

This Act has *not* been approved by the ABA House of Delegates, nor by the Section of Litigation and should not be construed as ABA Policy.

ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings¹

SECTION 1. DEFINITIONS. In this [act]:

(a) “Abuse or neglect proceeding” means a court proceeding under [cite state statute] for protection of a child from abuse or neglect or a court proceeding under [cite state statute] in which termination of parental rights is at issue.ⁱ These proceedings include:

- (1) abuse;
- (2) neglect;
- (3) dependency;
- (4) child placed voluntarily into state care;
- (5) termination of parental rights;
- (6) permanency hearings; and
- (7) post termination of parental rights through adoption or other permanency proceeding.

(b) A child is:

- (1) an individual who is under the age of 18; or
- (2) an individual under the age of 21 who remains under the jurisdiction of the juvenile court.

(c) “Child’s lawyer” (or “lawyer for children”) means a lawyer who provides legal services for a child and who owes all of the same duties that are due an adult client, including loyalty, confidentiality, diligence, client direction, communication, duty to advise, and competent representation.ⁱⁱ

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

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

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. This Act has *not* been approved by the ABA House of Delegates, nor by the Section of Litigation and should not be construed as ABA Policy.

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

36
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.**

46 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}**

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

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

59 **(f) The child, and only the child, after consultation with a lawyer and with informed**
60 **consent, may waive representation. Neither the best interest advocate, nor a representative**
61 **of the child, may waive representation for the child.^{vi}**

62
63 *Commentary:*

64 This act recognizes the right of every child to have quality legal representation and a voice in
65 any abuse, neglect, dependency, or termination of parental rights proceedings, regardless of
66 developmental level. Nothing in this Act precludes a child from retaining a lawyer. States also
67 should provide a lawyer to a child who has been placed into state custody through a voluntary
68 placement arrangement. The fact that the child is in the state’s custody, even through the

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69 parent’s voluntary decision, should not diminish the child’s entitlement to a lawyer.

70 A best interest advocate does not replace the appointment of a lawyer for the child. A best
71 interest advocate serves to provide guidance to the court with respect to the child’s best interest
72 and does not establish a lawyer-client relationship with the child. Nothing in this Act restricts a
73 court’s ability to appoint a best interest advocate in any proceeding. Because this act deals
74 specifically with lawyers for children, it will not further address the role of the best interest
75 advocate.

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

80

81 **SECTION 4. QUALIFICATIONS OF THE CHILD’S LAWYER.**

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

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

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

92

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

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

97

98 *Commentary:*

99

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

104

105 The lawyer needs to spend enough time on each abuse and neglect case to establish a lawyer-
106 client relationship and zealously advocate for the client. A lawyer’s caseload must allow
107 realistic performance of functions assigned to the lawyer under the [Act]. The amount of time
108 and the number of children a lawyer can effectively represent will differ based on a number of

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109 factors, including type of case, the jurisdiction, whether the lawyer is affiliated with a children's
110 law office, whether the lawyer is assisted by investigators or other child welfare professionals,
111 and the percent of the lawyer's practice spent on abuse and neglect cases. States are encouraged
112 to conduct caseload analyses to determine guidelines for lawyers representing children in abuse
113 and neglect cases.
114

115 **SECTION 5. ORDER OF APPOINTMENT.**

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

121 **(b) In an order of appointment issued under subsection (a), the court may identify a**
122 **private organization, law school clinical program or governmental program through which**
123 **a child's lawyer will be provided. The organization or program shall designate the lawyer**
124 **who will act in that capacity and notify the parties and the court of the name of the**
125 **assigned lawyer as soon as practicable.^{viii} Additionally, the organization or program shall**
126 **notify the parties and the court of any changes in the individual assignment.**
127

128 **SECTION 6. DURATION OF APPOINTMENT.**

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

135 As long as the child remains in state custody, even if the state custody is long-term or permanent,
136 the child should retain the right to counsel so that his or her lawyer can deal with the issues that
137 may arise while the child is in custody but the case is not before the court.

