:

1) it removes "the People," whom CAs always previously represented, from CINA and TPR cases;

2) it takes away the independent prosecutorial discretion and decision-making ability of Iowa's elected CAs in CINA and TPR prosecutions, by making CAs subservient to the recommendations and policies of a state agency, DHS; and

3) it nullifies all existing Chapter 232 provisions that grant CAs the authority to take action independent of DHS when necessary to protect a child.

The ICAA also argues that the Supreme Court's imposition of an attorney-client relationship on CAs also invoked the Iowa Rules of Professional Conduct, specifically Rule 32.1:2 and 32:1.7:

Under the Professional Conduct Rules, the creation of an attorney-client relationship between CAs and DHS creates ethical issues for CAs where none existed before. This is due to the CA's role in the prosecution of a parent or the child in a related criminal or delinquency case, where the CA represents the People of the State. The 1988 Kempe Study and the 2004 ABA Standards of Practice for Attorneys Representing Child Welfare Agencies (and at least one chief judge in Iowa in 2011) identify and acknowledge these ethical conflicts. The issue of ethical conflicts has not simply been recently "conjured up" by CAs. Furthermore, under the Iowa Supreme Court's current "differing interests" and "materially limited" analysis of concurrent conflict of interest issues, it is highly likely the Supreme Court and/or the Attorney Disciplinary Board and Grievance Commission will ultimately find an ethical conflict exists. With their law licenses at stake, CAs have a strong desire to guard against conflicts of interest.

Position of the Office of the Attorney General

The Office of Iowa Attorney General opposes H.F. 608, asserting that conflicts of interest generally do not arise when CAs represent DHS in juvenile cases, absent an actual conflict of interest arising when a CA has a conflicting personal or emotional involvement in a case. The AG's Office, in documents presented to the Study Committee, set forth three arguments in support of its position:

1.) Government lawyers are different than lawyers in private practice because the government lawyer's clients and responsibilities are defined by statute. Since 1989, the Iowa legislature has assigned both criminal and juvenile court duties on behalf of the State to CAs. Iowa Code sections 331.756(2) and 232.90.

2.) There is, in essence, only one client in these cases – the State of Iowa. On the criminal side, section 8 of the Iowa Constitution states that all prosecutions shall be conducted in the name and by the authority of "The State of Iowa." On the juvenile side, DHS is a central department of the executive branch of government and the State of Iowa appears in court

through DHS. The notion that there is another client – "The People" – is not supported in the law.

3.) Even assuming that there are two clients, there is generally no concurrent conflict of interest because representation of one client is not directly adverse to another client because DHS is not a party to the criminal case. In the vast majority of cases, there is no significant risk that representation of a client will be materially limited by representation of another client.

The AG's Office opposes H.F. 608 for the following reasons:

1.) The result of H.F. 608 would be 99 views of child welfare. Ultimately courts make the decision but the CA would be controlling how the case is argued. Similarly situated families in different counties could be treated differently solely because of their address, raising serious issues of fairness and rationality.

2.) Allowing 99 CAs to make independent decisions on the disposition of juvenile cases eliminates any ability to control costs on a statewide basis. Although the legislation requires the CA to present fiscal evidence provided by DHS to the court, there is no requirement that the CA support the position of DHS. Likewise, the variety of outcomes eliminates the ability to achieve statewide goals required by the federal government. The legislation requires the CA to "consult" with DHS on this issue, but there is no requirement that the CA must defer to the position of DHS.

3.) Giving the CA the authority to determine the state's position in child welfare cases could result in the elimination of the expertise of DHS from the proceeding. On a statewide basis, DHS sets child protection policies based on research, best practices, federal requirements, fiscal realities, and statewide accountability. The CA does not have this background and is only accountable to the voters of one county. On a local basis, the DHS caseworker has the most knowledge about the situation and the families involved. The caseworker has worked directly with the family and providers, has usually been in the home, and understands the dynamics. Moreover, the DHS caseworker has training in this area.

