NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings

(June 2007)

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NYSBA

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COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007)

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PREFACE

Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (2007) is a revised compilation of Parts III. Child Protective Proceedings; IV. Termination of Parental Rights Proceedings; and V. Foster Care Placement & Review Proceedings of the 1996 edition of Standards. The 1996 Standards on Juvenile Delinquency Proceedings and Person in Need of Supervision Proceedings will be revised at a later date.

These Standards apply to all attorneys representing children in the proceedings referenced above. The term "law guardian" has not been used, because the label is outdated and confusing to attorneys and parties alike. Although the efforts of the NYSBA to have the term deleted from the Family Court Act have not yet been successful, perpetuating the use of "law guardian" in this new edition of the Standards seems inappropriate. In addition, despite some ongoing confusion regarding the party status of the child in the context of child welfare proceedings, the child will be considered a party and referenced as such throughout these Standards.

Attorneys and judges who are familiar with the 1996 edition of the Standards will find many similarities with the 2007 edition. A major difference is that the 2007 edition is shorter and does not provide separate standards for each stage in the proceeding. Because all Departments now provide training for attorneys representing children in protective proceedings, the Committee felt that extensive, substantive commentary for each stage in a proceeding was no longer needed. The format and some language come from the American Bar Association's Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, which were approved by the ABA House of Delegates in February, 1996; although there are substantial differences between the NYSBA standards and the ABA standards, we appreciate the assistance received from the ABA standards.

The **Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (2007)** are intended to define what constitutes effective representation.

The Committee welcomes comments and suggestions to improve this edition of the Standards. These should be sent to the Committee through the NYSBA.

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007)

A. THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship. Whether retained or assigned, and whether called "counsel" or "law guardian," the child's attorney shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. There is a presumption that the attorney will adhere to the direction of a young client in the same manner that the attorney would follow the direction of a competent adult pursuant to Canon 7 of the Lawyers Code of Professional Responsibility and Ethical Consideration 7-8, even if the attorney for the child believes that what the child wants is not in the child's best interests. Unless a child is not capable of expressing a preference, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, the attorney must not "substitute judgment" in determining and advocating the child's position.

A-2. Counseling and Advising the Child. The lawyer has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the lawyer with meaningful input and guidance. Because a child may be more susceptible to intimidation and manipulation than an adult client, the lawyer should ensure that the child's decisions reflect his/her actual position. The lawyer has a duty not to overbear the will of the child.

The lawyer's duties as counselor and advisor include:
(1) Developing a thorough knowledge of the child's circumstances and needs;
(2) Informing the child of the relevant facts and applicable laws;
(3) Explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings;
(4) Expressing an opinion concerning the likelihood that the court will accept particular arguments;
(5) Providing an assessment of the case and the best position for the child to take, and the reasons for such assessment;
(6) Counseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position.

Commentary

The attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when, at the end of the day,

the lawyer and the child disagree. However, representation is also "lawyer-directed" in the sense that, particularly when representing a young child, a lawyer has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.

The child's lawyer, like any lawyer, must perform the vital role of being an advisor and counselor. In that role, the lawyer may attempt to persuade the child to adopt a course of action that, in the lawyer's view, will promote the child's legal interests, even when this course of action differs from the client's initial position. To do so effectively, the lawyer needs to determine what factors have been most influential in the child's thinking, what the child does not know, and what may be confusing to the child, and then work diligently to help the child understand the lawyer's perspective and thinking.

While explaining why the lawyer believes a different outcome, or route to the outcome may be preferable, the lawyer must take care not to overwhelm the client's will, and thus override the child's actual wishes. The lawyer must remain aware of the power dynamics inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests. Ultimately, the child must understand that unless the attorney has factual grounds to believe that the child's articulated position will place the child at imminent danger of grave physical harm, the attorney will represent the child's position to the court, even if the attorney does not personally agree with that position.

A-3. Overcoming the Presumption of Adherence to the Client's Directions An attorney must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences, except in the following circumstances:

1. The attorney has concluded that the court's adoption of the child's expressed preference would expose the child to imminent danger of grave physical harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision; or

2. The attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions.

In these circumstances, the attorney for the child must inform the court of the child's articulated wishes, unless the child has expressly instructed the attorney not to do so.

Commentary

When considering whether the child has "capacity to perceive and comprehend the consequences of his or her decisions," the lawyer should not make judgments that turn on the level of maturity, sophistication, or "good judgment" reflected in the child's decision-making. All that is required is that the child have a basic understanding of issues and consequences. The attorney may not use substituted judgment merely because

the attorney believes that another course of action would be "better" for the child. Thus, most children ages seven and above, and sometimes even younger, will have the capacity to make decisions that bind the lawyer with respect to fundamental issues such as where the child should live. In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child's developmental status and capability (see A-5).

