

RULES OF JUVENILE COURT PROCEDURE

DELINQUENCY MATTERS

Table of Rules

PART B(2) COUNSEL

- 150. Attorney -- Appearances and Withdrawals
- 151. Assignment of Counsel
- 152. Waiver of Counsel
- 153. Role of Counsel**

RULE 153. ROLE OF COUNSEL

This is an entirely new rule

A. **Role of Counsel.** Attorneys who represent juveniles in proceedings commenced pursuant to these Rules and the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.* shall:

- 1) zealously and competently represent the juvenile at every stage of the proceedings;
- 2) advise and communicate with the juvenile in a developmentally appropriate manner;
- 3) if applicable, review and complete the admission colloquy mandated by Rule 407 with the juvenile; and
- 4) litigate the juvenile's case when an admission is inappropriate and protect the record for appeal.

B. **Ethical obligations.** The attorney has an ethical and professional obligation to the juvenile, rather than the juvenile's guardian.

COMMENT

Pursuant to paragraph (A)(1) and (B), the attorney has an ethical and professional obligation to the juvenile, rather than the juvenile's guardian. The attorney is to comply with the wishes of the juvenile over the wishes of the juvenile's guardian. See Pa.Rs.P.C. 1.6(a) and 1.14(a).

Counsel for the juvenile should comply with basic standards of practice, which may include, but are not limited to: a) interviewing the client as soon as practicable and in advance of any court hearing; b) preparing for the case by seeking and reviewing written allegations, police reports, and interviews; the petition; probation reports; pleadings; relevant laws and procedures; warrants; and any other evidence in law enforcement files or the possession of the attorney for the Commonwealth; c) identifying, interviewing, and preparing witnesses, including requesting witness's contact information; d) obtaining social studies, education records, and any other reports and records from the juvenile probation officer; e) investigating the facts, the scene of the incident, and circumstances surrounding the allegations of delinquency; f) call any necessary experts or investigators as witnesses; g) file timely motions; h) when necessary, request continuances at the juvenile's request; i) review applicable laws, including the Constitution, statutes, Rules of Procedure, Rules of Evidence, case law, local rules, and other persuasive authority; j) when appropriate, negotiate plea agreements; k) litigate important fact and legal issues when appropriate; l) present witnesses, alibis, mitigating circumstances, and other appropriate defenses, including applicable law, to the court; m) gather other information or evidence to support the juvenile's case; n) negotiate the best dispositional outcome for the juvenile; o) file necessary post-dispositional motions; p) attend all hearings; q) when appropriate, file and prepare an appeal; and r) when applicable, file expungement motions.

Pursuant to paragraph (A)(2), the attorney is to communicate in a developmentally appropriate manner with the juvenile so the juvenile can understand the process and make informed decisions.

If a juvenile speaks a different language than the attorney, counsel is to request an interpreter to alleviate any communication barriers in preparing for a case and during all proceedings.

Prior to an admission, a colloquy is to be prepared and presented to the court. See Rule 407.

Counsel is to attend all proceedings and remain in the case unless permitted to withdraw pursuant to Rule 150. This includes attendance at all dispositional review and probation revocation hearings. See Rule 150(B) on duration of counsel.

For further ethical obligations, see Pa.R.P.C.

PART (D)(1)
MASTERS

183. Role of Master

- 185. Appointment to Cases
- 187. Authority of Master
- 190. Admissions Before Master
- 191. Master's Findings and Recommendation to the Judge
- 192. Challenge to Master's Recommendation

RULE 183. ROLE OF MASTER

This is an entirely new rule

A. **Role of Master.** The master shall ensure:

- 1) the juvenile understands and has been apprised:
 - a) of the right to have a hearing before a judge;
 - b) that the findings and recommendations of the master must be approved by the judge before they are final;
 - c) of the rights at each stage of the proceeding, including if the juvenile is admitting to the delinquent acts pursuant to Rule 407, all the rights the juvenile is waiving as set forth in the admission colloquy under Rule 407(C) are understood; and
- 2) the Rules of Juvenile Court Procedure and the requirements of the Juvenile Act are followed at every proceeding.

B. **Ethical Obligations.** The master has ethical and professional obligations pursuant to the Rules of Professional Conduct and the Code of Judicial Conduct.

COMMENT

See the Pa.R.P.C. for specific obligations. See *also* Canon 7 of the Code of Judicial Conduct for applicability of Code to attorneys presiding as an officer of the judicial system.

