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Comments on the Proposed ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings

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The proposed Model Act drafted under the auspices of the ABA Section of Litigation (Children's Rights Litigation Committee) with the assistance of the ABA Center on Children and the Law and First Star represents a laudatory draft for state enactment. Virtually every state statute governing the subject matter of child dependency court jurisdiction would be improved were it to be enacted in place of current law. Our state of California is among them.

The merits of the proposed draft in relation to known deficiencies in child representation are many, and include:

- It properly defines “proceeding” to include all stages and does not allow the avoidance of representation at point of adoption, in cases of voluntary placement, or in appellate proceedings.¹
- It separately defines and elucidates the role of a “court appointed adviser.”
- It specifies that children are “parties” in dependency court proceedings—recognizing their status not as chattel in dispute among adult authorities, but as persons whose fundamental liberty interests are being adjudicated.
- It provides for timely appointment of counsel, for conflict management, and for proper qualification.
- It applies the rules of professional conduct to counsel, provides for client confidentiality and work-product protection. It specifies that counsel shall meet with the child prior to each hearing, and visit the child in placement. And it outlines the obligations that attend representation—including “health, mental health, educational, developmental, cultural and placement needs.” Bravo.

¹ Regrettably, California allows the abandonment of appellate counsel for most children where either the parent or county appeal. Child attorneys are compelled to obtain special “advance permission” from the appellate court, with stated justifications and paperwork, in order to provide the representation that parents and the county social workers receive as a matter of course. This barrier coincides with caseloads that are unconscionable (commonly above 250) to inhibit effective appellate representation for children where the determinative decision is made in most of the state's appellate districts.

- It properly gives weight to the child's preferences and instructions, with exceptions properly drawn and based on diminished capacity. And it allows for the appointment of a Guardian Ad Litem in the event representation of the client's wishes is not feasible.²
- It allows for the appointment of a Guardian Ad Litem in cases where the child is incapable of directing representation.
- It includes the prescription that court hearings include the presence of the child (or determine why not) and that waiting areas be child friendly.

We do believe that the Model Act could be improved in four aspects:

1. **Interdisciplinary training.** Some mention of the importance of interdisciplinary training is appropriate given the rather extraordinary setting for child representation; these are clients who may be entirely inarticulate, subject to court jurisdiction that is uniquely broad. In few other court proceedings is the court acting as a legal parent, and with the obligation to essentially parent a child. Representing such a client in the context of government programs and needs relevant to health, education, disability, mental health, child care, and living situation make it a unique obligation to understand a breadth of subject matter.
2. **A defined caseload limit.** We understand that caseload limits properly vary depending on whether investigative or social worker staffs are provided and whether the office is organized horizontally or vertically (see below). We also appreciate that the model recommends the inclusion of some caseload standard. And we understand that the arbitrary citation of the *Kenny*

² The provisions governing this subject area are in a common sense format. We would note that the conundrum of whether to advocate as counsel for a young client, or to substitute counsel's judgment in the "best interests of the child" has been the subject of career spanning academic preoccupation. We would respectfully note that common discussion of the topic seems unaware that the problem of client irrationality or less-than-optimum goal is hardly confined to child clients. Those of us who have represented adults know well the irrationality common in litigation instructions to counsel. Perhaps no forum provides more examples than family court, but they pervade all legal practice and include every type of criminal and civil client. In point of fact, having represented these children for two decades after having represented adults for two decades, we respectfully conclude that, on the whole, the child clients we have represented are more rational, more thoughtful, and more generous than any group of adults we have encountered. And there is special value to have what-they-want-to-see-happen a part of the process. Every other party has counsel so litigating. If a desire or contention is less than ideal, we trust the process to say "no" or "yes, but..." for every other party. This one is no less deserving. And that inclusion makes the proceeding legitimate in their eyes. A good parent hears the child out before deciding to punish or act.

The Rules of Professional Conduct include all sorts of limitations and protections for counsel when confronting self-destructive client behavior—limitations on representation where violation of law would be facilitated, where the client will be harmed, where the time and resources of the court would be wasted, where the client is uncooperative or refuses to accept prudent advice, etc. These and other bases commonly exist for withdrawal of counsel, either by stipulation or court order. And in the case of juveniles, we have the option of a Guardian Ad Litem to be appointed as a substitute or to complement counsel for the child. The ABA proposed model includes that option.

