

**AMERICAN BAR ASSOCIATION**  
**SECTION OF LITIGATION**  
**SECTION OF FAMILY LAW**  
**CRIMINAL JUSTICE SECTION**  
**COMMISSION ON HOMELESSNESS AND POVERTY**  
**COMMISSION ON YOUTH AT RISK**  
**GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION**  
**STEERING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association adopts the *Model Act Governing the*
- 2 *Representation of Children in Abuse, Neglect, and Dependency Proceedings*, dated August,
- 3 2011.

1           **ABA Model Act Governing the Representation of Children in**  
 2           **Abuse, Neglect, and Dependency Proceedings**<sup>1</sup>

3  
 4           **SECTION 1. DEFINITIONS. In this [act]:**

5           **(a) “Abuse and neglect proceeding” means a court proceeding under [cite state**  
 6 **statute] for protection of a child from abuse or neglect or a court proceeding under [cite**  
 7 **state statute] in which termination of parental rights is at issue.**<sup>2</sup> **These proceedings**  
 8 **include:**

9                   **(1) abuse;**

10                   **(2) neglect;**

11                   **(3) dependency;**

12                   **(4) child in voluntary placement in state care;**

13                   **(5) termination of parental rights;**

14                   **(6) permanency hearings; and**

15                   **(7) post termination of parental rights through adoption or other**  
 16 **permanency proceeding.**

17           **(b) A child is:**

18                   **(1) an individual under the age of 18; or**

19                   **(2) an individual under the age of 22 who remains under the jurisdiction of**  
 20 **the juvenile court.**

21           **(c) “Child’s lawyer” (or “lawyer for children”) means a lawyer who provides legal**  
 22 **services for a child and who owes the same duties, including undivided loyalty,**  
 23 **confidentiality and competent representation, to the child as is due an adult client, subject**  
 24 **to Section 7 of this Act.**<sup>3</sup>

25           **(d) “Best interest advocate” means an individual, not functioning or intended to**  
 26 **function as the child’s lawyer, appointed by the court to assist the court in determining the**  
 27 **best interests of the child.**

28           **(e) “Developmental level” is a measure of the ability to communicate and**  
 29 **understand others, taking into account such factors as age, mental capacity, level of**

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<sup>1</sup> This Model Act was drafted under the auspices of the ABA Section of Litigation Children’s Rights Litigation Committee with the assistance of the Bar-Youth Empowerment Program of the ABA Center on Children and the Law and First Star. The Act incorporates some language from the provisions of the NCCUSL Representation of Children in Abuse, Neglect, and Custody Proceedings Act.

<sup>2</sup> NCCUSL, 2006 *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings*, Sec. 2(2) [Hereinafter NCCUSL Act]

<sup>3</sup> *Id.*, Sec. 2(6); American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, Part I, Sec A-1, 29 Fam. L. Q. 375 (1995). The standards were formally adopted by the ABA House of Delegates in 1996. [Hereinafter ABA Standards].

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30 education, cultural background, and degree of language acquisition.<sup>4</sup>

31

32 *Legislative Note: States should implement a mechanism to bring children into court*  
33 *when they have been voluntarily placed into state care, if such procedures do not already exist.*  
34 *Court action should be triggered after a specific number of days in voluntary care (not fewer*  
35 *than 30 days, but not more than 90 days).*

36 *Commentary:*

37

38 Under the Act, a “child’s lawyer” is a client-directed lawyer in a traditional attorney-client  
39 relationship with the child. A “best interests advocate” does not function as the child’s lawyer  
40 and is not bound by the child’s expressed wishes in determining what to advocate, although the  
41 best interests advocate should consider those wishes.

42

43 The best interest advocate may be a lawyer or a lay person, such as a court-appointed special  
44 advocate, or CASA. The best interests advocate assists the court in determining the best interests  
45 of a child and will therefore perform many of the functions formerly attributable to guardians *ad*  
46 *litem*, but best interests advocates are not to function as the child’s lawyer. A lawyer appointed  
47 as a best interest advocate shall function as otherwise set forth in state law.

48

49

50

## **SECTION 2. APPLICABILITY AND RELATIONSHIP TO OTHER LAW.**

51 **(a) This [act] applies to an abuse and neglect proceeding pending or commenced on**  
52 **or after [the effective date of this act].**

53 **(b) The child in these proceedings is a party.**

54

55

## **SECTION 3. APPOINTMENT IN ABUSE OR NEGLECT PROCEEDING.**

56 **(a) The court shall appoint a child’s lawyer for each child who is the subject of a**  
57 **petition in an abuse and neglect proceeding. The appointment of a child’s lawyer must be**  
58 **made as soon as practicable to ensure effective representation of the child and, in any**  
59 **event, before the first court hearing.**

60 **(b) In addition to the appointment of a child’s lawyer, the court may appoint a best**  
61 **interest advocate to assist the court in determining the child’s best interests.**

62 **(c) The court may appoint one child’s lawyer to represent siblings if there is no**  
63 **conflict of interest as defined under the applicable rules of professional conduct.<sup>5</sup> The**  
64 **court may appoint additional counsel to represent individual siblings at a child’s lawyer’s**  
65 **request due to a conflict of interest between or among the siblings.**

66 **(d) The applicable rules of professional conduct and any law governing the**  
67 **obligations of lawyers to their clients shall apply to such appointed lawyers for children.**

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<sup>4</sup> ABA Standards, Part I, Sec A-3.

<sup>5</sup> NCCUSL Act, Sec. 4(c); *see also* ABA Standards, Part I, Sec B-1

68 **(e) The appointed child’s lawyer shall represent the child at all stages of the**  
 69 **proceedings, unless otherwise discharged by order of court.<sup>6</sup>**

70 **(f) A child’s right to counsel may not be waived at any court proceeding.**

71

72 *Commentary:*

73

74 This act recognizes the right of every child to have quality legal representation and a voice in any  
 75 abuse, neglect, dependency, or termination of parental rights proceeding, regardless of  
 76 developmental level. Nothing in this Act precludes a child from retaining a lawyer. States  
 77 should provide a lawyer to a child who has been placed into state custody through a voluntary  
 78 placement arrangement. The fact that the child is in the state’s custody through the parent’s  
 79 voluntary decision should not diminish the child’s entitlement to a lawyer.

80

81 A best interest advocate does not replace the appointment of a lawyer for the child. A best  
 82 interest advocate serves to provide guidance to the court with respect to the child’s best interest  
 83 and does not establish a lawyer-client relationship with the child. Nothing in this Act restricts a  
 84 court’s ability to appoint a best interest advocate in any proceeding. Because this Act deals  
 85 specifically with lawyers for children, it will not further address the role of the best interest  
 86 advocate.

87

88 The child is entitled to conflict-free representation and the applicable rules of professional  
 89 conduct must be applied in the same manner as they would be applied for lawyers for adults. A  
 90 lawyer representing siblings should maintain the same lawyer-client relationship with respect to  
 91 each child.

