

DRAFT
FOR DISCUSSION ONLY

**UNIFORM REPRESENTATION OF CHILDREN IN
ABUSE AND NEGLECT AND CUSTODY
PROCEEDINGS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting October 7-9, 2005

WITH PREFATORY NOTE AND COMMENTS

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ON UNIFORM STATE LAWS

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UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT AND CUSTODY PROCEEDINGS ACT

Prefatory Note

The role of lawyers representing children in court proceedings affecting their interests has been the subject of intense debate within the last decade. Disagreements focus on such fundamental questions as whether appointment of counsel should be mandatory, how a lawyer should determine a child's capacity to direct the legal representation, what a lawyer should do for a child who lacks that capacity, and whether a lawyer may both represent a child as the child's lawyer and participate as guardian ad litem for the child.¹

Several competing proposals have emerged that address the important question of representation of children. In 1995, the American Academy of Matrimonial Lawyers adopted a set of standards under which lawyers are to advocate the wishes of the "unimpaired" child but can act only as a conduit of information for the "impaired" child.² In the same year, the Family

¹For thoughtful explorations of all of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). In Professor Peters's view, an attorney should develop a relationship with a child over time and interpret the child's wishes in context of the child's individualized circumstances. Another comprehensive analysis of the legal and ethical issues involved in representing children is ANN M. HARALAMBIE, THE CHILD'S ATTORNEY (1993). Haralambie proposes that children's attorneys should advocate the child's wishes unless they are potentially harmful to the child but should request appointment of a guardian ad litem where the child's wishes are deemed unreasonable. She also notes that ethical dilemmas can be minimized or eliminated if children's attorneys spend significant time advising their clients. Haralambie urges lawyers to explain to children why their positions are unreasonable and counsel them about alternatives. *See also* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996)(exploring ways in which lawyers can redefine their role *vis a vis* the child client); Catherine Ross, *From Vulnerability to Voice*, 64 FORDHAM L. REV. 1579 (1996)(advocating mandatory appointment of independent counsel for children in high conflict divorces); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996)(advocating that a child's lawyer should focus on enforcing the child's legal rights rather than on carrying out the child's expressed objectives). For an insightful examination of the child's limited capacity to direct counsel, see Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

²*American Academy of Matrimonial Lawyers Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1 (1995). For a critique of the AAML approach, see Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J.

Law Section of the American Bar Association proposed a contrasting set of Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (“Abuse and Neglect Standards”),³ taking a different approach to the question of children’s competence to direct representation. Under those standards, which were adopted by the ABA in 1996, a lawyer should advocate the child’s articulated preference, but if a child will not or does not express a preference, the lawyer should advocate the child’s legal interests determined by objective criteria. The ABA Abuse and Neglect Standards take the position that a child’s disability from immaturity is incremental and issue-specific.

A conference on the representation of children was held at Fordham Law School in 1996 entitled Ethical Issues in the Legal Representation of Children. This conference examined the principles set out in the then-proposed standards promulgated by the ABA and proposed various refinements.⁴ The American Law Institute added its views with the publication of the Principles of the Law of Family Dissolution.⁵ The ALI recommends that courts be given broad discretion in private custody disputes to appoint either a guardian with investigatory or advocacy capacity or a lawyer for the child if the child is competent to direct the terms of the representation.⁶ Most recently, the ABA returned to the same questions in the context of child custody proceedings and in 2003 adopted Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards).⁷

State laws vary dramatically on the appointment of representatives for children, with some models emphasizing the unique vulnerability of children and children’s need for adult protection and guardianship to determine their interests, while other models affirm a child’s right

Am Acad. Matrim. Law. 57 (1995).

³American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375 (1995) (Abuse and Neglect Standards).

⁴*Recommendations of the Conference on Ethical issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996)(Fordham Recommendations)(attorney must follow child’s expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint).

⁵American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

⁶*Id.* at § 2.13.

⁷American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003).

to have his or her wishes presented by a zealous advocate.⁸ In the abuse and neglect context, the federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a guardian ad litem for a child, but the role and identity of that representative are largely undefined.⁹ In response to CAPTA, almost all states now require some form of child representation in abuse and neglect proceedings, but the role of the representative ranges from lay guardians to legal counsel.¹⁰ Many states routinely appoint lawyers to function as guardians ad litem, without careful delineation of the distinctions between the ethical responsibilities of a lawyer to the client and the professional obligations of the guardian ad litem as a best interests witness for the court. In the custody context outside of child protective proceedings, states have even fewer guidelines about the appointment of representatives for children. Typically, state law simply authorizes the appointment of counsel or guardian ad litem as a matter of judicial discretion.¹¹

In light of the disagreements among the various professional organizations committed to child advocacy and the marked variation in approaches across the United States, the National Conference of Commissioners on Uniform State Laws concluded that this important area could benefit from a uniform law. The Conference concluded that a uniform act would enhance the quality and professionalism of children's representatives and ultimately would benefit the interests of children nationwide.

The proposed Act seeks to improve the representation of children in proceedings directly affecting their interests by clearly defining the roles and responsibilities of children's

⁸See Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice* (1999)(reporting that attorney/GAL and traditional attorney are models that have dominated representation of children).

⁹See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000), which requires states to have “provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings–(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”

¹⁰See Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 Fam. L. Q. 765, 768-69 (1999).

¹¹Section 310 of the Uniform Marriage and Divorce Act, for example, provides for the discretionary appointment of counsel for a child. Revealing the blurring of professional lines, the Comment explains that “[t]he attorney is not a guardian ad litem for the child, but an advocate whose roles is to represent the child's interests.”

representatives and by providing guidelines to courts in appointing representatives. An important premise underlying the Act is that an attorney should be appointed for every child who is the subject of an abuse or neglect proceeding.¹² In abuse and neglect cases, as defined in the Act, court orders effectively determine a child's future, including whether the child will remain in his or her home, the nature and duration of any placement outside the home, the child's contact with parents and other relatives, and the child's access to social services. The requirement of appointed counsel rests on the recognition that children's interests in these proceedings are of fundamental importance. The ABA has long advocated the mandatory appointment of attorneys for children in abuse and neglect proceedings in addition to the appointment of guardians ad litem, and more than half the states require the appointment of an attorney/guardian ad litem. Although the role of counsel may vary depending on the developmental level of the child and other factors, legal representation for children can ensure that court orders are based on an accurate, informed, and sensitive assessment of the child's circumstances.

The Act not only integrates the two sets of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody Standards – but it also addresses the role of the non-lawyer representative, denominated a “court advisor” under the Act. By its inclusive nature, the Act provides standards that differentiate among the various representatives while indicating where certain core duties are shared by all categories of children's representatives. These objectives are implemented through the definitions set out in Section 2, standards for the appointment of counsel and court advisors in Sections 4-8, the qualifications of counsel and court advisors in Sections 9 and 10, and the description of powers, responsibilities, and immunity in Sections 11-18. Fees and expenses are addressed in Sections 19 and 20.

The Act provides for two categories of lawyers for children—the child's attorney and the best interests attorney—but does not endorse the dual role category of attorney/guardian ad litem.¹³

¹²Recognizing the need for legal representation for children in abuse and neglect proceedings, a federal district court held that appointment of counsel was required as a matter of procedural due process under the Georgia Constitution. *See Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005). Moreover, federal law has long authorized the discretionary appointment of counsel for Indian children subject to the Indian Child Welfare Act. See 25 U.S.C. § 1912(b).

¹³The Act rejects the dual role category because it has given rise to a blurring of professional roles where, for example, the same individual functions both as an attorney for the child and a witness in the proceeding. *See* Rule 3.7, A.B.A. Model Rules of Professional Conduct (2002) (generally prohibiting attorney from acting as advocate and witness in same proceeding). In addition, problems have arisen with the dual role approach because of ethical constraints that are inherent in the attorney/client relationship, including in particular the confidentiality of client communications. For a court's recognition of the tensions inherent in the hybrid attorney/guardian ad litem, see *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

The child's attorney is in a traditional attorney-client relationship with the child and is therefore under traditional ethical limitations governing that relationship.¹⁴ The Act authorizes, however, a limited exercise of "substituted judgment" by the child's attorney under Section 12 when the child is incapable of reasoned judgment and meaningful communication as to a particular issue. In that limited circumstance, the child's attorney may take a position that is in the child's best interests so long as the position is not in conflict with the child's expressed objectives. The child's attorney may also request appointment of a court advisor or, where permitted, a best interests attorney.¹⁵ Similarly, if a child's expressed goals would put the child at risk of harm, the child's attorney should request the appointment of a court advisor or, where permitted, a best interests attorney. By appointing a court advisor, the court can seek to ensure that evidence of potential harm to the child will be disclosed. Nevertheless, the child's attorney may continue to present the child's expressed goals to the court unless the child's position is prohibited by law or lacking in factual foundation. Under the Act, the child's attorney remains a client-directed representative. The design of the Act is to keep the child's attorney within the appointed role and not to permit a more subjective pursuit of the child's best interests.

In contrast, the best interests attorney under the Act, while remaining in the professional role of an attorney, has the substantive responsibility of assisting the court in determining the child's best interests. Thus, under Section 13, the best interests attorney is not bound by the client's expressed objectives and may use (but not disclose) client's confidences where necessary to protect the child's interests in the proceeding.

