

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 or 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.**ⁱ **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 21 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 all of the same duties that are due an adult client,**
23 **including loyalty, confidentiality, diligence, client direction, communication, duty to advise,**
24 **and competent representation.**ⁱⁱ

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

28 **(e) “Developmental level” means the ability to understand others and communicate,**
29 **taking into account such factors as age, mental capacity, level of education, cultural**
30 **background, and degree of language acquisition.**ⁱⁱⁱ

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 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

37 The best interests advocate includes but is not limited to well-trained lay volunteer advocates,
38 such as a Court Appointed Special Advocate (“CASA”), guardians *ad litem* or a professional
39 who holds a relevant professional license and whose training relates to the determination of a
40 child's best interests.

41

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

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

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

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

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

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

54 (c) **The court may appoint one lawyer to represent siblings if there is no conflict of**
55 **interest as defined under the applicable rules of professional conduct.^{iv} The court may**
56 **thereafter amend such appointment to add additional counsel to represent siblings should**
57 **it develop during the course of the proceedings that there exists a conflict of interest**
58 **between or among the siblings**

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

61 (e) **The appointed lawyer shall represent the child for all stages of the proceedings.^v**

62 (f) **The child, and only the child, after consultation with a lawyer and with informed**
63 **consent, may waive representation. Neither the best interest advocate, nor a representative**
64 **of the child, may waive representation for the child.^{vi} A child may waive counsel only if:**

65 (1) **the waiver is knowing, intelligent, and voluntary;**

66 (2) **the court conducts a colloquy with the child on the record;**

67 (3) **the court appoints stand-by counsel for the child; and**

68 (4) **the waiver only applies to that proceeding. The child may revoke waiver**
69 **of counsel at any time.^{vii}**

70

71 *Commentary:*

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

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

84 The child is entitled to conflict-free counsel and the applicable rules of professional conduct
85 must be applied in the same manner as they would be applied for lawyers for adults. A lawyer
86 representing siblings should maintain the same lawyer-client relationship with respect to each
87 child.

88

89 The child has the right to waive counsel, however it is essential that courts ensure that waiver of
90 counsel by the child is knowing, voluntary and made with informed consent. The procedures in
91 this section will help to ensure that it is. If a child waives counsel at one proceeding, the child
92 shall be informed of the right to counsel at all subsequent proceedings.

93

94 **SECTION 4. QUALIFICATIONS OF THE CHILD'S LAWYER.**

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

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

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

105

106 *Legislative Note: States that adopt training standards and standards of practice for*
107 *children's lawyers should include the bracketed portion of this section and insert a reference to*
108 *the state laws, court rules, or administrative guidelines containing those standards.^{viii}*

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

110

111 *Commentary:*

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113 States should establish training requirements for lawyers for children that focus on the
114 applicable, controlling law, the development of a meaningful lawyer-client relationship with the
115 child, assessing the capacity of the child and interdisciplinary issues that arise in child welfare
116 cases.

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

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128 **SECTION 5. ORDER OF APPOINTMENT.**

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

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

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141 **SECTION 6. DURATION OF APPOINTMENT.**

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

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 his or her 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 **SECTION 7. DUTIES OF CHILD'S LAWYER AND SCOPE OF** 152 **REPRESENTATION.**

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

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

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

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

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

167 (4) where appropriate, after consultation with the client, discussing the
168 possibility of settlement or the use of alternative forms of dispute resolution and
169 participating in such processes to the extent permitted under the law of this state;^{xii}

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

172 (6) consulting with any best interest advocate for the child;

173 (7) consulting prior to each hearing with any person providing medical,
174 mental health, social, educational, or other services to the child;

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

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

180 (10) representing the child in all proceedings affecting the issues before the
181 court, including hearings on appeal or referring the child's case to the appropriate
182 appellate counsel as provided for by/ mandated by [inset local rule/law etc]; and

183 (11) where appropriate, endeavoring to represent the child in ancillary legal
184 matters, either through appointment from the court or through the retention of alternate
185 legal counsel.

