NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children in Juvenile Delinquency Proceedings

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK JUVENILE DELINQUENCY PROCEEDINGS (2014)

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COMMITTEE ON CHILDREN & THE LAW STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK JUVENILE DELINQUENCY PROCEEDINGS (2014)

PREFACE

Standards for Attorneys Representing Children in New York Juvenile Delinquency Proceedings (2014) is a revised edition of the Standards that were issued in 2009. These Standards apply to all attorneys representing children in juvenile delinquency proceedings.

Because of the complexity of the statutory and case law applicable in juvenile delinquency proceedings, the substantial liberty interests at stake and the imposing and intimidating presence of a Government prosecutor possessing substantial resources that can be brought to bear against the child, these Standards, unlike the Standards governing other types of proceedings, include a substantial amount of statutory and case law, as well as detailed discussions regarding defense strategy. In other words, these Standards do more than provide standards of practice; they are also designed to be a day-to-day practice resource.

For additional guidance, children's attorneys in New York also can consult the National Juvenile Defense Standards, issued by the National Juvenile Defender Center in 2012.

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 JUVENILE DELINQUENCY PROCEEDINGS (2014)

A. ROLE OF THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship

Whether retained or assigned, the child's attorney should maintain a traditional attorney-client relationship with the child and zealously defend the child. The attorney owes a duty of undivided loyalty to the child; the attorney shall protect confidential information and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with the child, advise the child in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. Ethics rules require a lawyer "to abide by a client's decisions concerning the objectives of representation and ... consult with the client as to the means by which they are to be pursued." (NY Rules of Professional Conduct [22 NYCRR 1200.0], rule 1.2[a]). In addition, the lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4(a)(2).

Commentary

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

(b) The attorney for the child is subject to the ethical requirements applicable to all lawyers, 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.

(c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child should zealously defend the child.

Case law makes it clear that children are entitled to more than the mere presence of an attorney; the constitutional right to the effective assistance of counsel extends to children charged in juvenile delinquency proceedings. See, e.g., Matter of Jeffrey V., 82 N.Y.2d 121 (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. A child may be more susceptible to intimidation and manipulation than an adult client, and therefore 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) Explaining the attorney's ethical obligation to defend and seek the best possible outcome for the child, and the nature and limits of attorney-client confidentiality;

(2) Developing a thorough knowledge of the child's circumstances and needs;

(3) Explaining the relevant facts, including the role of the other persons and agencies involved in the proceeding, and the applicable laws;

(4) 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;

(5) Providing an assessment of the case and the best position for the child to take, and the reasons for such assessment;

(6) Expressing an opinion concerning the likelihood that the court will accept particular arguments;

(7) Counseling for or against pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position;

(8) Identifying problematic behavior that may have an adverse impact on the judge's determinations, and, with any necessary assistance from a mental health professional, attempting to obtain services and treatment for the child, such as drug or mental health treatment or educational services.

Commentary

The attorney should explain, in developmentally appropriate language, the attorney's obligation to zealously represent the child no matter what the child may have done. The attorney also should explain the nature of attorney-client confidentiality, including the obligation to protect client confidences, the fact that confidentiality precludes the attorney from disclosing information to the child's parent or guardian, and the circumstances under which the attorney would be free or could be compelled to disclose confidential information. The attorney should explain to the child the role of the judge, the Presentment Agency, the Probation Department, and the attorney(s) for any co-respondent(s). The attorney should instruct the child not to speak with anyone about the charges unless the attorney and the child have first discussed such communications.

Because matters of trial strategy are left to the attorney, 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. The child is entitled to make decisions with respect to, inter alia*, "a plea to be entered" and "whether the [child] will testify." NY Rules of Professional Conduct, Rule 1.2(a)*; *Jones v. Barnes, 463 U.S. 745 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").*

The attorney has the responsibility to perform the vital role of being an advisor and counselor by bringing his/her knowledge and expertise to bear in counseling the client to make sound decisions. See NY Rules of Professional Conduct, Rule 1.4(a) (lawyer shall promptly inform client of material developments, including settlement or plea offers, reasonably consult with client about means by which client's objectives are to be accomplished, keep client reasonably informed about status of matter, promptly comply with client's reasonable requests for information, and explain matter to extent reasonably necessary to permit client to make informed decisions); Rule 2.1 (lawyer shall exercise independent professional judgment and render candid advice, and may refer not only to law but to other considerations such as moral and psychological factors).

In that role, the attorney may attempt to counsel 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 child'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 desired by the child, may be preferable, the attorney should take care not to overwhelm the child's will, and thus override the child's actual wishes. The attorney should remain aware of the dynamics of power 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 should understand that the attorney will advocate the child's position in the court, even if the attorney does not personally agree with that position.

A-3. 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 be disclosed by the child's attorney only in the following circumstances:

(1) The child consents to disclosure;

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

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

Commentary

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 (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. However, it is the child who ultimately determines when and if confidentiality can be waived.*

The third exception to confidentiality finds 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). Support can also be found in NY Rules of Professional Conduct, Rule 1.6(b), which states that disclosure of a confidence is permitted (but not required) when necessary to prevent reasonably certain death or substantial bodily harm. In determining whether to make disclosure, the attorney should always 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 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 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. ATTORNEY-CLIENT CONTACTS

B-1. Meet With the Child

Establishing and maintaining a relationship with the child is the foundation of representation. Therefore, the attorney should meet with the child as soon as possible and on a regular basis, including prior to court hearings and when apprised of emergencies or significant events affecting the child, so that the attorney will be aware of and can address the child's concerns.

[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).

Additionally, if appropriate, the attorney should maintain telephone contact. The attorney should undertake training so as to become reasonably familiar with child clients' ethnicity and culture.

Commentary

If the attorney is assigned prior to the initial appearance, or, while not assigned, is permitted by local practice to speak to the child, the attorney should interview the child for the first time before the initial appearance.

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. 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 and enable the attorney to obtain facts with which he or she can formulate positions prior to court appearances.

The attorney should explain to the child, 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.

B-2. Interview the Child Regarding the Charges

The attorney should explain to the child the nature of the charges, and the manner in which the Presentment Agency will attempt to establish the child's guilt; elicit detailed information regarding the alleged incident(s), the conduct of the child and any alleged accomplices, and related issues such as suppression, and possible defenses and weaknesses in the Presentment Agency's case; and attempt to ascertain the identity of witnesses, and their location and/or means by which to contact them. The child's parent should not be present during these discussions unless the child consents.

Commentary

It is critical that, during the <u>initial</u> interview, the attorney obtain as much detailed information as possible. Motions in which the attorney may have to include allegations that derive from the child must be filed within thirty days after the child's initial appearance in court, and it is not always possible to conduct a timely follow-up interview. If the child raises a defense to the charges, the attorney should attempt to elicit the names, addresses or other locations, and/or phone numbers of any witnesses identified by the child, and set up follow-up contacts with the child if the information is not yet available. This is particularly important when the child is raising an alibi defense and the attorney will need to file timely notice of alibi. In order to determine whether a suppression motion should be made, the attorney should discuss with the child the circumstances under which physical evidence was recovered or statements were elicited from the child by the police, or an identification was made by a witness.