92

#### 93 **SECTION 4. QUALIFICATIONS OF THE CHILD’S LAWYER.**

94 **(a) The court shall appoint as the child’s lawyer an individual who is qualified**  
 95 **through training and experience, according to standards established by [insert reference to**  
 96 **source of standards].**

97 **(b) Lawyers for children shall receive initial training and annual continuing legal**  
 98 **education that is specific to child welfare law. Lawyers for children shall be familiar with**  
 99 **all relevant federal, state, and local applicable laws.**

100 **(c) Lawyers for children shall not be appointed to new cases when their present**  
 101 **caseload exceeds more than a reasonable number given the jurisdiction, the percent of the**  
 102 **lawyer’s practice spent on abuse and neglect cases, the complexity of the case, and other**  
 103 **relevant factors.**

104

105 *Legislative Note: States that adopt training standards and standards of practice for*  
 106 *children’s lawyers should include the bracketed portion of this section and insert a reference to*  
 107 *the state laws, court rules, or administrative guidelines containing those standards.<sup>7</sup>*

<sup>6</sup> ABA Standards, Sec D-13; F-1-5; *see generally* La. Sup. Ct. R. XXXIII, Standard 1; *see generally* Ariz. R. Proc. Juv. Ct. R. 39(b).

<sup>7</sup> ABA Standards, Part II, Sec L-1-2.

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108 *Jurisdictions are urged to specify a case limit at the time of passage of this Act.*

109  
110 *Commentary:*

111  
112 States should establish minimum training requirements for lawyers who represent children. Such  
113 training should focus on applicable law, skills needed to develop a meaningful lawyer-client  
114 relationship with child-clients, techniques to assess capacity in children, as well as the many  
115 interdisciplinary issues that arise in child welfare cases.

116  
117 The lawyer needs to spend enough time on each abuse and neglect case to establish a lawyer-  
118 client relationship and zealously advocate for the client. A lawyer's caseload must allow realistic  
119 performance of functions assigned to the lawyer under the [Act]. The amount of time and the  
120 number of children a lawyer can represent effectively will differ based on a number of factors,  
121 including type of case, the demands of the jurisdiction, whether the lawyer is affiliated with a  
122 children's law office, whether the lawyer is assisted by investigators or other child welfare  
123 professionals, and the percent of the lawyer's practice spent on abuse and neglect cases. States  
124 are encouraged to conduct caseload analyses to determine guidelines for lawyers representing  
125 children in abuse and neglect cases.

## 126 127 **SECTION 5. ORDER OF APPOINTMENT.**

128 **(a) Subject to subsection (b), an order of appointment of a child's lawyer shall be in**  
129 **writing and on the record, identify the lawyer who will act in that capacity, and clearly set**  
130 **forth the terms of the appointment, including the reasons for the appointment, rights of**  
131 **access as provided under Section 8, and applicable terms of compensation as provided**  
132 **under Section 12.**

133 **(b) In an order of appointment issued under subsection (a), the court may identify a**  
134 **private organization, law school clinical program or governmental program through which**  
135 **a child's lawyer will be provided. The organization or program shall designate the lawyer**  
136 **who will act in that capacity and notify the parties and the court of the name of the**  
137 **assigned lawyer as soon as practicable.<sup>8</sup> Additionally, the organization or program shall**  
138 **notify the parties and the court of any changes in the individual assignment.**  
139

## 140 **SECTION 6. DURATION OF APPOINTMENT.**

141 **Unless otherwise provided by a court order, an appointment of a child's lawyer in**  
142 **an abuse and neglect proceeding continues in effect until the lawyer is discharged by court**  
143 **order or the case is dismissed.<sup>9</sup> The appointment includes all stages thereof, from removal**  
144 **from the home or initial appointment through all available appellate proceedings. With the**  
145 **permission of the court, the lawyer may arrange for supplemental or separate counsel to**  
146 **handle proceedings at an appellate stage.<sup>10</sup>**

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<sup>8</sup> NCCUSL Act, Sec. 9

<sup>9</sup> *Id.*, Sec. 10(a)

<sup>10</sup> ABA Standards, Part I, Sec D-13; F-1-5; *see generally* La. Sup. Ct. R. XXXIII, Standard 1.; *see generally* Ariz. R.

147 *Commentary:*

148 As long as the child remains in state custody, even if the state custody is long-term or permanent,  
 149 the child should retain the right to counsel so that the child's lawyer can deal with the issues that  
 150 may arise while the child is in custody but the case is not before the court.

151

152 **SECTION 7. DUTIES OF CHILD'S LAWYER AND SCOPE OF**  
 153 **REPRESENTATION.**

154 **(a) A child's lawyer shall participate in any proceeding concerning the child with**  
 155 **the same rights and obligations as any other lawyer for a party to the proceeding.**

156 **(b) The duties of a child's lawyer include, but are not limited to:**

157 **(1) taking all steps reasonably necessary to represent the client in the**  
 158 **proceeding, including but not limited to: interviewing and counseling the client, preparing**  
 159 **a case theory and strategy, preparing for and participating in negotiations and hearings,**  
 160 **drafting and submitting motions, memoranda and orders, and such other steps as**  
 161 **established by the applicable standards of practice for lawyers acting on behalf of children**  
 162 **in this jurisdiction;**

163 **(2) reviewing and accepting or declining, after consultation with the client,**  
 164 **any proposed stipulation for an order affecting the child and explaining to the court the**  
 165 **basis for any opposition;**

166 **(3) taking action the lawyer considers appropriate to expedite the proceeding**  
 167 **and the resolution of contested issues;**

168 **(4) where appropriate, after consultation with the client, discussing the**  
 169 **possibility of settlement or the use of alternative forms of dispute resolution and**  
 170 **participating in such processes to the extent permitted under the law of this state;<sup>11</sup>**

171 **(5) meeting with the child prior to each hearing and for at least one in-person**  
 172 **meeting every quarter;**

173 **(6) where appropriate and consistent with both confidentiality and the child's**  
 174 **legal interests, consulting with the best interests advocate;**

175 **(7) prior to every hearing, investigating and taking necessary legal action**  
 176 **regarding the child's medical, mental health, social, education, and overall well-being;**

177 **(8) visiting the home, residence, or any prospective residence of the child,**  
 178 **including each time the placement is changed;**

179 **(9) seeking court orders or taking any other necessary steps in accordance**  
 180 **with the child's direction to ensure that the child's health, mental health, educational,**  
 181 **developmental, cultural and placement needs are met; and**

182 **(10) representing the child in all proceedings affecting the issues before the**

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Proc. Juv. Ct. R. 39(b).

<sup>11</sup> NCCUSL Act, Sec. 11 Alternative A..

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183 court, including hearings on appeal or referring the child’s case to the appropriate  
184 appellate counsel as provided for by/ mandated by [inset local rule/law etc].

