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SEP 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

September 22, 2022

Re: ✓ADKT 0598: *Support for Nevada Rules of Conduct for Lawyers
Representing Children in Child Welfare Cases and use of "substituted
judgment determination"*

Dear Justices of the Supreme Court of Nevada,

In an effort to clarify the duty of courtroom advocacy, we added language to Rule IV(c) (new language in italics below):

- c. **Participation in Proceedings:** A child's lawyer shall participate in any proceeding concerning the child with the same rights and obligations as any other lawyer for a party to the proceeding. *Upon request of the court, the lawyer for a child shall communicate their legal position, and any other relevant supporting information, in the same manner as any other lawyer for any other party would provide said information.* Additionally, the child's lawyer shall advise the child of the child's right to participate in the proceeding, and the means by which the child may participate. If the child is required to attend the proceeding, by court order, subpoena or otherwise, the lawyer shall counsel the child about his or her obligation. If the child does not want to participate, or wishes to waive the right to attend after being informed about the child's rights and the nature of the hearing, the lawyer shall inform the court of the child's decision not to attend.

Attached as Exhibit "2" is a complete version of our proposed Rules.

Sincerely,

Barbara E. Buckley, Esq.
Executive Director
Legal Aid Center of Southern Nevada

Janice Wolf, Esq., CWLS
Directing Attorney, Children's Attorneys Project
Legal Aid Center of Southern Nevada

22-29836

EXHIBIT “2”

**NEVADA RULES OF CONDUCT FOR LAWYERS REPRESENTING
CHILDREN IN CHILD WELFARE CASES**

PREFATORY STATEMENT: In August 2011, the American Bar Association adopted the *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, (“the Model Act”) which was drafted under the auspices of the ABA Section of Litigation Children’s Rights Litigation Committee with the assistance of the Bar-Youth Empowerment Program of the ABA Center on Children and the Law and First Star. The Model Act incorporates some language from the provisions of the NCCUSL Representation of Children in Abuse, Neglect, and Custody Proceedings Act. The Model Act has been endorsed by the National Association of Counsel for Children and has been fundamental in the formulation of a model for quality child representation in Nevada. The proposed Nevada Rules of Conduct set forth below incorporate the Model Act, as applied to existing Nevada law and procedure. To the extent that the Model Act contained rules already contained within the Nevada Rules of Professional Conduct, those were not included below. Comments following the rules below are the comments from the Model Act, with amendments to reflect the substance of the proposed rules and Nevada law.

- I. **DEFINITIONS: Reserved.**
- II. **APPLICABILITY: These rules of professional conduct apply to lawyers representing children in abuse/neglect matters, including proceedings under Chapter 432B of the Nevada Revised Statutes and Chapter 128 of Nevada Revised Statutes, as well as related collateral proceedings that affect the child’s welfare.**

Model Act, §3, *Comments*:

Every child has a right to have quality legal representation and a voice in any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of the developmental level of the child.

III. DURATION OF REPRESENTATION

- a. **Commencement of Representation:** Representation of a child by a lawyer shall commence as soon as practicable following intervention by the child welfare agency into the child's home and, if necessary, upon referral by the court.
 - i. The child's lawyer shall obtain placement information and meet with client as early as possible to establish a lawyer/client relationship and identify the client's objectives of representation.
 - ii. If necessary, or if required by local rule, the child's lawyer shall submit all necessary documents to formally appear on behalf of the child, gain access to the court file, and obtain placement information at the commencement of representation.
- b. **Conclusion of Representation:** A lawyer for a child shall remain as counsel for the child until one of the following occurs:
 - i. All legal matters are concluded, and all cases are closed by court order for children under the age of 18;
 - ii. The court does not have continuing jurisdiction pursuant to NRS 432B.591 *et seq.* if the client has reached the age of 18 and all other collateral matters, if any, have resolved; or
 - iii. The lawyer is no longer able to represent the child as contemplated by Nevada Rule of Professional Conduct 1.16, and has received permission from the appropriate court to withdraw.

Model Act, §6, *Comments:*

As long as the child remains in the agency's custody or is under the court's jurisdiction as a result of the agency's actions, the child should retain the right to counsel so that the child's lawyer can deal with the issues that may arise while the child is in custody but the case is not before the court.