During the initial interview, at a time when the fact-finding hearing is not imminent and the child does not yet have to decide whether to accept a plea bargain proffered by the Presentment Agency, the attorney may have no need to act on any doubts regarding the veracity of the child's denial of guilt and version of the facts. The need may arise when the child is in detention and a hearing is, in fact, imminent, or the Presentment Agency is proposing a favorable plea bargain early in the case. And, of course, by the time the attorney needs to file motion papers that include information derived from the child, and conduct a fact investigation,

the attorney will want to be operating with accurate information. In any event, it is appropriate for the attorney to disclose to the child his/her doubts regarding the child's version of events rather than be hampered in defending the child or let the child lose out on a good plea bargain. (Criminal defendants may enter a nolo contendre*, or "Alford," plea without admitting guilt; few family court judges permit children to enter such a plea, but the possibility should be explored when appropriate.) Experienced attorneys employ different methods when exploring with a child the truth of his/her statements. Some attorneys state bluntly that the story is unbelievable. But this could suggest to the child that the attorney is disloyal and will mount a defense only half-heartedly. A more common, and prudent, approach is to point out problems with the child's story in a less harsh and judgmental manner. The attorney can point out that one or more witnesses have signed sworn statements, and ask the child whether he/she knows of any reason the witnesses would lie. Or, the attorney can conduct a polite and informal "cross-examination," and attempt to lay bare for the child the story's inconsistencies and flawed premise. Often, over time, the attorney's use of these strategies will succeed in convincing the child of both the attorney's sincerity and the wisdom of revealing the truth.*

B-3. Interview The Child Regarding the Child's Life Circumstances

In the initial interview and thereafter, the attorney should elicit detailed information regarding all aspects of the child's family history, and social, health, educational and legal history, and assist the child and his/her family in obtaining necessary services.

Commentary

The attorney should elicit relevant information from the child and his/her family, and from school officials, medical and mental health providers, and other agencies and individuals who have knowledge regarding the child's background. Necessary releases should be obtained from the child and his/her family. Confidential records, which may contain information that will undermine the child's legal interests, should not be obtained via subpoena since they will be produced in court and be available to the Presentment Agency, the Probation Department and the judge.

The attorney should assist the child and his/her family in obtaining treatment and/or services that will address whatever behavioral and other issues exist and improve the child's chances of avoiding detention during the pendency of the proceeding and/or placement at disposition. This is not a "one-shot" obligation for the attorney. The child's progress must be monitored on a regular basis so that problems can be addressed in a timely fashion.

The attorney should pay particular attention to school-related matters. In school disciplinary proceedings involving the same charges that have been filed in family court, useful discovery may be obtained. Also, a child's truant behavior while a case is pending often is the ground upon which a judge relies when ordering detention.

Also important is information regarding the child's legal background – that is, prior juvenile delinquency or persons in need of supervision charges brought against the child, and child abuse/neglect charges brought against the child's parent or guardian. When, for some reason, such information is not known to the Presentment Agency, Probation and the judge, the information may constitute protected client confidential information.

C. ACTIONS TO BE TAKEN BEFORE THE FACT-FINDING HEARING

C-1. Advocacy at the Initial Appearance

When preparing for and advocating on behalf of the child at the initial appearance, the attorney should:

(1) Determine whether there is a risk that the court will order pre-trial detention, gather all relevant information and otherwise prepare to address the detention issue, disclose and explain to the child the risk and likelihood of detention, and describe to the child the conditions at any detention facility to which the child might be remanded.

(2) When appropriate, specifically discuss the statutory standards in F.C.A. § 320.5 that govern pre-trial detention.

(3) Insure that the court's selection of a trial date complies with statutory speedy trial rules, unless, after consultation with the child, the attorney has determined that there is good reason to waive compliance.

(4) If the court orders detention, request that a probable cause hearing be held within three days unless, after consultation with the child, the attorney determines that there is good reason to waive the hearing or agree to a delay.

(5) Determine whether dismissal should be sought due to a violation of the child's right to a timely initial appearance.

(6) Determine whether an application for a court-ordered referral for further efforts at adjustment pursuant to F.C.A. § 320.6, or an application for an adjournment in contemplation of dismissal pursuant to F.C.A. § 315.3, would be appropriate, and whether the petition appears to be jurisdictionally defective.

Commentary

At the initial appearance, the possibility that the court will order pre-trial detention is the attorney's most pressing concern. The attorney must focus on whether, under F.C.A. § 320.5, detention is precluded because "available alternatives to detention, including conditional release, would be appropriate;" whether detention is authorized because "there is a substantial probability that [the child] will not appear in court on the return date" or "a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime;" whether, even if the court finds that detention is necessary, the child should be released with an electronic monitoring condition; and whether reasonable efforts have been made to prevent or eliminate the need for detention. In order to effectively address the "available alternatives to detention," the attorney must be familiar with available ATD programs and other services the judge can look to in issuing conditions of release, and be able to articulate the reasons why participation in such a program or services will help ensure that the child will not

commit further illegal acts, will attend school and will otherwise comply with reasonable conditions of release.

In addition, when directing detention, the court must state the facts, the level of risk the youth was assessed in a detention risk assessment instrument, and the reasons for directing detention, including the reasons why detention was determined to be necessary even though the child was assessed at low or medium risk. The attorney should become familiar with the risk assessment instrument itself and how it is used, ascertain the grounds for the assessment, and, as appropriate, gather facts that rebut the assessment and otherwise challenge the accuracy of the assessment in individual cases.

Preparation for the initial appearance is critical. Because the Department of Probation already has interviewed the child and the parent, and the Presentment Agency has had an opportunity to consult with Probation and sometimes even with the parent, the child's attorney usually is the last one to know what is going on. The attorney should question the parent and the child to ascertain what has already been revealed to Probation and/or the Presentment Agency, and other prejudicial information that might be revealed for the first time in court. The attorney should fish for useful information about the child's academic performance and any honors and extracurricular school activities, part-time jobs, charitable work or religious exercise. The attorney should look to uncover mitigating evidence related to the child's prior misconduct. Because judges scrutinize the behavior and body language displayed by the child and the parent, as well as what they say and how they say it, the attorney should determine whether the parent or the child seems volatile and likely to erupt in court or show disrespect to the judge, and provide appropriate advice regarding courtroom behavior. The attorney should explain the initial appearance procedures to the child and parent, and, in particular, what an argument regarding proposed detention will be like. It is important for the attorney to prepare the child for the possibility that he/she will be detained by the judge. The child should not be permitted to have unrealistic expectations about his/her chances of going home. Obviously, this may cause the child to become upset and fearful, which makes it even more important that the attorney discuss with the child the importance of behaving in an appropriate manner in the courtroom.

The attorney should ascertain whether the child is or soon will be receiving therapeutic, educational or other services, and, if it might help convince the court to release the child, provide the court with relevant facts. The attorney should determine whether there are other family members willing to provide a home or additional supervision for the child, and consider proposing such a plan to the judge. The attorney should consider advising the child to consent to issuance of a temporary order of protection under F.C.A. § 304.2 in lieu of detention.

In sum, the attorney should attempt to change the focus from the child's past behavior to changed circumstances that will minimize the risk of future misconduct. If, however, detention seems inevitable, the attorney should consider presenting an argument aimed primarily at convincing the judge to order non-secure detention. (The attorney should keep in mind that under F.C.A. § 304.1(3), a child under the age of 10 may not be detained in a secure facility.)

As the court is selecting a trial date, the attorney should keep in mind statutory speedy trial rules, which require that the fact-finding hearing commence within 3 or 14 days after the conclusion of the initial appearance when detention is ordered and within 60 days when the child is released (see Commentary to Standard C-13), and the requirement that when detention is ordered for more than 3 days, a probable cause hearing must be held within 3 days following the initial appearance or 4 days after the petition is filed, whichever is sooner (F.C.A. § 325.1[2]), or on an even earlier date if pre-petition detention was ordered pursuant to F.C.A. § 307.4. The attorney should insist upon compliance with these time limits unless there is a

strategic reason not to and the child has agreed to waive his/her rights. For instance, the attorney may believe, and the child may agree, that more time is needed to adequately prepare a defense.

