NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN AND THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS

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STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS (2008)

PREFACE

Standards for Attorneys Representing Children in New York Custody, Visitation and Guardianship Proceedings (2008) is a fourth edition of the child custody standards and commentaries first adopted and published by the New York State Bar Association in 1992.

These Standards apply to all attorneys representing children in custody, visitation and guardianship proceedings between private persons, whether in supreme court, surrogates court, or family court. These Standards are not meant to apply to actions in which the government or a child care agency is a party, although many of the principles set forth here are relevant to both public and private custody proceedings.

The term "law guardian" has not been used because the October 17, 2007 Administrative Order of the Chief Judge of the State of New York indicates that "attorney for the child" means a law guardian and because the term "attorney" reflects the current understanding of the function of the child's representative. 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.

Attorneys and judges who are familiar with earlier editions of the Standards will find many similarities with the third edition. A major difference is that this edition changes the structure and formatting to conform more closely to other representation standards adopted by the New York State Bar Association's Committee on Children and the Law.

The **Standards for Attorneys Representing Children in New York Custody, Visitation and Guardianship Proceedings (2008)** 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 CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS (2008)

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, shall keep client confidences and secrets, 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. Pursuant to Canon 7 of the Lawyer's Code of Professional Responsibility and Ethical Consideration 7-8, there is a presumption that the attorney will adhere to the direction of a competent client. This presumption should apply in representation of a child client, 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 one of the conditions set forth in §A-3 (below) has been met, the attorney must not "substitute judgment" in determining and advocating the child's position.

Commentary

Under the Rules of the Chief Judge,§ 7.2 (b) & (d):

(b) The attorney for the child is subject to the ethical requirements applicable to all attorneys, including but not limited to, constraints on: ex parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation.

(d) In other types of proceedings [other than JD and PINS], where the child is the subject, the attorney for the child must zealously advocate the child's position.

(1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.

(2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

(3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following

the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

Case law makes plain that children are entitled to more than the mere presence of an attorney; they deserve effective representation and the failure to provide effective representation constitutes reversible error. See, Matter of Elizabeth R,. 155 A.D.2d 666 (3d Dept, 1989); Matter of Jamie TT., 191 A.D.2d 132, 599 N.Y.S.2d 892 (3rd Dept. 1993).

A-2. Counseling and Advising the Child. The attorney 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 attorney with meaningful input and guidance. Because a child may be more susceptible to intimidation and manipulation than an adult client, the attorney should ensure that the child's decisions reflect his/her actual position. The attorney has a duty not to overbear the will of the child.

The attorney'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

When representing a child who is competent, as defined in section A-3 (below), the attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when the attorney and the child disagree. However, representation is also "attorney-directed" in the sense that, particularly when

representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.

The child's attorney, like any attorney, must perform the vital role of being an advisor and counselor. In that role, the attorney may attempt to persuade the child to adopt a course of action that, in the attorney'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 attorney 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 attorney's perspective and thinking.

While explaining why the attorney believes a different outcome, or route to the outcome, may be preferable, the attorney must take care not to overwhelm the child's will, and thus override the child's actual wishes. The attorney 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 substantial risk of imminent, serious 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 substantial risk of imminent, serious 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 child's attorney 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 attorney 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 has a basic understanding of the issues in the case and their 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 attorney 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.)

While section A-2 (see above) explores the nuances of the attorney's responsibility to counsel his or her client, there is no question that this responsibility is tested most acutely when, after counseling the child, the attorney disagrees with the child's position. In such situations, the attorney must be especially careful when evaluating whether the extraordinary step of implementing substituted judgment is warranted. It is critical to remember that although an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions, 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 substantial risk of imminent, serious harm the attorney will represent the child's position to the court, even if the attorney does not personally agree with that position. This is the case no matter what the reasons are for the attorney's disagreement with the child's articulated position. Even when the attorney believes that the child has been influenced by a third party to take his or her position, the child's articulated position must govern unless that position places the child at substantial risk of imminent, serious harm.

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 or when the child is not capable of expressing a preference, the attorney must inform the court and the child that substituted judgment 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, which includes interviewing the child, reviewing the evidence, and applying it against the applicable legal standard; 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 and/or to assist the attorney in formulating a legal position on behalf of a child who is not competent (see A-3).

Commentary

In those cases in which the attorney has properly decided to make decisions for the child, the attorney should be guided by his/her objective analysis of the legal issues governing the proceeding. The attorney 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 the proceeding.

