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ARTICLES

Legislative Regulation of Dependency Court Attorneys: Public Relations and Separation of Powers

William Wesley Patton*

I. INTRODUCTION

The public's "lack of trust and confidence in both attorneys and the judicial system has created an overall discontent with the legal profession." The public's major criticisms include distrust of the attorney disciplinary system,

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disgust in perceiving lawyers as "parasites, hired-guns of large corporations or grasping clients, motivated by greed and neglectful of the public good,"

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and contempt for the nastiness of the adversarial system.

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Legislatures, courts, bar examiners, and law schools have created

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1. Lisa M. Stern, Note, Code of Professional Responsibility, 70 ST. JOHN'S L. REV. 839, 839 (1996). "Unlike the political realm, the legal profession has not always been viewed with the scorn reserved for it today. In words that may seem strange to us now, Alexis de Tocqueville wrote that 'people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation because they do not attribute to them any sinister designs.'" Senator Paul Simon, Foreword: Ethics in Law and Politics, 28 LOY. U. CHI. L.J. 221, 225 (1996) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275-76 (Phillips Bradley ed., 1835)). Lawyers today personally suffer from the public's perception of them: "If lawyers believe the public hates and distrusts them, their job satisfaction obviously will be affected. Almost nine of every ten attorneys believe the image of the profession has been suffering." Richard Delgado, Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents, 95 MICH. L. REV. 1105, 1116 (1997). "Unfortunately, the public's general cynicism about lawyers is shared by members of the profession as well." Denise C. Redmann, Has the Golden Rule Tarnished? Put Professionalism Back into the Profession, 43 LA. B.J. 370, 370 (1995).


3. Simon, supra note 1, at 225. "[F]ifty-six percent of the public believe[s] lawyers tend to recommend more legal work than necessary because it increases their fees." Delgado, supra note 1, at 1110 (citing Gordon Black, USA Today Poll, USA TODAY, Feb. 20, 1984).

4. "[T]he adversarial nature of the courtroom experience means half of those involved are destined to lose their case." Gary A. Hengstler, Vox Populi: The Public Perception of Lawyers: ABA Poll, A.B.A. J., Sept. 1993, at 62. The same poll found that forty-two percent favor expanding "alternatives to lawsuits by encouraging use of mediation, arbitration, and other alternative dispute resolution programs." Id. at 64. See also Judge Sherman A. Ross, Order in the Court: A Judge's Perspective on Professionalism for the Bench and Bar, 32 HOUS. LAW. 29 (1995).
mandatory ethics requirements in an attempt to appease the public and to remedy many
of the shortcomings of contemporary legal practice. There is often little correspond-
ence, however, between the content of mandatory legal ethics courses and the
public's definition of deplorable attorney behavior. Courses help law students explicate
the Model Rules of Professional Conduct and State Bar Rules, which focus on such
issues as conflicts of interest, definitions of client loyalty and confidentiality, and a
very few pragmatic office management or interpersonal relationship issues. The pub-
lic, on the other hand, defines legal ethics differently: "Apparently, while many law-
yers view ethics as the absence of disciplinary measures and adherence to the
profession's own Model Rules of Professional Conduct, the public views ethical con-
duct on a much broader scope, to include things such as fee disputes, lack of client
relations and communication problems." Therefore, there is some question whether
the mandatory legal ethics and continuing education courses will have any effect upon
the public's perceptions of attorney ethics.

More problematic than the courts' and state bar organizations' mandatory educa-
tional response to the public's dissatisfaction with lawyers have been a series of recent
tries to redefine the attorney-client relationship and to shift responsibility for assur-
ing attorney competence from state supreme courts to legislatures and administrative
agencies. Although scholars continue debating the historical genesis of supreme courts'
power to control the legal profession, most agree that courts have such inherent and
plenary authority. The public however continues to pressure legislators to bring more

5. Training in legal ethics usually begins in the second year of law school in formal classes on
professional responsibility, proceeds through a bar examination on legal ethics, and continues indefinitely
through required continuing education courses. Lorle M. Graham, Aristotle's Ethics and the Virtuous
Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education, 20 J. LEGAL PROF. 5

6. For example, California Continuing Education of the Bar courses for 1997-98 offer only one
class each in ethics and responding to client demands, but offer the following substantive and proce-
dural courses: nine in business law, eight in civil litigation, eleven in estate planning, trust, and pro-
bate, one in criminal law, two in family law, two in torts and workers' compensation, and eight in real property law. 1997-98 Program Calendar, CONTINUING EDUC. B. CAL., June 1997, at 14, 15.

7. Hengstler, supra note 4, at 62. It is not only unsophisticated clients who want personable at-
torneys. In two separate studies the CEO's of major corporations listed issues like "[p]ersonal interest
ty," and "[a]ccessibility" as some of the most important factors in hiring outside counsel.

8. "Black-letter rules of professional conduct may not be enough by themselves to assure public
confidence in the justice system." John Gibeaut, Doing the Right Thing: Lawyers May Have to Look

9. Since the Magna Carta legislatures have "always recognized [that] the admission of attorneys
was a matter of judicial discretion." Note, Legislative or Judicial Control of Attorneys, 8 FORDHAM L.
REV. 103, 105 (1939). "[F]or more than six hundred years it has been the practice of the courts to
admit attorneys upon their own examination, and . . . at the time the Colonies separated from the
mother country the power of examination and admission of attorneys was vested in the courts." Blewett Lee, The Constitutional Power of the Courts over Admission to the Bar, 13 HARV. L. REV. 233, 245 (1899). Traditionally, the only statutory proscriptions of courts' authority to admit attorneys
have been enacted under the police power and have been "of a negative character, forbidding the
admission of unfit or unworthy persons." Id. at 244. It has been argued that even if the history of
colonial America demonstrates that admission to the bar was not solely a judicial activity, such judicial
control "is a means so necessary to the end of adequate control that it is considered 'inherent' or
'implied' in the judicial office itself." Charles A. Degnan, Admission to the Bar and the Separation of
Powers, 7 UTAH L. REV. 82, 86 (1960). "The great weight of modern authority has interpreted this
traditional judicial power [over regulating attorneys] as being inherent in the judicial branch by the
very fact of its being judicial and as essential to the maintenance of the dignity, independence and
consumer accountability to law practice, and public outcry in specific cases has led legislators to promulgate expedited legislative cures.\textsuperscript{10} "Office holders have become too quick, when faced with issues of public importance, to stick their finger to the wind to see which way the public passions are blowing."\textsuperscript{11} Although judges are certainly not immune to political pressure, they are much more insulated than legislators.\textsuperscript{12}