The attorney also should determine whether a favorable resolution of the case can be achieved at the initial appearance. For instance, a child in detention is entitled to an initial appearance no later than 72 hours after a petition is filed or the next day the court is in session, whichever is sooner, and if the child is not detained, the initial appearance must be held as soon as practicable and, absent good cause shown, within 10 days after a petition is filed. The initial appearance may be adjourned for no longer than 72 hours or until the next court day, whichever is sooner, to enable an attorney to appear for the child. If a warrant has been issued, the period during which the warrant is outstanding is excluded from the calculation if the Presentment Agency has exercised due diligence in attempting to secure the child's appearance. F.C.A. § 320.2(1). The remedy for an untimely initial appearance is dismissal, but the petition may be refiled. Matter of Robert O., 87 N.Y.2d 9 (1995). To preserve the issue, the attorney should raise it at the initial appearance even if the facts are not fully known and the attorney needs to conduct further investigation before filing a written motion; the attorney should specifically identify the alleged violation and either make an oral motion to dismiss while also reserving the right to file a written motion, or state on record that a written motion to dismiss will be forthcoming.

Particularly when the charges are not serious, the attorney should consider asking for a referral by the judge for Probation adjustment pursuant to F.C.A. § 320.6. Adjustment often fails the first time around because Probation made half-hearted or inadequate efforts to work with the complainant and the child to find common ground for settlement. Or, the child, lacking legal counsel or other proper guidance, may have remained wedded to a demonstrably incredible version of events and failed to show the remorse or insight into his/her behavior that Probation was hoping to see. Also, the complainant, whose consent to adjustment is required, may be more willing to consent if he/she knows the judge is inclined to order adjustment. Thus, the door may still be wide open to a quick and favorable resolution. If the complainant's position is not known at the time of the initial appearance, the attorney should at least raise and preserve the issue since there is case law suggesting that a request for an adjustment referral must be made at the initial appearance. Alternatively, the attorney can propose an adjournment in contemplation of dismissal pursuant to F.C.A. § 315.3, which can be ordered by the judge without the consent of the Presentment Agency or the complainant.

Whenever the judge appears to be leaning towards ordering detention, the petition and supporting depositions should be carefully scrutinized for facial insufficiency. Although motions to dismiss ordinarily must be made in writing and judges generally will insist upon a written motion, a judge cannot order detention upon a jurisdictionally defective petition. People v. Martini, 36 Misc.3d 729 (Crim.Ct., Queens Co., 2012) and thus the judge might consider releasing the child if there appears to be a valid argument for dismissal.

Finally, when it appears that there are insufficient grounds for detention or the length of a detention order violates the statute, the attorney should consider seeking habeas relief on behalf of the child.

C-2. Advocacy at a Probable Cause Hearing

The attorney should cross-examine witnesses and otherwise challenge the Presentment Agency's case at the probable cause hearing, make appropriate attempts to obtain discovery, and advocate for the child's release at the conclusion of the hearing.

Commentary

Probable cause hearings are governed by F.C.A. §§ 325.1, 325.2, and 325.3.

The hearing may be adjourned for no more than three days for good cause shown. F.C.A. § 325.1(3). If a hearing is not held within the time limits in F.C.A. § 325.1(2), the court may dismiss the petition without prejudice, or adjourn the hearing for good cause shown and release the respondent. F.C.A. § 325.3(4).

Except in an unusual case, it will not be difficult for the Presentment Agency to establish reasonable cause as long as the available evidence has been produced in court. Consequently, there are goals other than winning that must be considered. The probable cause hearing offers an invaluable opportunity to learn about the Presentment Agency's case. The discovery function of a probable cause hearing was recognized as a legitimate defense interest by the United States Supreme Court when it held in Coleman v. Alabama, 399 U.S. 1 (1970) that the hearing is a critical stage requiring the appointment of counsel. The hearing also provides an opportunity to elicit the testimony of prosecution witnesses for use as impeachment material at a suppression hearing or at a trial and to otherwise "nail down" the witnesses' testimony. If the judge is inclined to restrict the scope of cross-examination, the attorney should remind the judge that F.C.A. § 325.2(2) gives the child the right to cross-examine witnesses, which necessarily includes an opportunity to explore a witness's direct testimony and impeach the witness by showing inconsistencies, bias, an inability to observe, a failure to recall details, etc.

Even when the court finds probable cause, the court must make a de novo *determination as to whether detention is appropriate. F.C.A. § 325.3(3). Accordingly, when preparing for the hearing, the attorney should attempt to gather favorable evidence that was not available at the initial appearance.*

C-3. Request for Competency Determination

When it appears that the child may be an "incapacitated person," the attorney should consider requesting that the court order a competency examination. Such a request should not be made until after the attorney has discussed the matter with the child.

Commentary

Proceedings to determine whether a child is an "incapacitated person" are governed by F.C.A. §§ 322.1 and 322.2.

The court must order that the respondent be examined by two "qualified psychiatric examiners" to determine whether the respondent is "mentally ill, mentally retarded or developmentally disabled" when the court "is of the opinion that the respondent may be an incapacitated person." F.C.A. § 322.1(1). An "incapacitated person" is "a respondent who, as a result of mental illness, mental retardation or developmental disability as defined in [Mental Hygiene Law § 1.03(20), (21), (22)], lacks capacity to understand the proceedings against him or to assist in his own defense." F.C.A. § 301.2(13).

Given their lack of maturity and experience, children do not have the same capacity as adult criminal defendants to comprehend the nature of the proceeding, or assist in the preparation of a defense and in the making of crucial litigation decisions. Moreover, many children charged in delinquency proceedings suffer from educational and mental health deficiencies that further hamper their ability to participate effectively in the proceeding. The

child's attorney may have difficulty communicating with the child, and, when the problems are severe, may be justified in requesting a competency determination.

However, before raising a competency issue in court, the child's attorney should, in a manner consistent with attorney-client confidentiality, consult with the child and his/ her family, and with any mental health professional who is familiar with the child, to determine whether a competency issue really exists; weigh the benefits and risks associated with raising it; and ascertain the child's position. In determining whether to raise a competency issue, the attorney should consider: the child's position regarding the competency issue; the extent to which the child's assistance is needed in the preparation of a defense given the particular facts of the case; and the potential consequences of a finding of incapacitation (in a misdemeanor case, a finding of incapacitation results in a 90 day commitment and dismissal of the petition, while, in a felony case, there is a risk of long-term involuntary commitment, possibly until the child is 18).

C-4. Obtain Pre-Trial Discovery

The attorney should make appropriate use of all discovery methods authorized by statute or case law, issue or request court-issued subpoenas, and seek sanctions for the violation of discovery requirements.

Commentary

Discovery requests should be tailored to the facts of the case at hand. Boilerplate documents are useful when they insure that the relevant areas of discovery are addressed in each case, but the judge may be more inclined to exercise discretion in the child's favor and direct discovery when the attorney at least specifies and concentrates on important items of discovery that the defense really needs.

The Family Court Act provides for discovery via service of a Demand to Produce (F.C.A. §§ 331.2, 331.7) and a Request for a Bill of Particulars (F.C.A. §§ 330.1, 331.7) upon the Presentment Agency. The statute provides for discovery by the Presentment Agency via Demand in F.C.A. § 331.2(3). The respondent may make a motion for court-ordered disclosure if the Presentment Agency has not fully complied with a Demand or Request, or discovery of property that will be introduced at trial (F.C.A. § 331.3). There is a continuing duty to disclose material that comes into the possession of a party after discovery already has been provided. F.C.A. § 331.5(4). Also, at suppression and at fact-finding hearings, each side must disclose the prior statements of its witnesses (so-called "Rosario material"), and criminal history information regarding its witnesses, pursuant to F.C.A. § 331.4. Protective orders may be sought under F.C.A. § 331.5.

Sanctions for non-compliance with statutory discovery requirements may be sought pursuant to F.C.A. § 331.6. Sanctions also may be sought for governmental authorities' failure to preserve relevant evidence that is not covered by statutory discovery provisions. Arizona v. Youngblood, 488 U.S. 51 (1988); People v. Kelly, 62 N.Y.2d 516 (1984). In addition, Penal Law § 450.10 addresses the duty to preserve for discovery purposes stolen property recovered by the police.