The use of the language, "imminent danger of grave physical harm" in sub-section 1. above, is intended to include sexual abuse and to recognize the extraordinary circumstances that should be present before overriding a child's expressed position. See, Merril Sobie, Representing Child Clients: Role of Counsel or Law Guardian, NYLJ, 10/6/92, p. 1, col. 1 (while opining that a law guardian may refuse to argue for a result that would place child in "imminent danger," author notes that those words "connote a grave immediate danger"). See also, American Bar Association Standard B-4(3).

A-4. The Use of Substituted Judgment. In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences, the attorney must inform the court that this is the basis upon which the attorney will be advocating the legal interests of the child. The attorney should be prepared to introduce evidence to support the attorney's position. The attorney also is required to inform the court of the child's articulated position, unless the child has expressly instructed the attorney not to do so. In formulating substituted judgment, the attorney:

(1) Must conduct a thorough investigation, including interviewing the child, reviewing the evidence and applying it against the legal standard applicable to the particular stage of the proceeding; and

(2) Should consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child's articulated position.

Commentary

In those cases in which the lawyer has properly decided to make decisions for the child, the lawyer should be guided by his/her objective analysis of the legal issues governing the proceeding. The lawyer has no right to make "best interests" determinations and act upon them when the law clearly states that a different standard applies. The lawyer properly advances the client's interests only by ensuring that the child's legal interests are protected and that the legal position advanced by the child's attorney conforms to the applicable legal standard governing each stage of the proceeding. For example, at the pre-fact-finding stage of a child protective proceeding, removal of the child is lawful only if there is an "imminent risk to the child's life or health" (FCA §§ 1022, 1024, 1027) as those terms are defined by the New York State Court of Appeals in Nicholson v. Scopetta, 3 N.Y.3d 357 (2004). Thus, pre-fact-finding,

an attorney using substituted judgment under the standard set forth in section A-3 (above) would look to the specific facts of the case and take a position for or against removal based on the legal guidelines set forth in Nicholson.

In contrast, some controversies do require the court, and thus the child's lawyer (when using substituted judgment), to consider the child's best interests. These include controversies related to, for example, parental and sibling visitation, or agency supervision, or treatment and services, or, when a return to a parent is not feasible, the choice of a custodian,. In those instances, the lawyer's formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney. The lawyer should take into account the full context in which the client lives, including the importance of the child's family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law.

It is important to note that if a child affirmatively chooses not to take a position in the litigation, this is not automatically cause for the use of substituted judgment. In such circumstance, the attorney should present this position to the court and represent the child's legal interests in this context. Substituted judgment should only be used if the attorney has objective factual evidence to support the conclusion that a failure to substitute judgment would expose the child to imminent danger of grave physical harm.

A-5. Confidentiality of the Attorney Client Relationship. The attorney-client privilege attaches to communications between the child and his or her attorney, including advice given by the attorney. Statements made by the child to a social worker, an investigator, a paralegal, or another person employed by the attorney also are protected by the privilege. Information protected by the attorney-client privilege may only be disclosed by the child's lawyer in the following circumstances:

(1) The child consents to disclosure;

(2) The attorney is required by law to disclose;

(3) The attorney has determined pursuant to Standard A-3 that the use of substituted judgment is required, and that disclosure advances the child's legal interests; or

(4) The attorney has determined that disclosure is necessary to protect the child from an imminent risk of physical abuse or death.

Commentary

Because attorney-client communications which take place in the presence of a third person are ordinarily not covered by the privilege, an attorney who represents multiple clients in a proceeding should conduct separate interviews of the children. Unless the child testifies and discloses confidential communications, the child's attorney cannot be compelled to turn over his or her notes of interviews with the child for use by other counsel on cross-examination. People v. Lynch, 23 N.Y. 2d 262 (1968). However, the testimony of a social worker regarding the child's out-of-court statements would

result in a waiver of the privilege. Matter of Lenny McN., 183 A.D. 2d 627, 584 N.Y.S.2d 17 *(1st Dept. 1992).*

The attorney also should protect a child's right to confidentiality--for instance, during the course of in camera discussions or negotiations or during casual contacts with attorneys and other persons. The child's permission to communicate discrete items of information to other parties or the judge can often be obtained by explaining to the child the importance or relevance of the disclosure to the child's legal interests.

The exceptions to confidentiality find support in City Bar Ethics Opinion1997-2, which concluded that the child's lawyer may disclose confidential information concerning abuse or mistreatment if the lawyer is required by law to do so, or disclosure is necessary to keep the client from being maimed or killed, or the client lacks capacity and the lawyer believes disclosure is in the client's best interest. See also State Bar Ethics Opinion 486 (1978) (attorney must balance protection of human life against professional standards when deciding whether to reveal client's contemplation of suicide). In determining whether to make disclosure, the attorney should take the child's desires into account and consider the effect disclosure would have on the attorney-client relationship.