186
187 *Commentary:*

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 Under (b)(9) every effort should be made to have the same lawyer in trial and appellate
195 proceedings.

196
197 The ancillary matters referred to in (b)(10) include special education, school discipline hearings,
198 mental health treatment, delinquency or criminal issues, status offender matters, guardianship,
199 adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth
200 transitioning out of care issues, postsecondary education opportunity qualification, and tort
201 actions for injury, as appropriate.^{xiii} The lawyer should make every effort to ensure that the child
202 is represented by legal counsel in all ancillary legal proceedings, either personally, when the
203 lawyer is competent to do so, or through referral or collaboration. There is value in having one
204 lawyer represent the child across multiple proceedings. The lawyer is better able to understand
205 and fully appreciate the various issues as they arise and how those issues may affect other
206 proceedings.

207
208 **(c) When the child is capable of directing the representation by expressing his or her**
209 **objectives, the lawyer shall maintain a normal client-lawyer relationship with the child in**
210 **accordance with the rules of professional conduct.**

211 *Commentary:*

212 The client-lawyer relationship for the child's lawyer is fundamentally indistinguishable from the
213 lawyer-client relationship in any other situation and includes duties of client direction^{xiv},
214 confidentiality^{xv}, diligence^{xvi}, competence^{xvii}, loyalty^{xviii}, communication^{xix}, and the duty to
215 advise.^{xx} Client direction requires the lawyer to abide by the client's decision about the
216 objectives of the representation. In order for the child to have an independent voice in abuse, and
217 neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes.^{xxi}
218 Moreover, providing the child with an independent and client-directed lawyer ensures that the
219 child's legal rights and interests are adequately protected.

220 **(1) The lawyer for the child shall explain the proceedings to the extent necessary to**
221 **permit the client to make informed decisions regarding the representation and abide by the**
222 **child's decisions concerning the child's objectives. This includes advising the child as to**
223 **options and eliciting the child's wishes in a developmentally appropriate manner.**

224 *Commentary:*

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

230 In addition to explaining the lawyer's role, the lawyer should explain the process to the child in a
231 developmentally appropriate manner as required by Rule 1.4 of the ABA Model Rules of
232 Professional Conduct or its equivalent.^{xxii} This explanation can and will change based on age,
233 cognitive ability, and emotional maturity. The lawyer needs to take the time to explain

234 thoroughly and in a way that allows and encourages the child to ask questions and that ensures
235 the child's understanding. The lawyer should also facilitate the child's participation in the
236 proceeding (See Section 9).

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

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

252 **(2) When the child's capacity to make adequately considered decisions in connection**
253 **with a representation is diminished, the lawyer shall, as far as reasonably possible,**
254 **maintain a normal client-lawyer relationship with the client. When the lawyer reasonably**
255 **believes that the client:**

256 **a. Has diminished capacity,**

257 **b. Is at risk of substantial physical, financial or other harm unless action is**
258 **taken, and**

259 **c. Cannot adequately act in the client's own interest,**

260 **the lawyer may take reasonably necessary protective action, including consulting with**
261 **individuals or entities that have the ability to take action to protect the client and, in**
262 **appropriate cases, seeking the appointment of a best interest advocate or investigator to**
263 **make an independent recommendation to the court with respect to the best interests of the**
264 **child. Information relating to the representation of a child with diminished capacity is**
265 **protected by Rule 1.6 and Rule 1.14 of the ABA Model Rules of Professional Conduct.**
266 **When taking protective action, the lawyer is impliedly authorized under Model Rule 1.6(a)**
267 **to reveal information about the child, but only to the extent reasonably necessary to protect**
268 **the child's interests.**^{xxiv}

269 *Commentary:*

270 If a child is able to direct counsel, but the lawyer determines that the child has diminished
271 capacity, is at risk of substantial harm and cannot act in the client's own interest in connection
272 with the representation, lawyers shall, after unsuccessful use of the lawyer's counseling role,

273 look to Rule 1.14 of the ABA Model Rules of Professional Conduct (“M.R.” or “ABA Model
274 Rules”) for guidance.^{xxv} Substantial harm includes both physical and sexual harm.