138 **SECTION 7. DUTIES OF CHILD'S LAWYER AND SCOPE OF** 139 **REPRESENTATION.**

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

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

143 **(1) taking all steps reasonably necessary to represent the client in the**
144 **proceeding, including but not limited to: interviewing and counseling the client, preparing**
145 **a case theory and strategy, preparing for and participating in negotiations and hearings,**
146 **drafting and submitting motions, memoranda and orders, and such other steps as**
147 **established by the applicable standards of care for lawyers acting on behalf of children in**

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148 **this jurisdiction;**

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

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

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

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

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

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

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

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

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

170 **(11) where appropriate, endeavoring to represent the child in ancillary legal**
171 **matters, either through appointment from the court or through the retention of alternate**
172 **legal counsel.**

173
174 *Commentary:*

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

177
178 In order to comply with the duties outlined in this section, lawyers must have caseloads that
179 allow realistic performance of these functions.

180
181 Under (b)(9) every effort should be made to have the same lawyer in trial and appellate
182 proceedings.

183
184 The ancillary matters referred to in (b)(10) include special education, school discipline hearings,
185 mental health treatment, delinquency or criminal issues, status offender matters, guardianship,
186 adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth

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187 transitioning out of care issues, postsecondary education opportunity qualification, and tort
188 actions for injury, as appropriate.^{xii} The lawyer should make every effort to ensure that the child
189 is represented by legal counsel in all ancillary legal proceedings, either personally, when the
190 lawyer is competent to do so, or through referral or collaboration. There is value in having one
191 lawyer represent the child across multiple proceedings. The lawyer is better able to understand
192 and fully appreciate the various issues as they arise and how those issues may affect other
193 proceedings.

194
195 **(c) When the child is capable of directing the representation by expressing his or her**
196 **objectives, the lawyer shall maintain a normal client-lawyer relationship with the child in**
197 **accordance with the rules of professional conduct.**

198 *Commentary:*

199 The client-lawyer relationship for the child’s lawyer is fundamentally indistinguishable from the
200 lawyer-client relationship in any other situation and includes duties of client direction^{xiii},
201 confidentiality^{xiv}, diligence^{xv}, competence^{xvi}, loyalty^{xvii}, communication^{xviii}, and the duty to
202 advise.^{xix} Client direction requires the lawyer to abide by the client’s decision about the
203 objectives of the representation. In order for the child to have an independent voice in abuse, and
204 neglect proceedings, the lawyer shall advocate for the child’s counseled and expressed wishes.^{xx}
205 Moreover, providing the child with an independent and client-directed lawyer ensures that the
206 child’s legal rights and interests are adequately protected.

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

211 *Commentary:*

212 The lawyer needs to explain his or her role to the client and, if applicable, explain in what
213 strictly limited circumstances the lawyer cannot advocate for the client’s expressed wishes and in
214 what circumstances the lawyer may be required to reveal confidential information. This
215 explanation should happen during the first meeting so the client understands the terms of the
216 relationship.

217 In addition to explaining the lawyer’s role, the lawyer should explain the process to the child in a
218 developmentally appropriate manner as required by Rule 1.4 of the ABA Model Rules of
219 Professional Conduct or its equivalent.^{xxi} This explanation can and will change based on age,
220 cognitive ability, and emotional maturity. The lawyer needs to take the time to explain
221 thoroughly and in a way that allows and encourages the child to ask questions and that ensures
222 the child’s understanding. The lawyer should also facilitate the child’s participation in the
223 proceeding (See Section 9).

224 In order to determine the objectives of the representation of the child, the lawyer should develop

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225 a relationship with the client. The lawyer should develop a thorough knowledge of the child's
226 circumstances and needs. The lawyer should visit the child in the child's home, school, or other
227 appropriate place where the child is comfortable. The lawyer should observe the child's
228 interactions with parents, foster parents, and other caregivers. The lawyer should maintain
229 regular and ongoing contact with the child throughout the case.