This article will argue that the admission, supervision, and discipline of attorneys should remain with the California Supreme Court and that the court should jealously guard against unwarranted intrusions by the Legislature, administrative agencies, or other constitutional bodies such as the California Judicial Council.\textsuperscript{13} As one commen-
tator wrote in 1899, "it ought to be clearly understood that the responsibility of admission is in all cases upon the courts, not the Legislature, and a legislative disregard of constitutional limitations ought not to be encouraged by an excess of judicial courtesy." In order to demonstrate the chaos of legislative and administrative intervention into attorney regulation, this article will focus first upon section 317(e) of the California Welfare & Institutions Code, which redefines the attorney-child client relationship in dependency cases, and second upon both section 317.6 of the California Welfare & Institutions Code and California Rule of Court 1438, which redefine minimal lawyer competency and continuing legal education requirements for dependency court attorneys.

II. LEGISLATIVE REDEFINITION OF THE ATTORNEY-CLIENT RELATIONSHIP

The California Legislature, in section 317(e) of the California Welfare & Institutions Code, promulgated the first statute in American jurisprudence which forbids attorneys to argue their competent client's stated preferences to the court: "Counsel for the minor shall not advocate for the return of the minor [to her home] if, to the best of his or her knowledge, that return conflicts with the protection and safety of the minor." This statute was a very rapid political response to a specific dependency case which was spread throughout the media in California. In that case, two-year-old Lance Helms was alleged to have been killed by his father's girlfriend after Lance had been returned to his father's home. "At a spirited fact-finding hearing on how to prevent such deaths, Senator Daniel Boatwright (D-Concord) said 'the law failed this child' and criticized those connected to the case, especially . . . Lance Helms' court-appointed lawyer." Section 317(e) is in several different respects an ill conceived law. First, it takes a zealous advocate away from the child client. Second, it transforms the child's attorney into a fact-finder who must balance the credibility of the child's witnesses against the state's in determining the ultimate legal issue: placement of the child. Third, it provides no guidance for the attorney regarding which evidentiary rules or standards of proof should be used in reaching the factual conclusion of whether return of the child would create an unreasonable risk. Fourth, it violates the confidential attorney-child client relationship if the attorney uses any evidence provided by his minor

and perform other functions prescribed by statute.
CAL. CONST. art. VI, § 6.
14. Lee, supra note 9, at 255.
15. CAL. WELF. & INST. CODE § 317(e) (West Supp. 1997). This section is not an isolated attempt to direct children's counsel how to represent minors. The California Legislature recently enacted a statute which requires a minor's counsel to file a report with the court concerning placement and visitation issues. The statement "shall set forth a summary of information received by counsel, including a list of the sources of information, the results of the counsel's investigation, the wishes of the child when counsel deems appropriate, and such other matters as the court may direct." Act of September 23, 1997, Ch. 449 (A.B. 1526), Cal. Legis. Serv. 2379 (West) (to be codified at CAL. FAM. CODE §§ 3151, 3151.5). The statute, however, protects a child's confidential communications pursuant to section 954 of the California Evidence Code. Id.
16. After the girlfriend was convicted and sentenced to a ten-year prison term, however, new evidence was introduced demonstrating that she could not have been present at the time of the beating. The girlfriend was ordered released from custody and the judge allowed her to change her plea to not guilty. See Andrew Blankstein, Lawyer to Seek Release of Woman Imprisoned in Toddler's Death, L.A. TIMES, Sept. 11, 1997, at B5; Andrew Blankstein, Woman to Be Freed in Toddler's Slaying, L.A. TIMES, Sept. 13, 1997, at B1.
client. Fifth, it transforms the child’s attorney into the strongest witness against the child because the attorney’s silence tacitly, yet resoundingly, informs the court that the attorney possesses information which might not have been admitted at trial, but which has led the attorney to conclude that returning the child home would create an unreasonable risk.  

Everyone wishes that we could guarantee the safety of children from the physical and psychological horror of child abuse. But courts have also recognized that the extremely moralistic and normative basis of dependency law requires a panoply of due process protections to both assure accuracy in fact-finding and to create an aura of fairness to the parties so that catharsis, contrition, and reunification can quickly take place. We must therefore balance the potential of statutes which may provide children more safety with the importance of involving competent children in the process of determining their own best interests. We must view the child’s safety through the reality of dependency court hearings: enumerable adults are in court arguing their perceived notions of the child’s best interest. First, the department investigates the case and decides whether facts are sufficient to warrant filing a section 300 dependency petition. The department is represented by one or more legal experts who argue the department’s case to the court; the parents have either joint or separate legal counsel, depending upon the existence of any conflicts of interest. Each of those four adults along with their attorneys investigate the facts surrounding the dependency petition and present their cases to the court. In addition, expert witnesses will testify in many cases, providing the court with more data upon which to make a reasoned judgment. In most cases, therefore, the chances of critical facts not being discovered or presented to the court are remote.