RULES OF JUVENILE COURT PROCEDURE

DEPENDENCY MATTERS

CHAPTER 11 GENERAL PROVISIONS

PART B(2) COUNSEL

- 1150. Attorneys -- Appearances and Withdrawals
- 1151. Assignment of [**Guardian Ad Litem &]**Counsel
- 1152. Waiver of Counsel
- 1153. Role of Counsel**
- 1154. Duties of [**Guardian Ad Litem]**Counsel
- 1158. Assignment of Court Appointed Special Advocates

RULE 1151. ASSIGNMENT OF [GUARDIAN AD LITEM & LEGAL]COUNSEL

A. [Guardian *ad litem* for child. The court shall assign a guardian *ad litem* to represent the legal interests and the best interests of the child if a proceeding has been commenced pursuant to Rule 1200 alleging a child to be dependent who:

- 1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the physical, mental or emotional health, or morals;**
- 2) has been placed for care or adoption in violation of law;**
- 3) has been abandoned by parents, guardian, or other custodian;**
- 4) is without a parent, guardian or legal custodian; or**
- 5) is born to a parent whose parental rights with regard to another child have been involuntarily terminated under 23 Pa.C.S. § 2511 (relating to grounds for involuntary termination) within three years immediately preceding the date of birth of the child and conduct of the parent poses a risk to the health, safety, or welfare of the child.**

B.] Counsel for child. The court shall appoint [legal] counsel for a child[:1]) if a proceeding has been commenced pursuant to Rule 1200 alleging a child to be dependent[who:

- a) while subject to compulsory school attendance is habitually and without justification truant from school;**
- b) has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of the child's guardian and who is ungovernable and found to be in need of care, treatment, or supervision;**
- c) is under the age of ten years and has committed a delinquent act;**
- d) has been formerly adjudicated dependent, and is under the jurisdiction of the court, subject to its conditions or placements and who commits an act which is defined as ungovernable in paragraph (B)(1)(b); or**
- e) has been referred pursuant to section 6323 (relating to informal adjustment), and who commits an act which is defined as ungovernable in paragraph (B)(1)(b); or**

2) upon order of the court].

B[C. Counsel and]Guardian *ad litem* for child. When the court, upon motion or *sua sponte*, determines that the requirements of Rule 1154(B)(4)&(5) have been met, the court shall appoint a guardian *ad litem* for the child. The guardian *ad litem* shall be a licensed attorney or licensed mental health professional.[If a child has legal counsel and a guardian *ad litem*, counsel shall represent the legal interests of the child and the guardian *ad litem* shall represent the best interests of the child.]

C[D]. Time of appointment.

- 1) **Child in custody.** The court shall appoint[a guardian *ad litem* or legal] counsel immediately after a child is taken into protective custody and prior to any proceeding.
- 2) **Child not in custody.** If the child is not in custody, the court shall appoint [a guardian *ad litem* or legal]counsel for the child when a dependency petition is filed.

D[E]. Counsel for other parties. If counsel does not enter an appearance for a party, the court shall inform the party of the right to counsel prior to any proceeding. If counsel is requested by a party in any case, the court shall assign counsel for the party if the party is without financial resources or otherwise unable to employ counsel. Counsel shall be appointed prior to the first court proceeding.

COMMENT

See 42 Pa.C.S. §§ 6302, 6311, and 6337.

[The guardian *ad litem*]Counsel for the child may move [the court for appointment as legal counsel and assignment of a separate]for appointment of a guardian *ad litem* when[, for example, the information that the guardian *ad litem* possesses gives rise to the conflict and can be used to the detriment of the child] the requirements of Rule 1154(B)(4) have been met. The attorney is to find: 1) the child has diminished capacity to direct legal representation; 2) the child is at risk of harm; and 3) the attorney cannot adequately act in the child's own interest. To the extent 42 Pa.C.S. § 6311(b)(9) is inconsistent with this rule, it is suspended. See Rule 1800. See *also* Pa.R.P.C. 1.7 and 1.8. **[Under paragraph (C), legal counsel represents the legal interests of the child and the guardian *ad litem* represents the best interests of the child.]**

Pursuant to Rule 1154(B)(5), the court, *sua sponte*, may appoint a guardian *ad litem*, at any time when it is necessary for the child's welfare, safety, or health.

Pursuant to paragraph (B), the guardian *ad litem* does not have to be an attorney. See Comment to Rule 1154 and Rule 1800. The court may appoint a licensed mental health professional. Assigning a court-appointed special advocate in the case may negate the need for appointment of a guardian *ad litem*. See Rule 1158 and 42 Pa.C.S. § 6342.

Nothing in these rules anticipates that a guardian *ad litem* for an adult is to be appointed by these rules. For appointment of a guardian of the person, see 20 Pa.C.S. § 5501 *et seq.* and Pa.O.C. Rules 14.2 - 14.5.

Pursuant to paragraph (D[E]), the court is to inform all parties of the right to counsel if they appear at a hearing without counsel. If a party is without financial resources or otherwise unable to employ counsel, the court is to appoint counsel prior to the proceeding. Because of the nature of the proceedings, it is extremely

important that every “guardian” has an attorney. Therefore, the court is to encourage the child’s guardian to obtain counsel. Pursuant to Rule 1120, a guardian is any parent, custodian, or other person who has legal custody of a child, or person designated by the court to be a temporary guardian for purposes of a proceeding. See Pa.R.J.C.P. 1120.