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

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

243 **a. Has diminished capacity,**

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

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

247 **the lawyer may take reasonably necessary protective action, including consulting with**
248 **individuals or entities that have the ability to take action to protect the client and, in**
249 **appropriate cases, seeking the appointment of a best interest advocate or investigator to**
250 **make an independent recommendation to the court with respect to the best interests of the**
251 **child. Information relating to the representation of a child with diminished capacity is**
252 **protected by Rule 1.6 and Rule 1.14 of the ABA Model Rules of Professional Conduct.**
253 **When taking protective action, the lawyer is impliedly authorized under Model Rule 1.6(a)**
254 **to reveal information about the child, but only to the extent reasonably necessary to protect**
255 **the child's interests.**^{xxiii}

256 *Commentary:*

257 If a child is able to direct counsel, but the lawyer determines that the child has diminished
258 capacity, is at risk of substantial harm and cannot act in the client's own interest in connection
259 with the representation, lawyers shall, after unsuccessful use of the lawyer's counseling role,
260 look to Rule 1.14 of the ABA Model Rules of Professional Conduct ("M.R." or "ABA Model
261 Rules") for guidance.^{xxiv} Substantial harm includes both physical and sexual harm.

262 After due consideration, it is the responsibility of the lawyer to determine whether the child

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263 suffers from diminished capacity. This decision shall be made after sufficient contact and
264 regular communication with the client. Determination about capacity should be grounded in
265 insights from child development science and should focus on the child’s decision-making
266 process rather than the child’s choices themselves. Just because the lawyer does not agree with
267 the child’s stated objectives does not mean the child does not have the capacity to direct the
268 representation. Lawyers should be careful not to construe proof of a disability from a client’s
269 insistence upon a view of the client’s welfare that the lawyer considers unwise or at variance
270 with lawyer’s view.^{xxv} When determining the child’s capacity the lawyer should elicit the
271 child’s expressed wishes in a developmentally appropriate manner. The lawyer should not
272 expect the child to convey information in the same way an adult client would. A child’s age is
273 not determinative of diminished capacity. For example, even very young children are regarded
274 as having opinions that are entitled to weight in legal proceedings concerning their custody.^{xxvi}

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

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

295 “Information relating to the representation is protected by M.R. 1.6. Therefore, unless
296 authorized to do so, the lawyer may not disclose such information. When taking protective
297 action pursuant to this section, the lawyer is impliedly authorized to make the necessary
298 disclosures, even when the client directs the lawyer to the contrary,”^{xxx} however the lawyer must
299 make every effort to avoid disclosures. Where disclosures are unavoidable, the lawyer must
300 limit the disclosures as much as possible. M.R. 1.6 and 1.14 limit what the lawyer may disclose
301 in consulting with other individuals or entities or in seeking the appointment of a best interest
302 advocate. Prior to any consultation, the lawyer should consider the impact on the client’s
303 position, and whether the individual is a party who might use the information to further his or her
304 own interests. “At the very least, the lawyer should determine whether it is likely that the person

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305 or entity consulted with will act adversely to the client’s interests before discussing matters
306 related to the client.”^{xxxii} If any disclosure by the lawyer will have a negative impact on the
307 client’s case or the lawyer-client relationship, the lawyer must consider whether representation
308 can continue and whether the lawyer-client relationship can be re-established. “The lawyer’s
309 position in such cases is an unavoidably difficult one.”^{xxxiii}

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

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

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

336
337 Recognizing that a lawyer’s training does not provide the multidisciplinary perspectives
338 necessary to determine a child’s best interest, the lawyer should seek input from experts from
339 other disciplines for guidance. Moreover, in determining the child’s best interest the lawyer
340 should seek to protect the child’s legal rights, maximize the child’s capacities, respect the child’s
341 family and social connections, recommend the least intrusive state intervention, recommend the
342 least detrimental alternative, address any disabilities the child and family may have, give due
343 weight to parents’ preference in the absence of conflict or harm to the child, and honor the
344 child’s culture. In order to do so, the lawyer needs to understand all available options and
345 develop a deep, rich understanding of the client in the context of his or her family, his or her
346 community, and his or her life to that point. Additionally, while the child is in state care, the

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347 child's lawyer should ensure that the state agency is providing the services to which the child is
348 entitled under the law including, but not limited to, the least restrictive placement alternative, a
349 safe foster home, stability of placements, medical care, early intervention and educational needs,
350 state and federal benefits, visitation, effective case planning, and services to the child and
351 biological family addressing the underlying reason for removal.

