DC BAR

D I S T R I C T O F C O L U M B I A B A R

Family Law Section

1250 H Street NW
Sixth Floor
Washington, DC
20005-5937

202-626-3463
FAX 202-626-3453
www.dcbar.org/sections

Sections EventLine
202-626-3455

Steering Committee:
Nancy A. Lopez, Co-Chair
Margaret J. McKinney, Co-Chair
Linda A. Delaney
Garrett L. Lee
Juliet J. McKenna
Jessica T. Rosenbaum
Dawn A. Wilson

Nancy Duff Campbell
Board of Governors Liaison

Committees:
Community Outreach
Le[illegible]ion and Court Rules
P[illegible]ns

John Payton
D.C. Bar President

George W. Jones, Jr.
D.C. Bar President-Elect

John P. Mahoney
Chair, Council on Sections

Philip T. Inglima
Vice Chair, Council on Sections

Katherine A. Mazzaferri
D.C. Bar Executive Director

Cynthia D. Hill
D.C. Bar Assistant Executive Director, Programs

Charles E. Lorenzetti
D.C. Bar Assistant Executive Director, Administration and Finance

Carol Ann Cunningham
D.C. Bar Sections Manager

SUMMARY D.C. BAR FAMILY LAW SECTION
TESTIMONY ON D.C. COUNCIL BILL 14-372

The Family Law Section has been invited to testify before the Committee on the Judiciary, D.C. Council, on Bill 14-372, the "Improved Child Abuse Investigations Amendment Act of 2001" which would amend D.C. Code Sections 16-2301 and 4-1301.02 *et seq*. The testimony was prepared primarily by Margaret J. McKinney, co-chair, with substantial assistance from Steering Committee members Juliet McKenna, Dawn Wilson, and co-chair Nancy Lopez. Input was received from all Steering Committee members. The Family Law Section generally supports the proposed legislation but has significant concerns about certain provisions, as set forth below. The views expressed herein represent only those of the Family Law Section of the District of Columbia Bar ("Family Law Section") and not those of the D.C. Bar or of its Board of Governors.

We support changing 16-2301(9)(E), to extend the statute's protection to non-siblings. In 16-2301(9)(A), we are concerned about the potential impact of the amendment on parents who are the victims of domestic violence. The statute should provide definitions in 16-2301(9)(H), (I), and (J), for the terms "controlled substance," "exposed to" and "drug related activity." Although in general we support the addition of subparagraphs (H), (I), and (J), we caution against making the statute so strict that it discourages women from seeking prenatal care and drug or alcohol treatment. We advise retaining the nexus provided in the current statute between exposure to drug related activity and some other form of abuse or neglect. We are concerned that the proposed amendment may unnecessarily overwhelm the abuse and neglect system by dramatically increasing the number of children in the system without a corresponding increase in the services available to those children. We do not believe it is necessary to include a specific list of unacceptable discipline in 16-2301(23)(A) through (F), but if the Council includes such a list it should indicate that the list is not exhaustive. In 16-2301(29) we suggest adding "but is not limited to" between the words "includes" and "lacerations." In 16-2301(30), definition of "mental injury," we suggest deleting the requirement that a licensed mental health practitioner must diagnose the emotional trauma. In 16-2301(33) and (34), we suggest adding the definitions of "sexual act" and "sexual contact" instead of referencing the anti-sexual abuse act.

As to the creation of the multidisciplinary investigation team (MDT), we believe the bill should set forth the purpose of the MDT and specify when it becomes involved in the abuse and neglect process. We are concerned that the MDT may be so large and so broad in scope that it unnecessarily delays permanency for children.

We have substantial concerns, including due process concerns, about the amendment's proposed changes in the types of child abuse reports, the provision that would require the inclusion of the newly created category of "inconclusive" reports (and the name of the alleged abuser) in the Child Protection Register maintained pursuant to D.C. Code Section 4-1302.02, the proposed repeal of Section 4-1302.02(c), and the incredibly high evidentiary burden placed on persons accused of abuse or neglect. We believe it is more appropriate to provide in Section 4-1302.02(a) that only substantiated reports will be included on the regular Child Protection Register and to retain D.C. Code Section 4-1302.02(c) (rather than repeal it) and apply it to all inconclusive and unjustified reports.