Finally, under the Act, the court advisor is a representative of the child whose role is to assist the court in determining the child's best interests. The court advisor's responsibilities include investigation of the case and, where appropriate, making a recommendation to the court. See Section 14. As such, the Act makes clear that the court advisor may not perform acts that would be restricted to a licensed attorney, even if the person appointed to be court advisor holds a license to practice law. The Act also endorses the widespread use of Court Appointed Special Advocates (CASAs) to fulfill the role of court advisor.¹⁶

¹⁴Model Rule 1.14 of the ABA Model Rules of Professional Conduct provides useful guidance in representing a client with diminished capacity. A helpful exploration of ethical issues facing a child's attorney can be found in Jennifer L. Renne, *Legal Ethics in Child Welfare Cases* (ABA 2004).

¹⁵In the design of the Act, states may choose to prohibit the appointment of a best interests attorney for a child who already has a child's attorney. See Sections 12 and 13 and Commentary.

¹⁶The Court Appointed Special Advocate is a lay volunteer who advocates as a non-lawyer on behalf of a child in child abuse and neglect proceedings. CASAs generally are screened and trained at the local level but all CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that

Because of the fundamental importance of the interests at stake in child welfare cases, Section 4 requires the appointment of either a child’s attorney or a best interests attorney for children in abuse and neglect proceedings. Under CAPTA, on the other hand, states must appoint a “guardian ad litem” for children in abuse and neglect proceedings as a condition of receiving federal CAPTA funding, and the statute expressly permits the guardian to be a lawyer.¹⁷ Although the CAPTA provision for guardian ad litem may be broad enough to encompass either a best interests attorney or a child’s attorney, In light of the ambiguity surrounding the meaning of “guardian ad litem” under federal law, this Act provides two alternative approaches. See Section 5 and Comment. If a child in an abuse or neglect proceeding does not have a best interests attorney, Section 5, Alternative A, requires the additional appointment of a court advisor to meet the CAPTA requirement. In contrast, under Section 5, Alternative B, the appointment of a court advisor is discretionary when either a child’s attorney or a best interests attorney has been appointed in an abuse and neglect proceeding.

In custody proceedings, the Act leaves to judicial discretion the question of appointing a child’s representative. Although there may be significant benefits to having a representative for a child, courts should consider the child’s interests, the court’s needs, and the parties’ resources before making an appointment. Section 6 provides a list of factors to assist the court in deciding whether to appoint a representative at all and, if a representative is to be appointed, which category of representative is appropriate.

While the Act sets out basic guidelines for the appointment and role of attorneys and court advisors, states can provide more detailed guidelines through separate standards of practice. Standards in effect in many states address ethical concerns, specific training and experience requirements, and other professional issues facing children’s representatives that are beyond the scope of this Act.

organization. See www.nationalcasa.org. In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience.

¹⁷See 42 U.S.C. § 5106a(b)(2)(A)(xiii), quoted *supra* at note 9.

1 **UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT AND**
2 **CUSTODY PROCEEDINGS ACT**

3
4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Representation of
5 Children in Abuse and Neglect and Custody Proceedings Act.

6 **SECTION 2. DEFINITIONS.** In this [act]:

7 (1) “Abuse and neglect proceeding” means a court proceeding under [cite state
8 statute] for protection of a child from abuse or neglect or a court proceeding under [cite state
9 statute] in which termination of parental rights is at issue.

10 (2) “Best interests attorney” means an attorney appointed by the court to provide
11 independent legal services to protect a child’s best interests without being bound by the child’s
12 directives or objectives.

13 (3) “Child’s attorney” means an attorney appointed by the court to provide legal
14 representation for a child.

15 (4) “Court advisor” means a person appointed to assist the court in determining
16 the best interests of a child.

17 (5) “Custody proceeding” means a court proceeding in which legal or physical
18 custody of a child, parenting time, access, or visitation is at issue, including a proceeding relating
19 to divorce, separation, determination of parentage, adoption, private guardianship, and protection
20 from domestic violence. The term does not include a proceeding initiated against a child because
21 of the conduct of the child.

22 (6) “Developmental level” means the ability to understand and communicate,

1 taking into account such factors as the child’s age, mental capacity, level of education, cultural
2 background, and degree of language acquisition.

3 **Comment**

4 The definitions reflect the range of court-appointed representatives for children that are
5 encompassed by the ABA Custody Standards: child’s attorney, best interests attorney, and
6 guardian ad litem, except that the Act uses the new term “court advisor” in order to avoid the
7 widespread disagreement and confusion about the meaning of “guardian ad litem.” Under the
8 Act, a “child’s attorney” is a client-directed lawyer in a traditional attorney-client relationship
9 with the child, while a “best interests attorney” provides legal services to a child but is not bound
10 by the child’s directives. A best interests attorney may only serve under the authority of a court
11 appointment, while in some jurisdictions a privately retained attorney may function as the child’s
12 attorney without a court appointment. This Act, however, governs only court-appointed
13 representatives for children.
14

15 The “court advisor” assists the court in determining the best interests of a child and will
16 therefore perform many of the functions formerly attributable to guardians ad litem, but the Act
17 makes clear that court advisors are not to function as attorneys. Instead, a court advisor will
18 independently investigate the child’s circumstances and may sometimes testify in the case about
19 the child’s best interests. *See* Section 14. Similarly, because the role of attorney, whether child’s
20 attorney or best interests attorney, is functionally and ethically inconsistent with that of a
21 guardian ad litem, the Act does not endorse the dual role attorney/guardian ad litem employed in
22 numerous states.
23

24 As a condition of receiving federal child welfare funding, states must appoint a “guardian
25 ad litem” in every judicial proceeding involving an abused or neglected child. *See* Child Abuse
26 Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). The federal Act does
27 not define the role of the guardian ad litem beyond stating that the guardian, who may be an
28 attorney or court appointed special advocate, shall “(I) obtain first-hand, a clear understanding of
29 the situation and needs of the child; and (II) make recommendations to the court concerning the
30 best interests of the child.” *Id.* The best interests attorney by definition should satisfy CAPTA’s
31 requirement, since that attorney’s role is to provide legal services to protect a child’s best
32 interests. A child’s attorney may also satisfy CAPTA, depending on a state’s interpretation of
33 federal law. Even a child-directed lawyer functioning in the role of a child’s attorney will
34 ultimately facilitate the court’s resolution in the child’s best interests, and the child’s attorney
35 may, in situations justifying substituted judgment under Section 12, advocate a position the
36 lawyer believes is in the child’s interests. Also, the attorney must take remedial action if the
37 child’s objectives will subject the child to a risk of serious harm. *See* Section 12. Section 5
38 addresses the potential impact of the CAPTA requirement in abuse and neglect proceedings for
39 the appointment of court advisors.
40

1 Under the definitions of this Act, abuse and neglect proceedings include child protection
2 proceedings ordinarily brought in juvenile court, such as dependency actions and foster care
3 placements, as well as actions to terminate parental rights. A custody proceeding, in contrast,
4 includes private custody disputes, adoptions, private guardianships, and other proceedings in
5 which the child's legal or physical custody is at issue. In some circumstances, credible and
6 serious allegations of abuse or neglect will surface in a custody proceeding. If the court
7 determines that the case should go forward as an abuse and neglect proceeding (generally
8 entailing a transfer to juvenile court), then this Act's terms regarding abuse and neglect
9 proceedings – including, in particular, the mandatory appointment of counsel for the child – will
10 govern. In some states a custody case can be referred to juvenile court for investigative purposes.
11 Such a referral would not transform the proceeding into an abuse and neglect proceeding until a
12 dependency petition is filed.
13

14 SECTION 3. APPLICATION.

15 (a) This [act] does not apply to a child's privately retained attorney or other
16 representative who has not been appointed by the court in the abuse and neglect or custody
17 proceeding.

18 (b) This [act] does not diminish children's rights, standing, or party status under
19 law other than this [act].

20 (c) Neither the child nor the child's representative, whether or not appointed by
21 court, may waive the child's right to representation under this [act].

22 Comment

23 The Act does not govern privately-retained counsel for children since in some
24 jurisdictions a child or parent remains free to independently hire a lawyer to represent the child.
25 While it is hoped that privately-retained counsel will adhere voluntarily to the standards in the
26 Act, the Act by its own force applies only to court-appointed lawyers and court advisors.
27 Nevertheless, a lawyer who is initially privately retained may thereafter seek an appointment.
28 Once such a formal appointment occurs, the Act applies. Similarly, if a child in an abuse and
29 neglect or custody proceeding already has a lay representative through appointment from another
30 court, that representative is not bound by this Act until he or she is appointed for purposes of the
31 instant proceeding. It should be noted that a representative may be court-appointed without
32 receiving compensation from the court or other government sources.
33

1 The Act is not intended to diminish children’s rights recognized under other federal or
2 state laws. For example, the Indian Child Welfare Act authorizes courts to appoint counsel for
3 Indian children in proceedings governed by the ICWA when such appointment is in the best
4 interests of the child. *See* 25 U.S.C. § 1912(b) (2000). While the ICWA gives courts discretion
5 to appoint counsel in Indian child welfare proceedings, this Act would supplement that provision
6 by requiring appointment of counsel as a matter of state law in all abuse and neglect proceedings.
7 At the same time, the ICWA provides jurisdictional rules and placement preferences for the
8 foster and adoptive placement of Indian children. *See* 25 U.S.C. §§ 1911-1915. The federal
9 statutory standards would necessarily govern the attorney’s representation of an Indian child
10 under the ICWA.

11
12 Similarly, this Act does not diminish state laws that afford children standing or the right
13 to broader participation in abuse and neglect or custody cases than provided under the Act. The
14 Act establishes guidelines for the appointment of representatives for children, without regard to a
15 state’s position on whether the child should be recognized as a separate party to a custody
16 proceeding. State laws regarding the standing of third parties to initiate custody actions are also
17 not affected by this Act.