275 After due consideration, it is the responsibility of the lawyer to determine whether the child
276 suffers from diminished capacity. This decision shall be made after sufficient contact and
277 regular communication with the client. Determination about capacity should be grounded in
278 insights from child development science and should focus on the child’s decision-making
279 process rather than the child’s choices themselves. Just because the lawyer does not agree with
280 the child’s stated objectives does not mean the child does not have the capacity to direct the
281 representation. Lawyers should be careful not to construe proof of a disability from a client’s
282 insistence upon a view of the client’s welfare that the lawyer considers unwise or at variance
283 with lawyer’s view.^{xxvi} When determining the child’s capacity the lawyer should elicit the
284 child’s expressed wishes in a developmentally appropriate manner. The lawyer should not
285 expect the child to convey information in the same way an adult client would. A child’s age is
286 not determinative of diminished capacity. For example, even very young children are regarded
287 as having opinions that are entitled to weight in legal proceedings concerning their custody.^{xxvii}

288 Criteria for determining diminished capacity include the child’s developmental stage, cognitive
289 ability, emotional and mental development, ability to communicate, ability to understand
290 consequences, consistency of the child’s decisions, strength of wishes and the opinions of others,
291 including social workers, therapists, teachers, family members or a hired expert.^{xxviii} To assist in
292 the assessment, the lawyer should ask questions in developmentally appropriate language to
293 determine whether the child understands the nature and purpose of the proceeding and the risks
294 and benefits of a desired position.^{xxix} A child may have the ability to make certain decisions, but
295 not others. A child with diminished capacity often has the ability to understand, deliberate upon,
296 and reach conclusions about matters affecting the child’s own well-being such as sibling visits,
297 kinship visits and school choice and should continue to direct counsel in those areas in which he
298 or she does have capacity. When the child suffers from diminished capacity, the lawyer should
299 continue to assess the child’s capacity as it may change over time.

300 When diminished capacity is an issue, the child is at risk of substantial harm, the child cannot
301 adequately act in his or her own interest, and the use of the lawyer’s counseling role is
302 unsuccessful, the lawyer may take protective action. Protective action includes consultation with
303 family members, or professionals who work with the child. Lawyers may also utilize a period of
304 reconsideration to allow for an improvement or clarification of circumstances or to allow for an
305 improvement in the child’s capacity.^{xxx} This rule reminds lawyers, among other things, that they
306 should ultimately be guided by the wishes and values of the child to the extent they can be
307 determined.^{xxxi}

308 “Information relating to the representation is protected by M.R. 1.6. Therefore, unless
309 authorized to do so, the lawyer may not disclose such information. When taking protective
310 action pursuant to this section, the lawyer is impliedly authorized to make the necessary
311 disclosures, even when the client directs the lawyer to the contrary,”^{xxxii} however the lawyer
312 must make every effort to avoid disclosures. Where disclosures are unavoidable, the lawyer
313 must limit the disclosures as much as possible. M.R. 1.6 and 1.14 limit what the lawyer may
314 disclose in consulting with other individuals or entities or in seeking the appointment of a best
315 interest advocate. Prior to any consultation, the lawyer should consider the impact on the

316 client’s position, and whether the individual is a party who might use the information to further
317 his or her own interests. “At the very least, the lawyer should determine whether it is likely that
318 the person or entity consulted with will act adversely to the client’s interests before discussing
319 matters related to the client.”^{xxxiii} If any disclosure by the lawyer will have a negative impact on
320 the client’s case or the lawyer-client relationship, the lawyer must consider whether
321 representation can continue and whether the lawyer-client relationship can be re-established.
322 “The lawyer’s position in such cases is an unavoidably difficult one.”^{xxxiv}

323 A request made of the judge to appoint a best interest advocate to make an independent
324 recommendation to the court with respect to the best interests of the child should be reserved for
325 extreme cases where the child is at risk of substantial physical harm, cannot act in his or her own
326 interest and all protective action remedies have been exhausted. Requesting the judge to appoint
327 a best interest advocate may undermine the relationship the lawyer has established with the
328 child. It also potentially compromises confidential information the child may have revealed to
329 the lawyer. The lawyer cannot ever become the best interest advocate, in part due to confidential
330 information that the lawyer receives in the course of representation. Nothing in this section
331 restricts a court from independently appointing a best interest advocate when it deems the
332 appointment appropriate.