IV. DUTIES OF A LAWYER REPRESENTING A CHILD

- a. **Nevada Rules of Professional Conduct:** The child's lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the Nevada Rules of Professional Conduct. The child's lawyer shall provide legal services for a child, and owes the same duties, including zealous advocacy, undivided loyalty, confidentiality and competent representation, as due to a client who is an adult. Nothing in these Rules is intended to abrogate the lawyer's ethical obligations set forth in the Nevada Rules of Professional Conduct.

Model Act, §1, *Comment*:

A "child's lawyer" is a client-directed lawyer in a traditional attorney-client relationship with the child.

Model Act, §3, *Comment*:

Every child has a right to have quality legal representation and a voice in any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of developmental level.

A best interest advocate or a guardian ad litem appointed pursuant to NRS 432B.550 does not replace the appointment of a lawyer for the child. A best interest advocate serves to provide guidance to the court with respect to the child's best interest and does not establish a lawyer-client relationship with the child.

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

- b. **Client-Directed Representation:**

- i. **A child who is capable of expressing his or her objectives is capable of directing representation. When the child is capable of directing representation, the lawyer must abide by and advocate for the child's**

expressed wishes, even if those expressed wishes are in conflict with the child's apparent best interests.

Model Act, §7(c), *Comments*:

The lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client's decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected.

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

In addition to explaining the role of the child's lawyer, the lawyer should explain the legal process to the child in a developmentally appropriate manner as required by Rule 1.4 of the Nevada Rules of Professional Conduct. This explanation can and will change based on age, cognitive ability, and emotional maturity of the child. The lawyer needs to take the time to explain thoroughly and in a way that allows and encourages the child to ask questions and that ensures the child's understanding. The lawyer should also facilitate the child's participation in the proceeding. (See Rule IV(e), below).

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

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

- ii. If the lawyer is unsure of whether the child is capable of directing representation, the lawyer shall follow Nevada Rule of Professional Conduct 1.14 to determine whether the child has diminished capacity to direct representation. The lawyer shall consult with the child, and may consult with other individuals or entities that can provide the lawyer with the information and assistance necessary to determine the child's ability to direct representation. When a child has diminished capacity, the child's lawyer shall make a good faith effort to determine the child's needs and wishes. The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client to the extent reasonably possible. To the extent that a normal client-lawyer relationship is not reasonably possible to maintain, the child's lawyer shall make a substituted judgment determination. A substituted judgment determination includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination.**

In formulating a substituted judgment determination, the child's lawyer's advocacy should be child-centered, research-informed, permanency-driven, and holistic. The child's needs and interests, not the adults' or professionals' interests, must be the center of all advocacy. For example, lawyers representing very young children must truly see the world through the child's eyes and formulate their approach from that perspective, gathering information and gaining insight into the child's experiences to inform advocacy related to placement, services, treatment and permanency. The child's lawyer should be proactive and seek out opportunities to observe and

interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.

When making a substituted judgment determination, the lawyer shall take into consideration the child's legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available. The child's lawyer should seek to speed the legal process, while also maintaining the child's critical relationships.

Model Act, §7(e), *Comments* (determining diminished capacity):

Consistent with Nevada Rule of Professional Conduct 1.14, the child's lawyer should determine whether the child has sufficient maturity to understand and form an attorney-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication. It is the responsibility of the child's lawyer to determine whether the child suffers from diminished capacity. This decision shall be made after sufficient contact and regular communication with the client. Determination about capacity should be grounded in insights from child development science and should focus on the child's decision-making process rather than the child's choices themselves. Lawyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view.

When determining the child's capacity the lawyer should elicit the child's expressed wishes in a developmentally appropriate manner. The lawyer should not expect the child to convey information in the same way as an adult client. A child's age is not determinative of diminished capacity. For example, even very young children are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

Criteria for determining diminished capacity include the child's developmental stage, cognitive ability, emotional and mental development, ability to communicate, ability to understand consequences, consistency of the child's decisions, strength of wishes and the opinions of others, including social workers, therapists, teachers, family members or a hired expert. To assist in the assessment,

the lawyer should ask questions in developmentally appropriate language to determine whether the child understands the nature and purpose of the proceeding and the risks and benefits of a desired position. A child may have the ability to make certain decisions, but not others. A child with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the child's own well-being such as sibling visits, kinship visits and school choice and should continue to direct counsel in those areas in which he or she does have capacity. The lawyer should continue to assess the child's capacity as it may change over time.