185  
186 *Commentary:*  
187

188 The national standards mentioned in (b)(1) include the *ABA Standards of Practice for Lawyers*  
189 *who Represent Children in Abuse and Neglect Cases*.

190  
191 In order to comply with the duties outlined in this section, lawyers must have caseloads that  
192 allow realistic performance of these functions.

193  
194 The child’s lawyer may request authority from the court to pursue issues on behalf of the child,  
195 administratively or judicially, even if those issues do not specifically arise from the court  
196 appointment.<sup>12</sup> Such ancillary matters include special education, school discipline hearings,  
197 mental health treatment, delinquency or criminal issues, status offender matters, guardianship,  
198 adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth  
199 transitioning out of care issues, postsecondary education opportunity qualification, and tort  
200 actions for injury, as appropriate.<sup>13</sup> The lawyer should make every effort to ensure that the child  
201 is represented by legal counsel in all ancillary legal proceedings, either personally, when the  
202 lawyer is competent to do so, or through referral or collaboration. Having one lawyer represent  
203 the child across multiple proceedings is valuable because the lawyer is better able to understand  
204 and fully appreciate the various issues as they arise and how those issues may affect other  
205 proceedings.

206  
207 **(c) When the child is capable of directing the representation by expressing his or her**  
208 **objectives, the child’s lawyer shall maintain a normal client-lawyer relationship with the**  
209 **child in accordance with the rules of professional conduct. In a developmentally**  
210 **appropriate manner, the lawyer shall elicit the child’s wishes and advise the child as to**  
211 **options.**

212  
213 *Commentary:*  
214

215 The lawyer-client relationship for the child’s lawyer is fundamentally indistinguishable from the  
216 lawyer-client relationship in any other situation and includes duties of client direction,<sup>14</sup>  
217 confidentiality,<sup>15</sup> diligence,<sup>16</sup> competence,<sup>17</sup> loyalty,<sup>18</sup> communication,<sup>19</sup> and the duty to provide  
218 independent advice.<sup>20</sup> Client direction requires the lawyer to abide by the client’s decision about

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<sup>12</sup> ABA Standards, Part I, Section D-12.

<sup>13</sup> *Id.*

<sup>14</sup> ABA Model Rules of Professional Responsibility (hereinafter M.R.) 1.2

<sup>15</sup> M.R. 1.6

<sup>16</sup> M.R. 1.3

<sup>17</sup> M.R. 1.1

<sup>18</sup> M.R. 1.7

<sup>19</sup> M.R. 1.4

<sup>20</sup> M.R. 2.1

219 the objectives of the representation. In order for the child to have an independent voice in abuse  
 220 and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed  
 221 wishes.<sup>21</sup> Moreover, providing the child with an independent and client-directed lawyer ensures  
 222 that the child's legal rights and interests are adequately protected.

223  
 224 The child's lawyer needs to explain his or her role to the client and, if applicable, explain in what  
 225 strictly limited circumstances the lawyer cannot advocate for the client's expressed wishes and in  
 226 what circumstances the lawyer may be required to reveal confidential information. This  
 227 explanation should occur during the first meeting so the client understands the terms of the  
 228 relationship.

229  
 230 In addition to explaining the role of the child's lawyer, the lawyer should explain the legal  
 231 process to the child in a developmentally appropriate manner as required by Rule 1.4 of the ABA  
 232 Model Rules of Professional Conduct or its equivalent.<sup>22</sup> This explanation can and will change  
 233 based on age, cognitive ability, and emotional maturity of the child. The lawyer needs to take the  
 234 time to explain thoroughly and in a way that allows and encourages the child to ask questions and  
 235 that ensures the child's understanding. The lawyer should also facilitate the child's participation  
 236 in the proceeding (See Section 9).

237  
 238 In order to determine the objectives of the representation of the child, the child's lawyer should  
 239 develop a relationship with the client. The lawyer should achieve a thorough knowledge of the  
 240 child's circumstances and needs. The lawyer should visit the child in the child's home, school,  
 241 or other appropriate place where the child is comfortable. The lawyer should observe the child's  
 242 interactions with parents, foster parents, and other caregivers. The lawyer should maintain  
 243 regular and ongoing contact with the child throughout the case.

244  
 245 The child's lawyer helps to make the child's wishes and voice heard but is not merely the child's  
 246 mouthpiece. As with any lawyer, a child's lawyer is both an advocate and a counselor for the  
 247 client. Without unduly influencing the child, the lawyer should advise the child by providing  
 248 options and information to assist the child in making decisions. The lawyer should explain the  
 249 practical effects of taking various positions, the likelihood that a court will accept particular  
 250 arguments, and the impact of such decisions on the child, other family members, and future legal  
 251 proceedings.<sup>23</sup> The lawyer should investigate the relevant facts, interview persons with  
 252 significant knowledge of the child's history, review relevant records, and work with others in the  
 253 case.

254

255 **(d) The child's lawyer shall determine whether the child has diminished capacity**  
 256 **pursuant to the Model Rules of Professional Conduct. {STATES MAY CONSIDER**  
 257 **INSERTING THE FOLLOWING TWO SENTENCES:} [Under this subsection a child**  
 258 **shall be presumed to be capable of directing representation at the age of \_\_\_\_\_. The**  
 259 **presumption of diminished capacity is rebutted if, in the sole discretion of the lawyer, the**

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<sup>21</sup> ABA Standards, commentary A-1

<sup>22</sup> M.R. 1.4

<sup>23</sup> M.R. 2.1



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260 child is deemed capable of directing representation.] In making the determination, the  
261 lawyer should consult the child and may consult other individuals or entities that can  
262 provide the child's lawyer with the information and assistance necessary to determine the  
263 child's ability to direct the representation.

264 When a child client has diminished capacity, the child's lawyer shall make a good  
265 faith effort to determine the child's needs and wishes. The lawyer shall, as far as  
266 reasonably possible, maintain a normal client-lawyer relationship with the client and fulfill  
267 the duties as outlined in Section 7(b) of this Act. During a temporary period or on a  
268 particular issue where a normal client-lawyer relationship is not reasonably possible to  
269 maintain, the child's lawyer shall make a substituted judgment determination. A  
270 substituted judgment determination includes determining what the child would decide if he  
271 or she were capable of making an adequately considered decision, and representing the  
272 child in accordance with that determination. The lawyer should take direction from the  
273 child as the child develops the capacity to direct the lawyer. The lawyer shall advise the  
274 court of the determination of capacity and any subsequent change in that determination.  
275

276  
277 *Commentary:*

278  
279 A determination of incapacity may be incremental and issue-specific, thus enabling the child's  
280 lawyer to continue to function as a client-directed lawyer as to major questions in the proceeding.  
281 Determination of diminished capacity requires ongoing re-assessment. A child may be able to  
282 direct the lawyer with respect to a particular issue at one time but not another. Similarly, a child  
283 may be able to determine some positions in the case, but not others. For guidance in assessing  
284 diminished capacity, see the commentary to Section (e). The lawyer shall advise the court of the  
285 determination of capacity and any subsequent change in that determination.  
286