18
19 Likewise, state law may impose specialized rules for particular proceedings, such as
20 guardianships or adoptions. In many states, for example, a child of a certain age has a statutory
21 right to veto a proposed adoption. *See, e.g.,* Ariz. Rev. Stat. § 8-106 (2004) (consent of child
22 twelve years of age or older required for adoption); West’s Ann. Cal. Fam. Code § 8602 (2004)
23 (same). Several states provide a right to counsel for children in contested adoption proceedings.
24 *See, e.g.,* Okla. Stat. Ann. § 7505-1.2 (2004). Where such specialized rules are in effect, they
25 control the more general provisions of this Act.

26
27 **SECTION 4. MANDATORY APPOINTMENT IN ABUSE AND NEGLECT**
28 **PROCEEDING.**

29 (a) [Subject to Section 12(e), in][In] an abuse and neglect proceeding, the court
30 shall appoint either a child’s attorney or a best interests attorney. The appointment must be made
31 as soon as practicable to ensure adequate representation of the child and in any event before the
32 first court hearing that substantially affects the interests of the child. If the court does not
33 designate the role of the attorney in the initial appointment, the court shall do so by order of
34 appointment no later than the first hearing, based on information provided by the appointed

1 attorney and any other source available to the court.

2 (b) In determining whether to appoint a child's attorney or a best interests
3 attorney, the court shall consider the child's circumstances and the court's needs for information
4 and assistance in the particular proceeding. The court shall consider such factors as the child's
5 developmental level, any desire for an attorney expressed by the child, ~~any objectives in the~~
6 ~~proceedings expressed by the child~~, and the value of an independent advocate for the child's best
7 interests.

8 (c) The court may appoint one attorney to represent siblings if there is no conflict
9 of interest, even if the attorney serves in different capacities with respect to two or more siblings.
10 If a conflict arises, the attorney shall take any action required by [this state's rules of professional
11 conduct].

12 **Comment**

13 This section requires the appointment of an attorney for every child who is the subject of
14 an abuse and neglect proceeding because of the fundamental importance of the interests at stake.
15 Although the nature of the attorney's role may vary from case to case, the child's right to legal
16 representation is a function of basic procedural justice. The Act leaves the choice between a best
17 interests attorney or a child's attorney to judicial discretion. It should be noted that a custody
18 proceeding may become an abuse and neglect proceeding because of substantial allegations of
19 abuse or neglect, as explained in the Comment to Section 2. In that event, this section's
20 mandatory appointment of counsel for the child would apply.

21
22 The nature of the appointment – whether child's attorney or best interests attorney –
23 should reflect the court's individualized assessment of the child's interests and developmental
24 level and the court's needs in the particular proceeding. Ordinarily, a child's attorney should be
25 appointed for a child capable of considered judgment, while a best interests attorney would be
26 appropriate for a preverbal or very young child incapable of expressing a considered choice about
27 issues that are relevant to the proceeding. The court should focus on the child's decision-making
28 process rather than the child's choices themselves. The selection of the type of attorney,
29 however, depends on the reasons for the appointment and the needs of the child and is not simply
30 a function of the child's chronological age.
31

1 This section permits the appointment of a single lawyer for two or more siblings, even if
2 that lawyer is acting as child's attorney for one sibling and best interests attorney for another. A
3 lawyer for multiple siblings may have a better understanding of the children's family context
4 than would a lawyer for only one sibling. Thus, the presence of a *potential* conflict of interest
5 should not preclude the representation of multiple siblings. On the other hand, if an *actual*
6 conflict of interest arises, common representation would be inappropriate. If the representation
7 of one child is materially limited by the lawyer's responsibilities to another child (where, for
8 example, one child seeks to establish parental unfitness and another opposes the production of
9 such evidence), the attorney must take remedial steps and may be forced to withdraw from some
10 or all representation. *See* Rule 1.7, ABA Model Rules of Professional Conduct (2002). Key
11 concerns are whether pursuing one client's objectives will prevent the lawyer from pursuing
12 another client's objectives, and whether confidentiality will be compromised. *See* Jennifer L.
13 Renne, *Legal Ethics in Child Welfare Cases* 47-60 (ABA 2004).

14
15 Ideally, a child will have the same lawyer throughout the pendency of the abuse and
16 neglect proceeding. Continuity in representation is particularly important in building trust in the
17 child, and the lawyer's representation will be more informed if the same lawyer has been on the
18 case from its inception. Nevertheless, a lawyer appointed to represent a child in an abuse and
19 neglect proceeding may need to withdraw from representation due to conflicts or other reasons.
20 If the court grants permission to withdraw, the court should appoint a new lawyer as soon as
21 feasible to continue the representation.
22

23 **SECTION 5. APPOINTMENT OF COURT ADVISOR IN ABUSE AND** 24 **NEGLECT PROCEEDING.**

25 ***ALTERNATIVE A***

26 (a) In an abuse and neglect proceeding:

27 (1) if the court does not appoint a best interests attorney, the court shall
28 appoint a court advisor; or

29 (2) if the court appoints a best interests attorney, the court may appoint a
30 court advisor if the court determines that a court advisor is necessary to assist the court in
31 determining the best interests of the child.

32 (b) In determining whether a court advisor is necessary under subsection (a)(2),

1 the court shall consider such factors as the court's need for information regarding the child's
2 circumstances, the value of a court advisor's expertise, and any request by the best interests
3 attorney for the appointment of a court advisor.

4 (c) The court shall make an appointment under subsection (a) as soon as
5 practicable. An appointment under subsection (a)(1) must be made before the first court hearing
6 that substantially affects the interests of the child.

7 ***ALTERNATIVE B***

8 Whether the attorney appointed pursuant to Section 4 is a child's attorney or a best
9 interests attorney, the court may appoint a court advisor if the court determines that a court
10 advisor is necessary to assist the court in determining the child's best interests. In determining
11 whether to make an appointment, the court shall consider such factors as the court's need for
12 information regarding the child's circumstances, the value of a court advisor's expertise, and any
13 request by the child's attorney or the best interests attorney for the appointment of a court
14 advisor.

15 **Comment**

16 This section is consistent with requirements of current federal law regarding the
17 appointment of guardians ad litem. As a condition of receiving federal child welfare funding,
18 states must appoint a guardian ad litem in every judicial proceeding involving an abused or
19 neglected child. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii)
20 (2000). *See* Comment to Section 2. While either a best interests attorney or a child's attorney
21 may satisfy CAPTA's guardian ad litem requirement, this section gives states the option of
22 interpreting CAPTA more narrowly. ~~The best interests attorney should satisfy CAPTA's~~
23 ~~requirement, since that attorney's role is to provide legal services to protect a child's best~~
24 ~~interests.~~ For those states that read CAPTA to always mandate a best interests advocate,
25 Alternative A requires that a court advisor be appointed unless the child has a best interests
26 attorney. Thus, if a best interests attorney has not been appointed, Alternative A of this section
27 directs the court to appoint a court advisor.
28

1 Alternative B, on the other hand, would be appropriate for those states that read
2 CAPTA's requirement to be satisfied by the appointment of either a child's attorney or a best
3 interests attorney. Even a client-directed lawyer functioning in the role of a child's attorney will
4 ultimately facilitate the court's resolution in the child's best interests. For that reason, under
5 Alternative B, the appointment of a court advisor is discretionary when either a child's attorney
6 or a best interests attorney has been appointed in an abuse and neglect proceeding. For this more
7 flexible interpretation of the CAPTA guardian ad litem requirement, see U.S. Department of
8 HHS Children's Bureau, *Adoption 2002: The President's Initiative on Adoption and Permanence*
9 *for Children*, Commentary to Guideline 15A.

11 **SECTION 6. DISCRETIONARY APPOINTMENT IN CUSTODY PROCEEDING.**

12 (a) [Subject to Section 12(e), in] [In] a custody proceeding, the court may appoint
13 either a child's attorney or a best interests attorney. Whether or not the court appoints an
14 attorney, the court may appoint a court advisor. An appointment may be made at any stage of the
15 proceeding and must designate the role of the appointee.

16 (b) Subject to subsection (c), the court shall make an appointment under this
17 section if it determines that an appointment is appropriate in light of the nature and adequacy of
18 the evidence ~~to be~~ presented by the parties, the court's need for additional information relevant to
19 the best interests of the child, the need to minimize harm to the child from the processes of
20 family separation and litigation, the cost to the parties and their ability to pay, and the cost of
21 available alternatives for resolving the issues in the proceeding.

22 (c) In determining whether an appointment is appropriate, the court shall
23 consider:

24 (1) any views or concerns expressed by the child, including any request by
25 the child for appointment of a representative;

26 (2) the likelihood that the child will be called as a witness or be examined

1 by the court in chambers;

2 (3) any need ~~requests~~ for extraordinary remedies, such as supervised
3 visitation;

4 (4) the presence of a high level of acrimony between the parties or a party
5 and the child;

6 (5) the likelihood of relocation that could substantially reduce the child's
7 time with a parent or sibling;

8 (6) any past or present substance abuse by the child, a party, or a
9 household member;

10 (7) any dispute as to paternity;

11 ~~(8) any past or present abduction of the child or risk of abduction;~~

12 ~~(9)~~ (8) any interference, or threatened interference, with custody or
13 parenting time, including abduction of the child or risk of abduction;

14 ~~(10)~~ (9) any past or present domestic violence;

15 ~~(11)~~ (10) any past or present physical, sexual, or emotional abuse of the
16 child or neglect of the child ~~by a party, relative, or household member;~~

17 ~~(12) any past or present mental health issues of a party or household~~
18 ~~member;~~

19 ~~(13)~~ (11) any special physical, educational, or mental health needs of the
20 child that require investigation or advocacy;

21 ~~(14)~~ (12) any inappropriate adult influence on or manipulation of the
22 child;

1 ~~(15) the need to minimize harm to the child from the processes of family~~
2 ~~separation and litigation, [and]~~

3 ~~[(16)(13)]~~ a referral of the proceeding to the juvenile court for
4 investigation of allegations of abuse or neglect; and]

5 ~~(17)(14)~~ any other factor relevant to the child's best interests.

