

# **SYMPOSIUM: THE TRUE VOICE OF THE CHILD: THE MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS**

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## **Reporter**

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## **Highlight**

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

-Former Foster Youth

## **Text**

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### **[\*313] I. INTRODUCTION**

Sentiments like this one from a former foster youth reinforce the importance of quality, client-directed representation.

In August 2011, the [American Bar Association (ABA)] House of Delegates passed the most comprehensive policy concerning the child's representative's role in dependency cases since *The Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* were adopted in 1996. *The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* [Model Act] gives attorneys clear guidance on representing the most vulnerable client, the minor-child. <sup>1</sup>

**[\*314]** Abuse and neglect court proceedings have a significant impact on the life of a child. The child's placement, visitation with family, and parental rights are among the critical decisions that judges must make in these

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<sup>1</sup> Andrea Khoury, *ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases*, 30 A.B.A. CHILD L. PRAC. 106, 106 (2011); see generally MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & DEPENDENCY PROCEEDINGS (2011) [hereinafter MODEL ACT 2011]; STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES (1996) [hereinafter STANDARDS OF PRACTICE].

proceedings. Children must be entitled to attorney representation, arguing zealously, and owing traditional duties of loyalty to the child. The children deserve to have their opinions heard, valued, and considered. They have interests that are often distinct or are opposed to the state and their parents in dependency proceedings. These children's attorneys are the voices for the children. They must listen to how the child feels and what the child wants.<sup>2</sup> Representing children is not easy, but by implementing the Model Act, states can ensure that children in abuse and neglect proceedings across the country have the best representation.

"Historically, states have not been uniform in child attorney governance," and there has been no federal mandate beyond the Child Abuse Prevention and Treatment Act's (CAPTA's) requirement for the appointment of a guardian ad litem (GAL) for a child as a condition for receiving federal funds for child abuse prevention and treatment programs.<sup>3</sup> Providing a child with a lawyer is consistent with the requirements of CAPTA.<sup>4</sup> No state that appoints lawyers has been held out of compliance with CAPTA, and Health and Human Services has issued guidance suggesting that appointing counsel for a child promotes the child's "best interests."<sup>5</sup> Consequently, states appoint children's representatives in a variety of ways: GALs--non-lawyers--are [\*315] appointed to represent what they think is best for the child;<sup>6</sup> lawyers are appointed to function in the traditional lawyer role;<sup>7</sup> lawyers are appointed to operate as GALs;<sup>8</sup> GALs are appointed, but the court may appoint a lawyer if requested

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<sup>2</sup> See MODEL ACT 2011, *supra* note 1, at § 1(c); Khoury, *supra* note 1, at 106.

<sup>3</sup> Khoury, *supra* note 1, at 106; see CAPTA Reauthorization Act of 2010, [42 U.S.C. § 5106a\(b\)\(2\)\(B\)\(xiii\)](#) (2006 & Supp. IV 2010).

<sup>4</sup> See [42 U.S.C. § 5106a\(b\)\(2\)\(B\)\(xiii\)](#).

<sup>5</sup> Donald N. Duquette et al., *Adoption 2002: The President's Initiative on Adoption and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. DEP'T OF HEALTH & HUMAN SERVS., available at <http://www.acf.hhs.gov/programs/cb/pubs/adopt02/02final.htm> (last visited Feb. 26, 2012).

<sup>6</sup> The GAL is "[a] licensed attorney appointed . . . to protect the best interests of an individual without being bound by the expressed wishes of that individual." [ALA. CODE § 12-15-102\(10\)](#) (2009). Arizona law requires the appointment of a GAL to protect the juvenile's best interests. [ARIZ. REV. STAT. § 8-221\(I\)](#) (LexisNexis 2011). Indiana law requires that if the child is alleged to be in need of services due to abuse, neglect, or abandonment, the "court may appoint a guardian ad litem or a court appointed special advocate, or both . . ." [IND. CODE § 31-32-3-1](#) (2011). "A guardian ad litem or court appointed special advocate need not be an attorney." *Id.* § 31-32-3-3. A GAL is appointed to "represent and protect the best interests of a child." *Id.* § 31-9-2-50(1). Iowa law requires the court to appoint a GAL to represent the child in the proceedings. [IOWA CODE § 232.71C\(3\)](#) (2011). In Indiana, a court appointed special advocate may be appointed to act as GAL. [IND. CODE § 31-32-3-1](#).