287 In making a substituted judgment determination, the child's lawyer may wish to seek guidance  
288 from appropriate professionals and others with knowledge of the child, including the advice of an  
289 expert. A substituted judgment determination is not the same as determining the child's best  
290 interests; determination of a child's best interests remains solely the province of the court.  
291 Rather, it involves determining what the child would decide if he or she were able to make an  
292 adequately considered decision.<sup>24</sup> A lawyer should determine the child's position based on  
293 objective facts and information, not personal beliefs. To assess the needs and interests of *this*  
294 child, the lawyer should observe the child in his or her environment, and consult with experts.<sup>25</sup>  
295

296 In formulating a substituted judgment position, the child's lawyer's advocacy should be child-  
297 centered, research-informed, permanency-driven, and holistic.<sup>26</sup> The child's needs and interests,  
298 not the adults' or professionals' interests, must be the center of all advocacy. For example,

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<sup>24</sup> Massachusetts Committee For Public Counsel Services, *Performance Standards Governing The Representation Of Children And Parents in Child Welfare Cases*, Chapter Four: Performance Standards and Complaint Procedures 4-1, Section 1.6(c) (2004).

<sup>25</sup> Candice L. Maze, JD, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation*, ABA Center on Children and the Law, October, 2010.

<sup>26</sup> *Id.*

299 lawyers representing very young children must truly *see* the world through the child’s eyes and  
 300 formulate their approach from that perspective, gathering information and gaining insight into the  
 301 child’s experiences to inform advocacy related to placement, services, treatment and  
 302 permanency.<sup>27</sup> The child’s lawyer should be proactive and seek out opportunities to observe and  
 303 interact with the very young child client. It is also essential that lawyers for very young children  
 304 have a firm working knowledge of child development and special entitlements for children under  
 305 age five.<sup>28</sup>

306  
 307 When determining a substituted judgment position, the lawyer shall take into consideration the  
 308 child’s legal interests based on objective criteria as set forth in the laws applicable to the  
 309 proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or  
 310 detrimental alternatives available. The child’s lawyer should seek to speed the legal process,  
 311 while also maintaining the child’s critical relationships.

312  
 313 The child’s lawyer should not confuse inability to express a preference with unwillingness to  
 314 express a preference. If an otherwise competent child chooses not to express a preference on a  
 315 particular matter, the child’s lawyer should determine if the child wishes the lawyer to take no  
 316 position in the proceeding, or if the child wishes the lawyer or someone else to make the decision  
 317 for him or her. In either case, the lawyer is bound to follow the client’s direction. A child may be  
 318 able to direct the lawyer with respect to a particular issue at one time but not at another. A child  
 319 may be able to determine some positions in the case but not others.

320

321 **(e) When the child’s lawyer reasonably believes that the client has diminished**  
 322 **capacity, is at risk of substantial physical, financial or other harm unless action is taken,**  
 323 **and cannot adequately act in the client’s own interest, the lawyer may take reasonably**  
 324 **necessary protective action, including consulting with individuals or entities that have the**  
 325 **ability to take action to protect the client and, in appropriate cases, seeking the**  
 326 **appointment of a best interest advocate or investigator to make an independent**  
 327 **recommendation to the court with respect to the best interests of the child.**

328 **When taking protective action, the lawyer is impliedly authorized under Model Rule**  
 329 **1.6(a) to reveal information about the child, but only to the extent reasonably necessary to**  
 330 **protect the child’s interests.<sup>29</sup> Information relating to the representation of a child with**  
 331 **diminished capacity is protected by Rule 1.6 and Rule 1.14 of the ABA Model Rules of**  
 332 **Professional Conduct. [OR ENTER STATE RULE CITATION]**

333

334 *Commentary:*

335

336 Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2004), the child’s lawyer  
 337 should determine whether the child has sufficient maturity to understand and form an attorney-  
 338 client relationship and whether the child is capable of making reasoned judgments and engaging  
 339 in meaningful communication. It is the responsibility of the child’s lawyer to determine whether

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> M.R. 1.14(c)

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340 the child suffers from diminished capacity. This decision shall be made after sufficient contact  
341 and regular communication with the client. Determination about capacity should be grounded in  
342 insights from child development science and should focus on the child's decision-making process  
343 rather than the child's choices themselves. Lawyers should be careful not to conclude that the  
344 child suffers diminished capacity from a client's insistence upon a course of action that the  
345 lawyer considers unwise or at variance with lawyer's view.<sup>30</sup>

346  
347 When determining the child's capacity the lawyer should elicit the child's expressed wishes in a  
348 developmentally appropriate manner. The lawyer should not expect the child to convey  
349 information in the same way as an adult client. A child's age is not determinative of diminished  
350 capacity. For example, even very young children are regarded as having opinions that are  
351 entitled to weight in legal proceedings concerning their custody.<sup>31</sup>

352  
353 Criteria for determining diminished capacity include the child's developmental stage, cognitive  
354 ability, emotional and mental development, ability to communicate, ability to understand  
355 consequences, consistency of the child's decisions, strength of wishes and the opinions of others,  
356 including social workers, therapists, teachers, family members or a hired expert.<sup>32</sup> To assist in  
357 the assessment, the lawyer should ask questions in developmentally appropriate language to  
358 determine whether the child understands the nature and purpose of the proceeding and the risks  
359 and benefits of a desired position.<sup>33</sup> A child may have the ability to make certain decisions, but  
360 not others. A child with diminished capacity often has the ability to understand, deliberate upon,  
361 and reach conclusions about matters affecting the child's own well-being such as sibling visits,  
362 kinship visits and school choice and should continue to direct counsel in those areas in which he  
363 or she does have capacity. The lawyer should continue to assess the child's capacity as it may  
364 change over time.

365  
366 When the lawyer determines that the child has diminished capacity, the child is at risk of  
367 substantial harm, the child cannot adequately act in his or her own interest, and the use of the  
368 lawyer's counseling role is unsuccessful, the lawyer may take protective action. Substantial harm  
369 includes physical, sexual and psychological harm. Protective action includes consultation with  
370 family members, or professionals who work with the child. Lawyers may also utilize a period of  
371 reconsideration to allow for an improvement or clarification of circumstances or to allow for an  
372 improvement in the child's capacity.<sup>34</sup> This rule reminds lawyers that, among other things, they  
373 should ultimately be guided by the wishes and values of the child to the extent they can be  
374 determined.<sup>35</sup>

375  
376 "Information relating to the representation is protected by Model Rule 1.6. Therefore, unless  
377 authorized to do so, the lawyer may not disclose such information. When taking protective

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<sup>30</sup> Restatement (Third) of the Law Governing Lawyers Sec. 24 c. c (2000).