DC BAR
DISTRICT OF COLUMBIA BAR
Family Law Section

1250 H Street NW
Sixth Floor
Washington, DC
20005-5937

202-626-3463
FAX 202-626-3453
www.dcbar.org/sections

Sections EventLine
202-626-3455

Steering Committee:
Nancy A. Lopez, Co-Chair
Margaret J. McKinney, Co-Chair
Linda A. Delaney
Garrett L. Lee
Juliet J. McKenna
Jessica T. Rosenbaum
Dawn A. Wilson

Nancy Duff Campbell
Board of Governors Liaison

Committees:
Community Outreach
Le ion and Court Rules
P. is

John Payton
D.C. Bar President

George W. Jones, Jr.
D.C. Bar President-Elect

John P. Mahoney
Chair, Council on Sections

Philip T. Inglima
Vice Chair, Council on Sections

Katherine A. Mazzaferri
D.C. Bar Executive Director

Cynthia D. Hill
D.C. Bar Assistant Executive Director, Programs

Charles E. Lorenzetti
D.C. Bar Assistant Executive Director, Administration and Finance

Carol Ann Cunningham
D.C. Bar Sections Manager

Testimony of the Family Law Section
Of the District of Columbia Bar
Before the Committee on the Judiciary
Council of the District of Columbia

January 17, 2002

The Family Law Section of the District of Columbia Bar is pleased to submit to this Committee this testimony on Bill 14-372, the "Improved Child Abuse Investigations Amendment Act of 2001." Our members are attorneys who represent children, parents, grandparents and other caretakers in all types of family law cases, including abuse and neglect, adoption, divorce, custody, child support, paternity and other such proceedings. The Family Law Section is comprised of those members of the D.C. Bar practicing family law in Washington, D.C. and neighboring jurisdictions. The views expressed herein represent only those of the Family Law Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

The Family Law Section is grateful to Chairperson Patterson for including us in this hearing. We appreciate having the opportunity to comment on the proposed amendments to D.C. Code Sections 16-2301 and 4-1301.02. In general, we support the proposed amendment as a positive step toward improving the quality of the city's abuse and neglect system. While the bill on its face seems straightforward and positive, it proposes several amendments to the current legislation that touch on issues upon which there is serious debate among child welfare practitioners. For example, the lack of general consensus within the social service, medical and legal communities on the appropriate response to prenatal drug exposure highlights the need to engage in extensive discussion with community stakeholders prior to passage and implementation to ensure that the legislation has its intended effect of protecting children. We encourage the Council to continue the dialogue that led to this draft legislation in order to craft the best statute possible.

In addition to suggesting changes to the proposed legislation, the Family Law Section would like to take this opportunity to encourage the Council and other city officials to focus more attention on solving the underlying societal problems that often lead to the abuse and neglect of our city's children. We firmly believe that the best way to improve the

quality of the abuse and neglect system, and to ensure that those children in the system receive the best possible services, is to reduce the number of children brought into the system by reducing the number of children who are abused and neglected. Amending the D.C. Code may be helpful in addressing abuse and neglect once it occurs but it will not prevent it from occurring, nor will it create more drug treatment programs, more services for children and families, or more safe homes for children. The Council should take this opportunity to recruit the various stakeholders in the abuse and neglect system to participate in a multidisciplinary expansion of the city's efforts to prevent abuse and neglect of children and provide much needed services to children and families. Until we have adequate mental health services, residential drug and alcohol treatment programs including programs where parents can bring their children, educational and job training programs, and effective employment programs, we cannot hope to solve the problems that so deeply affect our city's children.

While we encourage a continued dialogue among those charged with ensuring the welfare of children and expanded efforts to solve the problems that correspond with the abuse and neglect of children, we were asked to comment upon the legislation currently before the Committee and that will be the focus of our testimony. The Family Law Section has the following concerns about the specific language of the amendments to the D.C. Code proposed in Bill 14-372.

I. Proposed Amendments to Section 16-2301(9), definition of "neglected child"

The Family Law Section fully supports the amendment to subparagraph 9 (E), which extends the statute's protection to non-siblings.

With respect to the proposed amendment to subparagraph 9(A), we are concerned about the potential impact of this provision on parents who are the victims of domestic violence. While we agree that parents have an absolute obligation to protect their children from abuse, one cannot ignore the special circumstances of parents who are also victims of the abuser. We believe the current statute allows for investigation and prosecution of parents who willingly or knowingly and voluntarily allow their children to be abused. Accordingly, it may not be necessary to add the new language proposed in the bill. If the Council intends to add the new language, we believe there should be a provision that addresses situations where the parent is also suffering from or in danger of abuse at the hands of the alleged abuser. For example, the statute could exempt a parent who makes satisfactory efforts to protect the child from the abuser in the future or complies with the government's suggestions for protecting the child. The statute could also

allow the government agencies and the court to take into account situations where the abused parent was unable to protect the child from the abuser. In some instances, it may be sufficient for the parent/caretaker to obtain a civil protection order against the abuser which provides for the safety of the parent and child, as well as appropriate provisions for custody and visitation. Some cases may be more appropriately and efficiently handled in the custody or divorce system, which would help relieve the overburdened child welfare system.