Suppose that section 317(e) had never been promulgated and that a minor’s counsel has knowledge from which she concludes that there is a possibility of further abuse if the child is returned home, but nonetheless argues to the court the minor’s stated preference to return home. What are the chances that the attorney’s argument will be dispositive? To make that determination, we must consider the ethos of dependency court judges in the 1990’s. The judge must cope with two significant pressures in deciding whether to keep the child in the parents’ home. There is the internal fear that in a close case returning the child might result in serious additional abuse to the child. Judges do not want such injury on their conscience, even if the judge can rationalize that the decision was based upon the evidence presented and was hampered by the inability to accurately predict the future. But there is also an ever-growing external political pressure upon judges to be over-protective of children. Newspapers have been

20. In California, “A proceeding in the juvenile court to declare a minor a dependent child of the court is commenced by the filing with the court, by the probation officer, of a petition alleging child abuse or neglect in accordance with section 300 of the California Welfare & Institutions Code. CAL. WELF. & INST. CODE § 325 (West 1984). Under California Rule of Court 1406, the social worker or probation officer has sole discretion in filing a section 300 petition, which alleges that a person under the age of eighteen comes within a series of criteria putting that person “within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court” CAL. WELF. & INST. CODE § 300 (West 1984).
filled recently with the public's criticism of judges for being too oriented towards parents' rights. Despite the public's perception, however, dependency judges are likely in close cases to determine that children should be removed from their home. One must wonder, with the legion of adults investigating the case and advocating their perceived views of the child's best interests, why society cannot afford to provide a competent abused child a zealous advocate.

But section 317(e) has a much more nefarious result than merely stripping zealous and loyal counsel from children: the silence imposed upon the minor's counsel is outcome-determinative. Think of the highly charged political arena of dependency court. Under section 317(e) the child's attorney informs the court that the child would like to return home, but then must remain silent and not argue any facts in support of the child's stated preference. What must the judge now know? What is the effect of the attorney's silence? It clearly informs the court that the attorney knows facts, perhaps outside the record, which have led her to conclude that returning the child home will create an unreasonable risk of danger. What judge is going to follow the child's wishes and send such a child home? In effect, the child's attorney, by remaining silent, becomes the strongest witness against his own client.

It is difficult to construct a more serious violation of the attorney's duty of loyalty.

The purpose of this article however is not to again question the reasonableness of section 317(e). Rather it is to discuss whether the Legislature through its police power—in an attempt to predict and possibly reduce the chance of future child abuse—can prohibit attorneys from performing the most jealously guarded aspects of the attorney-client relationship: the duty of providing clients zealous and loyal advocacy. Can the Legislature dramatically alter this historically sacred attorney-client relationship in the


23. For instance, in 1995 in Los Angeles County only twenty-seven percent of children in disposition hearings were returned home to their parents. INTER-AGENCY COUNCIL ON CHILD ABUSE AND NEGLECT, DATA ANALYSIS REPORT FOR 1996: STATUS REPORT ON CHILD ABUSE & NEGLECT IN LOS ANGELES COUNTY 146 (1996). This demonstrates that judges are more likely to place children outside their home, despite minors' attorneys' arguments to the contrary.

24. The attorney's silence and failure to argue his minor client's case is in some respects worse than if the attorney testified against the child because it permits the judge to speculate about the nature of the potential danger of returning the child. The attorney's silence is similar to the speculation which the California Supreme Court rejected in People v. Rollo, 569 P.2d 771, 775-77 (Cal. 1977), where the jury was informed that the criminal defendant had been convicted of a prior felony, but the jury was not informed of the nature of that prior crime. "Normal human curiosity will inevitably lead to brisk speculation on the nature of that conviction, and the range of such speculation will be limited solely by the imaginations of individual jurors." Id. at 776. Similarly, in the dependency court the judge might read more into the attorney's silence than the attorney considered in his own determination that return home might be dangerous to the child.
name of public safety, or does the California Supreme Court’s plenary power preclude such statutory intervention?

III. THE CALIFORNIA SUPREME COURT’S AUTHORITY OVER ATTORNEYS

The California Supreme Court declared in Santa Clara County Counsel Attorneys Ass’n v. Woodside25 that it has the plenary and inherent power to control the admission, discipline and disbarment of attorneys. Even though the court has recognized that some areas regarding the regulation of attorneys may be shared with the Legislature through its police power to protect consumers, the court has consistently determined that direct legislative control of the admission or discipline of attorneys violates separation of powers.26 For instance, in Hustedt v. Worker’s Compensation Appeals Board,27 the court held that the Legislature overstepped its police power by providing in the California Labor Code that workers’ compensation judges could suspend attorneys from practicing in that court. In Merco Construction Engineers, Inc. v. Municipal Court,28 the court determined that the Legislature violated separation of powers by promulgating a statute giving non-lawyers the right to appear in municipal court because it infringed upon the judiciary’s right to admit attorneys to the practice of law. Finally, in In re Lavine29 the court found that by reinstating to the practice of law attorneys convicted of felonies, the Legislature’s act was “tantamount to the vacating of a judicial order by legislative mandate.”

The California Supreme Court in Woodside recognized some issues involving attorneys where the Legislature has concurrent power to act without violating separation of powers.