6 (d) If the court decides to make an appointment under this section, the court shall
7 consider the child's circumstances and the court's needs in the particular proceeding in
8 determining whether to appoint a child's attorney, best interests attorney, or court advisor. The
9 court shall consider such factors as the child's developmental level, the value of an independent
10 advocate for the child's best interests, any desire for an attorney expressed by the child, ~~any~~
11 ~~objectives in the proceeding expressed by the child,~~ the child's special needs, the legal
12 complexity of any disputed issue affecting the child, and the benefit to the court of an appointee's
13 special expertise.

14 **Comment**

15 This section leaves the appointment of an attorney or court advisor for children in custody
16 cases to judicial discretion, but courts should recognize the significant benefit in having a
17 representative for a child in certain situations. If a court anticipates that the evidentiary
18 presentation by the parties will be incomplete, distorted, or otherwise inadequate, the
19 appointment of a representative for the child can be particularly helpful. The factors listed in
20 subsection (c) may raise special concerns warranting the appointment of a representative for the
21 child and should guide the court's discretion. In some circumstances, such as where there are
22 credible allegations of domestic violence or child abuse, the appointment of a separate
23 representative for the child may be essential for the court's determination of the evidentiary
24 issues in the case. Similarly, in custody proceedings where parentage is at issue, the appointment
25 of counsel for the child may be extremely helpful to the court.

26
27 Moreover, one of the key values of a representative is to advocate for evidentiary
28 procedures and methods of dispute resolution that are the least harmful to the child. A
29 representative, for example, can assist the court in deciding whether to interview a child in

1 chambers or to involve the child as a participant in mediation between the parents. The goal of
2 child representation is not only to help the court arrive at an outcome that best serves the child's
3 interests but also to protect children from collateral damage from litigation.
4

5 At the same time, courts must recognize that the appointment of a lawyer or court advisor
6 for the child in a custody case may be unnecessary and might introduce a potentially intrusive
7 and expensive advocate. The court should take into account the cost of an appointment and the
8 parties' ability to pay, since public funds for children's representatives in custody proceedings are
9 rarely available. Section 20 provides guidelines for assessing fees against the parties for
10 children's representatives in custody proceedings.
11

12 In deciding whether to appoint a child's attorney, best interests attorney, or court advisor,
13 the court should consider the child's interests and the court's needs in the particular proceeding.
14 Subsection (e) recognizes that the decision to appoint a particular category of representative will
15 depend in large part on the child's developmental level and the court's sense of how the child's
16 interests can best be protected. In some cases, a mental health professional as court advisor may
17 be particularly helpful, while in other cases involving older children, a child's attorney may be
18 appropriate.
19

20 **SECTION 7. CONTINUED REPRESENTATION.**

21 (a) In an abuse and neglect proceeding, unless otherwise provided by court order,
22 an appointment of a child's attorney, best interests attorney, or court advisor continues in effect
23 until the proceeding is concluded.

24 (b) In a custody proceeding, an appointment of a child's attorney, best interests
25 attorney, or court advisor continues in effect only for the term provided in the order of
26 appointment or any subsequent order.

27 **Comment**

28 It is important to have continuity in representation, both in terms of practical impact and
29 in terms of the child's emotional perspective. A lawyer or court advisor who has been
30 representing a child from the beginning of an abuse and neglect or custody proceeding ordinarily
31 will have a fuller understanding of the issues in the case than will a representative who is
32 appointed midstream. Moreover, a child's sense of trust and confidence in his or her
33 representative will be enhanced if that representative is the same person over time. Of course, a
34 court remains free at any point to terminate the appointment of a representative if the

1 representative's performance is inadequate.

2
3 Under this section, the appointment of a representative in an abuse and neglect
4 proceeding presumptively lasts until the proceeding is concluded. Although the court can
5 provide otherwise, the appointment ordinarily will continue until the child is no longer under
6 state protection. For example, if a child's dependency is dismissed and the child's case is closed,
7 the proceeding can be deemed concluded. On the other hand, a child in long-term foster care
8 may not have an active case file but the proceeding would not be "concluded" within the
9 meaning of this section. Indeed, in the latter situation, the child's representative can play an
10 essential role in ensuring that periodic assessments of the child's placement and services occur as
11 required by law.
12

13 The right of a child's attorney, best interests attorney, or court advisor to participate in
14 any appeal or to bring an appeal on behalf of the child is determined by state law. State law
15 varies on the question of standing to file an appeal or participate on appeal, just as it varies on
16 whether children have formal party status in abuse and neglect and custody proceedings. In
17 states where the child through a representative can participate fully on appeal, the representation
18 of the child extends to any appellate proceeding. To the extent feasible, courts should ensure
19 continuity of counsel on appeal. The child's representative should take actions that are consistent
20 with the representative's role, taking into consideration the potential impact on the child, the
21 child's expressed objectives, the likelihood of success on appeal, and the available resources for
22 prosecuting the appeal.
23

24 **SECTION 8. ORDER OF APPOINTMENT.**

25 (a) An order of appointment designating the role of the appointee under Section
26 4, 5, or 6 must be recorded and clearly set forth the terms of the appointment, including the
27 reasons for and duration of the appointment, rights of access as provided under Section 15, and
28 applicable terms of compensation.

29 (b) If appropriate in light of changed circumstances or new information not
30 available at the time of the original appointment, an attorney appointed as a best interests
31 attorney may be reappointed as a child's attorney by a new order of appointment that complies
32 with subsection (a). In deciding whether to make a reappointment, the court shall consider such
33 factors as the child's developmental level, any desire for an attorney expressed by the child, any

objectives in the proceedings expressed by the child, and the value of an independent advocate for the child's best interests.

Comment

Orders of appointment for children's representatives have often failed to clearly communicate the expectations for the representative. Lack of clarity in a representative's role can lead to ineffective representation. Under this section, the order of appointment should be in writing and should identify the role of the appointed representative in plain language understandable to non-lawyers. The order should explain the reasons for the appointment and the tasks to be performed as precisely as possible, and it should state how long the appointment will last. Payment terms should also be expressly set out in the order. Clarity in the order will help all parties understand the role and authority of the appointed representative. Moreover, the court will be better equipped to exercise effective oversight if the appointed representative's powers and duties are clearly described in the order. For a Model Appointment Order, *see* Appendix A, ABA Standards of Practice for Lawyers Representing Children in Custody Cases.

A lawyer may not serve both as a child's attorney and a best interests attorney for the same child at the same time. Such a blurring of roles would give rise to the very problems that this Act is designed to avoid. On the other hand, a lawyer's role may change over time. This section recognizes that in some situations, an attorney initially appointed as a best interests attorney may be more appropriately designated as a child's attorney if the child over time has developed the capacity and desire to direct counsel. In that event, a lawyer should seek a reappointment in a new order of appointment from the court. Significantly, this section requires court action and does not permit a lawyer to unilaterally redesignate his or her role.

It should be noted that this section does not permit a child's attorney to be reappointed as a best interests attorney. In light of ethical restrictions on a child's attorney under Section 12 and the contrasting ability of a best interests attorney to use a child's confidential communications under section 13, a conversion of a child's attorney into a best interests attorney might compromise the child's confidences.

SECTION 9. QUALIFICATIONS OF CHILD'S ATTORNEY OR BEST INTERESTS ATTORNEY. The court may appoint as a child's attorney or best interests attorney only an individual who is qualified through training or experience in the type of proceeding in which the appointment is made, according to standards established by [federal law,] law of this state other than this [act][,] or judicial or other rule.

1 **Comment**

2 All court-appointed attorneys for children, whether in the role of child's attorney or best
3 interests attorney, must have adequate training or experience to discharge their duties with
4 competence. States are encouraged to adopt state-wide standards of practice for all children's
5 attorneys through court rule or rule promulgated by the state bar regulatory agency or otherwise.
6 Such standards of practice should include a description of required training in applicable
7 statutory codes, case law and court procedures, the dynamics of child abuse and neglect,
8 domestic violence, child development and child psychology, treatment issues, communication
9 with children, cultural awareness, and the impact of separation and long-term consequences to a
10 child of being in temporary care. In addition, mandatory periodic training requirements exist in
11 many states to ensure that children's counsel continue to meet standards of competence on an
12 ongoing basis.

13
14 Before making an appointment, courts should be satisfied that the attorney possesses the
15 relevant qualifications established by law or rule. Courts may rely on agencies or child advocacy
16 organizations for lists of available attorneys with appropriate training and experience, but this
17 section contemplates that in each case a particular lawyer will be appointed by name for each
18 child. Children's attorneys and best interests attorneys should become familiar with the ABA
19 Abuse and Neglect Standards, the suggested amendments to those standards adopted by the
20 National Association of Counsel for Children, and the ABA Custody Standards. Also, in making
21 an appointment under this Act, the court should ensure that the attorney's caseload is not so
22 burdensome as to undermine his or her ability to competently serve as the child's representative
23 and to fulfill the duties identified in Sections 11-13. See *ABA Abuse and Neglect Standards* L-1
24 (providing duty of trial courts to control size of court-appointed caseloads). For effective
25 representation, a lawyer must be able to engage in certain essential tasks, including meeting with
26 his or her client, interviewing relevant witnesses, conducting investigation and discovery, and
27 reviewing records pertaining to the child. The National Association of Counsel for Children has
28 recommended that a child's lawyer represent no more than 100 clients at a time. See Testimony
29 of Marvin Ventrell, NACC Executive Director, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d
30 1353 (N.D. Ga. 2005).