With respect to the new subparagraphs (H), (I), and (J), we have several concerns. The statute does not provide definitions for the terms "controlled substance," "exposed to" and "drug related activity" as used in the new subparagraphs (H), (I), and (J). We believe the statute should include a specific definition of each of those terms. Additionally, as written, the statute would not necessarily include as much protection for children born with fetal alcohol syndrome as it does for children born with drugs in their system. We believe the Council should consider including a provision specifically related to fetal alcohol syndrome or include alcohol in the definition of controlled substance.

Although in general we support the addition of subparagraphs (H), (I), and (J), we caution against making the statute so strict that it discourages women from seeking prenatal care and drug or alcohol treatment. There is literature indicating that the threat of losing one's child has the negative consequence of discouraging women from seeking prenatal care and appropriate drug and alcohol treatment. If women fear they will be tested during prenatal visits or when they give birth, or that the results of tests will be reported to the police, they may avoid seeking medical attention. It may discourage women from giving birth in a hospital, where the child's medical needs can be attended and services can be offered. We support the proposition that a positive drug or alcohol test should automatically trigger a screening of the family for possible neglect. However, we suggest that the focus should be on treating the child and other family members, and providing necessary services, rather than on law enforcement proceedings.

With respect to drug related activity, it may be advisable to retain the nexus provided in the current statute between exposure to drug related activity and some form of abuse or neglect. Although we support a broad definition of the phrase "exposed to drug related activity," we believe it is important to require a showing that the parent's ability to care for the child is impaired, or that the child has suffered some physical or mental injury as a result of the activity. In the vast majority of cases there in fact will be parental impairment or injury to the child where drugs are present. One could even argue that children may be more prone to start using drugs if

they grow up in a household where drugs are used, and that drug activity interferes with a child's ability to sleep, learn, feel safe, etc. and, therefore, there is always harm to the child when drugs are present in the home. However, in those rare instances where there is no parental impairment or harm to the child as a result of the use of drugs in a home, it is important to avoid unnecessary upheaval for those children while services are provided to the other family members. Additionally, as currently drafted, the definition would appear to encompass a child whose family was unable to move from an apartment where drug activity was rampant due to financial reasons, even if the parent has taken all possible precautions to protect the child from this activity. The statute should be more narrowly tailored to reflect that some demonstration of actual harm is required. Otherwise, the Counsel risks unnecessarily over burdening the abuse and neglect system.

One of the Family Law Section's concerns is that the proposed amendment has the potential to overwhelm the abuse and neglect system by dramatically increasing the number of children in the system without a corresponding increase in the services available to those children. Although the presence of illegal drugs in the home clearly has a negative impact on children, those children and many others will not be appropriately served if the resources available to them are not expanded. The serious shortage of drug treatment programs in the District of Columbia, particularly for pregnant women and women with children, makes it difficult to provide appropriate services to children and families. As a result, the amendment could cause difficulties in complying with the Adoption and Safe Families Act (ASFA). For example, if the allegation of neglect is based entirely on a positive drug test without additional evidence of the parent's inability to provide appropriate care or a safe living environment, an argument could be made that the District failed to make reasonable efforts (as required by ASFA) to prevent the child's removal if no drug treatment was offered or even available during pregnancy. In addition, the lack of drug treatment services could undermine the ability of judges presiding over neglect cases to make a finding that reasonable efforts were made to reunify the family. We again urge the Council to bear in mind the importance of providing more preventive services as a way of keeping children safe from abuse and neglect.

II. Proposed Amendments to Section 16-2301(23), unacceptable discipline

Paragraph (23)(A) through (F) appears to set forth an exhaustive list of actions that constitute unacceptable discipline. We do not believe it is necessary to include a specific list in the statute. However, if the Council intends to include a specific list of unacceptable disciplinary

actions in the amendment, we believe it is essential to include an additional paragraph (G) at the end of the list to provide a general catch-all phrase for those methods of discipline that are clearly unacceptable but not included on the list. It is potentially very dangerous to attempt to provide an exhaustive list of unacceptable discipline since a parent could then argue that his or her particular conduct is not included in the statute and thus is permissible. For example, many children have been seriously injured with belts, electrical cords, whips and shoes but those items are not listed in the amendment. Similarly, locking a child in a closet or other confined space is not included on the list but would clearly be unacceptable discipline. If the final version of this legislation includes the list set forth in paragraphs 23(A) through (F), we suggest including a catch-all phrase as paragraph (G) or including a statement such as, "this list is illustrative of unacceptable discipline and is not intended to be exclusive or exhaustive."