Model Act, §7(d), *Comments* (use of substituted judgment determination):

In making a substituted judgment determination, the child's lawyer may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. A substituted judgment determination is not the same as determining the child's best interests; determination of a child's best interests remains solely the province of the court. Rather, it involves determining what the child would decide if he or she were able to make an adequately considered decision. A lawyer should determine the child's position based on objective facts and information, not personal beliefs. To assess the needs and interests of this child, the lawyer should observe the child in his or her environment, and consult with experts.

~~In formulating a substituted judgment position, the child's lawyer's advocacy should be child-centered, research-informed, permanency-driven, and holistic. The child's needs and interests, not the adults' or professionals' interests, must be the center of all advocacy. For example, lawyers representing very young children must truly see the world through the child's eyes and formulate their approach from that perspective, gathering information and gaining insight into the child's experiences to inform advocacy related to placement, services, treatment and permanency. The child's lawyer should be proactive and seek out opportunities to observe and interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.~~

~~When determining a substituted judgment position, the lawyer shall take into consideration the child's legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available. The child's~~

~~lawyer should seek to speed the legal process, while also maintaining the child's critical relationships.~~

The child's lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child's lawyer should determine if the child wishes the lawyer to take no position in the proceeding, or if the child wishes the lawyer or someone else to make the decision for him or her. In either case, the lawyer is bound to follow the client's direction. A child may be able to direct the lawyer with respect to a particular issue at one time but not at another. A child may be able to determine some positions in the case but not others.

- iii. Because a child will naturally age, mature, and develop during the course of representation, the lawyer should continually reassess the child's capacity to direct the lawyer.**

Model Act, §7(d), *Comments*:

A determination of diminished capacity may be incremental and issue-specific, thus enabling the child's lawyer to continue to function as a client-directed lawyer as to major questions in the proceeding. Determination of diminished capacity requires ongoing re-assessment. A child may be able to direct the lawyer with respect to a particular issue at one time but not another. Similarly, a child may be able to determine some positions in the case, but not others.

- iv. The role of a child's lawyer is distinct from the role of a guardian ad litem appointed under NRS 432B.500. A lawyer for the child shall not serve as a guardian ad litem in the same case or in a related matter.**
- c. Participation in Proceedings: A child's lawyer shall participate in any proceeding concerning the child with the same rights and obligations as any other lawyer for a party to the proceeding. Upon request of the court, the lawyer for a child shall communicate their legal position, and any other relevant supporting information, in the same manner as any other lawyer for any other party would provide said information. Additionally, the child's lawyer shall advise the child of the child's right to participate in the proceeding, and the means by which the child may participate. If the child is required to attend the proceeding, by court order, subpoena or otherwise, the lawyer shall counsel the child about his or her obligation. If the child does not want to participate, or wishes**

to waive the right to attend after being informed about the child's rights and the nature of the hearing, the lawyer shall inform the court of the child's decision not to attend.

Model Act, §9, Comment:

The Court should enforce the child's right to attend and fully participate in all hearings related to his or her abuse and neglect proceeding. Having the child in court emphasizes for the judge and all parties that this hearing is about the child. Factors to consider regarding the child's presence at court and participation in the proceedings include: whether the child wants to attend, 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.

Lawyers may consider the following options in determining how to provide the most meaningful experience for the child to participate: allowing the child to be present throughout the entire hearing, presenting the child's testimony in chambers adhering to all applicable rules of evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing the child into the hearing, allowing the child to be present only when the child's input is required, excluding the child during harmful testimony, and presenting the child's statements in court adhering to all applicable rules of evidence. Lawyers should seek continuances or orders regarding transportation to allow the child to participate with minimal disruption to his or her daily routine.

