

Comment to Petition to Amend Rule 41, Rules of Procedure for Juvenile Court

The proposed amendment would require the presence of children who are the subject of a dependency proceeding at all substantive court hearings absent a court order excusing attendance. Although strongly supportive of the goal to maximize the opportunities for children to have a voice in their own proceedings, undersigned opposes requiring the children's attendance at every hearing.

There are many reasons where attendance may not be in the child's best interest. These may include: a child's age; a child who may be a victim; the distance a child may have to travel; hearings scheduled during school hours; etc. It is important to note that every child in a dependency proceeding is a party.ⁱ As such, every child should have the right to notice and an opportunity to attend and fully participate in every hearing related to their case. The decision to attend, however, should ultimately be left to each individual child.

The American Bar Association (ABA) has provided us with some direction on this:

Each child who is the subject of an abuse or neglect proceeding is a party to that proceeding and has the right to attend and fully participate in all hearings related to their case. If the child is not present at the hearing, the court shall determine whether the child was properly notified of his or her right to attend the hearing.ⁱⁱ

Section 9(a), ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings. Undersigned supports the specific language of the *Model Act* in place of the proposed language as a means to accomplish the goals of the amendment while being sensitive to the child's wishes.

Another concern relates to the portion of the amendment wherein the court may excuse the child only "upon motion of the child." This may lead some attorneys to not file a motion to excuse their client's presence in order to fulfill the "meaningful contact" requirement of the new rule (as the child's presence will be required unless excused by the court), possibly pitting what is in the child's best interest against what is convenient for the attorney. This is not an issue under the language of the *Model Act*.

The second part of the proposed amendment would require a judicial determination regarding whether counsel has had meaningful contact with the child prior to each substantive hearing. Undersigned supports the rights of children to have meaningful contact with their counsel. As clients, children are generally at a disadvantage because of their age, maturity, and lack of knowledge. They are less likely to contact counsel on their own. They are also less likely to complain about the lack of contact they may have with their counsel. Thus, the amount and nature of the contact is generally up to counsel. Some lawyers have regular and meaningful contact with their clients. Others do not. Although, the judicial oversight in the proposed amendment would result in a general increase in the amount of meaningful contact between children and counsel as a whole, the better approach may be to more clearly define counsel's role with regard to client contact. Undersigned would recommend language similar to that in the American Bar Association's *Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases*:

Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

*Section C-1, ABA Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases.*ⁱⁱⁱ This modified language would accomplish the goal of increasing communication between counsel and the child while also providing counsel with some direction in terms of the nature and frequency of the contact. The court would also retain the inherent authority to inquire of counsel about any meaningful contact with the child.

Some of the posted comments recommend replacing the language “meaningful contact with” to “meaningful contact with *or regarding*” or “meaningful contact with *or about*,” thus arguably relieving counsel of the responsibility of face-to-face contact. If this Court is inclined to adopt the language in the proposed amendment regarding judicial oversight, undersigned recommends not adding the language “*or regarding*” or “*or about*.” As previously stated, the ABA recommends contact *with* the child.

Undersigned supports Petitioner’s goals to ensure that children’s voices are heard and that the children are effectively represented. The following modified language is offered as a means to accomplish those goals while being sensitive to the child’s wishes and the need for clearer direction regarding representation:

Each child who is the subject of an abuse or neglect proceeding is a party to that proceeding and has the right to attend and fully participate in all hearings related to their case. If the child is not present at the hearing, the court shall determine whether the child was properly notified of his or her right to attend the hearing. Irrespective of the child's age, the child's counsel should visit with the child prior to substantive court hearings and when apprised of emergencies or significant events impacting on the child.

This language comes almost entirely from the previously mentioned *ABA Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases* and the *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*.^{iv}

Respectfully Submitted,

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ⁱ Rule 37 (A), Rules of Procedure for the Juvenile Court, provides in part: “Reference to a party to the action means a child...” See also A.R.S. § 8-531 (12) which provides in part; “Parties includes the child...”

ⁱⁱ The Commentary to Section 9(a) of the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings is also enlightening:

Courts shall provide the child with notification of each hearing. The Court shall enforce the child's right to attend and fully participate in all hearings related to their dependency cases. Having the child in court emphasizes for the judge and all parties that this hearing is about the child. Lawyers should consider the following to decide whether the child should come to court: whether the child wants to attend, the child's age, the child's developmental ability, the child's emotional maturity, and whether the child would be severely traumatized by such attendance. In making this decision, the lawyer is urged to consult with therapists, caretakers, or other persons who have specific knowledge of the child.

Lawyers should consider the following participation options to provide the most meaningful experience for the child and the court: allowing the child to be present throughout the entire hearing, presenting the child's testimony in chambers adhering to all applicable rules of evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing the child into the hearing, allowing the child to be present only when the child's input is required, excluding the child during harmful testimony, and presenting the child's hearsay statements in court adhering to all applicable rules of evidence.

Courts must reasonably accommodate the child to ensure the hearing is a positive experience for the child. The court should consider: scheduling hearing dates and times when the child is available and least likely to disrupt the child's routine, setting specific hearing times to prevent the child from having to wait, making courtroom waiting areas child friendly, and ensuring the child will be transported to each hearing.

The lawyer for the child plays an important role in the child's court attendance and participation. The lawyer shall ensure that the child is properly prepared for the hearing. She should meet the child in advance to let the child know what to expect at the hearing, who will be present, what their roles are, what will be discussed, and what decisions will be made. If the child would like to speak to the judge, the lawyer should help the child decide what to say. The lawyer should also make time after the hearing to explain the judge's ruling and allow the child to ask questions about the proceeding.

ⁱⁱⁱ See also the Commentary to Section C-1, American Bar Association Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases:

Meeting with the child is important before court hearings and case reviews. In addition, changes in placement, school suspensions, in-patient hospitalizations, and other similar changes warrant meeting again with the child. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest. A lawyer can learn a great deal from meeting with child clients, including a preverbal child.

^{iv} The term "substantive" was used to define the type of hearing in order to prevent an unnecessary and overly burdensome requirement that counsel visit with the child at even insignificant hearings (i.e. publication hearings, initial hearings, etc.).