<sup>31</sup> M.R. 1.14 cmt. 1

<sup>32</sup> M.R. 1.14, cmt. 1

<sup>33</sup> Anne Graffam Walker, Ph.D. *Handbook on Questioning Children: A Linguistic Perspective* 2<sup>nd</sup> Edition ABA Center on Children and the Law Copyright 1999 by ABA.

<sup>34</sup> M.R. 1.14 cmt. 5

<sup>35</sup> M.R. 1.14 cmt. 5

378 action pursuant to this section, the lawyer is impliedly authorized to make necessary disclosures,  
 379 even when the client directs the lawyer to the contrary.”<sup>36</sup> However the lawyer should make  
 380 every effort to avoid disclosures if at all possible. Where disclosures are unavoidable, the lawyer  
 381 must limit the disclosures as much as possible. Prior to any consultation, the lawyer should  
 382 consider the impact on the client’s position, and whether the individual is a party who might use  
 383 the information to further his or her own interests. “At the very least, the lawyer should  
 384 determine whether it is likely that the person or entity consulted with will act adversely to the  
 385 client’s interests before discussing matters related to the client.”<sup>37</sup> If any disclosure by the lawyer  
 386 will have a negative impact on the client’s case or the lawyer-client relationship, the lawyer must  
 387 consider whether representation can continue and whether the lawyer-client relationship can be  
 388 re-established. “The lawyer’s position in such cases is an unavoidably difficult one.”<sup>38</sup>

389  
 390 A request made for the appointment of a best interest advocate to make an independent  
 391 recommendation to the court with respect to the best interests of the child should be reserved for  
 392 extreme cases, i.e. where the child is at risk of substantial physical harm, cannot act in his or her  
 393 own interest and all protective action remedies have been exhausted. Requesting the judge to  
 394 appoint a best interest advocate may undermine the relationship the lawyer has established with  
 395 the child. It also potentially compromises confidential information the child may have revealed to  
 396 the lawyer. The lawyer cannot ever become the best interest advocate, in part due to confidential  
 397 information that the lawyer receives in the course of representation. Nothing in this section  
 398 restricts a court from independently appointing a best interest advocate when it deems the  
 399 appointment appropriate.

400

401 **SECTION 8. ACCESS TO CHILD AND INFORMATION RELATING TO THE**  
 402 **CHILD.**

403 **(a) Subject to subsections (b) and (c), when the court appoints the child’s lawyer, it**  
 404 **shall issue an order, with notice to all parties, authorizing the child’s lawyer to have access**  
 405 **to:**

406 **(1) the child; and**

407 **(2) confidential information regarding the child, including the child's**  
 408 **educational, medical, and mental health records, social services agency files, court records**  
 409 **including court files involving allegations of abuse or neglect of the child, any delinquency**  
 410 **records involving the child, and other information relevant to the issues in the proceeding,**  
 411 **and reports that form the basis of any recommendation made to the court.**

412 **(b) A child’s record that is privileged or confidential under law other than this [act]**  
 413 **may be released to a child’s lawyer appointed under this [act] only in accordance with that**  
 414 **law, including any requirements in that law for notice and opportunity to object to release**  
 415 **of records. Nothing in this act shall diminish or otherwise change the attorney-client**  
 416 **privilege of the child, nor shall the child have any lesser rights than any other party in**

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<sup>36</sup> M.R. 1.14, cmt. 8

<sup>37</sup> M.R. 1.14, cmt. 8

<sup>38</sup> M.R. 1.14, cmt 8

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417 regard to this or any other evidentiary privilege. Information that is privileged under the  
418 lawyer-client relationship may not be disclosed except as otherwise permitted by law of this  
419 state other than this [act].

420 (c) An order issued pursuant to subsection (a) shall require that a child's lawyer  
421 maintain the confidentiality of information released pursuant to Model Rule 1.6. The court  
422 may impose any other condition or limitation on an order of access which is required by  
423 law, rules of professional conduct, the child's needs, or the circumstances of the  
424 proceeding.

425 (d) The custodian of any record regarding the child shall provide access to the  
426 record to an individual authorized access by order issued pursuant to subsection (a).

427 (e) Subject to subsection (b), an order issued pursuant to subsection (a) takes effect  
428 upon issuance.<sup>39</sup>

429

## 430 SECTION 9. PARTICIPATION IN PROCEEDINGS.

431 (a) Each child who is the subject of an abuse and neglect proceeding has the right  
432 to attend and fully participate in all hearings related to his or her case.

433 (b) Each child shall receive notice from the child welfare agency worker and the  
434 child's lawyer of his or her right to attend the court hearings.

435 (c) If the child is not present at the hearing, the court shall determine whether the  
436 child was properly notified of his or her right to attend the hearing, whether the child  
437 wished to attend the hearing, whether the child had the means (transportation) to attend,  
438 and the reasons for the non-appearance.

439 (d) If the child wished to attend and was not transported to court the matter shall  
440 be continued.

441 (e) The child's presence shall only be excused after the lawyer for the child has  
442 consulted with the child and, with informed consent, the child has waived his or her right  
443 to attend.

444 (f) A child's lawyer appointed under this [act] is entitled to:

445 (1) receive a copy of each pleading or other record filed with the court in the  
446 proceeding;

447 (2) receive notice of and attend each hearing in the proceeding [and  
448 participate and receive copies of all records in any appeal that may be filed in the  
449 proceeding];

450 (3) receive notice of and participate in any case staffing or case management  
451 conference regarding the child in an abuse and neglect proceeding; and

452 (4) receive notice of any intent to change the child's placement. In the case of  
453 an emergency change, the lawyer shall receive notice as soon as possible but no later than

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<sup>39</sup> NCCUSL Act, Sec. 15

454 **48 hours following the change of placement.**

455 **(g) A child’s lawyer appointed under this [act] may not engage in ex parte contact**  
 456 **with the court except as authorized by the applicable rules of professional conduct, court**  
 457 **order, or other law.**

458 **(h) Subject to court approval, a party may call any best interest advocate as a**  
 459 **witness for the purpose of cross-examination regarding the advocate’s report, even if the**  
 460 **advocate is not listed as a witness by a party.**

461 **[(i) In a jury trial, disclosure to the jury of the contents of a best interest advocate’s**  
 462 **report is subject to this state’s rules of evidence.]<sup>40</sup>**

463

464 *Commentary:*

465

466 Courts need to provide the child with notification of each hearing. The Court should enforce the  
 467 child’s right to attend and fully participate in all hearings related to his or her abuse and neglect  
 468 proceeding.<sup>41</sup> Having the child in court emphasizes for the judge and all parties that this hearing  
 469 is about the child. Factors to consider regarding the child’s presence at court and participation in  
 470 the proceedings include: whether the child wants to attend, the child’s age, the child’s  
 471 developmental ability, the child’s emotional maturity, the purpose of the hearing and whether the  
 472 child would be severely traumatized by such attendance.