III. Section 5. Multidisciplinary Child Abuse and Neglect Investigation Teams

It would be helpful for the amendment to set forth the purpose of the multidisciplinary investigation team (MDT) and to specify when the MDT becomes involved in the abuse and neglect process. Subparagraphs (a) and (b) appear to create two separate roles for the MDT. We wholeheartedly and enthusiastically support the creation of a standard protocol pursuant to subparagraph (b). We believe such a protocol would be a positive step toward improving the abuse and neglect system. With respect to individual cases, it is not entirely clear from the statute when and to what extent the MDT will become involved. If the MDT provision is intended to apply to cases from the time they are referred to CFSA, the first sentence of paragraph (a) should refer to "alleged" child abuse or neglect. Failure to use the term "alleged" implies that the abuse or neglect has already been adjudicated. If the MDT is not intended to be involved prior to an adjudication of abuse or neglect, the statute should specify the time at which the MDT is required to become involved with the child.

Although the creation of multidisciplinary child abuse and neglect investigation teams is a principle we support, the language specified in the bill poses some potential problems. We fear that paragraph (a) has the potential to seriously delay permanency for children. If every allegation of abuse or neglect is submitted for investigation to a team consisting of at least seven, and possibly twelve, members it may cause serious logistical problems in terms of ensuring prompt attention to children's needs and prompt steps toward permanency. We also are concerned that parents and caretakers may not be as forthcoming and cooperative if the Metropolitan Police Department (MPD) or U.S. Attorney is present at all meetings and involved

in every case even when criminal charges are not pending. Parental candor and cooperation are important to providing the most effective services and treatment for children, and should be encouraged. We fear that requiring the involvement of MPD and the U.S. Attorney in every case will have a chilling effect on parental/caretaker cooperation, thereby undermining the ability to resolve cases outside the legal system, through mediation, or prior to adjudication. The result may be an unnecessary delay in achieving permanency for children.

We are also concerned about unnecessarily taxing the limited resources of the various agencies participating in the MDT. Certainly there will be cases where it will be helpful, if not essential, to have the participation of representatives from all seven of the agencies listed in the amendment. However, it may be a waste of District resources, for example, to require participation of D.C. Public Schools (DCPS) in all cases. Although many children may need some sort of educational program earlier than typical school age because they are developmentally delayed or have other issues, others will not. DCPS should be involved in all cases where the child is school age, has developmental or other learning issues, will enter the school system within six months, or is in need of immunizations, but the statute does not need to mandate involvement in other cases. Similarly, in some cases there will be no need for the participation of the United States Attorney's Office and/or the Metropolitan Police Department. We suggest that the proposed legislation should be revised to allow as appropriate—instead of mandating in all cases—the participation of one or more representatives of the specified agencies.

We also suggest that this section of the bill may provide an opportunity to address another serious issue that affects the welfare of children in the District—proper immunization. As recently reported in the Washington Post, many children are precluded from attending school because they are not properly immunized. It is important for the District to have a centralized system for tracking immunization of children from birth. Until such a system is operative, the MDT provides an excellent opportunity to ensure that each child in the abuse and neglect system is properly immunized and eligible to attend school. We suggest including the immunization department as a permissive member of the MDT to address any immunization problems.

It may also be important and appropriate to include counsel for the child, parents and caretakers on the MDT. If it were the Council's intent to have the MDT function more on a policy level, counsel would not be necessary. If the MDT will be discussing specific cases and developing protocols to ensure that necessary services are in place, the participation of the

parties' representatives, if not the actual parties, would make this process more productive. The MDT meeting could then serve as the forum in which a case plan is developed, setting forth the goals of the case and what must be accomplished in order to achieve them. This would seem to best and most expeditiously facilitate permanency for children.

IV. Proposed amendments to D.C. Code Section 4-1302.02

We have concerns about the amendment's proposed changes in the types of child abuse reports, the provision that would require the inclusion of the newly created category of "inconclusive" reports (and the name of the alleged abuser) in the Child Protection Register maintained pursuant to D.C. Code Section 4-1302.02, and the proposed repeal of Section 4-1302.02(c). Under the current statute, there are only two types of reports, "supported" (those supported by credible evidence) and "unsupported" (those not supported by credible evidence). Under the current law, supported reports are maintained on one register and unsupported reports are maintained on a separate register that is not supposed to include identifying information. The proposed amendment creates three types of reports: substantiated (those supported by credible evidence), unjustified (those which are shown by *clear and convincing evidence* to have no basis in fact) and inconclusive (those which cannot be proven to be either substantiated or unjustified).