The attorney also should be familiar with non-statutory discovery authorized by case law. Among the types of discovery that may be obtained in appropriate circumstances are: names, addresses and other information about prosecution witnesses [People v. Rivera, 119 A.D.2d 517 (1st Dept, 1986)]; police records related to the arrest of the child [People v. Giler, 19 Misc.3d

1137(A) (Crim. Ct., N.Y. Co., 2008)]; the identity of a police informant who played an important role in the case [People v. Darden, 34 N.Y.2d 177 (1974); People v. Goggins, 34 N.Y.2d 163 (1974), cert den'd 419 U.S. 1012]; search warrant documents [People v. Nottage, 11 Misc.3d 1052(A)ie (Crim. Ct., Kings Co., 2006)]; a mental health examination of a prosecution witness [People v. Earel, 89 N.Y.2d 960 (1997)]; and records protected by statutory confidentiality rules, such as child welfare agency records relating to a child complainant [Pennsylvania v. Ritchie, 480 U.S. 39 (1987)], police disciplinary records [People v. Gissendanner, 48 N.Y.2d 543 (1979)], a witness's mental health records [People v. Rivera, 138 A.D.2d 169 (1st Dept, 1988), lv denied 72 N.Y.2d 923], a witness's court records [People v. Harder, 146 A.D.2d 286 (3rd Dept, 1989)], and media records [People v. Combest, 4 N.Y.3d 341 (2005)].

The attorney also should be vigilant and timely in responding to Presentment Agency demands for disclosure, in order to avoid the risk of court-ordered preclusion of evidence. This is particularly important when the Presentment Agency has served a demand for notice of alibi witnesses pursuant to F.C.A. § 335.2, or a demand for notice of a defense of mental disease or defect pursuant to F.C.A. § 335.1. When the attorney has provided untimely notice, and the Presentment Agency has moved for preclusion of the evidence, the attorney should present an argument premised on the constitutional right to present a defense. Noble v. Kelly, 246 F.3d 93 (2d Cir. 2001), cert denied 534 U.S. 886.

The attorney also should become familiar with relevant provisions of the Criminal Procedure Law and the Civil Practice Law and Rules. Although "[t]he provisions of the criminal procedure law shall not apply . . . unless the applicability of such provisions are specifically prescribed by [the family court] act" [F.C.A. § 303.1(1)], the attorney should consider raising a constitutional equal protection argument when the Criminal Procedure Law provides protections that are not found in the Family Court Act. For instance, neither CPL. § 240.44, which provides for discovery of witness statements at a felony hearing (the counterpart to a family court probable cause hearing), nor CPL. § 240.43, which provides for disclosure, upon a defendant's request, of prior uncharged acts the prosecution intends to use to impeach the defendant should he/she testify at trial, has a Family Court Act counterpart. Provisions of the Civil Practice Law and Rules may be applied in a juvenile delinquency proceeding "to the extent they are suitable" pursuant to F.C.A. § 165(a).

C-5. Conduct Factual Investigation

In order to develop a theory of defense, prepare for effective cross-examination of the Presentment Agency's witnesses, and identify witnesses and obtain physical and documentary evidence supporting the theory of defense, the attorney should conduct and/or direct an independent investigation which may include a visit to the crime scene, witness interviews, the preparation of photographs and diagrams and conversations with the prosecutor. The attorney should discuss the investigation with the child, elicit the child's assistance when appropriate and keep the child up to date on the progress of the investigation.

Commentary

The discovery authorized by statute and case law in criminal/juvenile delinquency proceedings is remarkably limited given the liberty interests at stake, and rarely provides the defense with a genuine preview of the prosecution's case. Recorded witness statements, often received by the defense shortly before trial, usually contain scant detail since police officers and

prosecutors are trained and/or naturally inclined to write little. Discovery through a bill of particulars also is severely limited. Witness depositions do contain some detail, but only enough to satisfy pleading requirements.

There is no substitute for face-to-face interviews with prosecution witnesses. Unlike police officers, civilian witnesses are not necessarily conditioned by training and experience to avoid contacts with the defense. Although a witness may be advised that he/she has the right to decline to speak to the defense and that it is the witness's decision, neither a prosecutor nor defense counsel should instruct a witness (other than the accused) to decline to speak to the opposing side. If the prosecutor has improperly instructed a witness not to speak, the child's attorney should remind the witness that only he/she can decide whether to speak, and if he/she continues to refuse to speak, sanctions, such as a court-ordered interview or oral deposition, should be sought. United States v. Carrigan, 804 F.2d 599 (10th Cir. 1986); People v. Marino, 87 Misc.2d 542 (County Ct., Monroe Co., 1976).

Because the advocate-witness rule (NY Rules of Professional Conduct, Rule 3.7) may require an attorney's disqualification when he/she becomes a necessary witness, the child's attorney should try to avoid becoming the only source of information regarding what a witness stated during an interview, or other facts discovered during an investigation. This can be achieved by obtaining the assistance of a trained investigator or taking a witness's written and signed statement.

The attorney should maintain a complete file, with all documentary discovery, witness information, etc., clearly organized. However, when determining whether and to what extent interviews with defense witnesses should be recorded, the attorney should keep in mind that such information must be disclosed to the Presentment Agency if the witness testifies.

Informal "discovery" also should be sought. Some prosecutors, believing that they have nothing to gain and everything to lose, will never discuss their witnesses' testimony or other evidence. Others, who believe that a public prosecutor should share information as a matter of fairness, and/or conclude in certain cases that a plea can be obtained if the defense is aware of the strength of the prosecution's case, may provide a detailed preview of the prosecution's case.

In some cases, the child is a crucial component of the investigation. The child may be the only one with information regarding potential witnesses. The attorney should be diligent in contacting the child, repeatedly if necessary, to encourage the child to provide information. Often the child's parent or guardian can be helpful as well. When appropriate, the attorney should meet the child and enlist his/her assistance in the course of an on-scene investigation.

C-6. Pre-trial Motions

The attorney should determine what pre-trial motions should be made, and file them in a timely fashion.

Commentary

Except as otherwise provided in F.C.A. Article 3, all "pre-trial motions" must be filed within 30 days after the conclusion of the initial appearance and before commencement of the fact-finding hearing unless the court grants an extension of time. F.C.A. § 332.2(1). Under F.C.A. § 332.1, the "pre-trial motions" subject to the 30 day deadline are motions seeking an order: transferring a proceeding to another county pursuant to F.C.A. § 302.3; granting separate fact-finding hearings pursuant to F.C.A. § 311.3 or § 311.6, or consolidating petitions

pursuant to § 311.6; dismissing a defective petition pursuant to F.C.A. § 315.1; granting a bill of particulars pursuant to F.C.A § 330.1 or discovery pursuant to F.C.A § 331.3; suppressing evidence pursuant to F.C.A § 330.2 (and CPL Article 710); dismissing a petition pursuant to F.C.A § 302.2 (and CPL § 30.10) because the statute of limitations has expired; or dismissing a petition on double jeopardy grounds pursuant to F.C.A § 303.2 (and CPL Article 40).

A motion to dismiss on speedy trial grounds pursuant to F.C.A. § 310.2 must be made prior to the commencement of a fact-finding hearing or entry of an admission. F.C.A § 332.2(1). A constitutional due process claim can be raised if there is an undue delay before filing. Matter of Benjamin L., 92 N.Y.2d 660 (1999). In Benjamin L., the Court of Appeals adapted for use in the juvenile delinquency context the balancing test used in criminal proceedings, with the most important factors being the reason for the delay and whether the respondent's ability to mount a defense has been prejudiced.