333 **d) When the child is incapable of directing the representation by expressing his or her**
334 **objectives, the lawyer shall seek the appointment of a best interest advocate. If the child is**
335 **incapable of directing the representation and a best interest advocate is not appointed the**
336 **lawyer may formulate and advocate for a position that is in the best interest of the child,**
337 **but only after consultation with individuals or entities that can provide the lawyer with the**
338 **information and assistance necessary to determine the best interest of the child.**

339 Commentary: This section seeks to address the cases involving the very young or severely
340 incapacitated child, the child who has no capacity to direct the representation. In compliance
341 with the conception of the lawyer-client relationship embodied in the ABA Model Rules, the
342 proper approach when the child cannot direct the representation is to seek a best interest
343 advocate who is trained to bring the multidisciplinary perspectives necessary to determine the
344 child’s best interests. However, the question must be answered as to what happens if the court is
345 unable or unwilling to appoint a best interest advocate. When a best interest advocate is not
346 appointed, the lawyer may advocate for what is in the child’s best interest. Rather than relying
347 on the lawyer’s own personal views and values, the lawyer should develop the best interest
348 position that reflects the child’s unique circumstances.

349
350 Recognizing that a lawyer’s training does not provide the multidisciplinary perspectives
351 necessary to determine a child’s best interest, the lawyer should seek input from experts from
352 other disciplines for guidance. Moreover, in determining the child’s best interest the lawyer
353 should seek to protect the child’s legal rights, maximize the child’s capacities, respect the child’s
354 family and social connections, recommend the least intrusive state intervention, recommend the
355 least detrimental alternative, address any disabilities the child and family may have, give due
356 weight to parents’ preference in the absence of conflict or harm to the child, and honor the
357 child’s culture. In order to do so, the lawyer needs to understand all available options and
358 develop a deep, rich understanding of the client in the context of his or her family, his or her

359 community, and his or her life to that point. Additionally, while the child is in state care, the
360 child's lawyer should ensure that the state agency is providing the services to which the child is
361 entitled under the law including, but not limited to, the least restrictive placement alternative, a
362 safe foster home, stability of placements, medical care, early intervention and educational needs,
363 state and federal benefits, visitation, effective case planning, and services to the child and
364 biological family addressing the underlying reason for removal.

365
366 Criteria for determining when a client is incapable of directing the representation include the
367 child's age (though age alone is not dispositive) and inability to communicate because the child
368 is preverbal or so young as to be unable to engage in a meaningful reasoning process about
369 issues that are relevant to the proceeding. A child's capacity to direct counsel is contextual and
370 incremental and is not simply a function of his or her chronological age. Because of the evolving
371 nature of children's competencies, a child who is unable to express his or her objectives for one
372 hearing or proceeding may be able to communicate sufficiently to direct the lawyer at a later
373 hearing or proceeding. The lawyer must maintain regular contact with an incapacitated child in
374 order to continue to assess the child's capacity.

375 Some children are able to articulate thoughts and feelings, but suffer from diminished capacity.
376 Rule (c)(2) provides guidance for lawyers in that situation; (d) refers only to children who are
377 incapable of directing representation.

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379

380 SECTION 8. ACCESS TO CHILD AND INFORMATION RELATING TO THE 381 CHILD.

382 (a) Subject to subsections (b) and (c), when the court appoints the child's lawyer, it
383 shall issue an order, with notice to all parties, authorizing the lawyer appointed to have
384 access to:

385 (1) the child; and

386 (2) confidential information regarding the child, including the child's
387 educational, medical, and mental health records, responsible social services agency files,
388 court records including court files involving allegations of abuse or neglect of the child, any
389 delinquency records involving the child, and other information relevant to the issues in the
390 proceeding, and reports that form the basis of any recommendation made to the court.