The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle has been summarized as follows. “The legislature may put reasonable restrictions upon the constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.”30

26. The California case most critical of permitting the legislative police power from intruding on the inherent power of courts to regulate the profession was an appellate court case, In re Cate, 273 P. 617 (Cal. Ct. App. 1928), rev’d, 279 P. 131 (Cal. 1929). That case presented a direct confrontation between the courts and the Legislature’s newly created State Bar Act. The court of appeal ruled that despite the Act the courts, not the Legislature, had the power to determine whether disqualified attorneys would be readmitted. The court determined that the power to regulate attorneys was exclusive with the courts through inherent power derived through the constitution. “[I]t is obvious that they [the courts] can possess no inherent powers prior to their existence, and they owe their existence to the Constitution. Their inherent powers are therefore derived from that paper.” Id. at 620. In decrying an evisceration of courts’ inherent authority through the Legislature’s use of the police power, the court stated: “If the courts exercise a constitutional function in making provision for a bar, how can the Legislature divest the power through the exercise of an assumed police power? It is too clear for words that the Legislature cannot, under the feeble guise of regulation, destroy a constitutional function of either of the other departments of government.” Id. at 624.
30. Id. at 163.
The *Woodside* court articulated several factors to be used in determining the appropriate scope of the Legislature’s regulation of attorneys. First, a statute “of general application, which does not affect traditional areas of attorney admission, disbarment and discipline,” is more likely to pass constitutional scrutiny. Second, a statute which “permit[s] an attorney to act in such a way as to seriously violate the integrity of the attorney-client relationship, so as to ‘materially impair’ the functioning of the courts, would be constitutionally suspect.” Third, to raise a claim of unconstitutionality, it must at least be shown “that a direct and fundamental conflict exists between the operation of the statute in question as it applies to attorneys, and attorneys’ settled ethical obligations, as embodied in this state’s Rules of Professional Conduct or some well-established common law rule.” Thus, the California Supreme Court will jealously guard its plenary and inherent authority to supervise attorneys; in the spirit of comity, however, the court recognizes that the Legislature has some authority to regulate attorneys pursuant to the police power, as long as that regulation does not seriously affect the court’s supervisory powers.

Although frequently recognizing that there are ethical limits to zealfulness, the court has consistently noted that zealous advocacy is a duty which lawyers have toward their clients. In addition to zealfulness, attorneys owe clients a duty of loyalty and confidentiality, which includes not arguing against the client’s stated position: “the general duty of loyalty recognized at common law” requires that an attorney “protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter’s free and intelligent consent.” It is therefore clear that the court has historically and consistently regulated attorneys in the area of zealous and loyal representation; the real question is whether the Legislature’s regulation of those concepts in section 317(e) violates separation of powers. After applying the criteria established by the court in *Woodside*, the answer appears to be yes. First, defining attorney zealousness and loyalty affects traditional areas of attorney regulation, and section 317(e) is not a statute of general application, but rather focuses exclusively upon a small segment of the attorney population, viz. dependency court attorneys. Second, the prohibition on attorneys arguing the competent child’s stated preference permits attorneys “to act in such a way as to seriously violate the integrity of the attorney-client relationship.” Finally, section 317(e) creates an absolute conflict with settled ethical obligations. Therefore, if protection of abused children requires the abandonment of attorney zealiveness and loyalty, it is the court,

33. *Id.*
34. *Id.*
38. See supra text accompanying notes 31-33.
not the Legislature, which should consider such changes. The court has much more experience in considering those concepts and is much more shielded from lobbyists and the public's understandable, yet often uneducated, reaction to the child abuse maelstrom. The court should declare section 317(e) unconstitutional.

IV. REGULATION OF ATTORNEY COMPETENCY AND EDUCATION

In California the Judicial Council is authorized by article VI, section 6 of the California Constitution "to make recommendations to the courts to improve the administration of justice." Rules promulgated by the Judicial Council, however, may not be "inconsistent with statute." Therefore, even though the Judicial Council has independent authority to regulate some aspects of the practice of law, it may not contradict the Legislature. In one of the more interesting constitutional turf battles in recent years, the California Legislature ordered the Judicial Council in section 317.6(a) of the California Welfare & Institutions Code to "adopt rules of court regarding the appointment of competent counsel in dependency proceedings." The Judicial Council responded in California Rule of Court 1438 by promulgating prerequisite standards of competency and continuing legal education requirements for attorneys who wish to practice in dependency court. The Judicial Council rules have created substantial new educational requirements as prerequisites to practicing in dependency court, written a new definition of competent counsel, and promulgated new mandatory continuing legal education requirements which omit the express waivers for retired judges and law professors contained in the state bar requirements approved by the California Supreme Court. The rules have also created consumer confusion by forming a class of dependency attorneys with specialized skills who are certified to practice in dependency court, even though those attorneys do not meet the Rules Governing the State Bar of California Program for Certifying Legal Specialists, adopted by the Board of Governors on January 1, 1996. Finally, the rules have established a "patch-work

41. CAL. CONST. art. VI, § 6 (The Judicial Council "shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.").
42. CAL. WELF. & INST. CODE § 317.6(a) (West Supp. 1997).
43. CAL. R. CT. 1438(b)(3) ("Only those attorneys who have completed a minimum of eight hours of training or education in the area of juvenile dependency, or who have sufficient recent experience in dependency proceedings in which the attorney has demonstrated competency, shall be appointed to represent parties.").
44. CAL. R. Ct. 1438(b)(1) ("'Competent counsel' means an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, and cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs.").
45. CAL. R. Ct. 1438(b)(3) ("Within every three years attorneys are expected to complete at least 8 hours of continuing education related to dependency proceedings.").
46. CAL. MIN. CONTINUING LEGAL EDU. R. AND REGULATIONS 6.1.1 & 6.1.3 (providing exemptions from mandatory continuing legal education for retired judges and full-time law professors from state and ABA approved law schools).
47. The certification for dependency court attorneys found in rule 1438 contains no due process hearing if the attorney is denied admission to practice in juvenile court and contains no confidentiality requirements for documents submitted during the review process. In contrast, the Board of Governors has provided attorney applicants substantial due process if they are denied a certificate of legal specialization and provides that all records are confidential. RULE GOVERNING THE ST. BAR OF CAL. PROG.
quilt"—of differing standards of attorney competence and mandatory continuing legal education in each superior court throughout the state—which will place a substantial burden on attorneys who practice dependency law in more than one county in California.48

A. Separation and Coordination of Powers Among the Supreme Court, Legislature, and Judicial Council

Section 317.6 of the California Welfare & Institutions Code and California Rule of Court 1438 raise a number of intriguing constitutional questions. For instance, who has the authority to determine whether attorneys possess the minimum competency to practice law in particular substantive areas? “For decades, if not for centuries, control over practice and procedure has been the subject of concurrent jurisdiction” between courts and legislatures.49 It is interesting that the Legislature, in section 317.6, did not directly promulgate standards of attorney competence, but rather ordered the California Judicial Council to do so. At first blush, it appears that the Judicial Council has jurisdiction over such determinations of juvenile court procedures since the Legislature has determined that the Council “shall establish rules governing practice and procedure in the juvenile court not inconsistent with law.”50 One must look to the history of the Judicial Council, however, in order to determine the scope of its current jurisdiction.