The child's attorney is not among the mandated reporters listed in SSL §413, and the attorney has no obligation under that statute to reveal new abuse or neglect allegations made by the child. Licensed social workers are covered by §413, but, because statements made to a social worker employed by the child's attorney ordinarily are covered by the attorney-client privilege, there is substantial controversy with respect to whether §413 requires a social worker-employee to make disclosure.[1] *Accordingly, to best protect client confidentiality, the social worker employed by an attorney should explain to a child that if the child has any doubt about whether he or she wishes a statement regarding new abuse or neglect allegations to be disclosed to a third party, the child should first discuss the situation with the attorney. The social worker and the child's attorney should arrive at a joint decision concerning a social worker's §413 disclosure obligations before the social worker interviews any child.*

B. <u>GENERAL AUTHORITY AND DUTIES</u>

B-1. Basic Obligations. The attorney should ensure that facts in support of the child's position which may be relevant to any stage of the proceeding are presented to the court. To this end, the attorney should:

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[1] See Kansas Attorney General Opinion No. 2001-28 (licensed social worker should comply with reporting law, and lawyer should inform client of conflicting duties of lawyer and social worker and allow client to decide whether to proceed with use of social worker); District of Columbia Bar Opinion 282 (1998) (provision in ethics rules that permits lawyer to reveal confidences when "required by law" does not authorize social worker to reveal confidences and secrets under law that does not apply to lawyer; however, while lawyer should inform social worker of duty to protect client confidences and secrets and should not provide legal advice to social worker regarding reporting obligations, lawyers' ethics rules cannot insulate social worker from legal obligation to report, and, as a result, lawyer should not request that social worker ignore reporting law and must inform client that social worker may be obligated to report).

(1) Obtain copies of all pleadings and relevant notices and demand ongoing discovery;

(2) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g. judge, parties and their advocates, intervenors, case workers, child's lawyer), and what to expect in the legal process;

(3) Develop a theory and strategy of the case, including ultimate outcomes and goals to implement at hearings and including factual and legal issues;

(4) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, child interviews, and any changes of circumstances affecting the child and the child's family;

(5) Participate in depositions, negotiations, discovery, pretrial conferences and hearings; and

(6) Identify (upon consultation with the child) appropriate family and professional resources for the child.

(7) The attorney should obtain and review all court and agency records concerning the child's placement history and should consult with all law guardians who had previously represented the child.

(8) If the attorney is required, for any reason, to terminate representation of the child, the attorney must insure that the new attorney for the child receives all relevant court papers as well as other documents and information necessary to insure the least possible disruption in the case and/or trauma to the child.

Commentary

The attorney should not be merely a fact-finder, but rather should zealously advocate a position on behalf of the child. Delay is endemic to the Family Court process, but delay is especially harmful to children. The attorney for the child should take the initiative and not wait for child protective services, the foster care agency, or the parents to take action. The attorney for the child should make all appropriate motions and seek any necessary orders in furtherance of the child's position.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position. The attorney for the child should actively seek the child's participation and input throughout the legal process and should not undermine the position of the child by volunteering to the court information that contradicts that position. If the client is dissatisfied with the representation provided by his or her attorney, the attorney should inform the child of all of the options available to resolve the child's grievances.

The attorney for the child is not an arm of the court and should not engage in ex parte communications with the court.

B-2. Conflict Situations.
If a lawyer is appointed to represent siblings, there may be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Commentary

An attorney should not accept assignment for siblings if the exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by the attorney's representation of the other or if so doing would be likely to involve the lawyer in representing differing interests. If such a conflict arises during the course of representation, the attorney may not continue to represent all siblings. The attorney may accept assignment or continue his/her assignment when a conflict arises only "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." Code of Professional Conduct § 1200.24.

C. <u>ACTIONS TO BE TAKEN</u>

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child, and additionally, if appropriate, should maintain telephone contact. The attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child's ethnicity and culture.

Commentary

The attorney should recognize that the child's situation may be fluid. As a result, the attorney should remain in close communication with the child throughout the proceedings and apply to the court for further review, monitoring or modification of any preliminary orders, as necessary. The attorney should make reasonable efforts to visit the child in his or her current living situation whenever such a visit would facilitate communication with the child or enhance the attorney's ability to represent the child's legal interests.

The attorney should establish procedures for the person or agency caring for the child to facilitate an interview of the child when a proceeding is commenced, so that the attorney may meet with the child and obtain facts and formulate a position prior to any hearings being held or orders being issued.