The attorney should consider filing a motion for a separate trial when the Presentment Agency intends to offer at trial an incriminating statement made by a co-respondent that implicates the attorney's client [see Bruton v. United States, 391 U.S. 123 (1968)], and when the child's defense is irreconcilable with a defense being raised by a co-respondent [see People v. Mahmoubian, 74 N.Y.2d 174 (1989)].

A motion to dismiss a petition as facially defective due to a violation of the non-hearsay allegations requirement in F.C.A § 331.2(3) may be made at any time. Matter of Jahron S., 79 N.Y.2d 632 (1992). A motion for dismissal in furtherance of justice may be made at any time subsequent to the filing of the petition, F.C.A § 315.3(3), and a motion for an adjournment in contemplation of dismissal pursuant to F.C.A § 315.3 may be filed at any time prior to entry of a finding pursuant to F.C.A § 352.1 that the respondent is a juvenile delinquent. F.C.A § 315.3(1).

C-7. Motion to Suppress or Preclude Evidence

As appropriate, the attorney should move for suppression or preclusion of physical evidence, identification testimony and/or the child's statements, and/or move for preclusion of evidence of the child's prior crimes and/or bad acts.

Commentary

The attorney should become familiar with the complex statutory and constitutional rules and case law governing suppression and preclusion of statements, identification testimony, and physical evidence. While the law essentially mirrors that applicable in criminal proceedings, F.C.A § 305.2 contains special rules governing the admissibility of the child's statements, and there are instances in which the attorney can argue that the limited capacities and increased vulnerability of children merit protections that go beyond those provided to adults: for instance, when a court is determining whether a Miranda waiver was knowing and voluntary, or whether a child reasonably believed that he/she was not free to go and thus was in police custody.

Familiarity with search and seizure law and analysis is particularly important because a case involving only a charge of possession of contraband can be won at a suppression hearing. In New York, the State Constitution, as interpreted by the Court of Appeals in People v. De Bour, 40 N.Y.2d 210 (1976), requires a four-tiered analysis of police-civilian encounters. The attorney should become familiar with the De Bour analysis and the case law applying it, and keep the analysis in mind when preparing for a suppression hearing, cross-examining witnesses at the hearing and making final argument. Given the complexity of the issues, the attorney should

research the case law before the hearing, and consider requesting an opportunity to prepare a memorandum of law.

The attorney also should monitor compliance with the requirement in F.C.A § 330.2(2) that the Presentment Agency serve notice of its intention to offer statement, identification or physical evidence. Such notice must be served within 15 days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first, unless the court, for good cause shown, permits later service and accords the respondent a reasonable opportunity to make a suppression motion thereafter. (If the respondent is detained, the court shall direct that such notice be served on an expedited basis.) The penalty for the Presentment Agency's failure to comply with the notice requirement is preclusion of the evidence [F.C.A § 330.2(8)], and so this is an issue to which the attorney should be alert.

The accused also has a right to a pre-trial ruling concerning whether the prosecutor may, if the accused takes the stand, ask questions concerning prior convictions or bad acts. People v. Sandoval, 34 N.Y.2d 371 (1974). According to the weight of authority, the accused has a right to a "Sandoval hearing" prior to a bench trial. Compare, Matter of Joshua P., 270 A.D.2d 272 (2d Dept, 2000), lv denied 95 N.Y.2d 757, People v. Black, 183 A.D.2d 969 (3rd Dept, 1992) and People v. Oglesby, 137 A.D.2d 840 (2d Dept, 1988) with People v. Stevenson, 163 A.D.2d 854 (4th Dept, 1990). When requesting a Sandoval hearing, the attorney should request that the hearing not be held before the trial judge, and that the record of the hearing be maintained apart from the rest of the case file so that the trial judge will not learn about the Sandoval-related litigation. If the trial judge will be conducting the Sandoval hearing, and there is a strong probability that the child will not testify, the attorney usually should wait until trial to raise an objection rather than risk highlighting the child's prior misconduct at a Sandoval hearing for no reason. But, if the issue is raised at trial, the attorney should request a Sandoval ruling before the child actually takes the stand. People v. Delgado, 101 A.D.3d 1144 (2d Dept, 2012).

Also subject to pre-trial challenge is evidence of uncharged prior crimes committed by the child, offered as direct evidence of guilt. The general rule is that such evidence may not be admitted unless the court determines that the probative value of the evidence outweighs its prejudicial tendency to demonstrate criminal propensity. People v. Molineux, 168 N.Y. 264 (1901). To prevent the prosecutor from eliciting uncharged crimes evidence before the accused can object, a court should rule on the admissibility of the evidence out of the hearing of the trial fact-finder, and thus the prosecutor should ask for a pre-trial determination. People v. Ventimiglia, 52 N.Y.2d 350 (1981). Accordingly, the child's attorney should ask that a "Ventimiglia hearing" be held before a judge other than the trial judge.

C-8. Motion to Dismiss Charges, For an ACD, or Substitution of a PINS Petition

As appropriate, the attorney should move for an order dismissing the petition for facial insufficiency pursuant to F.C.A. § 315.1 or in furtherance of justice pursuant to F.C.A. § 315.2, adjourning the matter in contemplation of dismissal pursuant to F.C.A. § 315.3, or substituting a petition alleging that the child is a person in need of supervision pursuant to F.C.A. § 311.4(1).

Commentary

The attorney should examine the petition to determine whether it satisfies the pleading requirements in F.C.A §§ 311.1 and 311.2.

The attorney's primary focus should be on the requirement in F.C.A. § 311.2(3) that the "non-hearsay allegations of the factual part of the petition or of any supporting depositions [must] establish, if true, every element of each crime charged and the respondent's commission thereof." A defect in the non-hearsay allegations is jurisdictional and non-waivable, and may be raised for the first time at any stage of the proceeding, including on appeal. Matter of Michael M., 3 N.Y.3d 441 (2004). Since the speedy trial statute runs from the date of the initial appearance in the original proceeding after a new petition has replaced one that was dismissed for facial insufficiency [see Matter of Willie E., 88 N.Y.2d 205 (1996)], the attorney has the strategic option of withholding a motion to dismiss until after the statutory speedy trial deadline has passed and it can be argued that the case cannot be re-filed.

The attorney also should pay attention to the special requirements governing verification of a deposition [Matter of Neftali D., 85 N.Y.2d 631 (1995)]; designated felony petitions [F.C.A § 311.1(5); Matter of Stephan F., 274 A.D.2d 584 (2d Dept, 2000)]; removal petitions [F.C.A § 311.1(7); Matter of Michael M., 3 N.Y.3d 441 (2004)]; and petitions alleging that the charged offenses occurred on unspecified dates within a broad time frame [F.C.A § 311.1(3)(g); People v. Keindl, 68 N.Y.2d 410 (1986)]. Although obtaining dismissal of one or more but not all counts in the petition still leaves the child subject to prosecution, a motion to dismiss specific counts could result in dismissal of the most serious charge(s) in the petition, which may increase the defense's plea bargaining leverage.

Making a written motion for dismissal in furtherance of justice, an adjournment in contemplation of dismissal or substitution of a PINS petition not only creates the possibility of a favorable result, but also provides a legitimate excuse for providing the court with favorable information that would be inadmissible at trial. Among the items that can be submitted in support of the motion are affidavits or letters from teachers, the clergy, neighbors, athletic coaches, or employers, school report cards, and awards and certificates. Of course, the Presentment Agency will have an opportunity to respond with unfavorable information, and so the attorney, before making the motion, must determine what information the Presentment Agency already has or is likely to discover, and whether it is worthwhile to make the motion because the favorable information outweighs the unfavorable.

C-9. Conduct Plea Negotiations

The attorney should be active in initiating and participating in plea bargaining discussions with the Presentment Agency. The attorney must communicate to the child any benefit offered by the Presentment Agency, and provide the child with information, guidance and advice that will assist the child in deciding whether to make an admission. The attorney should discuss with the child all the significant legal consequences of the admission, whether they be characterized as direct or collateral, including possible dispositional and post-dispositional orders.