31 **SECTION 10. QUALIFICATIONS OF COURT ADVISOR.**

32 (a) The court may appoint as court advisor for a child only a qualified individual
33 or a non-profit or governmental organization of qualified individuals. To be qualified, an
34 individual must have received training or have experience in the type of proceeding in which the
35 appointment is made, according to standards established by [federal law,] law of this state other
36 than this [act][,] or judicial or other rule.

1 (b) The court may appoint an attorney to serve as court advisor for a child if the
2 attorney meets the qualifications in subsection (a) and is specifically appointed to serve solely in
3 the role of court advisor. An attorney appointed as court advisor may take only those actions that
4 may be taken by a court advisor who is not an attorney.

5 (c) The appointment of a court advisor does not create a professional relationship
6 between the advisor and the child unless such a relationship is expressly established in the order
7 of appointment.

8 **Comment**

9 In appointing a court advisor for a child, the court may appoint an individual as court
10 advisor based on that individual's training, ability, and experience in child advocacy.
11 Alternatively, the court may identify a nonprofit organization or governmental program
12 consisting of volunteer advocates, such as the Court Appointed Special Advocates (CASA), or a
13 specific volunteer advocate from a list maintained by the court pursuant to other provisions of
14 state law.

15
16 This section makes clear that if the court appoints an attorney to function as court advisor,
17 that person is not to function as an attorney in the proceeding. CAPTA expressly provides that
18 the guardian ad litem may be an attorney or a court-appointed special advocate, or both. *See*
19 *Comment to Section 5*. Although federal law may permit an attorney guardian ad litem to serve
20 as an attorney, under this Act an attorney appointed as court advisor is not appointed to serve as
21 an attorney and should function only as a non-lawyer.

22
23 As with the training for attorneys for children, the court advisor training should be
24 required on an ongoing basis. It should include instruction on the applicable state and federal
25 law, the dynamics of child abuse and neglect, domestic violence, child development, treatment
26 issues, communication with children, cultural awareness, the impact of separation, and the long-
27 term consequences to a child of being in temporary care.

28
29 Social workers, counselors, and therapists are often appointed as guardians ad litem for
30 children because of their valuable expertise in mental health, child development, and family
31 dynamics. This section makes clear that the appointment of a court advisor does not in itself
32 create a therapist-patient relationship or other professional relationship between the court advisor
33 and the child. Thus, unless the order of appointment expressly states otherwise, a child's
34 communications with a court advisor appointed under this Act are not privileged.
35

1
2 [LEGISLATIVE NOTE TO SECTIONS 11, 12, AND 13: In those states where the duties of
3 attorneys can only be prescribed by rules of court and not by legislation, the duties listed in
4 Sections 11, 12, and 13 should be adopted by appropriate court rule.]
5

6 **SECTION 11. DUTIES OF CHILD'S ATTORNEY AND BEST INTERESTS**

7 **ATTORNEY.**

8 (a) A child's attorney or best interests attorney shall participate in the conduct of
9 the litigation [to the same extent as an attorney for any party][to the extent permitted under the
10 law of this state other than this act].

11 (b) Within a reasonable time after appointment, a child's attorney or best interests
12 attorney shall:

13 (1) meet with the child and ascertain, in a manner appropriate to the
14 child's developmental level, the child's needs, circumstances, and views;

15 (2) meet and consult with any court advisor appointed for the child;

16 (3) investigate the facts relevant to the proceeding to the extent the
17 attorney considers appropriate, including interviewing persons with significant knowledge of the
18 child's history and condition;

19 (4) obtain and review copies of relevant records relating to the child to the
20 extent the attorney considers appropriate;

21 (5) determine, in a manner appropriate to the child's developmental level,
22 the child's expressed objectives in the proceeding;

23 (6) present the child's expressed objectives in the proceeding to the court,
24 if the child so desires, by a method that is appropriate in light of the purpose of the proceeding

1 and the impact on the child;

2 (7) inform the child of the status of the proceeding and the opportunity to
3 participate and, if appropriate, facilitate the child's participation in the proceeding;

4 (8) take any action that the attorney considers appropriate to expedite the
5 proceedings and the resolution of contested issues; and

6 (9) when the attorney considers appropriate, encourage settlement and the
7 use of alternative forms of dispute resolution and participate in such proceedings [to the extent
8 permitted under the law of this state].

9 **Comment**

10 The general duties of an attorney, whether serving as the child's attorney or as best
11 interests attorney, include developmentally appropriate communication with the child and
12 interviews of all parties and persons likely to have significant knowledge of the child's
13 circumstances. The attorney should investigate the case fully while still complying with ethical
14 restrictions on contact with represented parties, and conversely the attorney should ensure that
15 other parties respect the ethical restrictions arising from the fact that the child is represented in
16 the proceeding. The attorney is in a pivotal position in negotiations and should attempt to
17 resolve the case in the least adversarial manner possible. For a detailed enumeration of the
18 pretrial and trial responsibilities for children's counsel, attorneys should refer to Standards III (F)
19 and (G) of the ABA Custody Standards.

20
21 State law varies on children's procedural status in abuse and neglect and custody
22 proceedings. In several states, children are viewed as parties to abuse and neglect proceedings
23 and have the right to participate through their representatives in all stages of the proceedings.
24 *See, e.g.*, Minn. Stat. Ann § 260C.163(2) (child who is subject to petition for protection has right
25 to participate in all proceedings); *In re Williams*, 805 N.E.2d 1110 (Ohio 2004)(child is party to
26 parental rights termination action and has right to legal counsel). In a few states children are
27 nonparties whose rights of participation are more limited. *In re R.S.*, 647 N.Y. Supp. 2d 361
28 (NY Fam. Ct. 1996)(child is not party to child protective proceeding and therefore cannot be
29 deposed as party); *In re Anthony*, 675 N.Y. supp. 2d 759 (NY Fam. Ct. 1998)(child is not party
30 to termination of parental rights proceeding and therefore cannot seek relief from judgment). In
31 child custody disputes, children typically are not viewed as parties and are not permitted to
32 become parties through intervention. *See, e.g.*, *Auclair v. Auclair*, 730 A.2d 1260 (Md. App.
33 1999); *J.A.R. v. Superior Court*, 877 P.2d 1323 (Ariz. App. 1994); *In re Marriage of Hartley*,
34 886 P.2d 665 (Col. 1994). In a few states, however, a child who is the subject of a custody

1 dispute is viewed as an indispensable party to the proceeding. *See, e.g., In re J.W.F. v.*
2 *Schoolcraft*, 763 P.2d 1217 (Utah App. 1988). The bracketed phrases in subsection (a) permit
3 states to select the option that best comports with the state's view of the child's right of
4 participation. Similarly, in those states where there is full participation by children's attorneys in
5 alternative forms of dispute resolution, the bracketed phrase under subsection (9) should be
6 omitted.

7
8 In addition, courts must ensure that children and their attorneys receive notice and the
9 opportunity to participate in all judicial proceedings affecting the child's welfare. The attorney,
10 whether child's attorney or best interests attorney, should participate actively in all hearings and
11 conferences on issues within the scope of the appointment. Moreover, the child's attorney and
12 best interests attorney should inform the child of hearings, settlement conferences, and other
13 proceedings and enable the child to attend when appropriate. The emotional and psychological
14 value to a child of participating in a proceeding affecting his or her welfare may be of profound
15 significance. In the abuse and neglect context, a recent study concluded that "[c]hildren, parents,
16 and caregivers all benefit when they have the opportunity to actively participate in court
17 proceedings, as does the quality of decisions when judges can see and hear from key parties."
18 The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and*
19 *Well-Being for Children in Foster Care* 42 (2004), available at www.pewfostercare.org. On the
20 other hand, a child might receive little therapeutic benefit from observing an acrimonious custody
21 dispute. Thus, this section recognizes the potential value of participation by the child and places
22 a corresponding duty on both the child's attorney and best interests attorney in that regard.

23
24 A child's legal counsel, whether a child's attorney or best interests attorney, may become
25 aware of needs of the child that go beyond the particular proceeding. In abuse and neglect
26 proceedings in particular, a child may be eligible for specialized educational, medical, or mental
27 health services under federal or state programs. To the extent that a lawyer learns of such needs,
28 the lawyer should request permission from the court to pursue issues on behalf of the child,
29 administratively or judicially, even if those issues do not specifically arise from the court
30 appointment. *See* Standard D-12, ABA Abuse and Neglect Standards.

31 32 **SECTION 12. DUTIES UNIQUE TO CHILD'S ATTORNEY.**

33 (a) A child's attorney owes to the child the duties imposed by the law of this state
34 in an attorney-client relationship.

35 (b) A child's attorney shall:

36 (1) explain the nature of the attorney-client relationship to the child,
37 including the requirements of confidentiality;

1 (2) provide advice and counsel to the child;
2 (3) keep the child informed of the nature and status of the proceeding; and
3 (4) review and accept or decline to accept any proposed stipulation for an
4 order affecting the child and explain to the court the basis for any opposition.

5 (c) Subject to subsections (d) and (e), once the child has formed an attorney-client
6 relationship with a child's attorney, the attorney shall advocate any objectives of representation
7 expressed by the child unless they are prohibited by law or without factual foundation.