In preparation for a termination of parental rights proceeding, the attorney should ascertain the detailed facts concerning the placement, the foster parents, the birth parents and the child's wishes concerning placement and adoption. It is crucial to explore the relationship between the child and the foster parent or prospective adoptive

parents. Of equal significance is the relationship between the child and the birth parents as well as the child's relationship with siblings. Termination can result in a total severance of the parent-child relationship so the attorney must carefully discuss these issues with the child.

C-2. Investigate. To advocate for the client's position, the attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

(1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

(2) Reviewing the social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other relevant records of any other parties in the case;

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. The attorney may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those records which pertain to the other parties. Unless overriding client-directed advocacy, the attorney should obtain the child's permission before obtaining and/or reviewing the child's records (e.g. mental health, law enforcement, and education) or contacting the child's school, counselor, therapist, and other similar persons and institutions.

(3) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;

Commentary

Another key aspect of representing children is the review of all documents submitted to the court as well as relevant agency case files and law enforcement reports. As noted above, other relevant files that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate potential placements and services.

(4) Contacting lawyers for other parties and for background information;

Commentary

The other parties' lawyers may have information not included in any of the available records. Further, they can provide information on their respective clients' perspectives.

(5) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

Commentary

Such contact generally should include visiting the child's place of residence, which can give the attorney additional information about the child's custodial circumstances.

In a termination of parental rights proceeding, the parents' attorney should be solicited for approval to interview the birth parents; if possible, the respondents should be interviewed and, if they oppose termination, their plan concerning the child's future should be evaluated.

(6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records;

Commentary

F.C.A. § 1038(a) provides that "each hospital and any other private or public agency having custody of any records, photographs or other evidence relating to abuse or neglect" shall be required to send such material to the court upon subpoena of any of the parties, including "counsel for the child."

(7) Interviewing individuals involved with the child who may be relevant to the case, including school personnel, child welfare case workers, non-respondent parents, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary

In some jurisdictions the attorney is permitted free access to agency case workers. In others, contact with the case worker must be arranged through the agency's lawyer.

(8) Reviewing relevant photographs, video or audio tapes and other evidence;

Commentary

It is essential that the lawyer review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence. F.C.A. § 1038(b) provides that the attorney may "pursuant to a demand pursuant to Section 3120 of the Civil Practice Law and Rules, obtain any record, photograph or other relevant evidence from the petitioner or a Social Services official for inspection and photocopying."

(9) The attorney should consider whether the child should be examined by a physician, a psychologist, or a social worker.

Commentary

When considering a request for the child to be examined by a physician, psychologist or social worker pursuant to F.C.A. § 1038, the attorney must consider not

just the usefulness of the examination as a fact finding tool, but must also consider the effect of the examination on the child. In determining whether to support a motion made by another party for an examination, or whether to make a motion seeking an examination, the attorney must balance the need for the information against the effect that the examination would have upon the child. The attorney should consider whether the scope of the examination sought can be limited, and move for such a limit if appropriate. For example, a psychological examination may be less harmful than a physical or complete psychiatric examination.

(10) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences concerning the child as needed.

Commentary

Attendance at collateral meetings is often important because the attorney can present the child's perspective at such meetings, as well as gather information necessary for proper representation. In some cases the attorney can be pivotal in achieving a negotiated settlement of all or some issues. The attorney may not need to attend collateral meetings if another person involved in the case, such as a social worker who works with the lawyer, can get the information or present the child's perspective.

(11) If the child is removed from the home, the attorney should investigate the possibility of placement in the home of a non-respondent parent, other suitable relative, or other adult with whom the child has a relationship, and with the child's siblings. Unless so directed by a competent client, in a child protective proceeding, the attorney should not agree or fail to object to a removal or remand without the court conducting a hearing under FCA §1027.

Commentary

If the court determines it is necessary to remove the child from his home, it must inquire, during the course of a F.C.A. §1027 hearing and a S.S.L. § 358-a hearing, if the child is older than five, whether he or she has identified a relative or other suitable person who plays or has played a significant positive role in his or her life. It is crucial that the attorney explores such resources and/or helps the client, regardless of the age of the client, identify possible caretakers. It is also important to identify which potential resources the child does not wish to live with.

C-3. File Pleadings. The attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;
(2) A protective order to prevent successive mental health or other evaluations of the child;
(3) A parenting, custody or visitation evaluation;
(4) An increase, decrease, or termination of contact or visiting;
(5) Restraining or enjoining a change of placement;
(6) Contempt for non-compliance with a court order;
(7) Termination of the parent-child relationship;

(8) Child support;
(9) A protective order concerning the child's privileged communications or tangible or intangible property;
(10) A request for services for child or family; and
(11) Dismissal of petitions or motions.