RULE 1152. WAIVER OF COUNSEL

A. Children. [1) Guardian *ad litem*.] A child may not waive the right to **counsel** [a guardian *ad litem*.

2) Legal Counsel. A child may waive legal counsel if:

- a) the waiver is knowingly, intelligently, and voluntarily made; and**
- b) the court conducts a colloquy with the child on the record].**

* * *

COMMENT

Under paragraph (A), **neither** a child **nor his or her guardian** may **[not]** waive the right to **counsel**[a guardian *ad litem*]. The right of waiver to legal counsel belongs to the child, not the guardian. See Rule 1800, which suspends 42 Pa.C.S. § 6337, which provides that counsel must be provided unless the guardian is present and waives counsel for the child.

[It is recommended that, at a minimum, the court ask questions to elicit the following information in determining a knowing, intelligent, and voluntary waiver of counsel:

- 1) Whether the party understands the right to be represented by counsel;**
- 2) Whether the party understands the nature of the dependency allegations and the elements of each of those allegations;**
- 3) Whether the party is aware of the dispositions and placements that may be imposed by the court, including foster care placement and adoption;**
- 4) Whether the party understands that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;**
- 5) Whether the party understands that counsel may be better suited to defend the dependency allegations; and**
- 6) Whether the party understands that the party has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the party, the ability to correct these errors may be lost permanently].**

RULE 1153. ROLE OF COUNSEL

This is an entirely new rule

A. **Role of Counsel for the child and parents.** Attorneys who represent parties in proceedings commenced pursuant to these Rules and the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.* shall:

- 1) zealously and competently represent their client at every stage of the proceedings;
- 2) advise and communicate with their client in a developmentally appropriate manner; and
- 3) litigate the client's case when appropriate and protect the record for appeal.

B. **Ethical obligations.** Attorneys have an ethical and professional obligation to their clients.

- 1) The attorney must communicate to their client the meaning of privileged communications and the attorney/client relationship.
- 2) The client may authorize the attorney's disclosure of information as is necessary to carry out the representation.
- 3) After consultation with the attorney, the client, when a child, may permit the attorney to disclose privileged communications to the child's guardian or other interested person who may be in a position to help support or encourage the child.
- 4) The child's attorney may reveal otherwise confidential client communications to the extent that the attorney reasonably believes necessary to prevent child abuse as defined by 23 Pa.C.S. § 6302 and as permitted pursuant to Pa.R.P.C. 1.6.

COMMENT

Counsel for any party should comply with basic standards of practice, which may include, but are not limited to: a) interviewing the client as soon as practicable and in advance of any court hearing; b) preparing for the case by seeking and reviewing all court documents; relevant evidence; county agency reports, files, and interviews; the petition; other agency reports for the family; pleadings; and any other evidence necessary for the proceeding; c) identifying, interviewing, and preparing witnesses, including requesting witness's contact information; d) investigating the facts and circumstances surrounding the allegations of dependency; e) when appropriate, seek any necessary experts or investigators as witnesses; f) file timely motions; g) gather other evidence to support your client's case; h) review applicable laws, including the Constitution, statutes, Rules of Procedure, Rules of Evidence, case law, local rules, and other persuasive authority; i) litigate important fact and legal issues when appropriate; j) present witnesses and make recommendations or arguments to the court; k) attend all hearings; and l) when appropriate, file and prepare an appeal.

The purpose of paragraph (A)(2) is to ensure the client can understand the process and make informed decisions. A developmentally appropriate manner will depend on the client and the client's ability to comprehend.

If a party speaks a different language than the attorney, counsel is to request an interpreter to alleviate any communication barriers in preparing for a case and during all proceedings.

In the limited circumstances when an attorney is appointed for a guardian who is not the parent, these rules are to apply.

Counsel is to attend all proceedings and remain in the case unless permitted to withdraw pursuant to Rule 1150. This includes attendance at all permanency hearings. See Rule 1150(B) on duration of counsel.

For further ethical obligations, see Pa.R.P.C.