391 (b) A child's record that is privileged or confidential under law other than this [act]
392 may be released to a lawyer appointed under this [act] only in accordance with that law,
393 including any requirements in that law for notice and opportunity to object to release of
394 records. Nothing in this act shall diminish or otherwise change the attorney-client privilege
395 of the child, nor shall the child have any lesser rights than any other party in regard to this
396 or any other evidentiary privilege. Information that is privileged under the lawyer-client
397 relationship may not be disclosed except as otherwise permitted by law of this state other
398 than this [act].

399 (c) An order issued pursuant to subsection (a) shall require that a child's lawyer
400 maintain the confidentiality of information released pursuant to Model Rule 1.6. The court

401 may impose any other condition or limitation on an order of access which is required by
402 law, rules of professional conduct, the child's needs, or the circumstances of the
403 proceeding.

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

406 (e) Subject to subsection (b), an order issued pursuant to subsection (a) takes effect
407 upon issuance.^{xxxv}

408 **SECTION 9. PARTICIPATION IN PROCEEDINGS.**

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

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

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

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

419 (e) The child's presence shall only be excused after counsel for the child has
420 consulted with the child and, with informed consent, has waived the child's right to attend.

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

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

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

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

429 (4) receive notice of any intent to change the child's placement. In the case of
430 an emergency change, the lawyer shall receive notice as soon as possible but no later than
431 48 hours following the change of placement.

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

435 (h) A best interest advocate may not take any action that may be taken only by a
436 lawyer licensed in this state, including making opening and closing statements, examining
437 witnesses in court, and engaging in discovery other than as a witness. A best interest
438 advocate may not engage in ex parte contact with the court.

439 (i) A party may call any best interest advocate for the child as a witness for the
440 purpose of cross-examination regarding the advocate’s report even if the advocate is not
441 listed as a witness by a party.

442 [(j) In a jury trial, disclosure to the jury of the contents of a best interest advocate’s
443 report is subject to this state’s rules of evidence.]^{xxxvi}
444

445 *Commentary:*

446
447 Courts need to provide the child with notification of each hearing. The Court should enforce the
448 child’s right to attend and fully participate in all hearings related to his or her abuse and neglect
449 proceeding.^{xxxvii} Having the child in court emphasizes for the judge and all parties that this
450 hearing is about the child. Factors to consider regarding the child’s presence at court and
451 participation in the proceedings include: whether the child wants to attend, the child’s age, the
452 child’s developmental ability, the child’s emotional maturity, the purpose of the hearing and
453 whether the child would be severely traumatized by such attendance. In accepting a decision not
454 to attend, the lawyer should consult with therapists, caretakers, or other persons who have
455 specific knowledge of the child.

456
457 Lawyers should consider the following options in determining how to provide the most
458 meaningful experience for the child to participate: allowing the child to be present throughout
459 the entire hearing, presenting the child’s testimony in chambers adhering to all applicable rules
460 of evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing
461 the child into the hearing, allowing the child to be present only when the child’s input is
462 required, excluding the child during harmful testimony, and presenting the child’s statements in
463 court adhering to all applicable rules of evidence.

464
465 Courts should reasonably accommodate the child to ensure the hearing is a meaningful
466 experience for the child. The court should consider: scheduling hearing dates and times when the
467 child is available and least likely to disrupt the child’s routine, setting specific hearing times to
468 prevent the child from having to wait, making courtroom waiting areas child friendly, and
469 ensuring the child will be transported to and from each hearing.

470
471 The lawyer for the child plays an important role in the child’s court participation. The lawyer
472 shall ensure that the child is properly prepared for the hearing. The lawyer should meet the child
473 in advance to let the child know what to expect at the hearing, who will be present, what their
474 roles are, what will be discussed, and what decisions will be made. If the child would like to
475 speak to the judge, the lawyer should counsel with the child on what to say and how to say it.
476 After the hearing, the lawyer should explain the judge’s ruling and allow the child to ask
477 questions about the proceeding.