Commentary

Filing and arguing necessary pleadings and motions is an essential part of the role of an attorney. The filing of such papers can ensure that appropriate issues are properly before the court and can expedite the court's consideration of issues important to the child's interests.

C-4. Request Services. Consistent with the child's legal interests, the attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include services for the child or for the parent(s), as long as the request for services is made in order to advance the child's legal interests. Such services may include, but are not limited to:

(1) Family preservation-related prevention or reunification services;
(2) Sibling and family visits;
(3) Child support;
(4) Domestic violence prevention, intervention, and treatment;
(5) Medical and mental health care;
(6) Drug and alcohol treatment;
(7) Parenting education;
(8) Semi-independent and independent living services;
(9) Foster care placement;
(10) Termination of parental rights action;
(11) Adoption services;
(12) Education;
(13) Recreational or social services; and
(14) Housing.

The attorney should monitor the child's progress in health care and education. If the child is in foster care, the attorney should monitor the quality of care provided to the child in the foster home or institution. Whenever it is consistent with the child's legal interests, the attorney should also advocate for the broadest parental and sibling visiting and monitor its provision.

Commentary

The attorney has full standing to request a hearing pursuant to F.C.A. § 1027 to determine whether the child's interests require protection pending a final order of disposition. For example, the court may remove the child from the home, place him with a non-respondent parent, relative or a foster parent, or may order any supportive measures that would protect the child in the home (such as homemaking services, day care services and counseling).

If the child has been temporarily removed from the home in a child protective proceeding, the attorney should arrive at a position, consistent with the child's wishes, as to whether the child should be returned to the home and, if so, apply for an order returning the child pursuant to F.C.A. § 1028.

In Nicholson v. Scopetta, 3 N.Y.3d 357 (2004), the Court of Appeals held that when a request is made to remove a child from a home, the court must consider whether the risk of harm that is posed by remaining in the home can be eliminated by putting services in place. Whenever it is consistent with the child's legal interests, the attorney should develop and present a service plan on behalf of the child.

In a voluntary foster care placement, the attorney should, consistent with the child's position, determine whether there were alternatives to placement, including preventive services, and whether the parents were made aware of alternatives to placement. In addition, because many S.S.L. § 358-a proceedings involve elements of abuse or neglect, the attorney should consider whether a child protective proceeding would be appropriate. If so, the attorney should request that a petition be filed, because child protective proceedings may afford better protection for the child.

The attorney should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal methods are unsuccessful, the lawyer should file a motion to bring the matter before the court. In some cases the attorney should file collateral actions, such as petitions for termination of parental rights, if such an action would advance the child's legal interest.

C-5. Child With Special Needs. Consistent with the child's wishes, the attorney should assure that a child with special needs receives appropriate services to address any physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;
(2) Supplemental security income (SSI) to help support needed services;
(3) Therapeutic foster or group home care; and
(4) Residential/in-patient and out-patient psychiatric treatment.

Commentary

The attorney should ensure that the court is aware of the child's needs, so that the court can take those needs into consideration in making decisions regarding placement and services. In particular, the child's emotional needs and attachments must be considered in any decision to remove a child from his/her home. Nicholson v. Scopetta 3 N.Y.3d at 379.

There are many services available from extra-judicial, as well as judicial, sources for children with special needs. The attorney should be familiar with these other services and how to assure their availability for the client.

C-6. Adolescent Clients. The attorney who represents a young person age fourteen or older should be familiar with, among other things, both the federal and state law governing services and discharge resources available to youth aging out of foster care.

Commentary

An enormous number of young people age out of the system each year without the resources they need and to which they are legally entitled. The attorney must advocate for effective planning for adolescent clients as early in a case as possible. See 42 U.S.C. §§ 675(1)(D), 677(a); F.C.A. §§ 1052(b)(i)(A)(6)(iv), 1089(c)(v), 1089(d)(2)(i); S.S.L. § 358-a(3); N.Y.C.R.R. § 430.12(f).

When clients approach the age of 18, the attorney should be prepared to discuss the advantages and disadvantages of remaining in foster care and, if the client decides to remain in care past their 18th birthday, have the client sign a written consent to remain in care.

C-7. Undocumented Children. The attorney for the child should determine at the outset of the case whether the child is an undocumented immigrant. Undocumented children have a unique opportunity to regularize their immigration status under the Special Immigrant Juvenile Status section of the federal Immigration and Naturalization Act. The attorney for the child should be familiar with this statute in order to determine whether the young person is eligible for Special Immigrant Juvenile Status (SIJS). If the young person is SIJS eligible, the attorney should obtain the family court orders required in order to adjust the young person's immigration status and connect them with appropriate immigration resources so that the child can obtain a green card.

