

## ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases

by Andrea Khoury

*“You are the one who makes the decisions, [but] I need to be heard so people may understand how I feel or what I need . . . Listen to me, since no one else will, and try to understand where I’m coming from.”*

—Former Foster Youth

Sentiments like this one from a former foster youth reinforce the importance of quality, client-directed representation. In August 2011, the ABA House of Delegates passed the most comprehensive policy concerning the child’s representative’s role in dependency cases since *The Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* were adopted in 1996. *The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* gives attorneys clear guidance on representing the most vulnerable client, the minor-child.

Children’s attorneys are the voices for the children. Children deserve someone who listens to how they feel and what they want. Representing children is not easy but by implementing *The Model Act* states can ensure that children in abuse

states appoint lawyers to function in the traditional lawyer role. Some states appoint nonlawyers, and some states instruct the lawyer to use a hybrid role. *The Model Act* gives legislatures concrete language to adopt that provides long-needed uniform guidance to lawyers representing children. The following summary highlights the Act’s provisions.

### Key requirements

*The Model Act* provides some basic requirements:

- Every child is appointed a lawyer who is bound by the rules of professional conduct, including confidentiality and zealous advocacy, and has access to the child’s confidential information regarding education, health, mental health, social services, delinquency, and other information relevant to the proceeding.

unreasonable.

- The lawyer’s appointment is in effect until the lawyer is discharged by the court.
- The child’s lawyer’s duties, among other things, include:
  - interviewing and counseling the child
  - preparing the case
  - negotiating and participating in hearings and settlement discussions
  - meeting with the child at least once per quarter
  - consulting with the best interests advocate when appropriate and consistent with confidentiality and the child’s legal interests
  - representing the child in all proceedings before the court
  - eliciting the child’s wishes in a developmentally appropriate manner
- The lawyer is entitled to reasonable and timely fees and expenses.

### Diminished capacity

*The Model Act* includes guidance for lawyers representing a child with diminished capacity.<sup>1</sup> It allows a state to use a rebuttable presumptive age (e.g., 10 years old) to establish a child’s ability to direct the representation. The lawyer may, however, rebut that presumption if the child is younger and deemed capable of directing representation. A child having a different opinion than the lawyer or insisting upon a course of action that the lawyer considers unwise is not diminished capacity. The determination should focus on the decision-making process rather

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and neglect proceedings across the country have the best representation.

Historically, states have not been uniform in child attorney governance. Some states appoint guardians ad litem to represent what they think is best for the child. Some

- The judicial officer **may** appoint a best interests advocate who does not function as the child’s lawyer but assists the court in determining best interests of the child.
- Lawyers must have specific child welfare legal training.
- Caseloads for lawyers may not be

than the decision. The lawyer should not expect the child to convey information in the same way as an adult client.

*The Model Act* provides criteria for determining diminished capacity:

- child's developmental stage
- cognitive ability
- emotional and mental development
- ability to communicate
- ability to understand consequences
- consistency of child's decisions
- strength of wishes and opinions of others (including social worker, therapists, teachers, family members, or hired experts)

Diminished capacity can be incremental and issue specific. A child may be able to make considered decisions about sibling visits but not about another aspect of the case. The child should direct representation in those areas that she does have capacity.

### Substituted judgment

Even when the child's capacity is diminished the lawyer must make a good faith effort to determine the child's needs and wishes and maintain a normal client-lawyer relationship with the client as much as possible. Only when this relationship is not possible can the lawyer substitute his or her judgment and represent the child based on that judgment.

Substituted judgment means the lawyer attempts to determine what the child would decide if the child was capable of making an adequately considered decision. The commentary further explains that the lawyer may seek guidance from appropriate professionals and others who know the child and must seek opportunities to see the child in her environment. *The Model Act* makes clear that substituted judgment is

not the same as determining the child's best interests. This is solely left to the judicial officer.

The commentary encourages lawyers to see the world through the eyes of the child and to ensure all advocacy is:

- child-centered,
- research-informed,
- permanency driven, and
- holistic.

The lawyer should consider the child's legal interests and aim to quickly resolve the case.

### Protective action

*The Model Act* reiterates the guidance in the ABA Model Rules of Professional Conduct (2004) when lawyers represent a client with diminished capacity who is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in his or her own interest. Under these circumstances, the lawyer may take reasonably necessary protective action. *See Rule 1.14, ABA Model Rules of Professional Conduct.* Protective action includes consulting with family members or professionals who work with the child, taking a reconsideration period to allow for improvement in circumstances or child's capacity, and in extreme cases requesting a best interests advocate be appointed.

### Child's participation in proceedings

*The Model Act* establishes that each child has the right to notice and to attend and fully participate in all hearings related to his or her case. If the child wants to be at a hearing and is not transported, *The Model Act* requires the court to postpone the hearing. The commentary provides the following factors to consider the manner in which the child will participate:

- whether the child wants to attend
- child's age

### Resource

For technical assistance on representation of children in abuse in neglect cases, involving youth in dependency court, and other child welfare issues, contact Andrea Khoury at [Andrea.Khoury@americanbar.org](mailto:Andrea.Khoury@americanbar.org)

- child's developmental ability
- child's emotional maturity
- purpose of the hearing
- whether the child would be severely traumatized by such attendance

*The Model Act* also provides several options to make court attendance most meaningful for the child, including the child being present throughout the entire hearing, the child speaking with the judicial officer in chambers, and excluding the child during harmful testimony.

Passing *The Model Act* is only the first step. States must adjust their statutes to ensure that every child is appointed an attorney who follows it. States must also ensure that lawyers have training to implement the provisions. The American Bar Association Center on Children and the Law can be a helpful resource.

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### Endnotes

<sup>1</sup> Previous guidance in the *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* and The ABA Model Rules of Professional Responsibility, although helpful, do not provide as much detail and concrete guidance at the Model Act. This clearer guidance will help provide consistency in representation across the country.