Authority to promulgate court procedures was definitively placed in the Legislature in 1876 when the Field Code was adopted.51 It was not until 1926 that the Judicial Council was given the constitutional authority to draft rules of practice and procedure.52 Proponents of the Judicial Council have never stopped lobbying for transfer of

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48. CAL. R. CT. 1438(a)(2) (“[T]he superior court of each county shall adopt local rules regarding the representation of parties in dependency proceedings. . . . The rules shall address the following as needed: . . . (b) Procedures for the screening, training, and appointment of attorneys representing parties; (c) Establishment of minimum standards of experience, training, and education of attorneys representing parties . . . . ”). San Francisco dependency courts explicitly deny reciprocity to attorneys who have been certified as competent by other counties' superior courts. SAN FRANCISCO COUNTY SUPERIOR CT. LOCAL R. FOR DEPENDENCY DEP'TS 2.2 (West, WESTLAW through Aug. 1, 1997) (“Any attorney, including those who transfer in from other counties, wishing to serve on the Dependency Panel must submit an application to the Lawyer Referral Service of the Bar Association of San Francisco. In order to qualify for the panel, the attorney must have handled four (4) dependency proceedings within the last two (2) years. Of these four (4), two (2) must have been contested hearings with testimony.”).


52. Stolz & Gunn, supra note 51, at 885.
exclusive rule-making power from the Legislature to the Judicial Council.\textsuperscript{53} Although the Legislature has consistently asserted its rule-making authority and rejected complete delegation of that power to the Judicial Council, the Legislature has continuously added to the scope of the Council’s discretion. For instance, in 1941 the Legislature gave the Council authority to promulgate rules of appellate procedure, in 1955 it was given power to draft rules regarding pretrial conferences, and in 1976 it was charged with writing rules of practice and procedure for juvenile courts.\textsuperscript{54}

The evolution of the Judicial Council’s constitutional power has been one of gradual expansion. But all attempts at wholesale abrogation of legislative rule-making power have failed. Through the 1980’s, the Council had “consciously remained extremely conservative in its scope of interest and its willingness to apply pressure for implementation of its policies.”\textsuperscript{55} Recently, however, the Judicial Council became much more politically active by arguing its constitutional independence and by promulgating a rule of court concerning electronic recording of superior court proceedings even though the Assembly Judiciary Committee rejected an almost identical bill earlier sponsored by the Judicial Council.\textsuperscript{56} Taking an uncharacteristically activist position, in November 1993 the Judicial Council adopted Rule of Court 33(e) which allowed official electronic recording of superior court proceedings.\textsuperscript{57} The Alameda County Superior Court promulgated similar regulations. The Alameda County Official Court Reporters Association filed a writ of mandate to preclude the Council and county from implementing electronic recording.\textsuperscript{58} For the first time in a reported decision, the Judicial Council argued that since both the Legislature and itself derive their power from the state constitution, “the two institutions are coequals” in promulgating rules of court.\textsuperscript{59}

\textsuperscript{53} When the Judicial Council was formed in 1926, the amendment “almost included a provision conferring on the Council full rule-making power. As originally submitted, the amendment would have provided the Council with complete rule-making authority. At the last minute the Legislature deleted this provision.” Glenn S. Koppel, \textit{Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California}, 24 \textit{PEPP. L. REV.} 455, 467-68 (1996). In 1941 another attempt to give the Council full rule-making power failed. \textit{Id.} at 468; Stolz & Gunn, \textit{supra} note 51, at 885. In 1957 “the State Bar and the Judicial Council once again recommended to the Legislature that it amend article VI of the constitution to give the Council complete rule-making power over all practice and procedure.” Koppel, \textit{supra}, at 469. There has been a continuing battle during this century over rulemaking power and that struggle has continued into the 1990’s. \textit{Id.} at 471-73; Hon. Phil S. Gibson, \textit{Chief Justice Urges Effective Plan to Give Courts Rule-Making Power}, 15 \textit{CAL. ST. B.J.} 331 (1940); Ray McAllaster, \textit{Should the Rule-Making Power Be Given to the Courts?}, 6 \textit{CAL. ST. B.J.} 215 (1931).


\textsuperscript{55} Stolz & Gunn, \textit{supra} note 55, at 901.

\textsuperscript{56} California Court Reporters Ass’n v. Judicial Council, 46 Cal. Rptr. 2d 44, 46 (Cal. Ct. App. 1995). The Legislature in 1986 authorized a pilot project to study the possibility of using electronic recording of superior court proceedings instead of using court reporters. “In 1992, the Judicial Council sponsored a bill that would have allowed electronic recording” on a permanent basis. \textit{Id.}

\textsuperscript{57} \textit{Id.} In the 1960’s the Council, for the first time, advanced a proposal which lacked support by the State Bar Association regarding pretrial settlement conferences. “The pretrial conference experiment was a departure from the Judicial Council’s normal pattern of activity, in that it involved a decision to implement a fairly major change in procedure without first gaining consensus among all of the interested groups in the state on the benefits to be derived from the change.” Stolz & Gunn, \textit{supra} note 51, at 893.

\textsuperscript{58} \textit{California Court Reporters Ass’n,} 46 Cal. Rptr. 2d at 46-47.