<sup>7</sup> Kentucky law requires the court to appoint counsel for the child. [KY. REV. STAT. ANN. § 620.100\(1\)\(a\)](#) (West 2011). The court may also "appoint a court-appointed special advocate . . . to represent the best interests of the child." *Id.* § 620.100(1)(d). *Louisiana Children's Code* requires that in every child in need of care proceeding, "the court shall appoint qualified, independent counsel for the child." [LA. CHILD. CODE art. 607A](#) (2011). "Neither the child nor anyone purporting to act on his behalf may be permitted to waive this right." *Id.* The court may also appoint a CASA, in addition to a lawyer, to represent the best interest of the child. [MD. CODE ANN. CTS. & JUD. PROC. § 3-813\(e\)](#) (LexisNexis 2011). Maryland law requires that the "child who is the subject of a [Child in Need of Assistance (CINA)] petition shall be represented by counsel." *Id.* § 3-813(d)(1). Massachusetts law requires that when a child alleged to be in need of services is brought before a juvenile court, the child shall be informed that he or she has a right to counsel at all hearings. [MASS. GEN. LAWS ch. 119, § 29](#) (2011). If the child is not able to retain counsel, the court shall appoint counsel for the child. *Id.* New Jersey law requires "[a]ny minor who is the subject of a child abuse or neglect proceeding . . . be represented by a law guardian." [N.J. REV. STAT. § 9:6-8.23\(3\)\(a\)](#) (2011).

<sup>8</sup> Alabama law requires that:

In every case involving an abused or neglected child which results in a judicial proceeding, an attorney shall be appointed to represent the child in such proceedings. Such attorney will represent the rights, interests, welfare, and well-being of the child, and serve as guardian ad litem for the child.

by the GAL or the child, if there is a conflict between what the [\*316] GAL thinks is best and what the child wants or the child is over a particular age; <sup>9</sup> either a GAL or lawyer may be appointed. <sup>10</sup>

[ALA. CODE § 26-14-11](#) (2009). Arkansas law requires the court to appoint an attorney ad litem when a dependency petition is filed. [ARK. CODE ANN. § 9-27-316\(f\)\(1\)](#) (2011). "An attorney ad litem shall represent the best interest of the [child]." *Id.* § 9-27-316(f)(5)(A). "If the [child's] wishes differ from the attorney's determination of the [child's] best interest, the attorney ad litem shall communicate the [child's] wishes to the court in addition to presenting his or her determination of the [child's] best interest." *Id.* § 9-27-316(f)(5)(B). Colorado law requires the court to appoint a GAL for the child in all dependency or neglect cases under this title. [COLO. REV. STAT. § 19-3-203\(1\)](#) (2011). The GAL represents the child's best interests. *Id.* § 19-3-203(3). Washington D.C. law requires that the court "in every case involving a neglected child which results in a judicial proceeding . . . appoint a guardian ad litem who is an attorney to represent the child in the proceedings." [D.C. CODE § 16-2304\(b\)\(5\)](#) (2011). Missouri law requires a GAL to be appointed to represent the child's best interests rather than representing the child's preferences. See [MO. REV. STAT. §§ 210.160.1\(1\), 453.025.4](#) (2011).

<sup>9</sup> Kansas law requires the court to appoint an attorney to serve as Lawyer-GAL "for a child who is the subject of [the] proceedings." [KAN. STAT. ANN. § 38-2205\(a\)](#) (2011). "When the child's position is not consistent with the determination of the guardian ad litem as to the child's best interests," a second attorney may be appointed "to serve as attorney for the child." *Id.* Michigan law requires the court to "appoint a lawyer-guardian ad litem to represent the child." [MICH. COMP. LAWS § 722.630\(10\)](#) (2011).