473

474 Lawyers should consider the following options in determining how to provide the most  
 475 meaningful experience for the child to participate: allowing the child to be present throughout the  
 476 entire hearing, presenting the child’s testimony in chambers adhering to all applicable rules of  
 477 evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing the  
 478 child into the hearing, allowing the child to be present only when the child’s input is required,  
 479 excluding the child during harmful testimony, and presenting the child’s statements in court  
 480 adhering to all applicable rules of evidence.

481

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

487

488 The lawyer for the child plays an important role in the child’s court participation. The lawyer  
 489 shall ensure that the child is properly prepared for the hearing. The lawyer should meet the child  
 490 in advance to let the child know what to expect at the hearing, who will be present, what their  
 491 roles are, what will be discussed, and what decisions will be made. If the child would like to  
 492 address the court, the lawyer should counsel with the child on what to say and how to say it.  
 493 After the hearing, the lawyer should explain the judge’s ruling and allow the child to ask  
 494 questions about the proceeding.

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<sup>40</sup> NCCUSL Act, Sec. 16

<sup>41</sup> American Bar Association Youth Transitioning from Foster Care August 2007; American Bar Association Foster Care Reform Act August 2005

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495  
496 Because of the wide range of roles assumed by best interest advocates in different jurisdictions,  
497 the question of whether a best interest advocate may be called as a witness should be left to the  
498 discretion of the court.  
499

## 500 SECTION 10. LAWYER WORK PRODUCT AND TESTIMONY.

501 (a) Except as authorized by [insert reference to this state’s rules of professional  
502 conduct] or court rule, a child’s lawyer may not:

503 (1) be compelled to produce work product developed during the  
504 appointment;

505 (2) be required to disclose the source of information obtained as a result of  
506 the appointment;

507 (3) introduce into evidence any report or analysis prepared by the child’s  
508 lawyer; or

509 (4) provide any testimony that is subject to the attorney-client privilege or  
510 any other testimony unless ordered by the court.

511  
512 *Commentary:*

513  
514 Nothing in this act shall diminish or otherwise change the lawyer-work product or attorney-client  
515 privilege protection for the child, nor shall the child have any lesser rights than any other party  
516 with respect to these protections.

517 If a state requires lawyers to report abuse or neglect under a mandated reporting statute, the state  
518 should list that statute under this section.

519

## 520 SECTION 11. CHILD’S RIGHT OF ACTION.

521 (a) The child’s lawyer may be liable for malpractice to the same extent as a lawyer  
522 for any other client.

523 (b) Only the child has a right of action for money damages against the child’s  
524 lawyer for inaction or action taken in the capacity of child’s lawyer.

525

## 526 SECTION 12. FEES AND EXPENSES IN ABUSE OR NEGLECT 527 PROCEEDINGS.

528 (a) In an abuse or neglect proceeding, a child’s lawyer appointed pursuant to this  
529 [act] is entitled to reasonable and timely fees and expenses in an amount set by [court or  
530 state agency to be paid from (authorized public funds)].<sup>42</sup>

531 (b) To receive payment under this section, the payee shall complete and submit a

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<sup>42</sup> N.C. Gen. Stat. Ann. § 7B-603.

532 written claim for payment, whether interim or final, justifying the fees and expenses  
533 charged.

534 (c) If after a hearing the court determines that a party whose conduct gave rise to a  
535 finding of abuse or neglect is able to defray all or part of the fees and expenses set pursuant  
536 to subsection (a), the court shall enter a judgment in favor of [the state, state agency, or  
537 political subdivision] against the party in an amount the court determines is reasonable.<sup>43</sup>  
538

539 SECTION 13. EFFECTIVE DATE. This [act] takes effect on \_\_\_\_\_.

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<sup>43</sup> NCCUSL Act, Sec. 19.



## REPORT

“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 issues at all stages of those proceedings.” IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Std. 1.1, at 11 (1980)(emphasis added).

Courts in abuse and neglect cases dramatically shape a child’s entire future in that the court decides where a child lives, with whom the child will live and whether the child’s parental rights will be terminated. No other legal proceeding that pertains to children has such a major effect on their lives. While the outcome of an abuse and neglect case has drastic implications for both the parents and the children involved, only children’s physical liberty is threatened. An abuse and neglect case that results in removal of the child from the home may immediately or ultimately result in the child being thrust into an array of confusing and frightening situations wherein the State moves the child from placement to placement with total strangers, puts the child in a group home, commits the child to an institution, or even locks the child up in detention for running away or otherwise violating a court order. Our notion of basic civil rights, and ABA Policy and Standards, demand that children and youth have a trained legal advocate to speak on their behalf and to protect their legal rights. There would be no question about legal representation for a child who was facing a month in juvenile detention, so why is there an issue for a child in an abuse and neglect case, where State intervention may last up to 18 years? The trauma faced by children in these proceedings has been recognized by at least one federal court which held that foster children have a constitutional right to adequate legal representation.<sup>1</sup>

Despite the gravity of these cases, the extent to which a child is entitled to legal representation varies not only from state to state, but from case to case, and all too often, from hearing to hearing. The root of these inconsistencies lies in the lack of a mandate for legal representation for children in abuse and neglect cases, and the lack of uniform standards for the legal representation of children, coupled with the lack of sufficient training necessary for attorneys to provide adequate representation to their child clients.

In 1996 the ABA adopted the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (hereinafter “ABA Abuse and Neglect Standards”) calling for a lawyer for every child subject to abuse and neglect proceedings.<sup>2</sup> The ABA Abuse and Neglect standards state that “All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continue.” In 2005, the ABA unanimously passed policy that

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<sup>1</sup> *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (2005).

<sup>2</sup> American Bar Association, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996) at preface.

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calls upon Congress, the States, and territories to ensure that “all dependent youth . . . be on equal footing with other parties in the dependency proceeding and have the right to quality legal representation, not simply an appointed lay guardian *ad litem* or lay volunteer advocate with no legal training, acting on their behalf in this court process.”

The proposed *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (hereinafter “Model Act”) focuses on the representation of children in abuse and neglect cases to ensure that states have a model of ethical representation for children that is consistent with the ABA Abuse and Neglect Standards,<sup>3</sup> ABA Policy, and the ABA Model Rules of Professional Conduct (hereinafter “ABA Model Rules”).

Although many states require that a lawyer be appointed for a child in an abuse and neglect proceeding, some require that the child’s lawyer be “client directed” and others require the lawyer to act as a guardian *ad litem* whereby the attorney is charged with the duty of protecting and serving the “best interests” of the child. Often there is not “careful delineation of the distinctions between the ethical responsibilities of a lawyer to the client and the professional obligations of the lay guardian *ad litem* as a best interests witness for the court.”<sup>4</sup> The states’ use of different statutory language and mandated roles for child representation has led to much confusion within the field.