RULE 1154. DUTIES OF COUNSEL[GUARDIAN AD LITEM]

A. Duties of Counsel for the Child. Counsel for the child[A guardian ad litem]

shall:

- 1) **[M]meet** with the child as soon as possible following assignment pursuant to Rule 1151 and on a regular basis thereafter **[in a manner appropriate to the child's age and maturity]**;
- 2) **[On a timely basis, be given access to]review** relevant court and county agency records, reports of examination of the guardians or the child, and medical, psychological, and school records;
- 3) **[Participate in all proceedings, including hearings before masters, and administrative hearings and reviews to the degree necessary to adequately represent the child;** 4) **C]conduct [such]** further investigation necessary to ascertain the facts;
- [5]4) [I]interview** potential witnesses**[, including the child's guardians, caretakers, and foster parents, examine and cross-examine witnesses, and present witnesses and evidence necessary to protect the best interests of the child]**;
- 5) **attend and present a case, necessary to pursue the child's desired outcome; and**
- 6) **[At the earliest possible date, be advised by the county agency having legal custody of the child of:**
 - a) **any plan to relocate the child or modify custody or visitation arrangements, including the reasons, prior to the relocation or change in custody or visitation; and**
 - b) **any proceeding, investigation, or hearing under the Child Protective Services Law, 23 Pa.C.S. § 6301 *et seq.* or the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.*, directly affecting the child;** 7) **Make any specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, including the]**
present evidence as to the child's educational, health care, and disability needs**[;].**
- [8) Explain the proceedings to the child to the extent appropriate given the child's age, mental condition, and emotional condition; and**

- 9) Advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court.]

B. Duties of Counsel when Child has Diminished Capacity in Directing Representation or when Child is at Risk of Harm.

- 1) The child's counsel shall determine whether the child has diminished capacity in directing representation.
 - a) It shall be presumed that a child is capable of directing representation at the age of ten.
 - b) The presumption of diminished capacity is rebutted if, in the sole discretion of the attorney, the child is deemed capable of directing representation.
 - c) In making this determination, the attorney should consult with the child and may consult with other individuals or entities who can provide the child's attorney with the information and assistance necessary to determine the child's ability to direct the representation.
- 2) 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.
- 3) When exercising substituted judgment, counsel shall make a good faith effort to determine the child's needs and wishes. The attorney shall:
 - a) maintain a traditional attorney-client relationship, as far as reasonably possible, with the client and fulfill the duties as outlined in the Rules of Professional Conduct;
 - b) substitute judgment when, during a temporary period or on a particular issue, it is not reasonably possible to maintain the attorney-client relationship, and present a case pursuant to paragraph (A)(5);
 - i) A substituted judgment determination includes determining what the child would decide if he or she were capable of

making an adequately considered decision and representing a child with that determination.

ii) The attorney should take direction from the child as the child develops the capacity and any subsequent change in that determination.

4) An attorney shall take reasonable steps to protect the child against harm, and in appropriate cases, may move for appointment of a guardian *ad litem* when the attorney reasonable believes that the attorney cannot adequately act in the child's own interest.

5) The court, *sua sponte*, may appoint a guardian *ad litem* at any time when the court has determined that a guardian *ad litem* is necessary for the child's welfare, safety, or health.

C. Duties of Counsel for Parents. Counsel for a parent shall:

1) meet with the parent as soon as possible following assignment and on a regular basis thereafter;

2) review relevant court and county agency records, reports of examination of the other parent or guardians of the child, and medical, psychological, and school records and provide records and reports to the parent when appropriate;

3) conduct further investigation necessary to ascertain the facts;

4) interview potential witnesses;

5) attend and present a case necessary to pursue the parent's desired outcome; and

6) advocate to the court on behalf of the parent's wishes.

D. Duties of Counsel for the County Agency. Counsel for the county agency shall:

1) meet with the county agency caseworkers to advance the position of the county agency on relevant issues consistent with the Juvenile Act;

2) review relevant court and county agency records, reports of examination of the guardians or the child, and medical, psychological, and school records;

3) conduct further investigation necessary to ascertain the facts;

- 4) interview potential witnesses;
- 5) facilitate discovery as provided in paragraph (D)(3); and
- 6) attend and present a case necessary to pursue the county agency's interests consistent with the purposes of the Juvenile Act.

COMMENT

[If there is a conflict of interest between the duties of the guardian *ad litem* pursuant to paragraphs (7) and (9), the guardian *ad litem* for the child may move the court for appointment as legal counsel and assignment of a separate guardian *ad litem* when, for example, the information that the guardian *ad litem* possesses gives rise to the conflict and can be used to the detriment of the child. If there is not a conflict of interest, the guardian *ad litem* represents the legal interests and best interests of the child at every stage of the proceedings. 42 Pa.C.S. § 6311(b). To the extent 42 Pa.C.S. § 6311(b)(9) is inconsistent with this rule, it is suspended. See Rules 1151 and 1800. See also Pa.R.P.C. 1.7 and 1.8.

“Legal interests” denotes that an attorney is to express the child’s wishes to the court regardless of whether the attorney agrees with the child’s recommendation. “Best interests” denotes that a guardian *ad litem* guardian *ad litem* believes is best for the child’s care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees.]