4.) H.F. 608 could create uncertainty and confusion in regard to the handling of appeals in these cases. If DHS is excluded at the trial level it is uncertain what would happen at the appellate level. Unresolved is whether the AG's Office would argue on behalf of DHS in the appellate courts or whether it would argue a position in opposition to DHS in the appellate courts.

Position of the Department of Human Services

The Department of Human Services is opposed to H.F. 608 as it would result in the removal of DHS as a party to CINA proceedings.
In 1988, after a series of child deaths and other high profile child welfare cases in Iowa, Governor Branstad requested that a study of how Iowa protects its children be undertaken. The study focused on the following areas:

1) The removal of children;
2) The termination of the parent-child legal relationship;
3) The staffing, training, and procedures of the Juvenile Court and DHS;
4) The confidentiality of child welfare information.

The report recommended that the state create within the Attorney General's Office a special unit of attorneys assigned and located throughout the state to represent DHS in all CINA and CINA related cases. This is the "agency representation model" that is the most common model followed in other states. However, due to the cost of such a system of representation, it was not created and, in addition, DHS was not provided with funding to employ its own attorneys.

The 1988 study concluded that Iowa law "clearly mandates an interpretation that DHS is a full party in a CINA proceeding" and that Chapter 232 requires that DHS be represented in all juvenile court proceedings. The current system is one in which county attorneys represent DHS. This system offers a mechanism for resolving issues of disagreement in those juvenile court proceedings in which a county attorney and a DHS caseworker disagree. In cases of disagreement in which the county attorney believes that it cannot represent DHS, an assistant Attorney General can provide legal representation for DHS.

If HF 608 is enacted, and county attorneys are relieved of representing DHS in juvenile court proceedings, DHS would have no recourse but to find alternative legal representation, resulting in a significant increase in the fiscal obligations of DHS. While the ICAA asserts that county attorneys would continue to work with DHS in some capacity, DHS would, nevertheless, still be required to hire its own attorneys in order to carry out its roles and responsibilities under Iowa law as related to juvenile court proceedings.

During the current HF 608 debate, as in 1998, county attorneys have taken the position that DHS is no more a party in a CINA case than a law enforcement agency is in a criminal case. However, the 1988 study found this argument flawed. DHS is required to take appropriate action to initiate CINA proceedings under Chapter 232 and is one of those persons or agencies specifically authorized to actually file a CINA petition. DHS also is permitted to authorize other competent persons to file a CINA petition. It is clear that Iowa law gives DHS the authority to bring an action in its own right and to control the bringing of such an action by others.

Iowa law envisions that DHS's participation does not end with the filing of a CINA petition, but continues throughout the resulting juvenile court proceedings. DHS must

be viewed as having indispensible party status in a CINA case. A clear reading of Iowa code sections 232.71(11) and 232.90 supports this. The "state", represented by the county attorney in 232.90, must refer to DHS as the designated agent or representative of the state's interest and role in a CINA case. A contrary position that the "state" in 232.90 is a separate entity, other than DHS, creates an untenable situation in which the state could, ultimately, be forced to argue against itself in a CINA hearing. Because 232.71(11) requires the county attorney to represent the department at all juvenile court proceedings, a county attorney cannot ethically represent any other interest, party or not, in the same action.

At any one time, DHS has approximately 5,000 children in its care. For every case, DHS is required to submit reports and be prepared to testify at every hearing. Should county attorneys no longer be required to represent DHS, it is estimated that the cost for DHS and the AG's office to provide the legally mandated, and needed, legal representation would be between $6 and $9 million dollars. This estimate does not only take into account attorney time spent in court but attorney preparation time as well. Neither Governor Branstad's fiscal year 2012 proposed Health & Human Services Appropriations budget nor proposed House Health & Human Services Appropriations bills provide DHS with any new resources to fund the cost necessary to employ its own attorneys.

DHS has many other costs that it must be concerned with in attempting to balance its child welfare budget. DHS must balance the interest of every child in every case with its budgetary obligations. A scenario in which DHS would not have a voice in court would greatly impact how and for what resources child welfare dollars would be spent.