If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

*Id.* § 712A.17d(2). Maine law requires the court to "appoint a guardian ad litem for the child." [ME. REV. STAT. tit. 22, § 4005\(1\)\(A\)](#) (2011). "The guardian ad litem or the child may request the court to appoint legal counsel for the child." *Id.* § 4005(F). Minnesota law requires the court to appoint a GAL to protect the interests of the child. [MINN. STAT. § 260C.163\(5\)\(a\)](#) (2011). "[I]f the child . . . desires counsel but is unable to employ it, the court shall appoint counsel to represent the child who is ten years of age or older . . ." *Id.* § 260C.163(3)(b). Hawaii law requires "[t]he court [to] appoint a guardian ad litem for [the] child to serve throughout the pendency of [the] child protective proceedings." [HAW. REV. STAT. § 587A-16\(a\)](#) (2011). If the child does not agree with the recommendations of his or her GAL, the court shall appoint a special counsel for the child "to serve as the child's legal advocate concerning [those] issues and during such proceedings as the court deems to be in the best interests of the child." *Id.* § 587A-16(c)(6). Illinois law requires the court to appoint a GAL "upon the filing of [the] petition." [705 ILL. COMP. STAT. 405/2-17\(1\)](#) (2011). "The guardian ad litem shall represent the best interests of the [child] . . ." *Id.* at 405/2-17(1)(b)(1). Unless the GAL "is an attorney at law he [or she] shall be represented in the performance of his [or her] duties by counsel." *Id.* If the GAL is an attorney, or if the CASA has an attorney, the court may only require the appointment of counsel to represent the child if the court finds that the minor's interests are in conflict with what the GAL determines to be in the best interests of the child. *Id.* at 405/2-17(3), .1(1). New Hampshire law requires the court to appoint a GAL or Court Appointed Special Advocate for the child. N.H. REV. STAT. ANN. § 169-C:10(I) (LexisNexis 2011). "[W]here the child's expressed interests conflict with the recommendation for dispositional orders of the guardian ad litem, the court may appoint an attorney to represent the interests of the child." *Id.* § 169-C:10(II)(a). Idaho law requires the appointment of a GAL for children. [IDAHO CODE ANN. § 16-1614\(1\)](#) (West 2012).

For a child under the age of twelve . . . years the attorney will have the powers and duties of a guardian ad litem. For a child twelve . . . years of age or older, the court may order that the counsel act with or without the powers and duties of a guardian ad litem.

*Id.* § 16-1614(2). Connecticut law requires the child to "be represented by counsel . . . who shall be appointed by the court to represent the child and to act as guardian ad litem." [CONN. GEN. STAT. ANN. § 46b-129a\(2\)](#) (West 2011). "When a conflict arises between the child's wishes or position and that which counsel for the child believes is in the best interest of the child, the court shall appoint another person as guardian ad litem for the child." *Id.*

<sup>10</sup> Alaska allows the court to determine whether "the welfare of a child will be promoted by [either] the appointment of an attorney" or "the appointment of a guardian ad litem." [ALASKA STAT. ANN. § 47.10.050\(a\)](#) (West 2011). California law requires

[\*317] There is also the same lack of uniformity within the states, regardless of statutory guidance.<sup>11</sup> In one county there may be a "lawyers for children" program, and lawyers are regularly appointed, and in another county in the same state, there is no such similar program, and courts will appoint nonlawyers or Court Appointed Special Advocates (CASAs). Children suffer when there is a lack of consistent representation and required training of the representatives. The Model Act gives legislatures concrete language to adopt that provides long-needed uniform guidance to lawyers representing children.<sup>12</sup> The following summary highlights the Act's provisions.

## II. KEY REQUIREMENTS

The Model Act provides some basic requirements. Every child is a party to the dependency action.<sup>13</sup> "Every child is appointed a lawyer" as early as possible, and certainly before the initial hearing, "who is bound by the rules of professional conduct, including confidentiality and zealous advocacy."<sup>14</sup> The child's lawyer has access to the child's confidential information regarding education, health, mental health, social services, delinquency, and other information relevant to the proceeding.<sup>15</sup> Siblings may have the same lawyer as long as the representation does not conflict with "applicable rules of professional conduct."<sup>16</sup> The judicial officer *may* appoint a best interests advocate; this can be a CASA who does not function as the child's lawyer, but assists the court in determining the best interests of the child.<sup>17</sup> This advocate may not replace the child's lawyer and is not bound by the child's expressed wishes.<sup>18</sup> Lawyers must have specific child welfare legal training.<sup>19</sup> States should adopt training standards and standards of practice for [\*318] children's lawyers.<sup>20</sup> Caseloads for lawyers may not be

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the court to "appoint counsel for the child, [however], the court [may] find[] that the child would not benefit from the appointment of counsel," in which case, the court must appoint a CASA. [CAL. WELF. & INST. CODE § 317\(c\)](#) (West 2012). Florida requires a "guardian ad litem . . . be appointed by the court." [FLA. STAT. § 39.822\(1\) \(2011\)](#).