352
353 Criteria for determining when a client is incapable of directing the representation include the
354 child's age (though age alone is not dispositive) and inability to communicate because the child
355 is preverbal or so young as to be unable to engage in a meaningful reasoning process about
356 issues that are relevant to the proceeding. A child's capacity to direct counsel is contextual and
357 incremental and is not simply a function of his or her chronological age. Because of the evolving
358 nature of children's competencies, a child who is unable to express his or her objectives for one
359 hearing or proceeding may be able to communicate sufficiently to direct the lawyer at a later
360 hearing or proceeding. The lawyer must maintain regular contact with an incapacitated child in
361 order to continue to assess the child's capacity.

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

365
366

367 **SECTION 8. ACCESS TO CHILD AND INFORMATION RELATING TO THE**
368 **CHILD.**

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

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

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

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

386 **(c) An order issued pursuant to subsection (a) shall require that a child's lawyer**

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387 **maintain the confidentiality of information released pursuant to Model Rule 1.6. The court**
388 **may impose any other condition or limitation on an order of access which is required by**
389 **law, rules of professional conduct, the child’s needs, or the circumstances of the**
390 **proceeding.**

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

393 (e) **Subject to subsection (b), an order issued pursuant to subsection (a) takes effect**
394 **upon issuance.**^{xxxiv}

395 **SECTION 9. PARTICIPATION IN PROCEEDINGS.**

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

398 (b) **Each child shall receive notice from the child welfare agency worker and the**
399 **child’s lawyer of his or her right to attend the court hearings.**

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

404 (d) **If the child wished to attend and was not transported to court the matter shall**
405 **be continued.**

406 (e) **The child’s presence shall only be excused after counsel for the child has**
407 **consulted with the child and, with informed consent, has waived the child’s right to attend.**

408 (f) **A child’s lawyer appointed under this [act] is entitled to:**

409 (1) **receive a copy of each pleading or other record filed with the court in the**
410 **proceeding;**

411 (2) **receive notice of and attend each hearing in the proceeding [and**
412 **participate and receive copies of all records in any appeal that may be filed in the**
413 **proceeding];**

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

416 (4) **receive notice of any intent to change the child’s placement. In the case of**
417 **an emergency change, the lawyer shall receive notice as soon as possible but no later than**
418 **48 hours following the change of placement.**

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

422 (h) **A best interest advocate may not take any action that may be taken only by a**
423 **lawyer licensed in this state, including making opening and closing statements, examining**

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424 **witnesses in court, and engaging in discovery other than as a witness. A best interest**
425 **advocate may not engage in ex parte contact with the court.**

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

429 [(j) **In a jury trial, disclosure to the jury of the contents of a best interest advocate’s**
430 **report is subject to this state’s rules of evidence.]^{xxxv}**

431
432 *Commentary:*

433
434 Courts need to provide the child with notification of each hearing. The Court should enforce the
435 child’s right to attend and fully participate in all hearings related to his or her abuse and neglect
436 proceeding.^{xxxvi} Having the child in court emphasizes for the judge and all parties that this
437 hearing is about the child. Factors to consider regarding the child’s presence at court and
438 participation in the proceedings include: whether the child wants to attend, the child’s age, the
439 child’s developmental ability, the child’s emotional maturity, the purpose of the hearing and
440 whether the child would be severely traumatized by such attendance. In accepting a decision not
441 to attend, the lawyer should consult with therapists, caretakers, or other persons who have
442 specific knowledge of the child.