It is the position of DHS that the current attorney-client relationship has worked well in the vast majority of the cases. This relationship allows DHS to be represented in court as the custodian for children in need. Should HF 608 be enacted, the children of Iowa would suffer.

Models of Legal Representation for Child Welfare Agencies

The Study Committee not only considered the position of the ICAA, the AG's Office, and DHS relative to the merits of HF 608, it expanded the scope of its inquiry to include an exploration of the models of legal representation for child welfare agencies that operate within other states. The Committee was concerned that should HF 608 be enacted it would result in a system that might compromise the statutorily mandated duties and responsibilities of DHS in protecting abused and neglected children. As such, committee members were interested in whether or not the child welfare agencies of other states have legal representation and, if so, how that representation is provided. The Committee found that there are two primary models of child welfare agency legal representation, the "Agency Model" and the "Prosecutorial Model." A third possibility is

the hybrid model, which incorporates elements of the Agency and the Prosecutorial Models.

Iowa currently operates under the "Agency Model" of child welfare agency legal representation. The ICAA proposal, as incorporated in H.F. 608, would result in a return to the "Prosecutorial Model."

In August of 2004, the American Bar Association (ABA) promulgated the "Standards of Practice for Lawyers Representing Child Welfare Agencies." Attorney Mimi Laver with the National Child Welfare Resource Center on Legal and Judicial Issues was a principal author of the Standards and participated in a tele-conference with the Study Committee in order to answer Committee questions about the Standards.

The following is excerpted from the ABA Standards:

Agency Model

Under the Agency 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, but the agency is clearly the defined client.

Benefits of the Agency Model include:

- reliance on the agency's familiarity with a child and family in decision making;
- value is 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, thereby boosting caseworker credibility in court;
- the agency attorney is very familiar with the agency and its practices and policies.

According to the Standards, one drawback to the Agency Model is that caseworkers may believe the attorney represents them personally, rather than the agency as a whole.

Prosecutorial Model

Under the Prosecutorial Model, an elected or appointed attorney files petitions and appears in court on behalf of the agency, and represents the state or "the people" of the

jurisdiction. This may mean the elected attorney may override the views of the agency in court.

Authors of the Standards state that a positive aspect of the Prosecutorial 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.

However, the authors enumerate several concerns with the Prosecutorial Model:

- the caseworker is often the only party in court without an attorney speaking for him or her;
- 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;
- 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.

The drafting committee of the ABA Standards recommended the Agency Representation Model over the Prosecutorial Model.

In 2008, the American Bar Association retained attorney Kimberly Halbig-Sparks, now an attorney with the Idaho Supreme Court, to analyze the two primary models of legal representation for child welfare agencies. The following is excerpted from her report to the ABA, entitled "In Support of an Agency Model of Legal Representation for the Child Welfare Agency:"

The model of representation is important. There are significant differences in an attorney's scope of responsibility depending upon the model. In addition, application of many of the ethical rules will differ depending upon the model. These distinctions have a far-reaching impact for the child welfare agency.

The biggest difference between the two models is that the agency is entitled to legal representation under the agency model but not under the prosecutorial model. Under the prosecutorial model, the child welfare agency does not have its own legal representative in court and it is not guaranteed that its opinions, recommendations or

expertise will be shared with or considered by the court. The local county or district attorney decides which agency opinions and recommendations, if any, to share with the court. In most cases, the child welfare agency and the prosecutor's positions in a case will be aligned and it may often appear as if the agency is the client. However, the agency and the prosecutor may be at odds in some cases particularly on critical decisions such as when to reunify a child with a parent or when to file a TPR action. Under such circumstances, the agency is left without a voice in court.

The agency's voice is critical. Child welfare cases are unique. Social work and legal issues are closely intertwined. While prosecutors are often skilled litigators, many do not have the requisite social work training or child welfare law experience to be making independent determinations on what is in a child's best interests. Conversely, the child welfare agency is a key party in any child welfare proceeding and its voice is critical to ensure appropriate decisions are being made for the safety, permanency and well being of the child. The child welfare agency is the expert on the social work issues and works in collaboration with an array of service providers to make assessments regarding the needs of the family and recommendations regarding placement, reunification services and permanency planning for the child and family.