<sup>11</sup> See STANDARDS OF PRACTICE, *supra* note 1, at 17.

<sup>12</sup> MODEL ACT 2011, *supra* note 1, § 7.

<sup>13</sup> *Id.* § 2(b).

<sup>14</sup> Khoury, *supra* note 1, at 106; see MODEL ACT 2011, *supra* note 1, § 3(d).

<sup>15</sup> See MODEL ACT 2011, *supra* note 1, § 8(a)(2).

<sup>16</sup> See *id.* § 3(c).

<sup>17</sup> *Id.* § 3 cmt.

<sup>18</sup> See *id.*

<sup>19</sup> *Id.* § 4(b).

<sup>20</sup> MODEL ACT 2011, *supra* note 1, § 4(a); see e.g., CAL. SUPER. CT. R. 5.660(d)(3) (requiring that every three years attorneys representing children in dependency court "must complete at least eight hours of continuing education related to dependency proceedings"). Maryland guidelines for lawyers representing children in CINA and TPR proceedings include the following areas for attorneys to seek training: "[T]he role of child's counsel; assessing considered judgment; basic interviewing techniques; child development; . . . family dynamics and dysfunction, including substance abuse and mental illness; related issues, such as domestic violence, special education; . . . [and] developmental disability systems." MD. JUDICIARY'S FOSTER CARE COURT IMPROVEMENT PROJECT, GUIDELINES OF ADVOCACY FOR ATTORNEYS REPRESENTING CHILDREN IN CINA AND RELATED TPR AND ADOPTION PROCEEDINGS 11-12 (2001). Alaska requires GALs to "possess knowledge, skill, experience, training, or education that allows the GAL to conduct an . . . investigation." ALASKA CINA R.P. 11(c)(1). They should have an understanding of, among other things, "the impact of . . . out-of-home placement" on the child and family, "substance abuse, domestic violence, and disabilities;" "ethnic, cultural, and socio-economic backgrounds of the population to be served;" "and [the] cultural standards of the Indian community." *Id.* at 11(c)(2)(C)-(D), (F)-(G). Colorado's Chief Justice Directive requires child's representatives to obtain forty hours of training prior to appointment. COLO. SUP. CT. DIRECTIVE 04-08 STANDARD 6. The attorney must provide proof of compliance with this requirement. See *id.* at STANDARD 6 cmt. Delaware requires the attorney- GAL to "[b]e trained by the Office of the Child Advocate . . . [before] representing any child before the

unreasonable. <sup>21</sup> States should adopt caseload limits or guidelines for lawyers. <sup>22</sup> The lawyer's appointment is "in effect until the lawyer is discharged by [the] court . . . or the case is dismissed . . . . [T]he lawyer may arrange for . . . separate counsel to handle" appeals. <sup>23</sup>

The child's lawyer's duties, among other things, include: "interviewing and counseling the [child];" <sup>24</sup> explaining the lawyer's role "[i]n a developmentally appropriate [way]," <sup>25</sup> and "in what strictly limited circumstances the lawyer cannot advocate for the [child's] expressed wishes and in what circumstances [\*319] the lawyer may . . . reveal confidential information;" <sup>26</sup> investigating and preparing the case; <sup>27</sup> "observ[ing] the child's interactions with parents, foster parents, and other caregivers;" <sup>28</sup> negotiating and participating in hearings and settlement discussions; <sup>29</sup> "meeting with the child [before] each hearing and for at least [once] . . . [per] quarter;" <sup>30</sup> visiting the child's current and prospective placements and schools; <sup>31</sup> "consulting with the best interests advocate" when "appropriate and consistent with both confidentiality and the child's legal interests;" <sup>32</sup> "representing the child in all proceedings . . . before the court;" <sup>33</sup> eliciting the child's wishes "[i]n a developmentally appropriate manner;" <sup>34</sup> ensuring the child is represented in any ancillary matters, such as special education, status offenses, immigration, and other matters, "either personally . . . or through referral [and] collaboration;" <sup>35</sup> and "ensur[ing] that the child's health, mental health, educational, developmental, cultural, and placement needs are met." <sup>36</sup> The lawyer "is

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[c]ourt." **DEL. CODE ANN. tit. 29, § 9007A(c)(2)** (2012). Louisiana requires the attorney to "have completed within the last two years a minimum of eight hours of training . . . relevant to child abuse and neglect cases, and/or shall have sufficient knowledge to satisfy the court of the attorney's qualifications." LA. SUPER. CT. R. XXXIII, pt. III(3)(A)(2). "[T]he attorney shall complete a minimum of six hours of approved continuing legal education each calendar year, and shall submit to the [s]upreme [c]ourt documentation of compliance no later than January 31 of the following calendar year." *Id.* at pt. III(3)(A)(3). New Hampshire requires GALs to be certified by the GAL Board and must be renewed every three years. N.H. SUPER. CT. R. 490-C:5-a.