This rule was revised in 201- to lay out clearly the duties of counsel. The Juvenile Act requires appointment of a guardian *ad litem* for dependent children. Because the role of acting as child’s counsel and child’s protector confuses the attorney-client relationship and is inherently contradictory, 42 Pa.C.S. § 6311(b) is suspended.

More importantly, this statute violates Pa.R.P.C. 3.7 by directing a witness to serve as the attorney, and thus encroaches on the Supreme Court’s duty to regulate the practice of law. Rule 1151(B) provides the guardian *ad litem* does not have to be an attorney. The court could appoint a licensed mental health professional as the guardian *ad litem*. Additionally, the court could appoint a court-appointed special advocate (CASA) to serve in the case which could alleviate the need for appointment of a guardian *ad litem*. See Comment to Rule 1151. See also Rule 1158 and 42 Pa.C.S. § 6342. It is the role of counsel to act in the child’s legal interests. Therefore, counsel may move for the appointment of, or the court may appoint, a separate individual as guardian *ad litem* who will protect the child when necessary for the child’s safety, welfare, and health. This individual will be treated as any other witness and subject to cross-examination. If this person is an attorney, the attorney will not participate as an attorney and is to inform the child that he or she is the appointed guardian *ad litem* and the attorney-client relationship does not apply. See Pa.R.P.C. 3.7 and *Commonwealth v. McMullen*, 961 A.2d 842 (Pa. 2008)(acknowledging that where the Supreme Court has passed a rule pursuant to Article V, Section 10(c) of the Pennsylvania Constitution, a procedural statute conflicting with it is suspended). See also Rule 1151, 1800 and Pa.R.P.C. 1.7 and 1.8.

Pursuant to paragraphs (A)(1), (C)(1), & (D)(1), counsel is to meet with the client as soon as possible after being assigned to the case, and on a regular basis to develop a rapport with the client to be able to understand the client’s desires and wishes. Counsel is to communicate in a developmentally appropriate manner with the client so the client can speak easily with counsel and relay his or her wishes.

To prepare fully for the case, counsel is to review all necessary documents pertinent to the case, including court and county agency records; reports of examinations of the guardian(s) or child; and medical, psychological, and school records. See paragraphs (A)(2), (C)(2), & (D)(2). If counsel does not have the necessary documents, counsel may request discovery pursuant to Rule 1340. The county agency is to give access to discoverable materials in a timely manner and counsel for the county agency is to facilitate this process. See paragraph (D)(5). For counsel representing parents, it may be appropriate to provide the parent with a copy of the report. See paragraph (C)(2).

Pursuant to paragraphs (A)(3)&(4) & (C)(3)&(4), if counsel does not have all the necessary information, counsel is to conduct further investigations and interviews as necessary to ascertain all the facts in the case. This may include visiting the child, parent(s), or guardian(s) at his or her residence or potential residence and inspecting the home conditions, and/or conversing with the client, other parties, guardian(s), caretakers, and foster parents.

Counsel for the child and parent(s) are to attend and present a case consistent with the client's desired outcome under paragraphs (A)(5) & (C)(5). Counsel for the county agency is to pursue the county agency's interest while fulfilling the purposes of the Juvenile Act. See paragraph (D)(6). The county agency is to make specific recommendations relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety. These duties of counsel may include calling pertinent witness, entering necessary evidence, and cross-examining other parties' witness. Whenever relevant, counsel is to present evidence as to the child's educational, health care, and disability needs. See paragraph (A)(6).

When the court appoints a guardian *ad litem* or CASA, the guardian *ad litem* or CASA is to: 1) meet with the child as soon as possible following assignment and on a regular basis thereafter; 2) review relevant court and county agency records, reports of examination of the guardians or the child, and medical, psychological, and school records; 3) conduct further investigation necessary to ascertain the facts; 4) attend and present a case necessary best suited for the child's safety, welfare, and health; 5) present evidence as to the child's educational, health care, and disability needs; and 6) advocate to protect the child from any harm.

Pursuant to paragraph ([7]A)(6), the **child's attorney and the guardian *ad litem* or CASA, if appointed are[is]** to make specific recommendations to the court regarding the appropriateness of the child's placement, giving consideration to the proximity and appropriateness of the child's school. See 42 Pa.C.S. § 6311(b)(7) and 42 U.S.C. § 675(1)(G). Inquiries into the child's education should include the right to: 1) educational stability, including the right to remain in the same school regardless of a change in placement when in the child's best interest and the right to immediate enrollment when a school change is in the child's best interest, 42 U.S.C. §§ 675(1)(G) and 11431 *et seq.*; 2) an educational decision maker pursuant to Rule 1147, 42 Pa.C.S. § 6301, 20 U.S.C. § 1439(a)(5), and 34 C.F.R. § 300.519; 3) an appropriate education, including any necessary special education, early intervention, or remedial services, 24 P.S. §§ 13-1371 and 13-1372, 55 Pa. Code § 3130.87, and 20 U.S.C. § 1400 *et seq.*; 4) the educational services necessary to support the child's transition to independent living, 42 Pa.C.S. § 6351 if a child is sixteen or older; and 5) a transition plan that addresses the child's educational needs, 42 U.S.C. § 675(5)(H), if the child will age out of care in the next ninety days.