The agency has significant and ongoing responsibility throughout an entire child welfare case. Agency involvement begins upon receipt of a referral alleging abuse or neglect of a particular child. Agency staff conducts an investigation into the allegations and determines if they are substantiated or unsubstantiated. As part of their investigation, agency social workers will assess child safety and make determinations regarding imminent risk of harm and evaluate conditions that support or refute the need for emergency intervention. If necessary, the agency provides services to stabilize a family. If those services fail or are insufficient to ensure the child's safety and removal is warranted, the agency, in consultation with legal counsel, may file a dependency action. The agency develops a case plan and the social worker identifies and sets up the appropriate reunification services for the family and oversees the intervention plan. Agency staff also must identify and oversee the child's placement. The social worker monitors the family's progress towards reunification and makes assessments regarding the appropriate permanency plan including the possibility of termination of parental rights. If the latter is necessary, the agency moves forward with filing a Termination of Parental Rights Petition. It is often the agency's efforts that are key to the success of a termination of parental rights case. Even after a termination of parental rights, the agency's involvement in the child's life continues until the child is adopted or reaches adulthood. (P.5)

In her report to the ABA, Halbig-Sparks urged states that use a Prosecutorial Model to adopt an Agency Model of representation:

States using a prosecutorial model should give serious consideration to the adoption of an agency model of representation on a statewide basis, even if it means some loss of power and control for the prosecutor. In criminal cases there are no obvious clients and no opinions or recommendations from any individual or agency to advocate on behalf

of. The prosecutor represents the people and protects them from harm. In contrast, in civil child welfare proceedings, the state child welfare agency is given the statutory responsibility to protect abused and neglected children. There is a client, the child welfare agency, and it needs legal representation to advocate its opinions and recommendations. The agency should not lose its client status simply because a local prosecutor handles the case rather than a state's attorney, in-house counsel or assistant attorney general. (P.46)

In May 2009, the National Child Welfare Resource Center on Legal and Judicial Issues sent a survey to Court Improvement Programs regarding the basic organization of legal representation for state child welfare agencies, children and parents. Answers to survey questions were obtained from 49 jurisdictions, including the District of Columbia, Puerto Rico, and the Navajo Nation, with only four states failing to respond.

Forty-eight jurisdictions responded to questions on how they organize representation for agency attorneys:

- Seventeen (17) states responded that they had a "statewide system where the attorney is an employee of the agency."
- Twelve (12) states reported they had a "county-based system where most counties are organized with the attorney as an employee of the prosecutor or CA's office."
- Nine (9) states had a "statewide system where it is a function of the prosecutor or CA's office.
- Four (4) states had a "county-based system where most counties are organized with the attorney as an employee or contractor of the agency."
- Six (6) states had "another system". Most of these 6 had a hybrid system where there was a state supervised system in parts of the state and, usually larger counties or municipalities, a county or city run system.

In response to a question about which model their states use, 80% (36 of 45) of the jurisdictions reported that the agency attorney represents the agency. 20% (9 of 45) of the jurisdictions reported that the agency attorney represents "the people."

The authors of the survey reported the following with regard to a statewide system:

> " . . . the lack of any state-wide organization leads to less uniformity in procedures and less ability to track how specific regions in the state are functioning regarding child welfare systems. In states with a statewide system, it is easier to gather data for the entire state on caseload numbers or removal petitioning practices because each agency office functions more uniformly with respect to state law and policy. In some states with a county-based system, it is difficult to acquire such data because each county imposes its own rules and regulations." (P.3)

In November 2011, the Iowa Attorney General's Office requested that the National Association of Attorney Generals inquire of its members on whether or not the agency in each state that oversees child welfare matters is represented in abuse and neglect cases. Twenty states responded to the AG request. Nineteen indicated that the child welfare agencies in their respective states receive legal representation. Only in Kansas is the state agency not represented and not a party in child welfare proceedings.