\textsuperscript{59} \textit{Id.} at 49.
The court of appeal, however, found the Judicial Council's argument "specious," since article VI, section 6 of the California Constitution specifically provides that the Council may only "adopt rules for court administration, practice and procedure, not inconsistent with statute." The appellate court determined that the rule of court providing for electronic recording was inconsistent with a statute which specifically requires court reporters and reversed the trial court's determination that the rule of court was constitutional, holding that in deciding whether a rule of court promulgated by the Judicial Council is "inconsistent with statute" a court must "determine the Legislature's intent behind the statutory scheme that the rule was intended to implement and measure the rule's consistency with that intent." The court rejected the trial court's definition of "inconsistent with statute" which the Judicial Council supported: "not . . . merely inharmonious or unsymmetrical, but connot[ing] impossibility of concurrent operative effect, or contradictory in the sense that the provisions cannot co-exist."

The previous discussion answers the easiest constitutional dilemma when considering the effect of the Judicial Council's rules in relation to separation of powers: legislation trumps Council rules; the Council is subservient to the Legislature. An unexplored question, however, and the preeminent one in considering the constitutionality of section 317.6 and rule 1438, is whether the Judicial Council and the California Supreme Court share concurrent jurisdiction over regulation of attorneys when it affects court administration, practice and procedure, or whether the supreme court's inherent and plenary authority trumps the Council's limited constitutional prerogative. Article VI, section 6 of the California Constitution only circumscribes the Council's constitutional power by making its rules subservient to statutes; it does not additionally proscribe jurisdiction according to court precedent. Even though article VI, section 6 does not expressly define the Judicial Council as subordinate to the courts, however, it provides some evidence that the council may not order the courts to perform functions because it charges the Council merely to make recommendations to the courts. One commentator stated that, "The Council's role in relation to the courts is advisory as well. Despite its mandatory rule-making authority in some areas, the emphasis of the Judicial Council has been on a 'tenor of judicial administration that relies heavily on suggestion and persuasion as well as on rules.' The limitation on the power of the Council to make orders binding on the courts is both imposed and self-assumed." Of course, the Council's past decision to defer jurisdiction to the courts might rest merely upon notions of comity and harmony rather than on an admission that the Council's jurisdiction is inferior or upon the court's purported exclusive jurisdiction to regulate attorney behavior.

Some courts have held that the Judicial Council's rules may not conflict with constitutional provisions, as well as not conflict with legislative provisions. While it

60. Id.
61. CAL. CONST. art. VI, § 6.
62. California Court Reporters Ass'n, 46 Cal. Rptr. 2d at 49, 56.
63. Id. at 51.
64. Id. at 49.
65. Stolz & Gunn, supra note 51, at 903 (quoting Traynor, Rising Standard of Courts and Judges, 40 CAL. ST. B.J. 677, 683 (1965)).
might seem obvious that the Judicial Council is prohibited from passing unconstitutional rules of court, it is not so clear whether such a prohibition applies to the supreme court's assertion of plenary and inherent power under the rubric of exclusive jurisdiction and separation of powers. For instance, what if the Judicial Council were given power to admit attorneys to practice? Would that grant of power create concurrent jurisdiction between the Council and supreme court, would it abrogate the court's inherent power to regulate attorneys, or would the Council's exercise of that power still violate separation of powers?67 And if it created concurrent jurisdiction, what would happen if the Council admitted an attorney considered by the supreme court ineligible or incompetent?68 Perhaps the most historically accurate conclusion is that the supreme court's plenary and inherent power to admit, supervise, and discipline attorneys should trump any rules of court promulgated by the Judicial Council regulating that area of court management. "There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power."69 A constitutional grant of power to the Legislature of the ultimate authority over procedure does not affect many of the courts' inherent rights because they are "beyond procedure."70

B. The Judicial Council's Lack of Power over Superior Courts

The Judicial Council in rule 1438 mandated the superior courts to draft and implement guidelines for certifying that attorneys are competent to practice in dependency courts and to assure continuing competence through mandatory continuing legal education. The California Supreme Court, upon admitting attorneys to practice, makes an independent determination that they are presumptively competent to represent clients in any court.

The admission of an attorney to the bar establishes that the State deems him competent to undertake the practice of law before all our courts, in all types of actions.

67. Informal court procedures promulgated pursuant to courts' "implied power to expedite hearings, facilitate court business and fulfill more effectively the duty imposed upon it...are equally enforceable so long as they are reasonable and do not conflict with legislative enactments or rules promulgated by the Judicial Council." In re Jeanette H., 275 Cal. Rptr. at 15. Section 68070 of the California Government Code provides that, "Every court of record may make rules for its own government...not inconsistent with law or with the rules adopted and prescribed by the Judicial Council," CAL. GOV'T CODE § 68070(a) (West 1997). That code section, however, is "merely a statutory confirmation of an inherent power of these courts rather than as a grant from the Legislature of this power to them." Wisniewski v. Clary, 120 Cal. Rptr. 176, 180 (Cal. Ct. App. 1975). One must wonder where this ontological circle leads: if section 68070 is merely a codification of courts' inherent rulemaking authority and not a legislative grant of authority, why and how do the Judicial Council's rules trump the courts' rules? Perhaps the answer is that only those statutes dealing with what has traditionally been the "procedural" prerogative of the Legislature trump courts' inherent power to regulate its business. "A court may not by rule change or add to procedural requirements established by statutory provision." Conae v. Conae, 241 P.2d 266, 267 (Cal. Ct. App. 1952).

68. "[C]onflicts have occasionally arisen between court rules and legislative enactments purporting to cover the same subject-matter. This conflict has not arisen in California since the statutory and constitutional provisions governing the exercise of the rule-making power have consistently provided that any rules of court were to be subordinated to procedural statutes on the subject." Ralph N. Kleps, Efforts to Govern Court Procedure by Rule Make Progress in California, 17 CAL. ST. B.J. 18, 22 (1942).


