

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

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.**¹ **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.**²

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**
30 **education, cultural background, and degree of language acquisition.**³

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.*

¹ 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.

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.⁴ 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.**

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.⁵**

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.⁶*

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.⁷ 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.⁸ The appointment includes all stages thereof, from removal**
144 **from the home or initial appointment through all available appellate proceedings. The**
145 **lawyer may, with the permission of the court, arrange for supplemental or separate counsel**
146 **to handle proceedings at an appellate stage.⁹**

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;¹⁰

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
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.¹¹ 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.¹² 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,¹³
217 confidentiality,¹⁴ diligence,¹⁵ competence,¹⁶ loyalty,¹⁷ communication,¹⁸ and the duty to provide
218 independent advice.¹⁹ Client direction requires the lawyer to abide by the client’s decision about
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.²⁰ 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.²¹ 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 mouth piece. As with any lawyer, a child's lawyer is both an advocate and a counselor for the
247 client. The lawyer should, without unduly influencing the child, 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.²² 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**
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.²³ 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.²⁴

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.²⁵ The child’s needs and interests,
298 not the adults’ or professionals’ interests, must be the center of all advocacy. For example,
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.²⁶ 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.²⁷

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.²⁸ 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
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.²⁹

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.³⁰

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.³¹ 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.³² 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.³³ This rule reminds lawyers, among other things, that they
373 should ultimately be guided by the wishes and values of the child to the extent they can be
374 determined.³⁴

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
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.”³⁵ 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.”³⁶ 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.”³⁷

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
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.³⁸

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
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.]³⁹

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.⁴⁰ 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.

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)].⁴¹**

531 (b) To receive payment under this section, the payee shall complete and submit a
532 written claim for payment, whether interim or final, justifying the fees and expenses
533 charged.

534 (c) If the court, after a hearing, determines that a party whose conduct gave rise to
535 a finding of abuse or neglect is able to defray all or part of the fees and expenses set
536 pursuant to subsection (a), the court shall enter a judgment in favor of [the state, state
537 agency, or political subdivision] against the party in an amount the court determines is
538 reasonable.⁴²

539

540 SECTION 13. EFFECTIVE DATE. This [act] takes effect on _____.

541

¹ NCCUSL, 2006 *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings*, Sec. 2(2) [Hereinafter NCCUSL Act]

² *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].

³ ABA Standards, Part I, Sec A-3.

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

⁵ 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).

⁶ ABA Standards, Part II, Sec L-1-2.

⁷ NCCUSL Act, Sec. 9

⁸ *Id.*, Sec. 10(a)

⁹ ABA Standards, Part I, 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).

¹⁰ NCCUSL Act, Sec. 11 Alternative A..

¹¹ ABA Standards, Part I, Section D-12.

¹² *Id.*

¹³ ABA Model Rules of Professional Responsibility (hereinafter M.R.) 1.2

¹⁴ M.R. 1.6

¹⁵ M.R. 1.3

¹⁶ M.R. 1.1

¹⁷ M.R. 1.7

¹⁸ M.R. 1.4

¹⁹ M.R. 2.1

²⁰ ABA Standards, commentary A-1

²¹ M.R. 1.4

²² M.R. 2.1

²³ 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).

²⁴ 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.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ M.R. 1.14(c)

²⁹ Restatement (Third) of the Law Govering Lawyers Sec. 24 c. c (2000).

³⁰ M.R. 1.14 cmt. 1

³¹ M.R. 1.14, cmt. 1

³² Anne Graffam Walker, Ph.D. *Handbook on Questioning Children: A Linguistic Perspective* 2nd Edition ABA Center on Children and the Law Copyright 1999 by ABA.

³³ M.R. 1.14 cmt. 5

³⁴ M.R. 1.14 cmt. 5

³⁵ M.R. 1.14, cmt. 8

³⁶ M.R. 1.14, cmt. 8

³⁷ M.R. 1.14, cmt 8

³⁸ NCCUSL Act, Sec. 15

³⁹ NCCUSL Act, Sec. 16

⁴⁰ American Bar Association Youth Transitioning from Foster Care August 2007; American Bar Association Foster Care Reform Act August 2005

⁴¹ N.C. Gen. Stat. Ann. § 7B-603.

⁴² NCCUSL Act, Sec. 19.