The proposed Model Act conforms to the clearly stated preference in the ABA Abuse and Neglect Standards for a client-directed lawyer for each child. Similarly, the proposed Model Act is consistent with the ABA Model Rules. The Model Act states that the child’s lawyer should form an attorney-client relationship which is “fundamentally indistinguishable from the attorney-client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.”<sup>5</sup>

Consonant with the ABA Model Rules, the drafters of the Model Act started from the premise that all child clients have the capacity to form an attorney-client relationship. An attorney must enter into representation of a child treating the child client as he or she would any other client to every extent possible. The attorney should give the child frank advice on what he or she thinks is the best legal remedy to achieve the child’s expressed

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<sup>3</sup> American Bar Association, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996). The Standards can be found at <http://www.abanet.org/leadership/2006/annual/onehundredfourteen.doc>

<sup>4</sup> *Uniform Representation of Children in Abuse and Neglect, and Custody Proceedings Act* (hereinafter “NCCUSL Act”), National Conference of Commissioners of Uniform State Law. Prefatory Note (2007); the text of the final act can be found at [http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.htm). See Atwood, *supra* note 1, at 188-91; Howard A. Davidson, *Child Protection Policy and Practice at Century’s End*, 33 FAM. L. Q. 765, 768-69 (1999). For information about different state practices see *Representing Children Worldwide 2005* ([www.law.yale.edu/rcw](http://www.law.yale.edu/rcw)) or *A Child’s Right to Counsel. First Star’s National Report Card on Legal Representation for Children 2007*.

<sup>5</sup> ABA Model Act, Commentary to Section 7(c) which refers to ABA Model Rules 1.2, 1.6, 1.3, 1.1, 1.7, 1.4 and 2.1.

wishes. This decision should not be based on the attorney's mores or personal opinions; rather it should focus on the attorney's knowledge of the situation, the law, options available and the child's wishes. The proposed Model Act also provides specific guidance for lawyers charged with representing those child clients with diminished capacity. Some children (including infants, pre-verbal children, and children who are mentally or developmentally challenged) do not have the capacity to form a lawyer-client relationship. These child clients should be considered the exception, not the rule, and the structure of representation for children as a whole should be based upon a theory of competence and capacity.

Providing children in abuse and neglect cases with a client-directed 'traditional' lawyer is consistent with the thinking of national children's law experts. A conference on the representation of children was held at Fordham Law School in 1995 entitled *Ethical Issues in the Legal Representation of Children*. The conference examined the principles set out in the then-proposed (later adopted) ABA Abuse and Neglect Standards and conferees clearly recommended that lawyers for children should act as lawyers, not as guardians *ad litem*.<sup>6</sup> The co-sponsors and participants at the Fordham conference included national children's law organizations and many ABA entities.<sup>7</sup>

Ten years later in 2006, children's law experts gathered again at a conference at the University of Nevada, Las Vegas (UNLV), to review the state of legal representation of children. Like the Fordham Conference, the UNLV participants produced a set of recommendations.<sup>8</sup> The UNLV Recommendations encourage lawyers to seek to empower children by helping them develop decision-making capacity. Regarding the role of the lawyer, the UNLV Recommendations strongly support client-directed representation for children capable of making considered decisions.<sup>9</sup> Again, the list of co-sponsors and participants included nationally respected children's law organizations and many ABA entities.<sup>10</sup>

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<sup>6</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) (Fordham Recommendations) (attorney must follow child's expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint).

<sup>7</sup> Co-sponsors included the Administration for Children, Youth and Families, U.S. Department of Health and Human Services; ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility, ABA Section of Criminal Justice, Juvenile Justice Committee; ABA Section of Family Law; ABA Section of Individual Rights and Responsibilities; ABA Section of Litigation Task Force on Children; ABA Steering Committee on the Unmet Legal Needs of Children; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Counsel of Juvenile and Family Court Judges; Stein Center for Ethics and Public Interest Law, Fordham University School of Law.

<sup>8</sup> See *Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L. J. 592-687 (2006) (UNLV Recommendations).

<sup>9</sup> As stated in the Recommendations, "[c]hildren's attorneys should take their direction from the client and should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child." *Id.* at 609.

<sup>10</sup> Co-sponsors of UNLV included the ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility; ABA Child Custody and Adoption Pro Bono Project; ABA Section of Family Law; ABA Section of Litigation; Home at Last, Children's Law Center of Los Angeles;

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Consistent with the ABA Abuse and Neglect Standards, ABA policy, and the recommendations of national children's law experts, Section 3 of this Model Act mandates that an attorney, acting in a traditional role, should be appointed for every child who is the subject of an abuse or neglect proceeding.<sup>11</sup> Attorneys can identify legal issues regarding their child clients, use their legal skills to ensure the protection of their clients' rights and needs, and advocate for their clients. The Model Act requires lawyers to complete a thorough and independent investigation and participate fully in all stages of the litigation. Lawyers for children, as lawyers for any client, have a role as a counselor to their clients and should assist their clients in exploring the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.<sup>12</sup>

Lawyers for children allow children to be participants in the proceedings that affect their lives and safety. Children who are represented by a lawyer often feel the process is fairer because they had a chance to participate and to be heard. Consequently, children are more likely to accept the court's decision because of their own involvement in the process.

Requiring lawyers to represent children in abuse and neglect cases is also consistent with federal law. The Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a "guardian *ad litem*" for a child as a condition of receiving federal funds for child abuse prevention and treatment programs. Providing a child with a lawyer is consistent with the requirements of CAPTA. No state with a lawyer model has been held out of compliance with CAPTA and Health and Human Services (HHS) has issued guidance suggesting that appointing counsel for a child promotes the child's "best interest" consistent with CAPTA.<sup>13</sup>

The Model Act also provides lawyers guidance when representing children with diminished capacity, which includes young children. Like all children in these proceedings, young children are entitled to proceedings that fully examine and address their needs, including *inter alia* their physical, behavioral, and developmental health and well-being, their education and early-learning needs, their need for family permanency and stability, and their need to be safe from harm. The Model Act also allows states to set an age of capacity if they so choose.

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Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; National Juvenile Defender Center; Stein Center for Law and Ethics, Fordham University School of Law; Support Center for Child Advocates; and Youth Law Center.

<sup>11</sup> Federal law has long authorized the discretionary appointment of counsel for Indian children subject to the Indian Child Welfare Act. *See* 25 U.S.C. § 1912(b) (2000).

<sup>12</sup> Model Act, Commentary for Section (7)(c)(1).