70. Id. at 33.
If that appraisal turns out not to be erroneous, we [the supreme court] are the only court having jurisdiction to take direct action. 71 The Judicial Council has no authority to order the trial courts to overrule the supreme court’s determination of an attorney’s presumptive competence. In addition, trial courts exceed their jurisdiction in drafting prerequisites for practicing in dependency court if failure to complete those educational requirements results in the inability of attorneys to practice in that court. If the supreme court’s finding that admitted attorneys are presumptively competent were in a case holding, any contrary finding by the trial court through a series of prerequisites would violate the doctrine of Auto Equity Sales, Inc. v. Superior Court 72 and would be a nullity. Since the supreme court’s admission of attorneys is closer to one of its administrative functions, however, a contrary finding of presumptive competency by the trial court would be a nullity because it would be an ultra vires act. 73 Neither statutory nor historical inherent power to function as gatekeepers to the practice of law has resided with the trial courts. Superior courts may only make rules for their own government not inconsistent with legislative or constitutional provisions. 74

C. The California Supreme Court’s Authority

The California Supreme Court has never decided the constitutional boundaries between itself and the Judicial Council regarding the admission and continuing regulation of attorneys, even though it has determined that the Legislature has no power to admit, remove, or suspend the privileges of an attorney to appear in court. 75 Other state supreme courts have had the opportunity to consider their power to admit and continue regulating attorney’s conduct and education after admission to the bar. In every case examined below where such attorney regulation by the Legislature or other administrative body would result in a total ban upon an attorney appearing in court, the regulation has been found to have violated separation of powers.

In Ball v. Roberts 76 the Arkansas Legislature passed a statute which provided that if an attorney certified that he had not taken a criminal law course in twenty-five years and did not regularly practice criminal law he would not be appointed to represent indigent criminal defendants. The Arkansas Supreme Court held that the statute violated separation of powers because “[t]he right to decide whether an attorney who

72. Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937 (Cal. 1962). In Auto Equity Sales the California Supreme Court defined the limited jurisdiction of inferior courts. In that case the appellate department of the superior court admitted that a District Court of Appeal case was directly on point, but refused to follow it because it believed that the appellate court had incorrectly decided that opinion. The supreme court held that, “Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California.” 369 P.2d at 939-40. Thus, under the doctrine of Auto Equity Sales, the superior courts cannot refuse to permit attorneys certified as competent by the California Supreme Court the ability to practice in dependency courts based upon a presumption of incompetency or upon a series of mandated prerequisites.
74. Section 68070 of the California Government Code provides trial courts with the power to manage their affairs. CAL. GOV’T CODE § 68070(a) (West 1997).
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regularly practices before a court, can be appointed . . . is a judicial question, not a legislative one."77

In State ex rel. Fiedler v. Wisconsin Senate78 the Wisconsin Legislature passed a statute which in part established "a continuing legal education requirement on attorneys prior to their appointment as guardians ad litem."79 The Wisconsin Supreme Court found that the statute "improperly intrudes on a regulation of the practice of law that is exclusively within the province of the judiciary. Accordingly, we hold the statute void as an unconstitutional violation of the separation of powers doctrine."80 The court further found that the statute "usurps the uniquely judicial function of determining the qualifications of those seeking to represent a minor litigant's interest."81 In Joni B. v. State,82 the Wisconsin Supreme Court held that a statute prohibiting the court from appointing counsel for anyone other than the child in a dependency hearing violated separation of powers because it stripped the courts of their inherent power to regulate the courtroom and administer justice. "A court's inherent power to appoint counsel is not derived from an individual litigant's constitutional right to counsel, but rather is inherent to serve the interests of the circuit court."83

In Attorney General v. Waldron,84 the Maryland Supreme Court found that a statute prohibiting a retired judge from the practice of law for compensation violated separation of powers. The court held that after being admitted to the practice of law "an attorney may be deprived of his license only through judicial action for proper cause, and any attempt by the Legislature to effect the same result by enactment must fail as an unconstitutional usurpation of a power vested exclusively in the judiciary."85

In Archer v. Ogden86 the Oklahoma Supreme Court held that a statute requiring previously admitted attorneys to maintain residency as a condition of practicing in that state violated separation of powers. The court noted that "once admitted to the [Bar] Association, [attorneys] shall be permitted to practice law within all courts of this State, whether or not they continue to reside in this State."87

In Singer Hunter Levine Seeman & Stuart v. Louisiana State Bar Ass'n,88 the Louisiana Supreme Court determined that a statute which proscribed the formation of a partnership between attorneys admitted to practice in Louisiana and persons admitted to practice in another state violated separation of powers because the "statute cannot frustrate this court's inherent authority to regulate the practice of law by subjecting to criminal penalties persons associated with a legal partnership which this court has authorized."89 Finally, in Succession of Wallace,90 the Louisiana Supreme Court de-

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77. Id. at 830.
78. State ex rel. Fiedler v. Wisconsin Senate, 454 N.W.2d 770 (Wis. 1990).
79. Id. at 771.
80. Id. at 774.
81. Id.
83. Id. at 414-15 (quoting State ex rel. Chiarkas v. Skow, 465 N.W.2d 625 (Wis. 1991)).
85. Id. at 939.
86. Archer v. Ogden, 600 P.2d 1223 (Okla. 1979).
87. Id. at 1226.
89. Id. at 427.
90. Succession of Wallace, 574 So. 2d 348 (La. 1991).
clared as null and void a statute which provided that an executor of an estate may discharge the attorney designated in the testator's will only for just cause because it violated a court rule and unlawfully impinged on the court's inherent power to regulate the practice of law.