Ethical Questions and Whether the Prosecutorial Model Answers Them

The Supreme Court in A.W. made it clear that DHS is the client of the CA in Chapter 232 actions. In states that use the Agency Model of child welfare representation, it is most common that the state attorney general or in-house agency attorneys provide the representation. Less frequently individual county-based prosecutors "represent" the child welfare agency, as is the case in Iowa.

In the aftermath of A.W., some CAs have reported a significant change in the way that they serve as attorneys in Chapter 232 cases. They report that they are no longer permitted to take a position contrary to DHS, at least in court. CAs feel that the holding in A.W. forced them to abdicate their responsibilities and authority as representatives of "the people" in child welfare cases. They also believe that recognizing that DHS is their client creates ethical dilemmas regarding conflicts of interest that did not exist before A.W., and fear that ethical complaints will be filed against well-intentioned prosecutors. Finally, CAs believe that A.W.'s view of the attorney-client relationship is at odds with other sections of Chapter 232.

The ICAA believes that H.F. 608 would restore CAs as pure prosecutors, i.e., representatives of "the people" in juvenile cases. However, Study Committee scrutiny suggests that H.F. 608 may create other problems that make it unacceptable.

DHS Party Status

The ICAA states that the primary goal of H.F. 608 is not to remove DHS as a party, and that DHS could remain a separate party and obtain representation through the attorney general's office or in-house counsel. If there were the funds to establish a new model of attorney representation for DHS, it is unclear how there could be two "prosecuting parties" in juvenile cases – the "people" as represented by the CA and the "state" as represented by DHS. In any event, DHS should retain party status in actions under Chapter 232, and should have attorney representation. The policy decision to have a statewide child welfare system supports DHS retaining party status. In many respects it

also suggests that it is best if DHS were to enjoy a traditional "attorney-client" relationship with its attorney(s). Putting the CA in charge of child welfare cases in each of the 99 counties could result in an unacceptable range of different child welfare policies and spending across the state. In individual cases where the attorney and DHS disagree, it could diminish or negate DHS's expertise and compliance role. A pure prosecutor model also complicates appeals, where the attorney general's office would be required to represent the state in each case, including possibly arguing conflicting legal and policy positions depending on the CA's positions taken in the cases below.

Valuable Check and Balance

A.W.'s conclusion that DHS is the CA's client suggests that the CA has no independent standing in a Chapter 232 case. No longer can a CA present his or her independent case recommendations to the court if it differs from those of DHS, his or her client. The valuable "check and balance" function that a CA can bring to bear on an ill-conceived DHS case judgment is confined to the CA's role as attorney/advisor/counselor. That is, the CA retains the ability, indeed the ethical obligation under 32:2.1, to remonstrate with the caseworker and DHS supervisors, if he or she believes that the client/DHS position is wrong. If the differences cannot be resolved, DHS can request (but not require) that the AG present its case. If the CA has an unacceptable conflict of interest, and the case is already filed, the CA can ask the court's permission to withdraw as counsel and appoint a special prosecutor at county expense.

Expertise

The CA, as any attorney, serves an important advising and counseling function and is required to exercise independent judgment in doing so. Putting CAs in the position of having the final say in juvenile court cases, however, would be poor for public policy. As consultant Mimi Laver stated, "lawyers don't learn a whole lot about the ways families operate, but social workers do…." Laver also observed that the national trend toward "committee decisions" involving families, agency attorneys, the children's attorneys and parents' attorneys, are having the best results.

Ethical Conflicts Questions

A number of hypothetical and real cases were presented in the ICAA materials to illustrate that A.W. created unacceptable conflicts of interest. In some ways, the ICAA's argument that H.F. 608 is required to address conflicts of interest is compelling. Ethics complaints are serious matters. Even the fear of ethics complaints may chill an attorney's zealous advocacy efforts. Complicating matters, Iowa has adopted the

Model Rules regarding conflicts of interest, which in relevant ways affect the analysis that must be done in these situations. Bottoms, while not a juvenile case, made it clear that conflicts analyses are very case-specific and fact-bound. "Inherent" or "potential" conflicts are no longer the ethical standard as they may have been under the old Code. For a conflict to rise to the level of an ethical violation it must be "actual" as defined in rule 32;1.7. However, if there is significant risk that representation of another client will materially limit the representation of another client, a conflict of interest actually exists. Bottoms v. Stapleton, 706 N.W.2d 417 (Iowa 2005).