See *In re S.J.*, 906 A.2d 547, 551 (Pa. Super. Ct. 2006) (citing *In re Tameka M.*, 525 Pa. 348, 580 A.2d 750 (1990)), for issues addressing a child's mental and moral welfare.

Pursuant to paragraph ([7]A)(6), the **child's attorney and the guardian *ad litem* or CASA are[is]** to make specific recommendations to the court regarding the appropriateness of the child's placement, giving consideration to meeting the child's needs concerning health care and disability. Inquiries into the child's health should include the right of: 1) the child to receive timely and medically appropriate screenings and health care services, 55 Pa. Code §§ 3700.51 and 3800.32, 42 U.S.C. § 1396d(r); and 2) a child with disabilities to receive necessary accommodations, 42 U.S.C. § 12132, 28 C.F.R. § 35.101 *et seq.*, Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. § 794 and implementing regulations at 45 C.F.R. § 84.1 *et seq.*

The guardian *ad litem* may be appointed as the educational decision maker. If the guardian *ad litem* is not the educational decision maker, the guardian *ad litem* is to coordinate efforts and consult with the educational decision maker. See Rule 1147 for duties of the educational decision maker.

In all cases, a child is to have counsel. Counsel is to fulfill his or her professional duties as an attorney and to maintain a normal attorney-client relationship, as far as reasonably possible with a child as the client.

However, there may be instances in which the child has diminished capacity. Pursuant to paragraph (B)(1), a child is presumed to be capable of directing representation at the age of ten. The attorney is to consult with other individuals and/or entities who can provide counsel with information concerning the child's ability to direct representation. Only the attorney can determine whether the child is capable of directing representation or the child has diminished capacity.

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*.

The following language has been taken from the ABA Model Act Explanatory Comment and may be helpful when determining if a child has diminished capacity in directing representation: Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2004), the child's lawyer should determine whether the child has sufficient maturity to understand and form an attorney-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication. It is the responsibility of the child's lawyer to determine whether the child suffers from diminished capacity. This decision shall be made after sufficient contact and regular communication with the client. Determination about capacity should be grounded in insights from child development science and should focus on the child's decision-making process rather than the child's choices themselves. Lawyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view.

When determining the child's capacity the lawyer should elicit the child's expressed wishes in a developmentally appropriate manner. The lawyer should not expect the child to convey information in the same way as an adult client. A child's age is not determinative of diminished capacity. For example, even very young children are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and the opinions of others, including social workers, therapists, teachers, family members or a hired expert. To assist in the assessment, the lawyer should ask questions in developmentally appropriate language to determine whether the child understands the nature and purpose of the proceeding and the risks and benefits of a desired position. A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time. See *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, dated August, 2011 from the American Bar Association.

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.

Attorneys for children and parents are to engage in out-of-court advocacy, including attending and participating in family service plan meetings, necessary to advocate effectively for their clients.

Pursuant to paragraph (C), there may be times when the court appoints counsel for other guardians. Counsel for other guardians should follow the same requirements as the requirements for a parent's attorney.

Paragraph (D)(6) requires the attorney for the county agency to attend and present a case necessary to pursue the county agency's interests consistent with the purposes of the Juvenile Act. The attorney is to enter evidence into the record and offer witnesses who are subject to cross-examination. It is the sole duty of the county agency through its attorney to present a case to the court consistent with the actions of the county agency and in support of the dependency petition.

The county agency is to file the petition. See Rule 1330. The county agency is also to ensure that if removal of the child from the home is proposed or has occurred that: a) the child's placement is the least restrictive placement that meets the needs of the child supported by reasons why there are no less restrictive alternatives available; b) continuation in the home is contrary to the welfare, safety, or health of the child; c) services are being provided to the guardian unless the court has made a finding that no reasonable efforts to prevent placement or promote reunification are necessary; or d) it has made all reasonable efforts to achieve

permanency in a timely manner and if reasonable efforts are not made, provide evidence that lack of services was reasonable. See Rules 1512(D)(2) and 1514.

The county agency is to advise the attorneys, and if appointed, the guardian *ad litem* or CASA, and unrepresented parties of: a) any plan to relocate the child or modify custody or visitation arrangements, including the reasons, prior to the filing of a motion pursuant to Rule 1606 or a change in visitation; and b) any proceeding, investigation, or hearing under the Child Protective Services Law, 23 Pa.C.S. § 6301 *et seq.* or the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.*, directly affecting the child.