443
444 Lawyers should consider the following options in determining how to provide the most
445 meaningful experience for the child to participate: allowing the child to be present throughout
446 the entire hearing, presenting the child’s testimony in chambers adhering to all applicable rules
447 of evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing
448 the child into the hearing, allowing the child to be present only when the child’s input is
449 required, excluding the child during harmful testimony, and presenting the child’s statements in
450 court adhering to all applicable rules of evidence.

451
452 Courts should reasonably accommodate the child to ensure the hearing is a meaningful
453 experience for the child. The court should consider: scheduling hearing dates and times when the
454 child is available and least likely to disrupt the child’s routine, setting specific hearing times to
455 prevent the child from having to wait, making courtroom waiting areas child friendly, and
456 ensuring the child will be transported to and from each hearing.

457
458 The lawyer for the child plays an important role in the child’s court participation. The lawyer
459 shall ensure that the child is properly prepared for the hearing. The lawyer should meet the child
460 in advance to let the child know what to expect at the hearing, who will be present, what their
461 roles are, what will be discussed, and what decisions will be made. If the child would like to
462 speak to the judge, the lawyer should counsel with the child on what to say and how to say it.
463 After the hearing, the lawyer should explain the judge’s ruling and allow the child to ask
464 questions about the proceeding.

465

This Act has *not* been approved by the ABA House of Delegates, nor by the Section of Litigation and should not be construed as ABA Policy.

466

467

SECTION 10. LAWYER WORK PRODUCT AND TESTIMONY.

468

469

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

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471

(a) be compelled to produce the lawyer’s work product developed during the appointment;

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473

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

474

475

(c) introduce into evidence a report prepared by the lawyer; or

476

(d) provide any testimony that is subject to the attorney-client privilege.

477

478

479

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

480

481

482

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

483

SECTION 11. CHILD’S RIGHT OF ACTION.

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485

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

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487

488

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

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490

SECTION 12. FEES AND EXPENSES IN ABUSE OR NEGLECT PROCEEDINGS.

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493

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

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

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

This Act has *not* been approved by the ABA House of Delegates, nor by the Section of Litigation and should not be construed as ABA Policy.

503

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].

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} ABA Standards, Part II, Sec L-1-2.

^{viii} NCCUSL Act, Sec. 9

^{ix} *Id.*, Sec. 10(a)

^x 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).

^{xi} NCCUSL Act, Sec. 11 Alternative A..

^{xii} ABA Standards, Part I, Sec C-1-6; *see generally* La. Sup. Ct. R. XXXIII, Standards 1-7.

^{xiii} ABA Model Rules of Professional Responsibility (hereinafter M.R.) 1.2

^{xiv} M.R. 1.6

^{xv} M.R. 1.3

^{xvi} M.R. 1.1

^{xvii} M.R. 1.7

^{xviii} M.R. 1.4

^{xix} M.R. 2.1

^{xx} ABA Standards, commentary A-1

^{xxi} M.R. 1.4

^{xxii} M.R. 2.1

^{xxiii} M.R. 1.14(c)

^{xxiv} *See* ABA *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (NACC Revised Version)*, B-4(4)

^{xxv} Restatement (Third) of the Law Governing Lawyers Sec. 24 c. c (2000).

^{xxvi} M.R. 1.14 cmt. 1

^{xxvii} M.R. 1.14, cmt. 1

^{xxviii} 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.

^{xxix} M.R. 1.14 cmt. 5

^{xxx} M.R. 1.14 cmt. 5

^{xxxi} M.R. 1.14, cmt. 8

^{xxxii} M.R. 1.14, cmt. 8

^{xxxiii} M.R. 1.14, cmt 8

^{xxxiv} NCCUSL Act, Sec. 15

^{xxxv} NCCUSL Act, Sec. 16

^{xxxvi} American Bar Association Youth Transitioning from Foster Care August 2007; American Bar Association Foster Care Reform Act August 2005

^{xxxvii} NCCUSL Act, Sec. 18; *see also* NACC, *Recommendations for Representation of Children in Abuse and Neglect Cases*, Sec. 3A(8).

^{xxxviii} N.C. Gen. Stat. Ann. § 7B-603.

^{xxxix} NCCUSL Act, Sec. 19.