Some controversies related to parenting time[1] or the choice of a custodian will require the court, and thus the attorney who is using substituted judgment, to consider the child's best interests. In those instances, the attorney'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 attorney 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. When using substituted judgment and formulating a best interests position, the attorney may wish to consult a social worker or other mental health professional for assistance.

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 represent this position to the court and represent the child's legal interests in this context. Substituted judgment should only be used when the child clearly lacks capacity pursuant to the criteria set forth in section A-3 (see above), or if the attorney has objective factual evidence to support the conclusion that a failure to substitute judgment would expose the child to substantial risk of imminent, serious 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. The child's attorney may only disclose information protected by the attorney-client privilege under 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 that 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

[1] From time to time, the term "parenting time" is used in these standards instead of the term "visitation." The intent is to recognize an emerging statewide and national trend toward this less polarizing, more child-focused nomenclature.

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 NY2d 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 Opinion 1997-2, which concluded that the child's attorney may disclose confidential information concerning abuse or mistreatment if the attorney 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 attorney 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 a 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 S.S.L. §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 a disclosure.[2] *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.*

At the beginning of the proceeding, in order to avoid confusion and unnecessary conflict, the attorney for the child may wish to advise parents' counsel, or the parents if they are proceeding pro se, *as to the role of the attorney for the child and the impact of the duty of confidentiality on the attorney for the child's ability to share information with the parents.*

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[2] See Kansas Attorney General Opinion No. 2001-28 (licensed social worker should comply with reporting law, and attorney should inform client of conflicting duties of attorney 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 attorney to reveal confidences when "required by law" does not authorize social worker to reveal confidences and secrets under law that does not apply to attorney; however, while attorney should inform social worker of duty to protect client confidences and secrets and should not provide legal advice to social worker regarding reporting obligations, attorneys' ethics rules cannot insulate social worker from legal obligation to report, and, as a result, attorney should not request that social worker ignore reporting law and must inform client that social worker may be obligated to report).

B. GENERAL AUTHORITY AND DUTIES

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

(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, case workers performing court-ordered investigations, child's lawyer), and what to expect in the legal process;

(3) Determine if a conflict of interest exists and observe ethical rules related to conflicts, when the attorney is representing multiple siblings;

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

(5) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification regarding any changes of circumstances affecting the child and the child's family;

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

(7) Consider whether a neglect petition or child protective investigation under F.C.A. 1034 should be undertaken, and if appropriate and the client consents, make the necessary motions;

(8) Identify (upon consultation with the child) appropriate resources to assist with visiting (as necessary) and to provide other services for the child;

(9) Obtain evaluations and retain expert services if deemed necessary to effectively present the child's position;

(10) Obtain and review all court and other records concerning the child's history and consult with all law guardians who had previously represented the child; and,

(11) If the attorney is required, for any reason, to terminate representation of the child, he or she must ensure that the new attorney for the child receives all relevant court papers as well as other documents and information necessary to ensure 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 the other parties to take action. The attorney for the child should make all appropriate motions and seek any necessary orders, including interim or temporary orders, in furtherance of the child's position.

Although the child's position may overlap with the position of one or both parents, or a third-party, 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, the attorney should determine if there is a conflict of interest, which could require that the lawyer decline representation or withdraw from representing some or 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. Depending on the circumstances and the stage of the proceeding, if such a conflict arises the attorney may not be able to continue to represent any or all of the 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." Lawyer's Code of Professional Responsibility, D.R. 5-105.

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 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 and position 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. When representing a very young client who cannot be interviewed, the attorney can observe the child in order to evaluate the child's demeanor, physical condition, reaction to the environment in which the child lives, and interaction with the parties.

The attorney should establish procedures for the custodian of 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.

The child should be made to feel free to articulate his or her views and concerns, but should never be compelled or even urged to choose between parents.

The prognosis of the litigation may also be explained and realistic alternatives offered. For example, the reluctance of the court to award custody to an unfit or less fit parent even if the child wishes to live with that parent should be discussed, as well as the alternative of advocating liberal visitation and joint decision making.

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

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

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

(3) Reviewing the court files of the child and siblings, as well as any relevant social service, child protective and law enforcement files;

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

(5) Contacting and meeting with the parties, with permission of their lawyer;

(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, child protective and social services records, and medical records pertaining to the child, as well as relevant criminal records, medical records, and mental health records pertaining to the parties;

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

(8) Reviewing relevant evidence provided by the other parties;

(9) Considering whether the child should be examined by a physician, a psychologist, or a social worker; and

(10) Visiting the child's present home and any proposed home, whenever the child's attorney deems it appropriate.

