November 15, 2013

Christine Riscili, Esq.
Supreme Court of Pennsylvania
Juvenile Court Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave, Suite 6200
P.O. Box 62635
Harrisburg, PA 17106-2635
juvenilerules@pacourts.us

Dear Ms. Riscili:

I write on behalf of the American Bar Association to express our support of proposed modifications to Rules 1151, 1152, 1154, 1340, and 1800 and new Rules 153, 183, 1153, and 1183 recently proposed by the Juvenile Court Procedural Rules Committee of the Pennsylvania Supreme Court that focus on establishing and clarifying the role and duties of lawyers in juvenile court proceedings.

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

The proposed juvenile court rules are patterned generally after the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (ABA Model Act). The ABA Model Act was drafted by experts in children’s law from throughout the ABA, and input was invited from children’s lawyers across the country. In August 2011, after an almost 3-year drafting process during which it was refined, debated and discussed, the ABA Model Act was adopted by the ABA House of Delegates with widespread support. In addition, almost 40 children’s law centers around the country supported the passage of the ABA Model Act.

The model of client-directed representation within the ABA Model Act represents the best practices as well as the highest ethical standards for the representation of children. In fact, “[t]he vast majority of legal scholars and authorities who have addressed this issue recommend that a lawyer should take direction from his or her child client if the child is determined to have developed the cognitive capacity to engage in reasoned decision making.” Donald Duquette with
During the drafting of the ABA Model Act, its drafters were conscious of and sensitive to the argument that allowing a child to direct his or her own representation will result in lawyers’ being bound to advocate for unsafe outcomes. However, as the Model Act clearly states, the lawyer “is not merely the child’s mouthpiece.” ABA Model Act Sec. 7(c) commentary. Rather, the lawyer’s role is to counsel the child in order to assist the child in exploring his or her options, and arriving at a reasoned decision. Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, 6 NEV. L.J. 682, 684 (2006). Further, the client directed model is more likely to result in the development of a level of trust and confidence between the client and the lawyer, trust and confidence that will make the lawyer more able to convince the client to pursue a wise course of action than anything that can be accomplished by a best-interests lawyer who cannot promise the client confidentiality and who may choose not to give voice to the client’s wishes.

The ABA Model Act, the ABA Model Rules of Professional Conduct and the proposed Juvenile Court Rules contain sufficient safeguards for clients with diminished capacity who cannot be counseled out of an unsafe decision, and they outline how a lawyer can take protective action for a child client if necessary. Thus, under the proposed model a lawyer would never be bound to advocate for something he or she felt would put the child client at risk of harm.

There is one area in which the Pennsylvania proposed rules differ from the ABA Model Act and, we believe, violates the canons of ethics. We would urge the committee to reconsider proposed language to Rule 1154 (B)(2), which states:

\[
\text{When a child has diminished capacity in directing representation, counsel shall inform the court and other parties that counsel is exercising substituted judgment. Counsel shall present evidence of diminished capacity to the court. The court shall decide whether the attorney will exercise substituted judgment. [Bold added.]}
\]

Pursuant to Rule 1.14 of the Model Rules of Professional Conduct and the ABA Model Act Sec. 7(d), only the lawyer can make the determination that a client has diminished capacity and when substituted judgment is appropriate. Both the confidentiality of the attorney-client relationship and the child-client’s involvement in that relationship may be compromised if the court, rather than, the lawyer, makes this determination. The Comment to Rule 1.14 explains that “[d]isclosure of the client’s diminished capacity could adversely affect the client’s interests. Also, while “[t]he lawyer shall advise the court of the determination of capacity and any subsequent change in that determination,” the lawyer need not present evidence of the client’s diminished capacity to the court, nor is it the court’s role to determine the role of the lawyer (ABA Model Act Sec. 7(d)). Indeed the commentary to Rule 1154 supports this thinking: “Only the attorney
can determine whether the child is capable of directing representation or the child has diminished capacity.” The language of Rule 1154(B)(2) should be amended to reflect this ethical boundary.

Additionally, we wanted to point out an internal conflict within the proposed PA rules. Proposed Rule 1154(B)(4) states that a lawyer “**may** move for appointment of a guardian *ad litem* when the attorney reasonably believes that the attorney cannot adequately act in the child’s own interest” (bold added). This language reflects the language within ABA Model Act and the scenario contemplated by the canons of ethics, to give the lawyer flexibility in decision-making that may affect both the trust relationship and the ultimate outcome of the case. For example, Rule 1.14 notes that the lawyer *may* take protective action, and Rule 1.6 dictates that the lawyer *may* disclose confidential information if harm is likely. However, the commentary to Rule 1154 appears to be in conflict with the language within the rule. From the commentary:

> Pursuant to paragraph (B)(2), if a child has diminished capacity in directing representation, counsel is to move for the appointment of a guardian *ad litem*… Pursuant to paragraph (B)(4), when the attorney reasonably believes that the child is at risk of harm unless action is taken, and cannot adequately act in the child’s own interest, the attorney is to move for appointment of a guardian *ad litem* to advocate for the child’s safety, welfare, and health.

Both clauses from the commentary imply that the lawyer is directed to request a guardian *ad litem*, while the rule itself permits such a request but does not require it. The commentary should be amended to reflect the language within Rule 1154 that makes it permissive, not mandatory, to request a guardian *ad litem*.

The American Bar Association urges the Juvenile Court Procedural Rules Committee of the Pennsylvania Supreme Court to adopt the proposed new Juvenile Court Rules patterned after the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, with the noted suggestions above. Thank you for your consideration of these comments. Please feel free to contact me should any questions arise.

Respectfully submitted,

Thomas M. Susman