

NEW YORK
CITY BAR

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March 10, 2009
Catherine Krebs
Director
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Dear Cathy:

I am writing in my position as Chair of the Association of the Bar of the City of New York's Council on Children to thank you for inviting comments on the draft Model Act Governing Representation of Children in Abuse and Neglect Proceedings.

I have attached the comments from the City Bar and I trust you will feel free to contact me with any questions, or if I can help clarify any of the suggestions we have made.

Best regards;



Karen J. Freedman
Chair, Council on Children

ABA MODEL ACT GOVERNING REPRESENTATION OF CHILDREN
IN ABUSE AND NEGLECT PROCEEDINGS

COMMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK, COUNCIL ON CHILDREN

March, 2009

General comments: We appreciate the opportunity to comment on the ABA's new draft of the Model Act Governing Representation Of Children In Abuse And Neglect Proceedings and we applaud your efforts to codify a professional attorney-client model for the representation of children. In order to make certain that readers interpret these rules in the intended spirit, ensuring that rules governing children's attorneys are no different than those that affect all attorney-client relationships, we urge you to revise the language that paraphrases MRPC 1.14 (lines 211-226) and strengthen the commentary to section 7(c)2. As written, we fear that the language in this section could be interpreted to permit greater use of substituted judgment for children and undermine major strides that have been made toward professionalizing the attorney-client relationship for lawyers representing children. In addition, we suggest changing references to "best interests" in section 7(d) to properly reflect the attorney's role to promote clients' legal interests.

We would be happy to participate in further discussion about these comments. Thank you for your consideration. The comments that follow are intended to abide by the format that you have requested for all comments to the draft.

* * *

Line 46: editing error -- text is "appointment of a child for the child" - should be "appointment of a lawyer for the child";

Lines 51-52: "No conflict of interest" is not the proper standard. Model Rules 1.7 addresses this and refers to "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." The shorthand reference to "no conflict of interest" with a citation to the NCCUSL Act distorts the proper legal test. Instead, we urge that citation be made to Model Rule 1.7. In addition, the commentary should clearly note that children's lawyers must abide by the ethics rules relating to conflicts in a manner no different from that of any other attorney. At the beginning of line 71, we suggest adding language to emphasize that conflicts analysis is no different for children's lawyers: "Children are entitled to conflict-free counsel and Model Rule 1.7 must be applied in the same manner as the rule would be applied for adult counsel."

Lines 91-99: add a sentence before the last sentence in this paragraph (line 98):

“Ancillary assistance for counsel should be encouraged wherever appropriate to enable child attorneys to provide high-quality representation.”

Lines 203-210: add language to the first sentence that begins on line 204: “The child’s lawyer helps to make the child’s wishes and voice heard. As any other lawyer, the child’s lawyer is not merely the child’s mouth piece. All lawyers are both advocates and advisors for their clients. The lawyer should advise the child...”

Lines 211-231: In addition to the language in lines 211-218, we would propose adding the following text:

Rules governing representation of children with diminished capacity are no different than the rules governing any representation of a client with limited capacity. See MRPC 1.14. The fact that a child is of tender years alone is not a basis for finding that a child has “diminished capacity” with respect to any particular client decision-making. [Retain lines 211-226 here.] Only where these findings have been properly made under MRPC 1.14, the lawyer may... (retain text of lines 219-228).

Instead of the current language in lines 228-231, we propose the following:

Allocation of decision-making authority between attorney and client for the child’s attorney is fundamentally indistinguishable from decision-making in any other lawyer-client relationship. Only where a child client meets the test for diminished capacity, substantial harm, and inability to act in one’s own interest under MRPC 1.14 may the attorney consider whether to invoke protective action in accordance with that rule. In any event, the lawyer should not consider protective action unless the lawyer has been unsuccessful in the lawyer’s counseling role.

We suggest removing the language about physical and sexual harm (“Substantial harm includes both physical and sexual harm.”). This section already enumerates risk of substantial physical harm. As MRPC 1.14 is tracked verbatim “other harm” in the text must include sexual harm.

Lines 257-270: Disclosure of confidences and secrets: we recommend that this language be strengthened to make clear that disclosure of a confidence or secret is a last resort where other options would not permit the protective action. In line 260-1, the language should be “however the lawyer must make every effort to avoid disclosures. Where disclosures are unavoidable, the lawyer must limit the disclosures as much as possible.”

Section 7(d), lines 278-321: We strongly suggest that the ABA eliminate references to “best interest” in this section and instead refer to “legal interest,” starting with line 280 and continuing in the commentary (line 289 and 295, most notably).

For the first paragraph of section 7(d), we recommend the following changes:

d) When the child is incapable of directing the representation by expressing his or her objectives, the lawyer may [shall] seek the appointment of a guardian ad litem in accordance with applicable state law. If the child is incapable of directing the representation and a guardian ad litem is not appointed, [If none is available] the lawyer shall formulate and advocate for a position that is in the child’s legal [best] interest [of the child], but only after consultation with individuals or entities that can provide the lawyer with the information and assistance necessary to determine the child’s interest. [best interest of the child.] The child’s legal interest will vary depending on the nature of the proceeding and the state law that applies to the proceeding.

Line 289: change best interest to “legal interest”

Lines 295-300: Moreover, in determining the *[child’s best interest the lawyer should take into account protecting the]* child’s legal rights, the lawyer should seek to maximize the child’s capacities, respect the child’s family and social connections, and recommend the least intrusive state intervention, while addressing any disabilities the child and family may have, giving weight to parent’s preference in the absence of conflict or harm to the child, and honoring the child’s culture.

Lines 309-312: The word “considered” in line 311 does not sufficiently express the concept involved, blurring the distinction between this section and 7(c)(2). Instead we recommend that the word “considered” be removed so that this section of the sentence would read: “unable to engage in a meaningful reasoning process about issues that are relevant to the proceeding.”

Lines 313-6: Because of the evolving nature of children’s competencies, a child who is unable to express his or her objectives [for whom a lawyer is advocating best interest] at one hearing or proceeding may be able to communicate sufficiently to direct the lawyer at a later hearing or proceeding.

Line 337: Add sentence: “Nothing in this act shall diminish or otherwise change the child’s attorney-client privilege, nor shall a child have any lesser rights than any other party in regard to this or any other evidentiary privilege.”

Lines 429-30: Few states require lawyers to report abuse or neglect. Most often, such a requirement would be incompatible with the attorney’s role. This language should be unnecessary, especially given that the Model Act provides significant room for protective

action. See comments above, lines 211-226 (protective action) and 257-70 (limiting disclosures).