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 records pertaining to the other parties. Unless the attorney is using substituted judgment pursuant to §§A-3 and A-4 above, 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, etc.

It is important that the child's attorney obtains and reviews every source of information that may be relevant to custody or visitation. If, for example, custody is one aspect of a divorce action based on alleged cruelty, the allegations and documents to support a fault divorce may well be relevant to the issue of parental fitness and the legal interests of the child (and false allegations may be as significant as valid charges). Many custody disputes also involve the material needs of a child, and may involve maintenance or a property distribution. In some cases, the required detailed financial statements, including the net worth statements, that are used to determine the material needs of the child may be relevant in determining a parent's motivation and sincerity regarding issues of custody or parenting time. All relevant documents should be obtained and reviewed in light of the child's wishes and interests.

Another key aspect of representing children is the review of all prior court proceedings regarding the family. Other relevant documents that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and education. 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 custodial arrangements.

When considering a request for the child to be examined by a physician, psychologist or social worker, 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 or oppose 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 could be limited, and move for such a limit, if appropriate. For example, a psychological examination may be less distressing for a child than a physical or complete psychiatric examination. The child's attorney should always conduct proper discovery to obtain the names, qualifications, and summaries of expected testimony of any expert witnesses.

A visit to the child's present home or proposed home, or an observation of each party with the child, may assist the attorney in determining the child's legal interests and in formulating the child's legal position. However, the attorney should never put him or herself in the position of becoming a witness, and should make every effort not to create this expectation on the part of either parent or parent's attorney.

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) A modification, or termination of contact or visiting pending the final outcome of the proceeding;

(5) Contempt for non-compliance with a court order;

(6) Child support;

(7) A protective order concerning the child's privileged communications or tangible or intangible property;

(8) A request for services for the child or family; and

(9) A 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 brought before the court and can expedite the court's consideration of issues important to the child's interests.

As a full participant in the proceedings, assigned to represent the child, the child's attorney should quickly determine whether the child needs temporary or protective relief and, if so, should move for appropriate measures. The child's attorney may move for the appointment of an independent expert or may move to limit the number of experts who may actually examine the child or the number of diagnostic sessions, to protect the child against repeated or unnecessary evaluations. Where child abuse is alleged in the course of a custody proceeding, the child's attorney may want the court to order an independent evaluation by child protective services and may need to apply to stay the custody action until the investigation is completed. When appropriate, the child's attorney should also determine the need for and immediately seek a protective order limiting visits or contact between child and the alleged abuser.

The child's attorney may also seek either agreement, through counsel, or a court order that the child not be taken to, seen by, or permitted to speak with any mental health professionals without the consent of the other parent and the child's attorney, or order of the court.

The most important evidence in a custody dispute may be reports and testimony by independent diagnostic experts. Professionals retained and paid by a party may be biased or are often suspected of bias, and expert testimony offered by the two opponents often conflict. The child's attorney, who represents only the child, may secure court-ordered independent evaluations. Examples include psychiatric, psychological, educational, medical, and social work evaluations, as well as a probation investigation or a "home study." The court may order any of these, or any combination, at the request of the child's attorney, or sua sponte. *The child's attorney should not hesitate to move for appropriate independent evaluations at the earliest practical date.*

Further, issues of temporary visitation, therapy, protection, or support frequently arise. The child's attorney's role is not limited strictly to custody, and the child's attorney should do everything possible to ensure that every aspect of the child's needs is being met. For example, the attorney for the child may sometimes find that support and custody issues are interrelated. As the child has the right under §422 of the Family Court Act to petition for support, the attorney for the child may find it appropriate to file whatever papers are necessary to ensure that the child will receive adequate financial support, and should guard against the situation where one party seeks to trade requests for custody or visits, for reduced support obligations. The child's attorney should be a full participant and should not hesitate to take a position, to initiate a request for temporary orders, or to move for modification of existing interim orders.

C-4. Assess Domestic Violence. The child's attorney should consider whether domestic violence may have occurred and, if so, the impact on the child. When appropriate, the child's attorney should apply for court orders to protect the child or obtain relevant relief.