<sup>21</sup> See MODEL ACT 2011, *supra* note 1, § 4(c).

<sup>22</sup> See *id.* § 4(c) cmt. The *California Welfare and Institutions Code* encourages court rules to institute guidelines for caseload standards for GALs. [CAL. WELF. & INST. CODE § 326.5](#) (West 2012). Colorado requires the Office of the Child Advocate to establish pay rates for GALs that take into consideration caseload limits. [COLO. REV. STAT. § 13-91-105\(1\)\(a\)\(VI\)](#) (2009).

<sup>23</sup> MODEL ACT 2011, *supra* note 1, § 6.

<sup>24</sup> *Id.* § 7(b)(1).

<sup>25</sup> *Id.* § 7(c).

<sup>26</sup> *Id.* § 7(c) cmt.

<sup>27</sup> See *id.*

<sup>28</sup> MODEL ACT 2011, *supra* note 1, § 7(c) cmt.

<sup>29</sup> See *id.* § 7(b)(1), (4).

<sup>30</sup> *Id.* § 7(b)(5).

<sup>31</sup> *Id.* § 7(b)(8), (c) cmt.

<sup>32</sup> *Id.* § 7(b)(6).

<sup>33</sup> MODEL ACT 2011, *supra* note 1, § 7(b)(10).

<sup>34</sup> *Id.* § 7(c).

<sup>35</sup> *Id.* § 7(b) cmt.

<sup>36</sup> *Id.* § 7(b)(9).

entitled to reasonable and timely fees and expenses." <sup>37</sup> The "lawyer may be liable for malpractice to the same extent as a lawyer for any other client." <sup>38</sup> "Only the child has [this] right of action [and any actions] for money damages against the child's lawyer. . . ." <sup>39</sup>

### III. LAWYER-CLIENT RELATIONSHIP

"When the child is capable of . . . expressing his or her [wishes and directing representation], the . . . lawyer shall maintain a normal client-lawyer relationship," including duties of loyalty, confidentiality, diligence, competence, client direction, communication, and the duty to provide independent advice. <sup>40</sup> This relationship should be "indistinguishable from [any other] lawyer-client relationship." <sup>41</sup> The lawyer is not a mouth piece for the child. <sup>42</sup> **[\*320]** The lawyer must counsel and "advise the child by providing options and information [that aid] the child in making decisions." <sup>43</sup> The lawyer must advise the child about the consequences of taking various positions and possible outcomes. <sup>44</sup>

### IV. DIMINISHED CAPACITY

The lawyer should, as far as reasonably possible, maintain a normal lawyer-client relationship with the child. The Model Act, however, does include guidance for lawyers representing a child with diminished capacity. <sup>45</sup> "It allows a state to use a rebuttable presumptive age (e.g., [ten] years old) to establish a child's ability to direct the representation. The lawyer may, however, rebut that presumption if the child is younger and [the lawyer deems the child] capable of directing representation." <sup>46</sup> Age should not be the only determinative of diminished capacity. "A child having a different opinion than the lawyer or insisting upon a course of action that the lawyer considers unwise is not diminished [in] capacity. The determination should focus on the decision-making process rather than the decision." <sup>47</sup> Not only must the lawyer know basic child development to make this assessment, but the lawyer should also have intimate knowledge about the specific client's physical, emotional, and developmental level and needs. <sup>48</sup> "The lawyer should not expect the child to convey information in the same way as an adult client." <sup>49</sup> Additionally, the lawyer must be conscious of cultural, ethnic, racial, or economic differences between the lawyer

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<sup>37</sup> *Id.* § 12(a).

<sup>38</sup> MODEL ACT 2011, *supra* note 1, § 11(a).

<sup>39</sup> *Id.* § 11(b).

<sup>40</sup> *Id.* § 7(c) & cmt.

<sup>41</sup> *Id.* § 7(c) cmt.