Commentary

Pleas (or "admissions") are governed by F.C.A. §§ 321.2 and 321.3.

Generally, the attorney should not advise a child to make an admission until the attorney has had a satisfactory opportunity to ascertain the facts and evaluate the strength of the Presentment Agency's case.

The attorney has a duty to present to the child any plea bargain offer that provides some benefit. People v. Fernandez, 13 A.D.3d 271 (1st Dept, 2004), aff'd, 5 N.Y.3d 813 (2005). The

attorney can, but is not required to, provide a bottom line recommendation to accept or reject the prosecution's offer. While the specific information and advice an attorney should provide to the child regarding a plea bargain offer will vary from case to case, the child does have a Sixth Amendment right to the effective assistance of counsel with respect to plea bargain offers that are accepted, and those that lapse without notice to the child or are rejected. Hill v. Lockhart, 474 U.S. 52 (1985); Missouri v. Frye, 132 S.Ct. 1399 (2012); Lafler v. Cooper, 132 S.Ct. 1376 (2012).

It has been said that the attorney's failure to advise the child of the collateral consequences of an admission does not constitute ineffective assistance of counsel. People v. Ford, 86 N.Y.2d 397 (1995). However, the United States Supreme Court has recognized that certain severe consequences, whether characterized as direct or collateral, must be addressed by the attorney. For instance, when exposure to automatic deportation is a consequence of an admission, counsel must give correct advice to a client before the client pleads guilty, and, when the deportation consequences of a plea are unclear or uncertain, counsel must advise a non-citizen client that the criminal proceeding may carry the risk of adverse immigration consequences. Padilla v. Kentucky, 559 U.S. 356 (2010). Moreover, erroneous advice regarding collateral consequences may constitute ineffective assistance. People v. McDonald, 1 N.Y.3d 109 (2003). In any event, the attorney should not strive to achieve only the constitutionally required minimum. The attorney should alert the child to any significant consequences of an admission. In juvenile delinquency proceedings, the consequences of an admission may include loss of Youthful Offender eligibility upon a designated felony finding; HIV testing upon a felony sex crime finding (F.C.A. § 347.1); consideration of the finding in proceedings involving the child's immigration status; disclosure of the information in a criminal proceeding brought against the child; required registration in another state as a sex offender; and use in a landlord-tenant eviction proceeding. In addition, an admission results in a waiver of various claims that otherwise could be raised on appeal, including inadequate notice of intent to offer evidence pursuant to F.C.A. § 330.2; the prosecution's improper failure to preserve evidence; improper denial of a motion to dismiss in furtherance of justice; improper denial of a severance motion; the violation of statutory speedy trial rules; non-jurisdictional pleading defects; and a violation of the statute of limitations.

In all plea bargaining scenarios, the attorney should consider and discuss with the child the likelihood that the case can be won at trial or at a suppression hearing, and the existence of a legal impediment to prosecution, such as a speedy trial or double jeopardy problem.

Because a designated felony adjudication can result in a restrictive placement and ineligibility for Youthful Offender treatment in a future criminal proceeding, a plea to a non-designated felony offense carries an automatic reduction of downside risk that has real value. But there are other relevant factors: (1) the likelihood of a designated felony finding if the case goes to trial; (2) the likelihood of a restrictive placement; and (3) the likelihood that the child will be re-arrested for criminal behavior committed after the child turns 16 years of age, and thus would be prejudiced by the loss of youthful offender status.

Pleading guilty to a misdemeanor offense in a felony prosecution provides two benefits: it avoids a felony finding that could become a predicate for a designated felony adjudication, and it reduces from 18 to twelve 12 the term of an initial placement. Yet, there is more to consider. While the incentive may be strong where the child is very young and there is a substantial period of time within which the child may commit additional felonies, the same is not true when the child is nearing 16 years of age. Also, a placement agency may release a child before the period

of placement has expired, and placement may be extended, and thus the length of placement may depend more on the child's behavior while in placement than on the level of the offense.

Another benefit available through plea bargaining is release from, or avoidance of, detention. This may decrease the likelihood of placement if the child is able to improve his/her behavior while at home, but because the child's time at home may only be a temporary reprieve before placement is ordered, this is not always a good deal in the long run. If outright avoidance of or release from secure detention cannot be won through negotiation, the attorney should consider asking for non-secure detention as the quid pro quo for a plea.

When the attorney is negotiating for a dispositional promise, an adjournment in contemplation of dismissal is a desirable result because it avoids an adjudication of delinquency and results in the sealing of records. Unlike an ACD, a one-year conditional discharge involves an adjudication of delinquency, but is more desirable than probation, which can be for a period of up to two years and typically involves the added burden of probation appointments. However, the attorney still has a duty to weigh, and discuss with the child, the chances of securing dismissal of the charges before or after trial, the actual risk of placement, and the likelihood that the child will violate the conditions of an ACD, a CD or probation and be placed anyway.

Because the child's parent usually is present in court and participates in the court's allocution, it is important for the attorney to include the parent or guardian in the plea discussions, with the consent of the child. When the child wants to accept a plea offer but the parent or guardian does not, the attorney is obligated to follow the directions of the child, and it appears that a court is bound to accept the child's admission despite the parent's or guardian's objection. Matter of Joseph H., 20 Misc. 3d 619 (Fam. Ct., Albany Co., 2008). The attorney also should determine whether the child wishes to discuss the plea with someone other than the parent or guardian.

The judge must approve a plea bargain before it can take effect. Thus, the attorney should approach the judge with the prosecutor after a deal has been struck and before the child actually proffers an admission in court. Moreover, as long as the prosecutor agrees to accept the proffered plea, and in any case in which the child is prepared to enter a plea to the entire petition, the attorney can bargain with the judge for a result opposed by the prosecutor.

Because the statute requires the judge to order a Probation investigation, some judges will insist upon receiving Probation's report before promising a particular disposition. If it appears that the judge's concerns are merely technical and that the judge would otherwise be willing to proceed immediately, the attorney should suggest that the information acquired by Probation during the pre-petition adjustment process, combined with other available information, be deemed the Probation investigation for purposes of disposition. Alternatively, the parties and the judge could enter into a "plea back" agreement that would allow the child to withdraw the plea if, because of new information contained in a Probation report, the judge refuses to order the agreed-upon disposition.

C-10. Prepare the Child for a Plea Allocution

Before the child makes an admission in court, the attorney should explain to the child in detail the constitutional and statutory rights the child will be waiving.

Commentary

The attorney should carefully prepare the child and his/her parent or guardian for the judge's plea allocution. Before accepting an admission, the judge must inform the child and the parent or guardian of the right to a fact-finding hearing, and ascertain that the child "is voluntarily waiving his right to a fact-finding hearing" and "is aware of the possible specific dispositional orders." These provisions "shall not be waived." F.C.A. § 321.3(1). Judges usually go beyond the statutory requirement, and reference the child's rights to cross-examine the Presentment Agency's witnesses; present evidence in support of a defense; and testify on his/her own behalf or remain silent without penalty. Keeping in mind the particular judge's manner of conducting this inquiry, the attorney should thoroughly explain to the child and parent or guardian what the judge will say and solicit questions about anything that is not understood.

The most important part of the allocution is the child's factual admission of guilt. This comes by way of the child's acknowledgment that he/she committed acts described by the judge, or, more typically, the child's own description of what he/she did. This is where many allocutions fall apart, as the child reverts to his/her initial reluctance to admit guilt and begins to hedge and offer self-serving caveats. Thus, the attorney should, whenever possible, negotiate a plea to a crime to which the child will find it easy to admit. When it is the child who will have to describe what happened, the attorney can suggest language the child should use and have the child rehearse. A judge is likely to become annoyed at the child and the attorney if the child seems unprepared for the judge's questions or is reluctant or unable to make the necessary factual admissions.