Commentary

It is estimated that well over one thousand children who enter foster care in New York State each year do not have legal immigration status. This poses a major obstacle to permanency planning for these young people, who are at risk of deportation, not authorized to work, and ineligible for college financial aid and other government benefits. Relief for these children is available in the form of SIJS, a type of visa designated for undocumented children who are the subject of abuse, neglect, voluntary foster care placement, guardianship, adoption, and PINS or delinquency proceedings. While the SIJS application itself is made to the United States Citizenship and Immigration Services, a prerequisite for the application is an order from the Family Court making specific factual findings that:

- *The young person is under 21 years of age;*
- *is unmarried;*
- *has been declared dependent upon a juvenile court;*
- *has been deemed eligible by the court for long-term foster care due to abuse, neglect or abandonment;*
- *continues to be dependent upon the juvenile court and eligible for long-term foster care in that family reunification is no longer an option; and that*
- *it would not be in the young person's best interest to be returned to the country of nationality or last residence.*

See, Immigration and Naturalization Act §101(a)(27)(J), 8 U.S.C.§1101(a)(27)(J)

C-8. Negotiate Settlements. The attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The attorney should use suitable mediation resources and, where appropriate, ask the court to authorize the use of conferencing or mediation to "further a plan for the child that fosters the child's health, safety, and wellbeing." F.C.A. § 1018.

Commentary

Particularly in contentious cases, the attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the attorney to negotiate with a parent directly without the consent of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the attorney for the child is in a pivotal position in negotiation.

Settlement frequently obtains at least short-term relief for all parties involved and is often the best resolution of a case. The attorney, however, should not become merely a facilitator to the parties reaching a negotiated settlement. As developmentally appropriate, the attorney should consult the child prior to any settlement becoming binding. The attorney's consent is required as a condition precedent to acceptance of an admission (F.C.A. § 1051(a)) or an adjournment in contemplation of dismissal (F.C.A. § 1036). Thus, the legislature clearly intended that the settlement protect the child's legal interests and wishes.

D. <u>HEARINGS</u>

D-1. Court Appearances. The attorney should attend and fully participate in all hearings and in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

Commentary

Whenever it furthers the child's legal position, the attorney for the child should verify that the parents and other necessary parties have been properly notified of the hearing.

D-2. Client Explanation. The attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during, and after each hearing. Post-court appearance updates should be provided to the child as soon as possible.

D-3. Motions and Objections. The attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the attorney should file briefs in support of evidentiary issues. Further, during all hearings, the attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The attorney should present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary to support the child's legal position.

Commentary

The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-6), and not a mere endorsement of another party's position. Caselaw makes plain that children are entitled to more than the mere presence of a lawyer; they deserve effective representation and the failure to provide effective representation constitutes reversible error. See Matter of Jamie TT, 191 A.D.2d 132. 599 N.Y.S.2d 892 (3rd Dept. 1993).

D-5. Child at Hearing. The attorney shall determine whether the child wishes to be, or in the case of a child who lacks capacity, whether the child should be present during courtroom proceedings. When the attorney determines that the child wishes to or should be present, the attorney shall make necessary applications to the court and otherwise attempt to enforce the child's right to be present.

Commentary

New York State has not yet enacted legislation nor recognized a constitutional right for children to be present during court proceedings. However, the ABA has opined that a child has the right to meaningful participation in the proceeding, which right includes the opportunity to be present at significant court hearings. Moreover, recent federal legislation mandates that states receiving federal funding require the court to "consult" with the child regarding the permanency plan. Children and Families Services Improvement Act of 2006 (Public Law 109-248). Arguably, the federal law requires an in-court appearance by the child.

When the attorney has determined pursuant to Standard A-3 that the child has the capacity to decide whether to appear in court, the attorney may first provide counseling and advice to the child, but, in the end, must assert the child's right to appear in court insofar as the child directs. The attorney should raise and discuss with the child the emotional impact of the child's presence in court or exposure to inflammatory facts, and, with the child's consent, waive the child's appearance for discrete portions of the proceeding.

When the attorney has determined pursuant to Standard A-3 that the child lacks capacity, the attorney, after taking into account the child's expressed wishes, may decide whether to assert the child's right to be present in court. In making such determinations, the attorney should, with due regard to rules governing disclosure of confidential information, consult with mental health professionals, caretakers, and any other persons who are knowledgeable about the child's emotional condition and possible reaction to the court proceedings. The attorney should keep in mind that even a child who is too young to sit through the hearing, or too developmentally delayed to direct the attorney with

regard to the outcome of the case, may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making decisions.

The lawyer should attempt to ensure that the child's experience in court is as comfortable and stress-free as possible. To that end, the attorney should press the state custodian to meet its obligation to transport the child to and from the hearing; arrange for the child to wait in an appropriate setting in the courthouse; and explain to the child, before and after the hearing, what is likely to occur and what has occurred.