The proposed amendment appears to require the inclusion of all "inconclusive" reports on the Child Protection Register, unless and until the accused abuser can prove by clear and convincing evidence that he or she is not guilty of the alleged abuse. Given the extremely high standard of proof required to label a report "unsubstantiated" (clear and convincing evidence) it is likely that "inconclusive" will soon be the largest category of reports. The proposed amendment would include all of those reports in the Child Protection Register for what could be a very significant period of time. The amendment may greatly increase the reporting burdens and the resources necessary to maintain the Register. More importantly, the proposed amendment imposes a high burden of proof on the person accused of abuse, rather than requiring the government to make at least a minimal showing that abuse or neglect occurred. The amendment effectively labels people guilty until proven innocent. We are not convinced this is an appropriate policy in light of general principles of due process.

It is an unfortunate fact of life that parents, caretakers and other third parties sometimes use false abuse and neglect reports to gain an advantage in custody and other domestic relations

cases or as a form of harassment. The proposed amendments may have the negative effect of encouraging false reporting since reports that could not be clearly and convincingly proven false would be included in the Register and could be dredged up in all future custody cases and any other matters involving the child or the accused. Although the statute sets forth specific and limited circumstances under which information on the register can be disclosed, there is reason to be concerned about the inclusion of inconclusive reports on the Register and the potential harm it could cause to innocent parents/caretakers. We believe it is important not to create a statute that may encourage false reporting. We believe it is more appropriate to provide in Section 4-1302.02(a) that only substantiated reports will be included on the regular Child Protection Register and to retain D.C. Code Section 4-1302.02(c) (rather than repeal it) and apply it to all inconclusive and unjustified reports. We believe this would more effectively balance the due process rights of parents/caretakers and the need to protect children from abuse and neglect.

V. Miscellaneous

Section 16-2301(29): We suggest adding to new paragraph (29) "but is not limited to" between the words "includes" and "lacerations." As with the list of unacceptable discipline, it is important that the statute make clear that the list of injuries is not exhaustive.

Section 16-2301(30): In the new paragraph (30), definition of "mental injury," we suggest deleting the requirement that a licensed mental health practitioner must diagnose the emotional trauma to the child. We view that issue as more relevant to the proof that must be introduced at trial in order to support a finding of abuse. Perhaps it would be appropriate to add such a requirement to D.C. Code Section 16-2316, i.e. that a finding of mental injury must be supported by the testimony of a licensed mental health practitioner. However, it is unreasonable and potentially dangerous to children to require a formal diagnosis in order to bring a child within the neglect system on the basis of mental injury. In our experience, some of the most common cases of mental injury involve a parent who is suffering from a mental illness, paranoia, delusions and other symptoms, and imposing those problems on the child. It is highly unlikely that the child will have been seen by a mental health professional in such a case, but the child would certainly be in need of supervision and assistance. We suggest deleting the last clause of paragraph (30).

Section 16-2301(33) and (34): With respect to new paragraphs (33) and (34), we suggest that those paragraphs specifically set forth the definitions of "sexual act" and "sexual contact" instead of referencing the anti-sexual abuse act. We understand that the council is working toward a cohesive child protection statute that would be contained in one section of the code. That goal would be undermined by cross-referencing definitions in other sections. Perhaps more importantly community organizations, schools, medical and mental health professionals, and attorneys who want to know what the law states on these issues are better served by having the definitions clearly stated in Section 16-2301.

VI. Conclusion

The Family Law Section of the D.C. Bar applauds the Council's efforts to improve our child abuse and neglect statute. We recognize the need to improve the entire abuse and neglect system in the District of Columbia. We believe that as a result of the attention these issues have received federally and locally, there have already been substantial improvements. It is our hope that with the planned reforms to the Child and Family Services Agency, D.C. Superior Court, and the abuse and neglect system as a whole, and with increased community services, the number of abuse and neglect cases in the District will be significantly reduced. We hope that the various stakeholders will work cooperatively to continue to improve the system and to craft a law that best serves the children and families of the District. We appreciate the opportunity to be involved in that process. We also hope that the governmental agencies, advocacy groups, and members of our community will strive to substantially improve the services available to all of the residents of D.C.

Respectfully submitted,

Margaret J. McKinney
Co-chair, Family Law Section
District of Columbia Bar