Nothing in this rule is intended to absolve the attorneys from the Rules of Professional Conduct when speaking with represented parties. The attorney for the county agency can authorize general questioning of county agency caseworkers without his or her presence. To wait for the attorney to approve or be present for questioning would create delays in the system.

PART D
PROCEEDINGS IN CASES BEFORE MASTER

1183. Role of Master

1185. Appointment to Cases

1187. Authority of Master

1190. Stipulations Before Master

1191. Master's Findings and Recommendation to the Judge

RULE 1183. ROLE OF MASTER

This is an entirely new rule

A. **Role of Master.** The master shall ensure:

- 1) that the juvenile understands and has been apprised:
 - a) of the right to have a hearing before a judge;
 - b) that the findings and recommendations of the master must be approved by the judge before they are final;
 - c) of their rights at each stage of the proceeding; and
- 2) the Rules of Juvenile Court Procedure and the requirements of the Juvenile Act are followed at every proceeding.

B. **Ethical Obligations.** The master has ethical and professional obligations pursuant to the Rules of Professional Conduct and the Code of Judicial Conduct.

COMMENT

See the Pa.R.P.C. for specific obligations. See also Canon 7 of the Code of Judicial Conduct for applicability of Code to attorneys presiding as an officer of the judicial system.

RULE 1340. DISCOVERY AND INSPECTION

- A. **Informal.** Before any party, **guardian ad litem or court-appointed special advocate (CASA)** can seek any disclosure or discovery under these rules, the parties or their counsel shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one party that the other party has refused to disclose, the demanding party may make an appropriate motion to the court. Such motion shall be made as soon as possible prior to the hearing. In such motion, the party, **guardian ad litem or CASA** shall state that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this rule shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.
- B. **Mandatory disclosure.**
- 1) **By the county agency.** In all cases, on request by a party, **guardian ad litem or CASA** and subject to any protective order which the county agency might obtain under this rule, the county agency shall disclose to a party, **guardian ad litem or CASA**, all of the following requested items or information, provided they are material to the instant case. The county agency shall, when applicable, permit a party, **guardian ad litem or CASA** to inspect and copy or photograph such items:
 - a) the name and last known address of each witness to the occurrence that forms the basis of allegations of dependency unless disclosure is prohibited by law;
 - b) the name and last known address of each witness who did not witness the occurrence but is expected to testify;
 - c) copies of any written statements made by any party or witness unless disclosure is prohibited by law;
 - d) any results or reports of scientific tests or expert opinions that are within the possession or control of the county agency that the county agency intends to use as evidence at a hearing;
 - e) any police reports, records of prior county agency involvement, or records of current or prior reports involving the Child Protective Services Law, 23 Pa.C.S. § 6301 *et seq.*, that the county agency intends to use as evidence at a hearing;
 - f) if any physical or mental condition of a party is in controversy, any physical or mental examinations, including oral or written reports that a party intends to use as evidence at the hearing;

- g) any tangible objects, including documents, photographs, or other tangible evidence unless disclosure is prohibited by law;
 - h) the names, addresses, and curriculum vitae of any expert witness that a party intends to call at a hearing and the subject matter about which each expert witness is expected to testify, and a summary of the grounds for each opinion to be offered; and
 - i) any other evidence that is material to adjudication, disposition, dispositional review, or permanency unless disclosure is prohibited by law, and is within the possession or control of the county agency;
- 2) **By all other parties.** All other parties shall provide discovery to the county agency and all other parties, **guardian ad litem or CASA** and shall disclose, all of the following requested items or information that the party intends to use at a hearing, provided they are material to the instant case unless disclosure is prohibited by law. The party shall, when applicable, permit the county agency to inspect and copy or photograph such items:
- a) the names and last known addresses of each witness who is expected to testify;
 - b) copies of any written statements made by any party or witness;
 - c) any tangible objects, including documents, photographs, or other tangible evidence;
 - d) the names, addresses, and curriculum vitae of any expert witness that a party intends to call at a hearing and the subject matter about which each expert witness is expected to testify, and a summary of the grounds for each opinion to be offered; and
 - e) any other evidence that a party intends to introduce at a hearing.
- C. **Discretionary.** Upon motion of any party, **guardian ad litem or CASA** for discovery, the court may order any discovery upon a showing that the evidence is material to the preparation of the case and that the request is reasonable.
- D. **Continuing Duty to Disclose.** If, prior to or during a hearing, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party promptly shall notify the opposing party or the court of the additional evidence, material, or witness.

- E. **Remedy.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence or witnesses not disclosed, or it may enter such other order as it deems just under the circumstances.
- F. **Protective orders.** Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate to protect the best interests of the child. Upon motion of any party, guardian ad litem or CASA, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court. If the court enters an order granting relief, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.
- G. **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for a party, guardian ad litem or CASA, or members of their legal staffs.