478
479

480 **SECTION 10. LAWYER WORK PRODUCT AND TESTIMONY.**

481 **Except as authorized by [insert reference to this state’s rules of professional**
482 **conduct] or court rule, a child’s lawyer may not:**

- 483 (a) be compelled to produce the lawyer’s work product developed during the
484 appointment;
485 (b) be required to disclose the source of information obtained as a result of
486 the appointment;
487 (c) introduce into evidence a report prepared by the lawyer; or
488 (d) provide any testimony that is subject to the attorney-client privilege.
489

490 *Commentary:* Nothing in this act shall diminish or otherwise change the lawyer-work product or
491 attorney-client privilege protection for the child, nor shall the child have any lesser rights than
492 any other party with respect to these protections.

493 If a state requires lawyers to report abuse or neglect under a mandated reporting statute, the state
494 should list that statute under this section.
495

496 **SECTION 11. CHILD’S RIGHT OF ACTION.**

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

499 (b) A best interest advocate appointed pursuant to this [act] is not liable for money
500 damages because of inaction or action taken in the capacity of best interest advocate unless
501 the inaction or action taken constitutes willful misconduct or gross negligence.^{xxxviii}

502 **SECTION 12. FEES AND EXPENSES IN ABUSE OR NEGLECT**
503 **PROCEEDINGS.**

504 (a) In an abuse or neglect proceeding, a child’s lawyer appointed pursuant to this
505 [act] is entitled to reasonable and timely fees and expenses in an amount set by [court or
506 state agency to be paid from (authorized public funds)].^{xxxix}

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

510 (c) If the court, after a hearing, determines that a party whose conduct gave rise to
511 a finding of abuse or neglect is able to defray all or part of the fees and expenses set
512 pursuant to subsection (a), the court shall enter a judgment in favor of [the state, state
513 agency, or political subdivision] against the party in an amount the court determines is
514 reasonable.^{xl}
515

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

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

ⁱⁱ *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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- iii ABA Standards, Part I, Sec A-3.
- iv NCCUSL Act, Sec. 4(c); *see also* ABA Standards, Part I, Sec B-1
- v 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).
- vi *See* La. Child. Code Ann. Art. 1016(A).
- vii Pa.R.J.C.P 1152.
- viii ABA Standards, Part II, Sec L-1-2.
- ix NCCUSL Act, Sec. 9
- x *Id.*, Sec. 10(a)
- xi 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).
- xii NCCUSL Act, Sec. 11 Alternative A..
- xiii ABA Standards, Part I, Sec C-1-6; *see generally* La. Sup. Ct. R. XXXIII, Standards 1-7.
- xiv ABA Model Rules of Professional Responsibility (hereinafter M.R.) 1.2
- xv M.R. 1.6
- xvi M.R. 1.3
- xvii M.R. 1.1
- xviii M.R. 1.7
- xix M.R. 1.4
- xx M.R. 2.1
- xxi ABA Standards, commentary A-1
- xxii M.R. 1.4
- xxiii M.R. 2.1
- xxiv M.R. 1.14(c)
- xxv *See ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (NACC Revised Version)*, B-4(4)
- xxvi Restatement (Third) of the Law Governing Lawyers Sec. 24 c. c (2000).
- xxvii M.R. 1.14 cmt. 1
- xxviii M.R. 1.14, cmt. 1
- xxix 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.
- xxx M.R. 1.14 cmt. 5
- xxxi M.R. 1.14 cmt. 5
- xxxii M.R. 1.14, cmt. 8
- xxxiii M.R. 1.14, cmt. 8
- xxxiv M.R. 1.14, cmt 8
- xxxv NCCUSL Act, Sec. 15
- xxxvi NCCUSL Act, Sec. 16
- xxxvii American Bar Association Youth Transitioning from Foster Care August 2007; American Bar Association Foster Care Reform Act August 2005
- xxxviii NCCUSL Act, Sec. 18; *see also* NACC, *Recommendations for Representation of Children in Abuse and Neglect Cases*, Sec. 3A(8).
- xxxix N.C. Gen. Stat. Ann. § 7B-603.
- xl NCCUSL Act, Sec. 19.