All these cases stand for the proposition that state supreme courts' inherent and plenary power to regulate the practice of law prohibits any other governmental body from setting up additional prerequisites or continuing legal education requirements which would nullify the court's certification of attorneys' competence to practice law in any court in that state. Applying the logic of these cases and the California Supreme Courts' Woodside separation of powers factors to section 317.6 of the California Welfare & Institutions Code and to California Rule of Court 1438, it appears that they violate separation of powers because (1) they create substantial new educational requirements as prerequisites to representing parties in dependency court; (2) they establish a definition of attorney competence which conflicts with that of the California Supreme Court; and (3) they promulgate new mandatory continuing education requirements for dependency counsel and they fail to apply the exemption granted by the supreme court to retired judges and law professors of state and ABA-approved law schools. Even if the court were to find that the new rules are somehow consistent with the separation of powers doctrine, they should nonetheless be reconsidered because they create a patch-work of differing standards among the superior courts throughout the state which will make it almost impossible for any single dependency attorney to practice in the various jurisdictions and because it will create confusion between the status of dependency court certification programs and the state bar specialist certification program.

V. CONCLUSION

Most juvenile law scholars would support the Judicial Council's and the superior courts' interest in training and retaining dependency court attorneys. They could accomplish this goal without violating the California Supreme Court's inherent and plenary power over the admission, discipline, and continuing legal education of attorneys: instead of making the requirements of rule 1438 prerequisites to representation of parties in dependency cases, superior courts could list advocates' expertise in juvenile law as one criteria the court will consider in determining which counsel to appoint.
Such an arrangement would provide attorneys a financial incentive to continue interdis-
ciplinary training, but would not circumscribe superior courts' ability to appoint any
California licensed attorney to represent parties in dependency court, and would not
interfere with the California Supreme Court's inherent and plenary authority to regulate
attorneys. Thus, a determination that section 317.6 and rule 1438 violate separation of
powers would not have a seriously adverse impact on the Judicial Council's ability to
promulgate guidelines for dependency counsel competency to be considered by the
superior courts' in contract negotiations with attorneys appointed to represent depen-
dency court parties.

There is no such easy accommodation, however, regarding the Legislature's usur-
pation in section 317(e) of the supreme court's inherent and plenary authority to define
the nature of the attorney-client relationship and the ambit of zealous advocacy. If
California is going to provide abused and neglected children—who are parties to the
litigation—less zealous advocates than other parties, or if the rules of professional
responsibility are to be modified to consider the unique aspects of the attorney-child
client relationship, it is the California Supreme Court with its knowledge of lawyers
and competent advocacy, not the Legislature with its substantial number of lay elected
officials, which should decide these important issues. The Legislature, which reacts
more directly and immediately to specific cases and the political heat applied by inter-
est groups and lobbyists, is an inappropriate forum for deciding the nature of the attor-
ney-child client relationship.

If the California Supreme Court holds that the Legislature, through its exercise of
the police power, may protect what it sees as children's best interests by stripping from
them traditional notions of zealous advocacy, what legislation might we expect to see
in the future? If the focus of the child dependency system is to solely protect the best
interests of children, then why not take zealous representation from all parties to the
dependency proceedings? It is doubtful that the California Supreme Court would also
uphold a statute which provides,

Attorneys representing parents in dependency court proceedings, not involving the
termination of parental rights, may not argue to the court for return of the minor to
the parents if to the best of his or her knowledge, that return conflicts with the
protection and safety of the minor. However, the attorney shall inform the court of
the parents' wishes.94

94. In 1928, in his concurring opinion in In re Cate, 273 P. 617 (Cal. Ct. App. 1928), rev'd,
279 P. 131 (Cal. 1929), Justice Thompson posed another perplexing hypothetical: "Suppose the Legisla-
ture should say . . . that it is the duty of lawyers to communicate to the court and jury all that has
been conveyed to them by their clients, thereby destroying the useful relation of attorney and cli-
ent . . . . Must they [the court] sit idly by and see the profession deprived of their usefulness, and
they themselves deprived of the services of their officers, because the Legislature in the exercise of

micro-management features of rule 1438, such as how often counsel should meet with the child client,
can be drafted as contractual terms, rather than as qualifications for an attorney to be certified as
"competent." There are limits however to how specific the contractual constraints may be before they
trample on the independence of dependency counsel to be zealous advocates. For instance, the court
could not base its contract on requiring counsel to waive closing argument in order to save judicial
resources. California Rule of Court 76.5 provides a compromise solution between no regulation and
prerequisites by requiring appellate courts to review an attorney's qualifications before appointing coun-
sel to represent an indigent and then to "place the attorney's name on one or more lists to receive ap-
pointments to cases for which he or she is qualified." CAL. R. Cr. 76.5. Of course, if under Rule
76.5 the justices bar counsel from representing defendants, they would similarly violate separation of
powers.
A competent child in dependency proceedings needs and is entitled to a zealous advocate, just like all other parties in court. The results of the hearing are as important or more important to the child as they are to the parents, foster parents, or prospective adoptive parents.

There is an inescapable irony in the Legislature's passage of section 317(e), as well as in section 317.6 and the Judicial Council's response in rule 1438. On the one hand an elaborate system of competency findings and continuing legal education requirements has been established to assure that parties in dependency court are provided knowledgeable and excellent counsel. But on the other hand, counsel for children have had their mouths taped shut; they cannot use those advocacy skills to argue the child client's stated preferences. Children's counsel are left with the following scenario. A ten-year-old girl, abused by a trusted adult, develops a trusting relationship with her court appointed attorney during several weeks of fact investigation and trial preparation. Before the child and attorney enter court for the dependency disposition hearing, the child's attorney stoops down and tells her, "I am sorry, but I cannot argue to the court that you should go home." What must the child be thinking as she is seemingly betrayed by another trusted adult? So much for attorney loyalty. So much for zealous advocacy. The child victim is re-victimized.

the 'police power' has so decreed? We think it too apparent for argument that the courts are to determine the duty of their officers and the standards of conduct by which their usefulness to the courts and the cause of justice shall be preserved." Id. at 627-28.