COMMENT

If a guardian ad litem or CASA is appointed to the case, he or she is entitled to discovery pursuant to this Rule. See Comment to Rule 1154 for role of guardian ad litem. See Rule 1158 and 42 Pa.C.S. § 6342 for role of CASA.

Discovery under this rule applies to discovery for the adjudicatory hearing, dispositional hearing, dispositional review hearings, or permanency hearings of dependency proceedings governed by the Juvenile Act. See Rule 1100 for scope of rules. See Rule 1123 for production of documents pursuant to a *subpoena duces tecum*. See also *In re A.H.*, 763 A.2d 873 (Pa. Super. Ct. 2000).

The purpose of paragraph (A) is to encourage an informal discovery process. Only when the informal process fails and there is a genuine dispute as to discovery, should a motion to compel discovery be made. Motions may be oral or written, see Rule 1344.

The items listed in paragraph (B) are to be disclosed to ensure a party, guardian ad litem or CASA has the ability to prepare adequately for the hearing. See *In re J.C.*, 412 Pa. Super. 369, 603 A.2d 627 (1992).

See Rule 1800 for suspension of 23 Pa.C.S. § 6339, which provides for the confidentiality of reports made pursuant to the Child Protective Services Law, 23 Pa.C.S. § 6301 *et seq.*, which is suspended only insofar as the Law is inconsistent with Rule 1340(B)(1)(e), which provides for the disclosure of such reports if the reports are going to be used as evidence in a hearing to prove dependency of a child. It is important to note that this section is only suspended if the reports are going to be used as evidence during a hearing. If the reports are not going to be used, the confidentiality requirements of 23 Pa.C.S. § 6339 still apply. In addition, confidential sources are protected and the name of the source does not have to be disclosed. See 23 Pa.C.S. § 6340 (c) for protection of confidential sources reporting allegations of abuse under the Child Protective Services Law. 23 Pa.C.S. § 6301 *et seq.*

Under paragraph (C), the following are examples of evidence that may be material to the preparation of the case, but the list is not meant to be exhaustive: 1) domestic violence treatment records; 2) drug and alcohol treatment records; 3) mental health records; 4) medical records; 5) any other evidence specifically identified, provided the requesting party can additionally establish that its disclosure would be in the interests of justice, including any information concerning any person involved in the case who has received either valuable consideration, or an oral or written promise or contract for valuable consideration, for information concerning the case, or for the production of any work describing the case, or for the right to depict the character of the person in connection with his or her involvement in the case.

Items listed in this paragraph are subject to rules of confidentiality and this rule is not intended to subrogate those rules.

Under paragraph (C), the court has discretion, upon motion, to order an expert who is expected to testify at a hearing to prepare a report. However, these provisions are not intended to require a prepared report in every case. The court should determine, on a case-by-case basis, whether a report should be prepared. For example, a prepared report ordinarily would not be necessary when the expert is known to the parties and testifies about the same subject on a regular basis. On the other hand, a report might be necessary if the expert is not known to the parties or is going to testify about a new or controversial technique.

It is intended that the remedies provided in paragraph (E) apply equally to all parties, as the interests of justice require.

The provision for a protective order, paragraph (F), does not confer upon any party any right of appeal not presently afforded by law.

In addition to information requested under this rule, an attorney has the right to inspect all court records and files. See Rule 1160.

**CHAPTER 18
SUSPENSIONS**

1800. SUSPENSIONS OF ACTS OF ASSEMBLY

This rule provides for the suspension of the following Acts of Assembly that apply to dependency proceedings only:

* * *

- 3) **The Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S. § 6311(a), which provides that the guardian *ad litem* must be an attorney at law, is suspended as the Act is inconsistent with Rules 1151 and 1154 and Pa.R.P.C. 3.7, which provide that the guardian *ad litem* does not have to be an attorney at law and a witness may not serve as an attorney for the child.**
- 4) **The Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S. § 6311(b)(9), which provides that there is not a conflict of interest for the guardian *ad litem* in communicating the child's wishes and the recommendation relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety, is suspended only insofar as the Act is inconsistent with Rules 1151 and 1154 and Pa.R.P.C. 3.7, which provides counsel shall represent the child's legal interests and communicate the child's wishes, the guardian *ad litem*, if appointed, shall advocate for the safety, welfare, and health of the child[allows for appointment of separate counsel and a guardian *ad litem* when the guardian *ad litem* determines there is a conflict of interest between the child's legal interest and best interest].**
- [4]5) **The Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S. § 6337, which provides that counsel must be provided unless the guardian is present and waives counsel for the child, is suspended only insofar as the Act is inconsistent with Rule 1152, which does not allow a guardian or a child to waive the child's right to counsel [and a child may not waive the right to a guardian *ad litem*].**

(re-number remaining paragraphs)

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