The ICAA has stated that H.F. 608 would remove all ethical conflicts for the CA because the "client" in both juvenile and criminal actions are the same – "the people," i.e. "his or her electorate." The CA has the authority and responsibility to exercise independent judgment on behalf of the one client – the people.

Furthermore, the ICAA believes that any differences in handling a CINA case and a related criminal case would not create ethical conflicts because the CA resolves those differences within the office using his or her independent judgment on behalf of the one client, the people. In short, the ICAA believes that removing DHS as a concurrent client would obviate all ethical conflicts. This would be so even if two attorneys in the office – one handling the CINA and another prosecuting a related criminal case – took contradictory positions.

More questions than answers have been raised by the Study Committee's discussion of the effects of A.W. on ethical issues and of H.F. 608 as a proposed solution to them. These include:

- Without H.F. 608's proposed changes, is there really a "directly adverse" type of conflict? Ordinarily "directly adverse" conflicts are created by an attorney representing two clients at the same time, one client against the other. This is prohibited even if the matters are totally unrelated. Certainly the CA cannot take a position or urge a resolution in a juvenile court case that is adverse to its client, DHS. But is urging a different position as the prosecutor in a factually-related criminal case really a "directly adverse" conflict if the CA also represents DHS/the state in a juvenile case?

- Is there a way to reconcile 232.90(1) and (2), such that there is not "adverseness" because the "state" is the plaintiff and therefore the CA's client in both the juvenile and criminal cases?

- Could it be that the court in A.W. did not mean to create such a classic or traditional "attorney-client" relationship between DHS and the CAs, if the plaintiff is the state in each, i.e., that DHS is the embodiment of the client, which is the state? Is it possible that the court would not have construed "client" in such a way as to have created the kind of conflict that the ICAA is urging needs to be fixed?

- Can A.W. be limited to its facts, given the procedural posture of the case involving a CA (not the AG) raising a constitutional challenge to a state statute against the wishes of DHS?

- With or without the passage of H.F. 608, can this type of conflict exist? Did it exist before A.W. and, if so, how did the CA and DHS work it out?

- Would removing the "attorney-client" relationship, as proposed under H.F. 608, eliminate potential conflicts as the ICAA urges? Is it possible that passage of H.F. 608 may actually mask conflicts that arise under the "material limitation" prohibition?

- Are the conflict questions different when government attorneys are the actors? The ethics rules' Scope section [18] suggests as much. Policies are discussed in the cases; economics does not affect the lawyers' judgments and client interests as in private practice; there is not the same choice of attorneys in government representation that clients in private lawsuits enjoy. There is precedent in other states and under the Model Rules that permit attorneys general to represent two conflicting state agencies, even in the same litigation. Screening is often permitted in government practice when it would not be in private practice.

Alternatives to H.F. 608

After many hours of Committee discussion, the ICAA maintained its position that H.F. 608 is the only viable solution to the issues that have been identified. Despite the information considered by the Committee concerning preferred models of legal representation, and the evidence that in nearly every state the child welfare agency does have legal representation, the ICAA continued to assert that DHS should not be represented and should not have legal standing. However, input from several of the Study Committee members suggests that HF 608 is not the solution. In many respects, H.F. 608 goes too far and in others not far enough. It goes too far in taking away DHS's direct voice. It goes too far in taking away attorney representation of DHS in juvenile court. It goes too far in consolidating authority to direct child welfare policy in the 99 CAs. However, it does not go far enough in addressing conflicts of interest and appeals.

