October 16, 2014

Attn: Eileen Fox, Clerk of the Supreme Court
New Hampshire Supreme Court Building
1 Charles Doe Drive
Concord NH 03301

Dear Ms. Fox:

The American Bar Association (ABA) submits these comments in response to the proposed change to Rule 3.11 of the Rules of the Circuit Court of the State of New Hampshire- Family Division, which would diminish the availability of legal representation to parents in abuse and neglect cases beyond a certain stage of the proceedings. The ABA respectfully opposes this proposed change because we believe that legal representation for parents after an initial disposition in abuse and neglect cases should be required as a matter of due process in view of the ongoing court intervention and monitoring of custody of children in these cases. The efficient and fair administration of justice is also best served in our view by legal representation for parents in cases in which the state has undertaken ongoing custody jurisdiction.

The ABA is one of the world’s largest voluntary professional organizations, with nearly 400,000 members. Its members include attorneys in private firms, corporations, nonprofit organizations, and government agencies, as well as judges, prosecutors, defense attorneys and public defenders, legislators, 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 parents.

As long ago as 1979, the ABA’s “Juvenile Justice Standards” called for parents to receive the effective support of legal counsel in all child protective court proceedings. These Standards are voluminous and several specific standards have been adopted by numerous states and also influenced enactment of similar or identical state guidelines and have been applied and cited in scores of appellate cases. Perhaps the most significant is the Right to Counsel Standard. The relevant Standard states: “The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of all issues at all stages of those proceedings” (Standards Relating to Counsel for Private Parties, 1.1) (emphasis added). Then, in 2006, the ABA House of Delegates adopted a resolution that “urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving … child custody ….” (ABA Res. 112A, 2006). In neither of these documents was the scope of representation limited to certain abuse or neglect proceedings; in fact, the Juvenile Justice Standards called for the provision of counsel at “all stages.”
Also in 2006, the ABA adopted the “Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases,” which has been adopted or used to develop similar standards by 22 states. Numerous additional states have initiated interventions to improve representation for parents based on the ABA Practice Standards. In relevant regard, they called for courts to “[e]nsure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court’s jurisdiction” (ABA Res. 114, 2006). The Commentary for this provision explains:

The parent is disadvantaged in a child abuse and neglect case if not represented by a competent attorney throughout the life of the case. The attorney can explain the case to the parent, counsel the parent on how best to achieve the parent’s goals with respect to the child, and assist the parent access necessary services. In most child welfare cases, the parent cannot afford an attorney and requires the court to appoint one. The court should make every effort to obtain an attorney for that parent as early in the case as feasible – preferably before the case comes to court for the first time or at the first hearing. In jurisdictions in which parents only obtain counsel for the termination of parental rights hearing, the parent has little chance of prevailing. A family that may have been reunified if the parent had appropriate legal support is separated forever.

The Standards add that the parent’s attorney must “[u]nderstand and protect the parent’s rights to information and decision making while the child is in foster care,” and the Commentary elaborates upon this responsibility:

Unless and until parental rights are terminated, the parent has parental obligations and rights while a child is in foster care. Advocacy may be necessary to ensure the parent is allowed to remain involved with key aspects of the child’s life. Not only should the parent’s rights be protected, but continuing to exercise as much parental responsibility as possible is often an effective strategy to speed family reunification. Often, though, a parent does not understand that he or she has the right to help make decisions for, or obtain information about, the child. Therefore, it is the parent’s attorney’s responsibility to counsel the client and help the parent understand his or her rights and responsibilities and try to assist the parent in carrying them out.

The Standards also specify that subsequent to hearings and rulings, the parent’s attorney must “[t]ake reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court,” and the Commentary explains:

The parent’s attorney should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When the child welfare agency does not offer appropriate services, the attorney should consider making referrals to social service providers and, when possible, retaining a social worker to assist the client.
The ABA believes that these responsibilities are inconsistent with a rule that discharges the attorney after the initial dispositional hearing.

Finally, in 2011, the ABA adopted the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Res 101A, 2011). Although addressing the rights of children, it contains language that is equally relevant to representation of parents:

> Unless otherwise provided by a court order, an appointment of a child’s lawyer in an abuse and neglect proceeding continues in effect until the lawyer is discharged by court order or the case is dismissed. The appointment includes all stages thereof, from removal from the home or initial appointment through all available appellate proceedings.

The Commentary explains that this appointment duration is necessary “so that the child’s lawyer can deal with the issues that may arise while the child is in custody but the case is not before the court.”

For all of the above reasons, the ABA strongly urges the Court to leave the current rule intact so as to ensure that parents are fully protected for the duration of these critical legal proceedings.

Sincerely,

Thomas M. Susman  
Director  
Governmental Affairs Office  
American Bar Association