C-11. Develop a Theory of Defense

In order to identify a theory or theories of defense, the attorney should: review the statutory elements of the charged offenses and any applicable statutory presumptions, and identify possible deficiencies in the Presentment Agency's proof; consider the availability of Penal Law and other defenses; and evaluate the probative value and credibility of defense and prosecution witnesses and other evidence. The attorney should keep in mind that the Presentment Agency must prove its case beyond a reasonable doubt.

Commentary

An attorney's failure to identify and pursue a viable theory of defense may establish a violation of the constitutional right to the effective assistance of counsel. Henry v. Poole, 409 F.3d 48 (2d Cir. 2005).

The defenses identified in Penal Law Articles 25, 35 and 40 shall apply to juvenile delinquency proceedings. F.C.A. § 303.3. Among the defenses identified are justification (PL Article 35); duress (PL § 40.00); entrapment (PL § 40.05); renunciation (PL § 40.10); and mental disease of defect (PL § 40.15). Although it is, strictly speaking, not a "defense," intoxication (PL § 15.25) also is included.

The attorney should always keep in mind the child's youthful limitations. With respect to the mental state required as proof of a particular Penal Law-defined crime – e.g., intent, recklessness, negligence – the attorney should consider whether the child's youth, by itself, can be invoked in an argument that the child was incapable of formulating the required mental state,

or was merely engaging in typical child like behavior without the required mental state. See, e.g., In re Ibn Abdus S., 91 A.D.3d 428 (1st Dept, 2012) (sexual gratification element of sexual abuse not established where 10 year-old respondent shoved complainant to floor in school, and, while his friend restrained the complainant, grabbed, squeezed and twisted complainant's breasts). In addition, when the child is charged with consensual sexual activity with another child who was under 17, and both children were incapable of providing legally effective consent (Penal Law § 130.05[3][a]), the attorney could argue that the statute does not apply. Alternatively, the attorney could move to dismiss the charges in furtherance of justice. See, e.g., Matter of Cerino P., 296 A.D.2d 868 (4th Dept, 2002).

The attorney should consult with the attorney(s) representing any co-respondent(s), and attempt to coordinate defense strategies in a way that will be most beneficial for the attorney's own client and ascertain whether the respondents' respective defenses are in conflict to such an extent that a severance motion would be appropriate.

In connection with a mental disease or defect defense, the attorney should review any relevant records, including mental health, drug/alcohol treatment, medical, school, and social service agency records.

C-12. Presentation of Expert Testimony

The attorney should determine whether expert testimony should be presented. If the child is financially unable to retain an expert, the attorney should make an application pursuant to County Law § 722-c for an order authorizing the attorney to obtain an expert's services for the child at public expense. When the Presentment Agency will be presenting expert testimony, the attorney should take appropriate steps to prepare to cross-examine the expert and otherwise challenge the evidence.

Commentary

An attorney's failure to present, or adequately challenge, expert testimony may establish a violation of the constitutional right to the effective assistance of counsel. Bell v. Miller, 500 F.3d 149 (2007).

An expert can assist the defense at trial by testifying about, among other things, the child's mental condition at the time of the offense and problems with the accuracy of eyewitness identification evidence. (It should also be noted that at a suppression hearing, expert testimony may help establish that the child did not understand Miranda warnings given by the police.)

Preparation for cross-examination of a prosecution expert may include investigating the expert's qualifications and potential bias, conducting research into the subject matter of the expert's testimony and/or consulting another expert in the field.

C-13. Preserve the Child's Right to a Speedy Trial

The attorney should be fully familiar with statutory and constitutional speedy trial rules monitor compliance with those rules, and move for dismissal of the petition on speedy trial grounds in appropriate circumstances.

Commentary

The attorney should be familiar with F.C.A. § 340.1, the juvenile delinquency speedy trial statute, particularly because the remedy for a speedy trial violation is dismissal of the petition with prejudice.

The statute provides generally that the fact-finding hearing must commence within a certain number of days after the conclusion of the initial appearance, and permits an adjournment beyond that deadline upon a showing of good cause, and successive adjournments upon a showing of special circumstances (under Matter of Nakia L., 81 N.Y.2d 898 [1993], an adjournment is "successive" even if it follows an adjournment obtained by the other side). The court must state the reason for any adjournment on the record. Matter of Frank C., 70 N.Y.2d 408 (1987). Weekends and holidays are included in the time computation, General Construction Law § 20, but if a deadline falls on a weekend or holiday it may be extended to the next court day. General Construction Law § 25-a. Nevertheless, the attorney could press the court to eschew reliance on § 25-a unless the Presentment Agency needs the extra time. See Matter Kevin M., 85A.D. 3d 920 (2d Dept, 2010).

More specifically, the statute provides that if the child is in detention, the fact-finding hearing must commence within 14 days if the highest count in the petition is a class A, B or C felony and within 3 days in other cases, adjournments requested by the Presentment Agency or the court may be for up to 3 days and adjournments requested by the child may be for up to 30; that when the child is not in detention, the fact-finding hearing must commence within 60 days, and adjournments may be for not more than thirty days; that in cases involving a homicide charge or another crime which resulted in a person being incapacitated from attending court, the court may adjourn the fact-finding hearing for a reasonable length of time; and that if a warrant has been issued, the period during which the warrant is outstanding is excluded from the calculation if the Presentment Agency has exercised due diligence in attempting to secure the child's appearance.

On each speedy trial deadline, the attorney should ascertain whether the Presentment Agency is ready to proceed, and, if it is not, consider moving for dismissal and arguing that there is no good cause/special circumstances. If the Presentment Agency is ready, the child has the option of requesting an adjournment if a pre-trial motion such as one seeking suppression, or other pre-trial activity or preparation, is necessary. Indeed, particularly when the child is in detention, the statutory speedy trial limits may not allow the attorney sufficient time to prepare. The attorney should characterize the requested adjournment as a "good cause" or "special circumstances" adjournment, rather than as a "consent" adjournment that will result in a tolling of the speedy trial clock for the entire period of the adjournment. However, because, under existing case law, the speedy trial statute ceases to apply as soon as the trial "commences," a consent adjournment or waiver that results in tolling, and leaves open the possibility of a speedy trial-related dismissal down the road, may be a good strategic option if it appears that a refusal to consent or waive will cause the judge to commence trial.

The commencement of a suppression hearing does not constitute the commencement of "trial" and thus the speedy trial statute continues to apply. The defense motion to suppress is treated as a defense request for an adjournment and constitutes good cause. However, the court is required to proceed in an expedited fashion when the child is in detention, F.C.A. § 332.2(4), and a speedy trial violation can be found when the court unreasonably delays the conclusion of the suppression hearing. Matter of George T., 99 N.Y.2d 307 (2003); Matter of Jabare B., 93 A.D.3d 719 (2d Dept, 2012).

After trial commences, delays are tested against an abuse of discretion standard. See Matter of Sharnell J., 237 A.D.2d 290 (2d Dept, 1997). However, the judge may properly deny the Presentment Agency an adjournment during its direct case when no adequate excuse is proffered, strike the direct testimony of any witness who has not been cross-examined and force the Presentment Agency to rest with the evidence presented to that point. See, e.g., People v. Moutinho, 146 A.D.2d 650 (2d Dept, 1989). And, unlike an order dismissing the petition on speedy trial grounds before the commencement of trial, which can be appealed by the Presentment Agency, a post-commencement dismissal order cannot be appealed. F.C.A. § 365.1.

D. ACTIONS TO BE TAKEN AT THE FACT-FINDING HEARING

D-1. Opening Address

If appropriate, the attorney should deliver an opening address. The attorney should consider the strategic advantages and disadvantages of disclosing specific facts the attorney believes will be established.