8 (d) If a child's attorney determines that the child [lacks the capacity to understand
9 the nature of an attorney-client relationship or] lacks the capacity or refuses to direct the attorney
10 with respect to a particular issue, the attorney shall:

11 (1) present to the court a position that the attorney determines will serve
12 the child's best interests if the position is not inconsistent with the child's expressed objectives;

13 (2) take no position as to the issue in question; or

14 (3) request appointment of a court advisor [or best interests attorney].

15 (e) If a child's attorney determines that, despite appropriate legal counseling, the
16 child continues to express objectives of representation that would put the child at risk of
17 reasonably certain and substantial harm, the attorney shall:

18 (1) if neither a best interests attorney nor a court advisor has been
19 appointed, request appointment of [a best interests attorney or] a court advisor without disclosing
20 the reason for the request, unless disclosure is ~~necessary to protect the child from substantial~~
21 ~~harm and is~~ permitted by [this state's rules of professional conduct]; and

22 (2) continue to advocate the child's expressed objectives or request to

1 withdraw from the representation.

2 **Comment**

3 The child's attorney is in a traditional lawyer/client relationship with the child and, as
4 such, is in a unique position to ensure that the child has a legal voice in the proceeding. The
5 child's attorney should explain the meaning and consequences of the child's choices in terms the
6 client can understand. As in other lawyer/client relationships, the lawyer may express his or her
7 assessment of the case and advise the child of the best goals to pursue. On the other hand, the
8 lawyer must remain aware that the child may be more vulnerable to manipulation than an adult
9 client. The lawyer has a duty not to overbear the will of the client. As a client-directed lawyer,
10 the lawyer may not advocate a position contrary to the child's expressed position except as
11 permitted by applicable ethical standards.

12
13 Consistent with ABA Model Rule 1.14, the child's attorney should determine whether the
14 child has sufficient maturity to understand and form an attorney-client relationship and whether
15 the child is capable of making reasoned judgments and engaging in meaningful communication.
16 A determination of incapacity may be incremental and issue-specific, thus enabling the child's
17 attorney to continue to function as a client-directed lawyer as to major questions in the
18 proceeding. When a child does lack capacity to formulate objectives of representation as to a
19 particular matter, this section permits the child's attorney to advocate the best interests of the
20 child as to that matter. In so doing, however, the child's attorney may not take a position that is
21 contrary to an expressed objective of the child in the proceeding. For cases of such incremental
22 lack of capacity, the child's attorney may also simply take no position on the matter in question.
23 Finally, the child's attorney may request the appointment of a court advisor or, where permitted,
24 a best interests attorney. Some states may wish to prohibit the appointment of a best interests
25 attorney, even on a temporary basis, when the child already has a child's attorney. If so, the
26 bracketed phrase in subsections (d)(3) should be excluded.

27
28 This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA
29 Custody Standards as to the dilemma that can arise when the child's expressed goals in the
30 proceeding may place the child at risk of harm. A child's attorney may not refuse to advocate the
31 child's wishes simply because the attorney disagrees with the child's view or believes the child's
32 objectives will not further the child's best interests. On the other hand, the child's attorney is not
33 bound by the child's expressed wishes if pursuing those wishes would put the child at risk of
34 substantial physical, emotional, psychological ~~financial~~ or other harm and is not merely contrary
35 to the lawyer's opinion of the child's interests. The requirement that the risk of harm be
36 "reasonably certain" is intended to distinguish situations where the risk is remote and
37 speculative. In most cases, the ethical conflict involved in asserting a position that would
38 seriously endanger the child can be resolved through the lawyer's counseling function. If it
39 cannot be resolved, this section permits the child's attorney to request the appointment of a court
40 advisor or, where permitted, a best interests attorney. Similar to the bracketed phrase in
41 subsection (d)(3), subsection (e)(1) includes a bracketed phrase for the appointment of a best

1 interests attorney. In any event, a child's attorney should not reveal the reason for the request
2 unless such disclosure is necessary to prevent harm to the child and is permitted by the state's
3 ethics rules on confidentiality. These guidelines for the child's attorney are consistent with
4 prevailing ethical standards. *See* Rules 1.14 and 1.6(a), ABA Model Rules.

5
6 Ordinarily, a court would not also appoint a best interests attorney for a child who already
7 has a child's attorney. Typically, a court advisor through appropriate investigation and reports
8 can enable the court to determine the child's best interests. Nevertheless, in exceptional cases
9 involving a competent child who persists in taking a position that poses a risk of serious harm, a
10 court might conclude that a best interests attorney should be appointed to ensure a full
11 presentation of the facts to the court. Alternatively, a court might appoint a court advisor as well
12 as a lawyer to represent the court advisor in the proceeding.

13
14 Even where the child's expressed objectives may place the child at risk of substantial
15 harm, the child has a right to have his or her views made known to the court. Under ordinary
16 ethical standards and court rules, however, a lawyer may not advocate positions that are not well
17 grounded in fact and warranted by existing law or a nonfrivolous argument for modification of
18 existing law. *See* ABA Model Rule 3.1. Thus, the child's attorney may not advocate the child's
19 wishes if the child's position is prohibited by law or lacks any factual foundation. In extreme and
20 rare situations where the child persists in wanting the attorney to advocate a position
21 unsupportable under the law, the attorney may seek to withdraw from the representation.

22
23 If a court grants permission to withdraw from representation in an abuse and neglect
24 proceeding, the court must ensure that the child continues to have legal representation in
25 compliance with Section 4. If the child does not already have a best interests attorney, the court
26 should appoint a lawyer for the child as soon as feasible after withdrawal. The court has
27 discretion to appoint either a best interests attorney or child's attorney, and the court should
28 decide on the nature of the appointment in light of the child's wishes, the court's needs, the
29 circumstances of the prior attorney's withdrawal, and other factors in the case. A request from an
30 older child for a child's attorney should be given special consideration by the court, since the
31 child's voice may be effectively silenced without such an appointment. In a custody proceeding,
32 on the other hand, the appointment of a lawyer is always discretionary. In the event of
33 withdrawal of a child's attorney in that context, the court retains discretion to decide whether to
34 appoint another representative for the child and to decide on the role of that representative.

35 36 **SECTION 13. DUTIES UNIQUE TO BEST INTERESTS ATTORNEY.**

37 (a) A best interests attorney shall advocate for a resolution of the proceeding
38 consistent with the best interests of the child based on the facts relevant to the proceeding and
39 according to criteria established by law related to the purposes of the proceeding.

(b) A best interests attorney, in a manner appropriate to the child's developmental level, shall:

- (1) explain the role of the best interests attorney to the child;
- (2) inform the child that, in providing assistance to the court, the attorney may use information that the child gives to the attorney; and
- (3) unless the child has a [child's attorney or] privately retained attorney:
 - (A) keep the child informed of the nature and status of the proceeding;
 - (B) provide advice and counsel to the child; and
 - (C) review and accept or decline to accept any proposed stipulation for an order affecting the child and explain to the court the basis for any opposition.

(c) A best interests attorney is not bound by the child's expressed objectives but shall consider the child's objectives in determining what to advocate.

(d) A best interests attorney may not disclose a child's confidential communications with the attorney except as permitted by [this state's rules of professional conduct for attorneys] as if the child were in an attorney-client relationship with the attorney, but the attorney may use the child's confidences for the purpose of performing the duties of a best interests attorney without disclosing the confidences.

Comment

The best interests attorney provides legal services for the purpose of protecting the child's best interests. Although the best interest attorney is not client-directed, the attorney is nevertheless providing legal representation to the child as a lawyer. Because the determination of best interests is imprecise and highly contextual, the best interests attorney should follow objective criteria and should not substitute his or her personal views of best interests. The

1 “criteria established by law relating to the purposes of the proceeding” will include standards
2 imposed by federal and state law for child protection in abuse and neglect proceedings, as well as
3 a state’s substantive law governing child custody determinations. *See, e.g.*, Section 402 of the
4 Uniform Marriage and Divorce Act. Moreover, the attorney’s legal representation should be
5 informed by an understanding of the child’s individual circumstances and needs, including the
6 child’s developmental level, unique family relationships, and cultural background.

7
8 If the child has no other attorney representative, the best interests attorney’s duties also
9 include keeping the child informed about the proceedings, advising the child, and reviewing
10 proposed stipulations. In rare circumstances, a child may have a privately retained counsel who
11 has not been appointed by the court. In addition, where permitted by state law, a court may
12 appoint a best interests attorney under Section 12 to assist it in determining the child’s interests
13 even where the child already has a child’s attorney. In these unusual situations, the best interests
14 attorney’s responsibilities are necessarily limited by the fact that the child has other counsel. The
15 bracketed phrase under subsection (b) recognizes that some states may not permit the
16 appointment of a best interests attorney for a child who already has a child’s attorney.

17
18 Under this section, a child’s communications with a best interests attorney are
19 confidential except that *use* of the communications is permitted if necessary to protect a child’s
20 interests. Although some states have permitted the hybrid lawyer/guardian ad litem to reveal the
21 child’s confidential communications to the court where necessary to promote the child’s best
22 interests, *see Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998), this section provides a more limited
23 exception to the principle of client confidentiality. Thus, a best interests attorney may use a
24 child’s confidential communications for the purpose of the representation without disclosing
25 them. The distinction between use and disclosure means, for example, that if a child tells the
26 attorney that a parent uses illegal drugs, the attorney may use that information to find and present
27 separate evidence of the drug use to the court but may not reveal that the initial source of
28 information was the child. The best interests attorney should explain to the child that the child’s
29 communications may be used by the attorney in order to achieve the best resolution for the child
30 in the proceeding.