<sup>13</sup> U.S. Department of HHS Children's Bureau, *Adoption 2002: The President's Initiative on Adoption and Permanence for Children*, Commentary to Guideline 15A

The Model Act allows and welcomes “best interest advocates” in child welfare cases. A best interest advocate is defined as “an individual, not functioning or intended to function as the child’s lawyer, appointed by the court to assist in determining the best interests of the child.”<sup>14</sup> The advisor may be a court-appointed special advocate (CASA), a guardian *ad litem* or other person who has received training specific to the best interest of the child. The Act endorses and in no way restricts the widespread use of CASAs to fulfill the role of court appointed advisor.<sup>15</sup>

A state’s law regarding abuse and neglect proceedings should be designed to provide children involved in an abuse and neglect case with a well-trained, high quality lawyer who is well-compensated and whose caseload allows for effective representation. Lawyers for children are essential for ensuring that the child’s legal rights are protected. “Unless children are allowed by lawyers to set the objectives of their cases, they would not only be effectively deprived of a number of constitutional rights, they would be denied procedures that are fundamental to the rule of law.”<sup>16</sup>

Children in dependency court proceedings are often taken from their parents, their siblings and extended families, their schools, and everything that is familiar to them. Children and youth deserve a voice when important and life-altering decisions are being made about them. They deserve to have their opinions heard, valued and considered. They have interests that are often distinct or are opposed to those of the state and their parents in dependency proceedings and, as the ABA has recognized many times, they deserve ethical legal representation.

In preparing this Model Act, the drafters have taken into consideration the enormous contributions of various organizations and advocates in defining standards of representation, most notably that of the American Bar Association (ABA), the National Association of Counsel for Children (NACC), the Uniform Law Commission (ULC), participants in the Representing Children in Families UNLV Conference, and the states

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<sup>14</sup> Model Act, Section 1.

<sup>15</sup> The Court Appointed Special Advocate is a lay volunteer who advocates as a non-lawyer on behalf of a child in child abuse and neglect proceedings. Volunteers are screened and trained at the local level, but all CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that organization. See [www.nationalcasa.org](http://www.nationalcasa.org). In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience. See generally Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 JOURNAL OF CENTER FOR CHILDREN AND THE COURTS 63 (1999). The Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice is authorized to enter into cooperative agreements with the National CASA Association to expand CASA programs nationally. See 42 U.S.C.A. § 13013 (2005 & Supp. 2006). One of the key strengths of the CASA program is that a CASA volunteer generally represents only one child at a time. Moreover, an attorney for the child working in tandem with a CASA volunteer can provide a powerful “team” approach in juvenile court. In addition, CASA volunteers may have access to the CASA program’s own legal representative for legal advice.

<sup>16</sup> Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L.Rev. 1399, 1423-24 (1996).

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themselves. In addition, drafters have sought input from the ABA Standing Committee on Ethics, various sections within the ABA, and more than 30 children's law centers around the country who represent children every day.

Respectfully Submitted,  
Hilarie Bass, Chair  
Section of Litigation  
August, 2011

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Litigation

Submitted by: Hilarie Bass, Chair

1. Summary of Resolution.

The resolution proposes that the ABA adopt a *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*. The *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* focuses on the representation of children in abuse and neglect cases to ensure that states have a model of ethical representation for children that is consistent with the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (adopted by the House of Delegates in 1996), ABA Policy, and the ABA Model Rules of Professional Conduct.

2. Approval by Submitting Entity.

On April 16, 2011 the Section of Litigation Council approved this Resolution at a meeting during the Section of Litigation Annual Conference in Miami, FL.

3. Has this or a similar resolution been submitted to the House or Board previously?

The Section of Litigation submitted a previous version of the *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* to the ABA House of Delegates for the 2009 ABA Annual Meeting. The Section of Litigation withdrew the Model Act prior to the ABA Annual Meeting, in the hopes that it could work with the Family Law Section to complete an Act that both entities could approve. The Family Law Section voted to co-sponsor the Model Act at their spring conference on April 8, 2011.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The Resolution is consistent with both the ABA Standards on the Representation of Children in Abuse and Neglect Standards and the ABA Model Rules of Professional Conduct. This Resolution provides states with a legislative option to institutionalize ABA Policy.

5. What urgency exists which requires action at this meeting of the House?

States are seeking guidance in defining the proper role of lawyers assigned to represent abused or neglected children. It is important for the American Bar Association to provide guidance in the form of model legislation.

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6. Status of Legislation. (If applicable).  
N/A

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the resolution will not result in expenditures.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Section of Family Law—co-sponsorship approved on April 8, 2011

Criminal Justice Section—co-sponsorship re-affirmed on April 16, 2011

Commission on Homelessness and Poverty—co-sponsorship re-affirmed on April 28, 2011

Commission on Youth at Risk—co-sponsorship approved

Steering Committee on Legal Aid and Indigent Defense (SCLAID)—co-sponsorship approved

General Practice and Solo Practitioners, co-sponsorship approved

Prior co-sponsors—updated resolution has been sent on April 26, 2011 to affirm co-sponsorship for the following entities:

New York State Bar Association

Los Angeles County Bar Association

Individual Rights & Responsibilities—co-sponsorship requested June, 2011

Young Lawyers Division, co-sponsorship requested June, 2011

Washington State Bar Association, co-sponsorship requested June, 2011

Judicial Division, will consider co-sponsorship on June 1, 2011

Commission on Immigration, co-sponsorship requested, June, 2011

Government and Public Sector Lawyers, co-sponsorship requested, June, 2011

Ethics and Professional Responsibility, co-sponsorship requested, June, 2011

10. Contact Persons. (Prior to the meeting.)

Lawrence J. Fox

Drinker Biddle LLP

One Logan Square

18<sup>th</sup> & Cherry Streets

Philadelphia, PA 19103

215-988-2714

Email: [lawrence.fox@dbr.com](mailto:lawrence.fox@dbr.com)



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11. Contact Person. (Who will present the report to the House.)

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## EXECUTIVE SUMMARY

### **1. Summary of the Resolution**

The Resolution calls upon the ABA to adopt the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, dated August, 2011.

### **2. Summary of the Issue which the Resolution Addresses**

The *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* focuses on the representation of children in abuse and neglect cases to ensure that states have a model of ethical representation for children that is consistent with the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (adopted by the House of Delegates in 1996), ABA Policy, and the ABA Model Rules of Professional Conduct.

Many states now require that a lawyer be appointed to a child in an abuse and neglect proceeding. The level to which children are entitled to and involved with their legal representation in court varies not only from state to state, but from case to case, and all too often, from hearing to hearing. The proposed *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (hereinafter “ABA Model Act”) includes a mandate which requires that a lawyer be appointed for each child who is the subject of a petition in an abuse, neglect, dependency, termination of parental rights or post termination of parental rights proceeding and that, consistent with the ABA Model Rules, the child’s lawyer should form an attorney-client relationship which is fundamentally indistinguishable from the attorney-client relationship in any other situation. This attorney-client relationship would include the duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.

### **3. Please Explain How the Proposed Policy Position Will Address the Issue**

These standards will seek to establish standards of required ethical conduct so that lawyers and judges will have a common understanding of what is expected from lawyers for children in abuse and neglect cases. The Model Act provides states with a legislative framework for providing lawyers for children and will ensure consistency within the state and from state to state.

### **4. Summary of Minority Views or Opposition**

None of which we are aware.