D-6. Whether Child Should Testify. The attorney should decide, in consultation with his or her client, whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the attorney is bound by the child's direction concerning testifying.

Commentary

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision to have the child testify should be made individually, based on the circumstances of the individual child and the individual case. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so. If the child does not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parent(s), and requesting sufficient hearing time in order for the child's testimony to be limited to one appearance. The child should know whether the in-chambers testimony will be shared with others, such as parents who might be excluded from chambers, before agreeing to this forum. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes.

If the child's testimony is requested or required, the attorney must thoroughly prepare the child, and advise the child of the nature of the testimony and the reasons the testimony is necessary. If the child's testimony is requested and the child does not wish to testify, the attorney should consider whether testifying may be avoided through either the introduction of other evidence or by stipulation to the facts to which the child would attest. The attorney should also consider requesting that the testimony be taken in the judge's chambers, rather than the more formal courtroom (which may be intimidating to the client), with the attorney present. The attorney should request that the in camera interview be structured in a way that would be least harmful to the child. The attorney should also consider consulting with a social worker or other mental health professional

to help the child prepare for the psychological, and emotional experience of testifying before the court.

D-7. Child Witness. The attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Commentary

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The lawyer should seek any necessary assistance from the court, including location of the testimony (in chambers, at a small table etc.), determination of who will be present, restrictions on the manner and phrasing of questions posed to the child, and the possibility of a prior visit to the court room.

The accuracy of children's testimony is enhanced when they feel comfortable. Courts have permitted support persons to be present in the courtroom, sometimes even with the child sitting on the person's lap to testify. Because child abuse and neglect cases are often closed to the public, special permission may be necessary to enable such persons to be present during hearings. Further, where the rule sequestering witnesses has been invoked, the order of witnesses may need to be changed or an exemption granted where the support person also will be a witness. The child should be asked whether he or she would like someone to be present and, if so, whom the child prefers. Typical support persons include parents, relatives, therapists, Court Appointed Special Advocates (CASAs), social workers, victim-witness advocates, and members of the clergy. For some, presence of the attorney provides sufficient support.

D-8. Questioning the Child. The attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility.

The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

D-9. Challenges to Child's Testimony or Statements. The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The attorney should be familiar with the current law and empirical

knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary

If necessary, the attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

D-10. Conclusion of Hearing. If appropriate, the attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The attorney should ensure that a written order is entered.

Commentary

One of the values of having a trained attorney is that such a lawyer can often present creative alternative solutions to the court. Further, the attorney is able to argue the child's legal position from the child's perspective, keeping the case focused on the child's wishes, needs and the effect of various dispositions on the child.

D-11. Dispositional Hearing. The attorney should, in consultation with the child, develop a dispositional plan to present to the court, and should request a hearing if necessary to advocate for the expressed wishes and legal interests of his/her client.

Commentary

Only the child's attorney is charged with expressing the child's wishes. Any disposition should be the product of extensive evaluation and review, should comprehensively address the family's problems, and should be consistent with the child's legal interests and, to the greatest extent possible, his or her wishes.

Development of a dispositional plan should commence at an early date, although the goals may be refined and updated as the case nears a conclusion.

In a termination of parental rights proceeding, a separate dispositional hearing is not required when the court has determined, at the fact-finding stage, that the parent has abandoned the child, or that parental rights should be terminated because of "permanent" mental illness or retardation. However, disposition, whether adoption, continued foster care, or family reunification, determines the child's future life. The need for specific services, the appropriateness of potential permanent placements and even the proof necessary to sustain a finding, may all flow from the dispositional goal. Therefore, the attorney should formulate an opinion as to the dispositional plan to be presented by the petitioning agency and if, after consultation with the child, the attorney disagrees with the agency's plan, a comprehensive alternative plan should be prepared and presented to the Court.

A denial of a request for a dispositional hearing in a termination of parental rights proceeding could constitute an abuse of discretion, and, in such situations, the attorney may initiate an appeal.

D-12. Expanded Scope of Representation. The attorney should evaluate, in consultation with the child, the pursuit of other issues on behalf of the child, administratively or judicially, even if those issues do not appear to arise from the court appointment. For example:

(1) Child support;
(2) Delinquency or status offender matters;
(3) SSI and other public benefits;
(4) Custody;
(5) Guardianship;
(6) Paternity;
(7) Personal injury;
(8) School/education issues, especially for a child with disabilities;
(9) Mental health proceedings;
(10) Termination of parental rights;
(11) Adoption; and
(12) Immigration status.

Commentary

The child's interests may be served through proceedings not directly connected with the case in which the attorney is participating. In such cases the lawyer may be able to secure assistance for the child by filing or participating in other actions.