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

- d. **Duties of the Child's Lawyer:** The duties of a child's lawyer include, but are not limited to:
 - i. **taking all steps reasonably necessary to represent the client in the proceeding, including but not limited to: interviewing and counseling**

the client, preparing a case theory and strategy, preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders;

- ii. reviewing and accepting or declining, after consultation with the client, any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;**
- iii. taking action the lawyer considers appropriate to expedite the proceeding and the resolution of contested issues;**
- iv. where appropriate, after consultation with the client, discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state;**
- v. meeting with the child prior to each hearing, to include regular in-person meetings every quarter; however, the child's lawyer may vary the frequency and the modality of client meetings under exceptional circumstances;**
- vi. where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the CASA or guardian *ad litem*;**
- vii. investigating and taking necessary legal action regarding the child's medical, mental health, social, education, and overall well-being;**
- viii. visiting the home, residence, or any prospective residence of the child;**
- ix. seeking court orders or taking any other necessary steps in accordance with the child's direction to ensure that the child's health, mental health, educational, developmental, cultural and placement needs are met; and representing the child in all proceedings affecting the issues before the court, including hearings on appeal or referring the child's case to the appropriate appellate counsel as needed.**

Model Act, §7(b), *Comments*:

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

The child's lawyer may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters may include special education, school discipline hearings, mental health treatment, delinquency or criminal issues, status offender matters, guardianship, adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification, and tort actions for injury, as appropriate. The lawyer should make every effort to ensure that the child is represented by legal counsel in all ancillary legal proceedings, either personally, when the lawyer is competent to do so, or through referral or collaboration. Having one lawyer represent the child across multiple proceedings is valuable because the lawyer is better able to understand and fully appreciate the various issues as they arise and how those issues may affect other proceedings.

V. QUALITY OF REPRESENTATION

- a. The court shall appoint as the child's lawyer an individual who is qualified through training and experience. Lawyers practicing in dependency court or in cases arising out of NRS Chapters 432B and 128 shall receive initial training and annual continuing legal education that is specific to child welfare law.**
 - 1. Lawyers practicing solely in child welfare law shall receive a minimum of 12 hours of initial training and no less than six hours of continuing legal education in child welfare each year.**
 - 2. Lawyers who receive compensation for representing a child in a child welfare case, but otherwise have a caseload consisting of matters outside of child welfare or dependency matters, should be proficient in Nevada and Federal law on child welfare, as well as relevant social and child development science. Those lawyers shall receive 12 hours of initial training over a two year period, and no less than two hours of continuing legal education each year thereafter.**
 - 3. Lawyers who volunteer to represent a child on a pro bono basis shall receive a two hour introduction to child welfare law in Nevada. Pro bono children's lawyers shall be assigned an attorney qualified under subsection 1, above, as a mentor by the agency or**

firm assigning the case to the volunteer. The agency will also advise the pro bono attorney of opportunities for continuing education, updates on the law as they become available, and other opportunities for support.

- b. Lawyers for children should also avail themselves for training in the areas of trauma, child development, and cultural humility and bias, as well as domestic violence, substance abuse and addiction, and their respective impacts on children.**
- c. Lawyers for children shall continually assess the demands of their caseloads, available resources, and the need for continuing education, to ensure that child clients receive zealous advocacy and competent representation.**

Model Act, §4, Comments:

Minimum training requirements for children's lawyers should focus on applicable law, skills needed to develop a meaningful lawyer-client relationship with child-clients, techniques to assess capacity in children, as well as the many interdisciplinary issues that arise in child welfare cases.

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

Additional Comments:

Standard V of the National Association of Counsel's Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings (2022) requires children's lawyers provide competent representation. The Comment recommends foundational training prior to accepting representation and continued learning thereafter. The Comment states: "Before representing a child or youth in

a dependency proceeding, an attorney should understand applicable federal and state laws and regulations, court rules, ethical duties, trial skills, interviewing skills, and relevant social science, including trauma and child and adolescent development. Attorneys should receive initial and ongoing training on cultural humility, the impact of systemic racism, and disproportionate and disparate outcomes experienced by Black and Indigenous children as well as LGBTQIA+ youth.” Rule V recognizes that not all judicial districts will have the same access to children’s lawyers and supportive training; however, this Rule is designed to support the premise that youth do better when provided high quality representation in an abuse and neglect proceeding. Accordingly, Nevada stakeholders and child welfare professionals will promote free or reduced cost access to child welfare education, including training through the Supreme Court of Nevada Administrative Office of the Courts, the State Bar of Nevada, or a Nevada-based legal aid organization, such as Legal Aid Center of Southern Nevada or Northern Nevada Legal Services (formerly Washoe Legal Services). Further, nothing in Rule V limits training to Nevada resources; the child’s lawyer may utilize training from a national organization, such as the American Bar Association and National Association of Counsel for Children.