Study Committee members have identified alternatives to H.F. 608 that should be explored:

1. Obtain an ethics opinion about the effects of A.W. and the new Iowa ethics rule on conflicts of interest 32:1.7.

2. Look for opportunities to take appeals to further clarify A.W.'s ruling that DHS is a client of the CA.

3. Develop protocols and training for CAs to identify conflicts of interest under 32:1.7.

4. Explore/implement screening procedures within CA offices between juvenile and criminal prosecutors.

5. Explore the possibility of the AG's Office representing DHS in all child welfare cases. This would be a pure form of the "Agency Model of legal representation" that is common throughout the country. Iowa already works with a similar model in the area of child support recovery in which representation by CAs has shifted to representation by the AG's Office.

6. Explore the possibility of DHS hiring employing its own attorneys to provide legal representation.

7. On a local or regional basis, develop methods and protocols for resolving differences of opinion between DHS and CAs on individual cases. One possibility, offered by the AG's Office, would utilize a 3rd Party Neutral to consult with DHS and the CA on a case-by-case basis. When disputes arise, be they perceived ethical conflicts or cases in which the real issue is a disagreement between DHS and the CA regarding the appropriate action to be taken in a case, the 3rd Party Neutral would be consulted.

Conclusions

It was the assessment of the Study Committee that not enough has been done to study the problems that H.F. 608 seeks to address and that efforts be continued to explore how to improve on the current system of legal representation. The Committee concluded that, if enacted, HF 608 would cause harm to rather than improve that system. A vote of the Study Committee members at the end of its final meeting reflected how strongly the Committee members feel about the wisdom of H.F. 608.

Of the twelve Committee members, eleven said that they are opposed to H.F. 608 in its present form. Only the representative of the ICAA on the Study Committee continued to favor H.F. 608. By the same count, eleven to one, the Committee members are opposed to legislation that would take away attorney representation of DHS in juvenile court.

Committee members clearly believe that DHS must retain legal standing in child welfare cases and that it must have competent legal representation in fulfilling its statutory duties and responsibilities to protect children.

Recommendations

In considering next steps, the following are recommended:

- That the ICAA, the AG's Office, and DHS participate in mediation in an attempt to determine if a compromise can be reached so that the present system of legal representation of DHS can continue. Committee member Michael Streit, former Chief Justice of the Iowa Supreme Court, has agreed to serve as mediator. The ICAA, AG's Office, and DHS have each agreed to have representatives participate in the mediation.

- That H.F. 608 be deferred for the upcoming 2012 legislative session. This would allow the Study Committee to meet to consider the results of any mediated agreement. If desired the Committee could continue to research, study and explore possibilities for improving the current system of legal representation. Following continued work by the Committee, a final report would be submitted for consideration by the legislature.

Appendix A

HF 608 STUDY GROUP

Member	Position
Gordon Allen	Attorney; Adjunct Clinical Professor @ Drake Law School Legal Clinic; former Assistant Iowa Attorney General
Vern Armstrong	Administrator of the Division of Field Operations, Iowa DHS
Mike Bandstra	Attorney; – Bandstra Law Firm
Ruth Cooperrider	Attorney; Iowa Citizens' Aide / Ombudsman; former Assistant Story County Attorney
Jerry Foxhoven	Attorney; Executive Director of the Drake Law School Legal Clinic
Linda McGuire	Attorney; Associate Dean and Instructor – University of Iowa Law School; former Assistant Johnson County Attorney
Jennifer Miller	Marshall County Attorney; President-Elect of the Iowa County Attorneys Association
Leo Oxberger	Attorney; former Judge of the Iowa Court of Appeals
Mary Richards	Attorney; former Story County Attorney
Wendy Rickman	Administrator of Division of Adult, Children & Family Services, Iowa DHS
Michael Streit	Attorney; Private Practice – Ahlers & Cooney; former Justice of the Iowa S. Ct.; former Lucas County Attorney
Eric Tabor	Attorney; Chief of Staff of the Iowa Attorney General's Office
Fred Van Liew	Attorney; Restorative Justice Services; Director of Mediation Services – Employee & Family Resources; former Assistant Polk County Attorney