A. case standard of 100 cases per attorney may not be appropriate for the Model Act. Finally, we understand that circumstances vary between urban and rural counties within a state. However, the ABA should appreciate the fact that much of this Model Act is rendered nugatory by commonly extant caseloads. In California, we have attorneys who have more than 250 and in some jurisdictions, over 400 or 500 children assigned to them. These counsel are not and cannot be compliant with the standards here proposed. Clients cannot be visited *in situ*, cannot be talked with prior to hearings, cannot be present at hearings. Addressing any legal need outside of dependency court immediate calendars and appearances is problematical.

It would be unworthy of the Model Act to offer with one hand, and then to effectively take away with the other. It would seem prudent to include in the rule a ceiling of 160 child clients where (a) those clients are represented by the same attorney in multiple proceedings, and (b) where at least one-half of a social worker/investigator position is allocated per attorney. Where (b) is not provided, the maximum should be 110 child clients. These maximums are above *Kenny A.* levels and are similar to the levels recommended by study groups, such as the recent Administrative Office of the Court's study of caseloads in California. When caseloads are above these levels, effective representation is inhibited to an extent justifying a specific statutory limitation. If a given state has a special organizational structure that commends a different caseload limit arrangement, it may amend the model accordingly. But for the vast majority of states (for which a model is properly directed) that provision is prudently commended.

3. **Vertical Representation.** We believe that strong preference should be included for vertical organization of representation, not horizontal. Horizontal commonly involves separate counsel performing defined functions, such as detention, termination, placement, appellate. Such an organization has the advantage of efficiency and task repetition. But these children are regrettably subject to a sea of changing faces during their foster care experience. Their need for a personal attorney who they know and trust and who stays connected to them is immense. For many of them, the adult anchors in their lives are gone. Court and counsel should strive for continuity above agency or court convenience or efficiency. A competent attorney should be able to manage the multiple proceedings, including appellate argument, that are involved in dependency court litigation. Ideally, he or she masters it and as many ancillary legal functions as is possible—organized around the child, not the agency's organizational chart.
4. **Civil Commitment/Confinement.** We understand that the scope of the Model Act is dependency court. Nevertheless, we recommend inclusion of its application to the civil commitment of children to mental institutions or other civil confinement. The regrettable leading case of *Parham v. J.R.* 442 U.S. 584 (1979) failed to provide basic 5th or 6th Amendment protection to a child subject to an indeterminant confinement in a Georgia state mental institution. There is a strong relationship between dependency court jurisdiction—which can and does include parents surrendering “incorrigible” youth to the dependency court's jurisdiction—and the related option of parental direction of children into mental institutions. In both circumstances, the child needs counsel. While the model properly excludes representation of children in disability cases, delinquency, educational rights, and family court custody disputes, the commitment of a child to a mental institution (allegedly for his or her “own good” and by the state or with state sanction) is too close to the basic decisions made in dependency court that

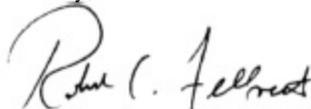
will determine the basic living conditions of the child, and those decisions properly include the same standards for child representation.

We also join in four of the specific comments of Professor Jane Spinak of Columbia, as follows:

- **Lines 79-80:** It would help to have an additional statement to the effect of “Lawyer’s representing children have an affirmative obligation to seek training which will enable them to develop effective professional relationships with their child clients.”
- **Line 179:** Add the word “counseled” into this sentence so it reads “shall advocate for the child’s counseled and expressed wishes” or change it to say “shall advocate for the child’s wishes after the child has the opportunity to be counseled by the attorney.” The point is that the attorney does not just advocate for the first thing out of the client’s mouth.
- **Line 357-358:** The ABA many want to include an exception of “unless the attorney for the child believes extraordinary circumstances exist to justify the hearing being held without the child present.” I do not think this should be a loophole but rather a safety net; it may be crucial for some action to be taken that day that the client would want done even if the client wasn’t there.
- **Line 369:** The ABA may want to add “In the case of an emergency change in the child’s placement, the attorney shall receive notice as soon as possible but no later than 48 hours following the change of placement.” I chose 48 hours but you could choose a shorter timeframe.

Notwithstanding these four general and four specific recommendations for further improvement, the Children’s Advocacy Institute supports this Model Act. It represents a major step forward in child representation. And those who have worked hard to fashion it into its present form have our admiration and gratitude.

Sincerely,



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