If a termination of parental rights petition is pending on behalf of the child, the attorney should consider whether or not an adoption petition should be filed forthwith. D.R.L. § 12(8).

As a result of legislation enacted in 2006, where a child is under the jurisdiction of the Family Court as a result of a Family Court child protective, foster care, surrender or termination of parental rights proceeding, there is a preference for filing an adoption proceeding in the same court and a procedure for ensuring that the case will be heard, to the extent practicable, before the same judge presiding over the pending proceeding.

D-13. Obligations after Disposition. The attorney's representation continues throughout the period of placement, supervision or adjournment in contemplation of dismissal. The attorney must monitor the case, receive relevant reports, and initiate appropriate modification, enforcement or other action in the interests of the child.

Commentary

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the attorney's work often comes after the initial hearing, including ongoing permanency hearings, service plan reviews, issues of termination, and so forth. Often a child's case workers, therapists, other service providers or even placements change while the case is still pending. The attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for

the agency and court. The attorney should stay in touch with the child, third party caretakers, case workers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

As a result of legislation enacted in 2005 which repealed F.C.A. § 1055-a and S.S.L. §392, there is now continuing court jurisdiction and calendaring for all children who have been placed or freed for adoption "until the child is discharged from placement and all orders regarding supervision, protection or services have expired." F.C.A. § 1088. Within eight months after the child was first removed and placed in foster care, and every six months thereafter, a permanency hearing must be held. The attorney should make best efforts to obtain the mandated permanency hearing report, which is due at least fourteen days before the date set for the permanency hearing F.C.A. § 1089. Although the hearing must be completed within 30 days, the attorney should consider asking the court for a continuance if the report has not been provided prior to the hearing so that the attorney can do an independent assessment and, if necessary, prepare for a full evidentiary hearing on behalf of his or her client. The legislative intent of the permanency legislation was to ensure that children who have been placed in foster care or freed for adoption do not languish and that the court oversees the progress of every child on a frequent basis. It is incumbent upon the attorney to make best efforts to ensure that every child achieves his or her permanency goal as soon as possible.

E. POST-HEARING

E-1. Review of Court's Order. The attorney should review all written orders to ensure that they conform to the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The attorney should discuss each order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children may assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished.

E-3. Implementation. The attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

Commentary

The lawyer should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with

implementation, the lawyer should stay in touch with the child, case worker, third party caretakers, and service providers between review hearings. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation. The attorney for the child is mandated by F.C.A. § 1075 ("special duties of law guardian") to review progress reports to determine whether there is reasonable cause to suspect that the child is at risk of further abuse or neglect or that there has been a substantive violation of a court order. Where the attorney makes such a determination, the attorney must apply to the court for appropriate relief pursuant to F.C.A. § 1061. That section provides that the attorney may move the court to stay, set aside, modify or vacate any order issued in the course of an Article 10 proceeding. It should be noted that the attorney may seek relief pursuant to F.C.A. § 1061 at any time s/he receives information that would render such a motion appropriate.

E-4. Protecting the Child's Rights. Whenever appropriate, after consulting with the child, the attorney should assist in the filing of a notice of claim, obtain counsel for clients who were abused or injured in foster care, and for clients who were removed in violation of their constitutional rights, and investigate bringing suit for damages for the client. The attorney for the child is obligated to protect all of the child's legal rights even if the attorney is not able to represent the child in another forum.

F. APPEAL

F-1. Decision to Appeal. The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal would not be frivolous, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

F.C.A. § 1121(2) requires the attorney to advise the child, in writing, of the right to appeal, the time limitations, the manner of initiating the appeal and obtaining a transcript, and the right to a free transcript and representation. The attorney is also statutorily required to explain to the child the consequences of an appeal and the reasons upon which an appeal may be based. The lawyer should explain to the child not only the legal possibility of an appeal, but also the ramifications of filing an appeal, including the potential for delaying implementation of services or placement options. The lawyer should also explain whether the trial court's orders will be stayed pending appeal and what the agency and trial court may do pending a final decision.

F-2. Withdrawal. If the attorney determines he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. Participation in Appeal. The attorney should participate in an appeal filed by another party unless discharged.

Commentary

The attorney should take a position in any appeal filed by the parent, agency, or other party. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal

As a result of the permanency legislation enacted in 2005, children and parents represented by a legal services organization or assigned counsel are now presumed eligible for assignment of counsel for the appeal and poor person relief. The attorney should submit a certification that the child is still eligible for assignment of counsel. The legislative intent was to simplify and make automatic these applications in order to expedite an often lengthy appeals process.

F-4. Conclusion of Appeal. When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

F-5. Cessation of Representation. The attorney should discuss the end of the legal representation and determine what contacts, if any, the attorney and the child will continue to have.

Commentary

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.