Commentary:

Domestic violence is a relevant and important consideration in any custody or visitation proceeding. And violence may have affected the child, regardless of whether the child witnessed such events. In recognition of the importance of domestic violence, the Legislature has mandated that whenever a party in an action concerning custody or visitation pleads and proves that another party has committed an act of domestic violence, "the court must consider the effect of such domestic violence upon the best interests of the child." D.R.L. § 240(1)(a). In the rare case when the person seeking custody or visitation has been convicted of a homicide, the court must apply the special provisions of Section 240(1-c). It is the child's attorney's responsibility to raise, argue, and prove acts of domestic violence even in the absence of a party's allegations, whenever consistent with the child's position and the attorney's legal strategy on behalf of the child.

C-5. Child With Special Needs. Consistent with the child's wishes, the attorney should ensure 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; and

(3) Community-based mental health services and, in extreme cases, residential or out-patient psychiatric treatment.

Commentary

The attorney should ensure that the court is aware of the child's special needs, so that the court can take those needs into consideration in making decisions regarding custody and parenting time. If the child is aware of his or her special needs, the attorney should ascertain whether or not the child believes each parent is able to address those needs, and discuss possible outcomes based on that ability.

C-6. 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 assist in reaching a resolution.

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 child's attorney to negotiate with a parent directly without the consent (preferably written) 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.

C-7. Pre-Trial Reports. The child's attorney should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence.

Commentary

In some cases, a child's attorney has been requested by the Court to submit a separate pre-trial report and recommendations, or the attorney has elected to submit such a report. The preparation and submission of such a report is inconsistent with the purpose and role of an attorney. The child's attorney is not a social worker or a probation investigator. If expert assistance or reports are needed or desirable, the child's attorney should request that the Court order the relevant expert evaluation or study. The child's attorney may also independently retain an expert, such as a social worker or psychologist, to conduct a study and prepare a report. Expert reports may be introduced as evidence, and the expert may be called as a witness. However, the attorney should never assume the role of an expert witness. A child's attorney who submits a report and recommendation opens the possibility that he or she will or should be called as a witness. A professional who has submitted a report may be called for testimony and cross-examination by any party, and may be questioned, under oath, concerning the factual basis of the report and the specific reasons for a conclusion, as well as questions based on hypothetical facts. Any party may also try to refute a witness's testimony. Presenting testimony as a witness is thus incompatible with legal representation. And the possibility raises a conflict under D.R. 5-102 of the Code of Professional Responsibility, which provides that "If, after undertaking employment in contemplated or pending litigation, an attorney learns or it is obvious that the attorney ought to be called as a witness on behalf of the client, the attorney shall withdraw as an advocate before the tribunal…" A child's attorney who submits a pre-trial report and recommendations may have no choice but to withdraw as child's attorney, or may be subject to a disqualification motion.

Nothing in this section is intended to relieve the attorney of the responsibility to file pre-trial motions, memos of law or other legal documents that may be necessary to support the child's legal position. Likewise, submission of a Parenting Plan by attorneys for the parents and the attorney for the child does not fall into the category of a prohibited pre-trial report. Submission of a detailed Parenting Plan is often requested in the New York State Supreme Courts and should be carefully drafted by the attorney for the child in order to reflect the child's legal position.

C-8. Undocumented Children In Guardianship Proceedings. 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 him or her with appropriate immigration resources so that the child can obtain a green card.

Commentary

Without legal immigration status, a young person risks deportation, cannot receive working papers, and is ineligible for college financial aid and other government benefits. In some guardianship cases, relief for these children is available in the form of SIJS, a type of visa designated for undocumented children who have been abused, neglected, and/or abandoned. SIJS is available to 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); 8 C.F.R. § 204.11. The federal regulations clarify that children placed in guardianships can qualify for SIJS and define "eligible for longer term foster care" as a determination by the Family Court that family reunification, i.e. reunification with biological parents, is no longer an option. 8 C.F.R. § 204.11(a). Although the majority of lower courts that have addressed the issue have granted SIJS orders in guardianship cases, a few courts have declined to issue the orders based on jurisdictional questions. Appeals of two lower court decisions that declined to grant SIJS orders in guardianships are currently pending in the Appellate Division, First and Second Departments. See Matter of Antowa M., __ A.D.3d __ (1st Dept. __) No.2006-12426; Matter of Vanessa D., __A.D.3d _ (2d Dept. __) No.2007-03365.

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.

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 be prepared to present opening and closing statements, 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 or a third-party caretaker. 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-1), and not a mere endorsement of another party's position. Caselaw makes plain that children are entitled to 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's Participation at Hearing. The child's participation at a hearing can take a variety of forms. Participation can be accomplished indirectly, through the attorney's representation of the child's position, or directly, through the child's presence in the courtroom or *in camera*. When the attorney determines that the child wishes to be present in the courtroom, the attorney shall make necessary applications to the court and otherwise attempt to further the child's desire to participate in the proceedings.