31
32 **SECTION 14. DUTIES OF COURT ADVISOR.** A court advisor appointed for a
33 child shall:

34 (1) within a reasonable time after the appointment:

35 (A) meet with the child and ascertain, in a manner appropriate to the
36 child’s developmental level, the child’s needs, circumstances, and views;

37 (B) investigate the facts relevant to the proceeding to the extent the court

1 advisor considers appropriate, including interviewing persons with significant knowledge of the
2 child's history and condition;

3 (C) obtain and review copies of relevant records relating to the child to
4 the extent the court advisor considers appropriate;

5 (D) meet and consult with the child's attorney or the best interests
6 attorney, if any, regarding the issues in the proceeding;

7 (2) determine, in a manner appropriate to the child's developmental level, the
8 child's expressed objectives in the proceeding;

9 (3) present the child's expressed objectives to the court, if the child so desires, by
10 report or other submission;

11 (4) consider the child's expressed objectives in the proceeding without being
12 bound by them;

13 (5) maintain the confidentiality of information relating to the proceeding except
14 as necessary to perform the duties of court advisor or as may be specifically provided by law of
15 this state other than this [act];

16 (6) if appropriate, present recommendations to the court regarding the child's best
17 interests and the bases of those recommendations;

18 (7) provide copies of any report or other document submitted to the court to any
19 child's attorney or best interests attorney appointed for the child and to the parties;

20 (8) when the court advisor considers appropriate, encourage settlement and the
21 use of any alternative forms of dispute resolution and participate in such proceedings [to the
22 extent permitted under the law of this state]; and

(9) perform any specific task directed by the court not inconsistent with the role of court advisor.

Comment

This section describes the general function of the court advisor and makes clear that the court advisor should explain his or her role to the child in terms the child can understand. The court advisor has a duty to conduct an independent investigation in order to ascertain the facts of the case. In carrying out that duty, the court advisor must have access to the child and a reasonable opportunity to interview persons with relevant knowledge of the child, including the parties. If the child is represented by counsel, whether child's attorney or best interests attorney, the court advisor should notify counsel and permit counsel to be present during any interview. In addition, the court advisor's investigation ordinarily should include a review of relevant records. To ensure that the court advisor has the ability to carry out his or her responsibilities under this section, the order of appointment should expressly provide for such rights of access.

In abuse and neglect and custody proceedings, the court advisor's obligations to the court may include the duty to make recommendations concerning the child's best interests. State law varies as to whether mental health experts should or must make recommendations to the court on the ultimate disposition of the case. Disagreement also exists within the mental health profession about whether mental health professionals are qualified to offer opinions on the ultimate question of the child's best interests. Some commentators argue that the determination of a child's best interests is the prerogative of the court and not within the expertise of the mental health profession. See generally Gary B. Melton, et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals* (Guilford Press 2d ed. 1997). In any event, the court advisor should be prepared to make such recommendations if requested by the court, always ensuring that the recommendation or opinion is based on the advisor's thorough and unbiased investigation of the case.

Court advisors, including CASA's, must observe all statutes and court rules concerning confidentiality and should not disclose information about the appointed case to non-parties other than the court and court-authorized personnel. Although attorney-client confidentiality rules do not govern the court advisor's communications with the child, the advisor should protect the child's privacy and should reveal the child's statements only when necessary to fulfill the advisor's duties to the court. For guidelines governing the duty of confidentiality for guardians ad litem, see Minnesota Rule 908, General Responsibilities of Guardians Ad Litem; Standard 7.0, Standards for Guardians Ad Litem in Missouri Juvenile and Family Court Matters.

Many states have developed more detailed standards governing the duties of court advisors, generally under the rubric of "guardian ad litem," than those contained in this Act. See, e.g., Judicial Council of Virginia, Standards to Govern the Appointment of Guardians Ad Litem, at www.courts.state.va.us/1/cover.htm; There are also numerous sources governing CASA

1 programs and specifying the duties of CASA volunteers. *See, e.g.,* Nat'l CASA Association,
2 Standards for National CASA Association Member Programs (2002), available at
3 www.nationalcasa.org; Office of Juvenile Justice and Delinquency Prevention, Court Appointed
4 Special Advocates: A Voice for Abused and Neglected Children in Court (1997).
5

6 **SECTION 15. ACCESS TO CHILD AND INFORMATION RELATING TO**
7 **CHILD.**

8 (a) Subject to subsection (c) and any conditions imposed by the court that are
9 required by law, rules of professional conduct, the child's needs, or the circumstances of the
10 proceeding, the court shall issue an order of access at the time of an order of appointment under
11 this [act], authorizing the child's attorney, best interests attorney, or court advisor to have
12 immediate access to:

13 (1) the child; and

14 (2) any ~~otherwise privileged or~~ confidential information relating to the
15 child as to which the child may otherwise have a privilege of nondisclosure.

16 (b) The custodian of any relevant record relating to a child shall provide access to
17 a person authorized by order issued pursuant to subsection (a) to access the records.

18 (c) A child's record that is privileged or confidential under law other than this
19 [act] may be released to a person appointed under this [act] only in accordance with that law.

20 **Comment**

21 Persons appointed to represent children under this Act must have access to information
22 regarding the child in order to competently perform their assigned roles. Relevant files include
23 those concerning child protective services, developmental disabilities, juvenile delinquency,
24 mental health, and educational programs. Access should also be provided to records of a probate
25 or other court proceeding as well as records of any trust or account for which the child is a
26 beneficiary.
27

1 Under subsection (a), a court may impose conditions on access that are required by law,
2 ethical rules, the child's needs, or the circumstances of the case. A lawyer may need to use
3 subpoenas or other discovery tools to obtain relevant records, for example. Moreover, if a
4 child's parent is represented by counsel, a child's attorney or best interests attorney would need
5 to comply with applicable rules governing contact with represented parties. Similarly, a child's
6 attorney or best interests attorney may have the right to be present when the child is interviewed
7 by others. To the extent feasible, the order of appointment should explain the relevant
8 limitations on access in detail.
9

10 Subsection (c) recognizes that federal or state law, such as the Family Educational Rights
11 and Privacy Act, 20 U.S.C. § 1232g (the "Buckley Amendment"), and the Health Insurance
12 Portability and Accountability Act of 1996, 42 U.S.C. § 201, may impose independent
13 requirements for access that a child's representative must observe. *See* 34 C.F.R. § 99.31-39
14 (requirements for access to educational records under Buckley Amendment); 45 C.F.R. §
15 164.512 (requirements for access to health records under HIPAA). In some circumstances, the
16 order of appointment will need to contain qualifying language to enable the appointed
17 representative to gain access to the protected records.
18

19 **SECTION 16. PARTICIPATION IN PROCEEDING BY CHILD'S ATTORNEY,**
20 **BEST INTERESTS ATTORNEY, AND COURT ADVISOR.**

21 (a) A child's attorney, best interests attorney, and court advisor for a child are
22 each entitled to:

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

25 (2) receive notice of and attend each hearing in the proceeding; and

26 (3) participate in any case staffing or case management conference
27 concerning the child in an abuse and neglect proceeding.

28 (b) A child's attorney, best interests attorney, and court advisor may not engage in
29 ex parte contact with the court except as authorized by law other than this [act].

30 (c) A court advisor may not take any action that may be taken only by a licensed

1 attorney, including making opening and closing statements, examining witnesses, and engaging
2 in discovery other than as a witness.

3 (d) The court, a child's attorney, or a best interests attorney may compel any court
4 advisor for a child to attend a trial or hearing relating to the child and to testify as necessary for
5 the proper disposition of the proceeding.

6 (e) The court shall ensure that any court advisor for a child has an opportunity to
7 testify or submit a report setting forth:

8 (1) the court advisor's recommendations regarding the best interests of the
9 child; and

10 (2) the bases for the court advisor's recommendations.

11 (f) In a [nonjury] proceeding, a party may call any court advisor for the child as a
12 witness for the purpose of cross-examination regarding the advisor's report without the advisor's
13 being listed as a witness by a party.

14 [(g) In a jury trial, disclosure to the jury of the contents of a court advisor's report
15 to the court is subject to this state's rules of evidence.]

16 **Comment**

17 This section makes clear that a child's attorney, a best interests attorney, and a court
18 advisor are each entitled to receive notice of all hearings and to receive copies of all documents
19 filed in the case. The right to participate in case staffings will arise in abuse and neglect
20 proceedings where periodic conferences among court personnel and a child's representative are
21 mandated by state and federal law to assess the child's current placement and future status.
22 Unlike the child's attorney or the best interests attorney, the court advisor may also testify or
23 submit a report to the court regarding recommendations as to the child's best interests. Indeed,
24 under Section 14, the court advisor may have a duty to submit such recommendations in certain
25 cases.