<sup>42</sup> *Id.*

<sup>43</sup> MODEL ACT 2011, *supra* note 1, § 7(c) cmt.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* § 7(d). Previous guidance in Khoury, *supra* note 1, at 106-07 and the MODEL RULES OF PROF'L CONDUCT R. 1.14 (2004), although helpful, do not provide as much detail and concrete guidance as the MODEL ACT 2011, *supra* note 1, § 7(d). This clearer guidance will help to provide consistency in representation across the country.

<sup>46</sup> Khoury, *supra* note 1, at 106; *see also* MODEL ACT 2011, *supra* note 1, § 7(d).

<sup>47</sup> Khoury, *supra* note 1, at 106-07.

<sup>48</sup> *See* MODEL ACT 2011, *supra* note 1, § 7(b)(9).

<sup>49</sup> Khoury, *supra* note 1, at 107.

and the client and not allow these differences to influence the lawyer's judgment of capacity.<sup>50</sup> The lawyer is the sole determinant of diminished capacity.<sup>51</sup> "The Model Act provides criteria for determining diminished capacity: child's developmental stage;<sup>52</sup> cognitive [\*321] ability;<sup>53</sup> emotional and mental development;<sup>54</sup> ability to communicate<sup>55</sup>; ability to understand consequences;<sup>56</sup> consistency of child's decisions;<sup>57</sup> [and] strength of wishes and opinions of others (including social worker, therapists, teachers, family members, or hired experts)."<sup>58</sup>

"Diminished capacity can be incremental and issue-specific."<sup>59</sup> Capacity is a continuum.<sup>60</sup> "A child may be able to make considered decisions about sibling visits but not about another aspect of the case. The child should direct representation in those areas that she does have capacity."<sup>61</sup> A very young child's capacity to direct representation will change as he develops. Because most dependency cases last at least one year, the lawyer should expect the client's capacity to change and should adjust the representation based on the client's current ability to direct representation. The lawyer is permitted to seek advice from therapists and other professionals working with the child.<sup>62</sup> However, confidentiality should not be compromised.<sup>63</sup>

## V. SUBSTITUTED JUDGMENT

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

Substituted judgment means the lawyer attempts to determine what the child would decide if the child was capable of making an adequately considered decision. The commentary . . . explains that the lawyer may seek guidance from appropriate professionals and others who know the child and must seek opportunities to see the child in her environment. The Model Act makes clear that substituted [\*322] judgment is not the same as determining the child's best interests. This is solely left to the judicial officer.

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<sup>50</sup> See MODEL ACT 2011, *supra* note 1, § 7(e) cmt.

<sup>51</sup> See *id.* § 7(d).

<sup>52</sup> Khoury, *supra* note 1, at 107. Age is one component of developmental level.

<sup>53</sup> Is the child on target or cognitively delayed? Even if the child is cognitively delayed, he may still have capacity. This is only one factor.

<sup>54</sup> Does she express emotions and feelings in an age appropriate way?

<sup>55</sup> Does the lawyer reasonably understand the client's wants and needs?

<sup>56</sup> When told the potential outcomes of certain decisions in a developmentally appropriate manner, does the client acknowledge and understand those outcomes?

<sup>57</sup> Do the client's feelings about a parent or specific issue change regularly or is the client fairly consistent?

<sup>58</sup> Khoury, *supra* note 1, at 107.

<sup>59</sup> *Id.*; see MODEL ACT 2011, *supra* note 1, § 7(d) cmt.

<sup>60</sup> See MODEL ACT 2011, *supra* note 1, § 7(d) cmt.

<sup>61</sup> Khoury, *supra* note 1, at 107.

<sup>62</sup> MODEL ACT 2011, *supra* note 1, § 7(d)-(e) cmt.

<sup>63</sup> *Id.* § 8(b)-(c).

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

- . child-centered; <sup>64</sup>
- . research-informed; <sup>65</sup>
- . permanency driven; <sup>66</sup> and
- . holistic. <sup>67</sup>

The lawyer should consider the child's legal interests and aim to quickly resolve the case. <sup>68</sup>

## VI. PROTECTIVE ACTION

The Model Act reiterates the guidance in the 2004 *Model Rules of Professional Conduct* for when lawyers represent a client with "diminished capacity, [who] is at risk of substantial physical, financial or other harm unless action is taken and [who] cannot adequately act in [his or her] own interest." <sup>69</sup> Under these circumstances, "the lawyer may take reasonably necessary protective action." <sup>70</sup> "Protective action includes consult[ing] with family members, or professionals who work with the child," taking a reconsideration period to allow for improvement in circumstances or the child's capacity, [\*323] and in extreme cases, when all other protective actions have been exhausted, requesting a best-interests advocate be appointed. <sup>71</sup> This last option may undermine the relationship between the lawyer and the client, so it should only be used in extreme cases. The lawyer can never become the best-interest advocate because the lawyer has received confidential information in the course of representation.