Commentary

New York State has not yet enacted legislation nor recognized a constitutional right for children to be present during court proceedings. However, when the attorney has determined pursuant to Standard A-1 that the child has the capacity to decide whether he or she wishes to appear in court, the attorney should provide counseling and advice to the child regarding the advisability of appearing in the courtroom as well as inform the child of other mechanisms for participation, such as presentation of in camera *testimony, or appearance for discrete portions of the proceeding. The attorney should also raise and discuss with the child the emotional impact of the child's presence in court or exposure to inflammatory facts but, in the end, should assert the child's desire to appear in court insofar as the child directs. Under the present statutory framework in custody and custody related proceedings, the court has discretion to grant or deny this request.*

When the attorney has determined pursuant to Standard A-1 that the child lacks capacity, the attorney should advocate for the child's presence in the courtroom only after determining

that the child's presence is essential to the furtherance of the child's legal position, and after consulting with mental health professionals, caretakers, and any other persons who are knowledgeable about the child's emotional condition and possible harmful reaction to the court proceedings. The attorney should keep in mind that any child, even one 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.

When an attorney's application to have a child present in court is granted by the judge, the lawyer should always attempt to ensure that the child's experience in court is as comfortable and stress-free as possible. To that end, the attorney should try to 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 in open court or whether the child should testify *in camera*. 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, unless the child clearly lacks capacity pursuant to the criteria set forth in section A-3 (above), 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), or the parents' attorneys, and requesting sufficient hearing time in order for the child's testimony to be limited to one appearance. Before agreeing to this forum, the child should always be made aware of the rare circumstances where judges have determined that in-chambers testimony can be shared with others, such as parents, who might be excluded from chambers. At the conclusion of the in camera *interview, the attorney should reiterate the confidential nature of the proceeding, and make every effort to ensure that the transcript will not be released to any unauthorized person. 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 either through the introduction of other evidence or by stipulation to the facts to which the child would attest or, when appropriate, by filing a protective order to prevent the compelled testimony of the child. If the child's testimony is required, the attorney should consider requesting that the testimony be taken in the judge's chambers with the attorney present, rather than in the more formal courtroom (which may be intimidating to the child). 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 minimal 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 accuracy of children's testimony is enhanced when they feel comfortable. The lawyer should seek any necessary assistance from the court in order to maximize the child's level of comfort, 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 courtroom.

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 attorney must become skilled at recognizing the child's developmental limitations and in asking developmentally appropriate questions. If the child is testifying in camera*, the attorney should request permission to ask questions that the judge may not have asked, whenever it is in the client's interest to have the judge hear that information.*

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 on the child of various options for custody, parenting time, and parental decision-making.

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. It is of particular importance that the child understands his or her continuing relationship with each parent (or the non-parent party) and each parent's continuing responsibilities to the child.

It is also helpful to maintain communication with the child subsequent to the trial. Post-trial problems may thereby be ameliorated or appropriate legal action commenced.

E-3. Implementation. The attorney should monitor the implementation of the court's orders and take appropriate legal action whenever necessary.

Commentary

The lawyer should ensure that the court's orders are implemented in a complete and timely fashion. In order to address problems with implementation, the lawyer should maintain an open avenue for communication with the child. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation.

E-4. Subsequent Proceedings. Whenever possible, the child's attorney should represent the child in any subsequent relevant proceeding, including a modification, a violation, or an enforcement action. The child's attorney should also file a post-disposition motion, such as a modification or enforcement motion, whenever one is needed to protect or further the child's interests.

Commentary

Continuity of representation is of great importance, and whenever possible, the child's attorney should represent the child in any proceeding subsequent to the initial custody determination. The child's attorney also has standing to initiate a post-dispositional motion seeking a modification of the original order or the enforcement of the order. The attorney should not hesitate to do so whenever appropriate in the child's interests. The child's attorney should also maintain communication with the child and may initiate inquiries or otherwise stay abreast of the situation.

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 that he or she lacks the necessary experience or expertise to handle the appeal or is otherwise unable to proceed on the appeal, the lawyer should notify the court and seek to be relieved. The attorney should always cooperate with the new appellate attorney by sharing all relevant information on the case.

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

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.

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, as well as pursue any appropriate post-decision remedies.

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 that there be closure between the child and the lawyer.

NEW YORK STATE BAR ASSOCIATION
One Elk Street
Albany, NY 12207