26
27 Under this section, the court advisor is subject to cross-examination regarding the

1 advisor's recommendations to the court. Although the court advisor is appointed to assist the
2 court in determining the child's best interests, ex parte communications with the court are not
3 permitted. The due process rights of the parties require the court advisor to observe ordinary
4 procedural rules in making recommendations to the court, including giving notice to other
5 participants and affording parties an opportunity to be heard and an opportunity for cross
6 examination. *See, e.g.,* In re Marriage of Bates, 2004 WL 2403721 (Ill. 2004) (failure to provide
7 copy of guardian ad litem report to mother in custody proceeding was violation of due process);
8 Leinenbach v. Leinenbach, 634 So.2d 252 (Fla. App. 1994) (trial court erred in relying on report
9 of guardian ad litem where father was not afforded opportunity to rebut contents of report).
10 Likewise, neither the child's attorney nor the best interests attorney may engage in ex parte
11 communication with the court except as otherwise authorized by law. Although this prohibition
12 is rooted in the rules of professional conduct governing all lawyers, experience has shown that
13 lawyers for children sometimes bend the rules in their desire to protect the interests of their
14 clients. Thus, the principle is restated in the Act.
15

16 **SECTION 17. ATTORNEY WORK PRODUCT AND TESTIMONY.**

17 (a) Subject to subsection (b) and except as authorized by [this state's rules of
18 professional conduct or] court rule, an attorney appointed as child's attorney or best interests
19 attorney may not:

20 (1) be compelled to produce the attorney's work product developed during
21 the appointment;

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

24 (3) submit a report authored by the attorney into evidence; or

25 (4) testify in court.

26 (b) Subsection (a) does not alter the duty of an attorney to report child abuse or
27 neglect under [applicable law].

28 **Comment**

29 There is widespread disagreement about the proper function of children's lawyers in

1 abuse and neglect and custody proceedings, particularly as a result of the attorney/guardian ad
2 litem model. *See generally* Ann M. Haralambie, *The Child's Attorney* 1-23 (ABA 1993). In
3 several states, the attorney/guardian ad litem may testify and be cross-examined. *See, e.g.,*
4 *Jacobsen v. Thomas*, 100 P.3d 106 (Mt. 2004). This section clarifies that the child's attorney and
5 the best interests attorney are to stay within their professional role as lawyers. Thus, the work
6 product of both the child's attorney and the best interests attorney is presumptively shielded from
7 disclosure. Likewise, neither category of attorney ordinarily should testify as a witness in a
8 proceeding in which the attorney is representing a child.
9

10 **SECTION 18. IMMUNITY.**

11 (a) Only the child has a right of action in civil damages against a child's attorney,
12 best interest attorney, or court advisor for inaction or action taken, including any
13 recommendation or opinion given, in the capacity of child's attorney, best interests attorney or
14 court advisor.

15 ~~(a)(b)~~ A best interests attorney or court advisor appointed pursuant to this [act] is
16 not liable for civil damages because of inaction or action taken, including any recommendation
17 or opinion given, in the capacity of best interests attorney or court advisor unless the inaction or
18 action was:

19 (1) grossly negligent or reckless;

20 (2) intentionally wrongful; or

21 (3) based on bad faith or malice.

22 ~~(b) Only the child has a right of action in civil damages against a child's attorney,~~
23 ~~best interest attorney, or court advisor.~~

24 **Comment**

25 Under this section, only the child has standing to sue for malpractice or other breach of
26 professional responsibility. As courts have recognized, the representative owes a duty of
27 professional competence to the child, not to other parties in the litigation. *See In the Interest of*

1 Z.J., 153 S.W.3d 535 (Tex. App. 2004)(mother lacked standing to challenge performance of
2 child's appointed attorney ad litem in parental rights termination proceeding).

3 This section provides qualified immunity for persons appointed to assist the court as best
4 interest attorneys or court advisors. The provision of qualified immunity is based on the
5 recognition that such individuals need protection from civil actions for damages when
6 performing functions consistent with their appointed roles. Immunity is necessary to ensure that
7 best attorneys and court advisors can fully investigate and formulate recommendations without
8 fear of retaliation by the parties. The threat of litigation from a disgruntled parent might interfere
9 with the representative's decision-making and might deter qualified individuals from accepting
10 appointment in the first place. Although in some states children's representatives have absolute
11 immunity, *see, e.g.,* Paige K.B. by Peterson v. Molepske, 580 N.W. 2d 289 (Wis.
12 1998)(recognizing absolute immunity for guardian ad litem in custody dispute for actions within
13 scope of authority); Billups v. Scott, 571 N.W. 2d 603 (Neb. 1997)(recognizing absolute
14 immunity for guardian ad litem in abuse and neglect proceeding for actions within scope of
15 authority); Carrubba v. Moskowicz, 877 A.2d 773 (Conn. 2005)(recognizing absolute immunity
16 for child's attorney whose primary duty was to protect child's best interests), the qualified
17 immunity provided in this section gives the best interests attorney and court advisor adequate
18 protection from suit while still holding them accountable for egregious misconduct. *See* Ore.
19 Rev. Stat. § 419A170 (providing qualified immunity to court appointed special advocate).

20
21 On the other hand, the Act does not provide immunity for persons appointed as a child's
22 attorney. Although a few states have extended immunity to children's attorneys, *e.g.,* Vernon's
23 Texas Code Ann. Family Code § 107.009 (2004), the premise of this section is that such lawyers
24 are in a traditional lawyer/client role and should be held to ordinary standards of care.
25 Nevertheless, in some circumstances children's attorneys may function as best interests attorneys.
26 If a child's attorney receives no direction from a child on a particular issue and takes an action
27 under Section 12(d) that the attorney has determined will serve the child's best interests, the
28 attorney should be protected by qualified immunity for the action taken. In other words, courts
29 should take a functional approach to the question of immunity. *See* Marquez v. Presbyterian
30 Hospital, 608 N.Y.S.2d 1012 (Sup. Ct. 1994)(holding that law guardian is entitled to qualified
31 immunity when functioning primarily as child's guardian ad litem but would be liable for
32 ordinary negligence when functioning as child's attorney).

33 34 **SECTION 19. FEES AND EXPENSES IN ABUSE AND NEGLECT** 35 **PROCEEDING.**

36 (a) In an abuse and neglect proceeding, an individual or organization appointed
37 pursuant to this [act], other than a volunteer advocate, is entitled to reasonable fees and expenses
38 in an amount set by the court.

(b) If the court determines that a parent or other responsible party is able to defray all or part of the fees and expenses set pursuant to subsection (a), the court shall:

(1) order one or more of those persons to pay all or part of the fees and expenses; or

(2) order one or more of those persons, before final hearing, to deposit the amount necessary to pay all or part of the fees and expenses into court or into an account authorized by the court for the use and benefit of the individual or organization appointed under this [act].

(c) Any fees and expenses set pursuant to subsection (a) that cannot be paid by a parent or responsible party because of indigency must be paid from [designated public funds].

The court may not award fees under this [act] against the state, a state agency, or a political subdivision of the state except as provided in this subsection.

(d) In order to receive payment of fees and expenses under this section, the payee must complete and submit to the court a voucher or claim for payment, listing the fees charged, actions taken, and hours worked.

Comment

This section requires that attorneys and court advisors receive adequate and timely compensation in abuse and neglect proceedings throughout the terms of appointment. States should ensure that adequate funds are appropriated and made available to compensate children's representatives. Under the mandate of federal law, states are obligated to appoint guardians ad litem for children in abuse and neglect proceedings. *See* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). As a matter of state law, this Act supplements the federal requirement by requiring that indigent children receive publicly-funded legal representation, whether in the form of child's attorney or best interests attorney. *See* Section 4. When a court advisor is also required under Section 5, that appointment will likewise be at public expense for indigent children. The child's attorney, best interests attorney, and court advisor should also have access, where necessary, to reimbursement for experts, investigative services,

1 research costs, and other activities undertaken to fulfill the obligations of the appointment.
2

3 **SECTION 20. FEES AND EXPENSES IN CUSTODY PROCEEDING.**

4 (a) In a custody proceeding, any individual or organization appointed pursuant to
5 this [act], other than a volunteer advocate, is entitled to reasonable fees and expenses in an
6 amount set by the court by reference to the reasonable and customary fees and expenses for
7 similar services in the county of jurisdiction.

8 (b) The court may:

9 (1) allocate fees and expenses between the parties in proportion to their
10 ability to pay;

11 (2) order a reasonable cost deposit to be made at the time the court makes
12 the appointment; and

13 (3) before the final hearing, order an amount in addition to the amount
14 ordered deposited under paragraph (2) to be paid into an account authorized by the court for the
15 use and benefit of the individual or organization appointed under this [act].

16 (c) [Except as otherwise authorized by [cite state law], a] [A] court may not
17 award costs, fees, or expenses under this section against the state, a state agency, or a political
18 subdivision of the state.

19 **Comment**

20 In custody proceedings, courts should make clear to all parties how fees will be
21 determined and how and by whom the fees are to be paid. Lawyers and court advisors, unless
22 functioning as volunteers, should be paid in accordance with prevailing legal standards of
23 reasonableness. This section recognizes that most states do not have public funds available to
24 compensate children's representatives in custody disputes other than abuse and neglect
25 proceedings. The ordinary approach will be for the court to assess fees against the parties, taking

1 into account significant disparities in ability to pay and awarding fees in proportion to ability to
2 pay. This section recognizes, however, that in some cases public funds will be available under
3 other provisions of state law for fees and expenses in private custody disputes. Courts may
4 require periodic reporting from appointed representatives regarding their services and fees on an
5 ongoing basis.

6
7 The award of fees and expenses in all cases should include reasonable expenses for expert
8 witnesses where the attorney or court advisor demonstrates to the court that such expenses are
9 necessary to accomplish the objective of the proceeding.
10

11 **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
12 applying and construing this Uniform Act, consideration must be given to the need to promote
13 uniformity of the law with respect to its subject matter among states that enact it.

14 **SECTION 22. TRANSITIONAL PROVISION.** This [act] applies to proceedings
15 filed on or after [the effective date of this [act].] A proceeding filed before [the effective date of
16 this [act]] is governed by the law in effect when the proceeding was filed, and the former law is
17 continued in effect for that purpose.

18 **SECTION 23. EFFECTIVE DATE.** This [act] takes effect on _____.