When the lawyer takes protective action, he or she is permitted to make necessary limited disclosures that may otherwise be considered confidential. <sup>72</sup> The lawyer should, however, "make every effort to avoid disclosures" and "consider the impact on the client's position" if the disclosure is made. <sup>73</sup>

## VII. CHILD'S PARTICIPATION IN PROCEEDINGS

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<sup>64</sup> How does the child feel about her environment? Who does the child feel close to? Who does the child look to for support and help? Does the child express fear about someone or somewhere?

<sup>65</sup> Does the lawyer know child development and the stage where the child is? Has the lawyer been trained on effective child interviewing techniques?

<sup>66</sup> Who does the child see as her permanent family?

<sup>67</sup> Are the child's physical needs being met? Are the child's developmental health and education needs being met? Are the child's early learning needs being addressed?

<sup>68</sup> Khoury, *supra* note 1, at 107. For more detailed guidance on representing pre-verbal and very young children, please refer to Candice L. Maze, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation*, 34 A.B.A. CTR. ON CHILDREN & THE L. (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/ethicalrep\\_final\\_10\\_10.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/ethicalrep_final_10_10.authcheckdam.pdf).

<sup>69</sup> MODEL ACT 2011, *supra* note 1, § 7(e); MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2004).

<sup>70</sup> MODEL ACT 2011, *supra* note 1, § 7(e); MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

<sup>71</sup> MODEL ACT 2011, *supra* note 1, § 7(e) cmt.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* § 7(c) cmt.

The Model Act establishes that each child has the right to notice and "to attend and fully participate in all hearings related to his or her case."<sup>74</sup> If the child is not present, the court is required to determine whether the child was given proper notice, whether the child wanted to attend, whether there was transportation for the child, and why the child is not present.<sup>75</sup> If the child wants to be at a hearing and is not transported, the Model Act requires the court to postpone the hearing.<sup>76</sup> The child's presence can only be excused by the lawyer after consulting with the child and ensuring the child wants his or her presence waived.<sup>77</sup> The commentary provides the following factors to consider the manner in which the child will participate: "[W]hether the child wants to attend [the entire hearing], the child's age, the child's developmental ability, the child's emotional maturity, the purpose of the hearing and whether the child would be severely traumatized by such attendance."<sup>78</sup>

The Model Act also provides several options to make court attendance most meaningful for the child, including the child "be[ing] present throughout the entire hearing," the child speaking with the judicial officer in chambers, "video [and] teleconferencing the child into the hearing," and "excluding the child during harmful testimony."<sup>79</sup>

In order to make the child's experience more meaningful, "[t]he lawyer [must] ensure that the child is properly prepared for the hearing" by letting [\*324] the child know "what to expect at the hearing, who will be present [and] what their roles are, what will be discussed, and what decisions will be made."<sup>80</sup>

"If the child [wants] to address the court, the lawyer should counsel . . . the child on what to say and how to say it."<sup>81</sup> Just as important as preparing the child, the lawyer must follow up with the child after the hearing to explain the judge's ruling and elicit any questions the child may have.<sup>82</sup>

## VIII. CONCLUSION

Children have been marginalized for many years in abuse, neglect, and dependency proceedings. Representation equal to the other parties in the proceedings is the only way to ensure that children's rights are protected and that their voices are heard. The ABA has taken the lead, instructing states on why and how to implement this equal representation. The call to action has gone out to the states. Passing the Model Act is only the first step. Formal legal representation by attorneys bound by ethical requirements who are trained to properly implement the Model Act is the only solution that will truly give our children a voice.

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<sup>74</sup> *Id.* § 9(a)-(b).

<sup>75</sup> *Id.* § 9(c).

<sup>76</sup> MODEL ACT 2011, *supra* note 1, § 9(d).

<sup>77</sup> *Id.* § 9(e).

<sup>78</sup> *Id.* § 9 cmt.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> MODEL ACT 2011, *supra* note 1, § 9 cmt.

<sup>82</sup> *Id.*

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