Commentary

"The Court shall permit the parties to deliver opening addresses." If the prosecutor wishes to do so, he/she must go first. F.C.A. § 342.1(1). Thus, delivering an opening address may secure for the child's attorney useful information about how the Presentment Agency intends to prove its case and the evidence it intends to use. An opening statement offers the child's attorney an opportunity to identify weaknesses in the prosecution's case, and provide a preview of any evidence the defense will offer, so that the court, with that factual backdrop, will be less likely to be swept along by the Presentment Agency's case.

D-2. Make Appropriate Objections

The attorney should be fully familiar with common law and statutory rules of evidence. As appropriate, the attorney should make timely objections to the introduction of evidence, while stating in detail the specific grounds for the objection in order to preserve the issue for appeal.

Commentary

"Only evidence that is competent, material and relevant may be admitted at a fact-finding hearing." F.C.A. § 342.2(1). Thus, hearsay is not admissible unless it fits within a State law hearsay exception, or, in the particular circumstances, the respondent has a constitutional right to present reliable hearsay. See People v. Robinson, 89 N.Y.2d 648 (1997). Appellate courts enforce strict and often arcane preservation requirements, and so the attorney should be as specific as possible when raising an objection. Even if an objection has been raised before trial, the attorney should make a timely and specific objection again during trial.

The court may allow rebuttal and surrebuttal evidence. In fact, "[i]n the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case." F.C.A. § 342.1(4).

F.C.A. Article 3 contains complex provisions mirroring those in the Criminal Procedure Law that govern the admissibility of evidence at trial. These provisions govern children's and other witnesses' capacity to give sworn or unsworn testimony (F.C.A. § 343.1); corroboration of accomplice testimony (F.C.A. § 343.2); testimony regarding a witness's prior out-of-court identification of the child (F.C.A. §§ 343.3, 343.4); impeachment of a party's own witness by proof of prior contradictory statement (F.C.A. § 343.5); proof of prior conviction or juvenile delinquency finding (F.C.A. § 344.1); admissibility and corroboration of the respondent's statements (F.C.A. § 344.2); psychiatric defenses (F.C.A. § 344.3); and evidence of a sex offense complainant's prior sexual conduct – i.e., the "rape shield" statute (F.C.A. § 344.4). A court may consider judicial interpretations of similar Criminal Procedure Law provisions "to the extent that such interpretations may assist the court in interpreting" the Family Court Act provisions. F.C.A. § 303.1(2).

When making hearsay objections, the attorney should determine whether an argument can be made that the hearsay is "testimonial" and thus is barred by the Confrontation Clause. Williams v. Illinois, 132 S.Ct.2221 (2012); Melendez-Diaz v. Massachusetts, 557 U.S 305 (2009); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

The attorney should watch out for testimony containing facts that deviate from the allegations in the petition, and object to any material change in the theory of prosecution. See People v. Roberts, 72 N.Y.2d 489 (1988).

D-3 Cross-Examine Prosecution Witnesses

The attorney should cross-examine prosecution witnesses to the extent necessary and in a manner designed to support the theory of defense. When appropriate, the attorney should forgo cross-examination. The attorney should be fully familiar with the means of impeaching prosecution witnesses and any required foundation for such impeachment.

Commentary

A party may impeach a witness by eliciting proof of the witness's inability to perceive and recall the events; the witness's bad acts and/or convictions; the witness's bias or other motive to falsify; the witness's bad reputation for truth and veracity; and the witness's prior inconsistent statements. The defense may present evidence of a witness's inability to perceive and recall, motive to falsify or bad reputation for truth and veracity without first questioning the witness about the matter. However, a witness's testimony may not be contradicted with a prior inconsistent statement unless the witness is first questioned about the statement and given an opportunity to admit or deny making it, and, if the inconsistency relates to omitted facts, it appears that, on the previous occasion, the witness's attention was called to the matter and he/she was specifically asked about the facts embraced in the question propounded at trial, or, under the circumstances, it would have been natural to mention the omitted facts. A witness's bad acts may be established only by questioning the witness and getting the witness to admit commission of the acts; the defense may not offer extrinsic evidence to prove the bad acts. However, if a witness denies the existence of a prior conviction, the defense may prove the conviction and question the witness about the acts underlying the conviction.

It is not uncommon for the judge to take the entire direct testimony of a prosecution witness before adjourning the case. This is an opportunity for reflection and preparation that the

child's attorney should exploit. A transcript of the direct testimony should be obtained. Transcripts also should be ordered when a trial has been conducted over a long period of time on multiple dates. When the attorney is expected to begin cross-examination immediately after lengthy and complicated direct testimony, or when the attorney was provided with discovery of the witness's prior statements moments before the direct testimony commenced, the attorney should consider requesting a recess or a continuance before commencement of cross-examination.

D-4. Motion to Dismiss at the Conclusion of the Presentment Agency's Case

At the conclusion of the Presentment Agency's direct case, the attorney should make a motion to dismiss on the ground that the evidence is legally insufficient, and specify the grounds for the motion. When appropriate, the attorney should request a missing witness inference.

Commentary

A general dismissal motion does not preserve a legal insufficiency claim. The attorney should specify the manner in which the Presentment Agency has failed to prove an element or elements of an offense. People v. Santos, 86 N.Y.2d 869 (1995); Matter of Marcel F., 233 A.D.2d 442 (2d Dept, 1996). The presentation of a defense case after denial of a "prima facie" dismissal motion automatically results in a waiver of the initial legal insufficiency claim and another motion will have to be made at the close of the proof. People v. Hines, 97 N.Y.2d 56 (2001).

In order to preserve the issue, the attorney should request a missing witness inference no later than at the conclusion of the Presentment Agency's case.

D-5. Presentation of a Defense Case

The attorney should present witnesses and offer documentary, demonstrative and other evidence in support of the theory of defense. When necessary, the attorney should engage in subpoena practice and employ other means of compelling the testimony of witnesses and the production of evidence. The attorney should carefully prepare defense witnesses for their testimony.

Commentary

The provisions of CP. Article 620 (securing attendance of witnesses by material witness order), CPL Article 640 (Uniform Act to Secure Attendance of Witnesses From Without the State in Criminal Cases), CPL Article 660 (securing testimony for use in subsequent proceeding), and CPL Article 680 (examination of witness by commission) apply in juvenile delinquency proceedings. F.C.A. § 370.1.

Preparation of witnesses is discussed in the Commentary to Standard D-6.

D-6. Presentation of the Child's Testimony

The attorney should discuss with the child his/her right to testify and the advantages and disadvantages of testifying, and, together with the child, determine whether the child will testify. This determination should take into account the child's desire to testify, any repercussions of testifying, the strategic necessity of the child's testimony, and the child's developmental ability

to testify effectively and withstand possible cross-examination. Ultimately, the attorney is bound by the child's decision concerning testifying.

Commentary

If the child will be testifying, the attorney should prepare the child by describing in detail the persons who will be in the courtroom and what the courtroom setting is like. The attorney should seek to insure that direct examination questions are phrased in a syntactically and linguistically appropriate manner. The phrasing of questions should take into consideration the law and research regarding children's testimony, memory and suggestibility. The attorney also should consider providing the type of advice given to witnesses of all ages: for instance, the child should answer "yes" or "no" when possible and give short answers otherwise; should listen to each question carefully; should speak slowly and with a clear and strong voice; should answer truthfully without arguing with or trying to outwit the prosecutor; should hesitate briefly before answering questions on cross-examination so the attorney can make objections; and should look at the judge and make eye contact frequently. When necessary, the attorney should suggest appropriate language; rehearse the child's direct testimony; assist the child in anticipating and developing means of coping with cross-examination and the behavior of the judge and prosecutor; and draw out the child's story in as much detail as possible, probing for inconsistencies and damaging facts that a thorough and skillful cross-examination would reveal.

Because child witnesses are vulnerable to manipulation and can rattle easily, the attorney should consider before trial how active he/she wants to be in making objections. To protect a child who angers easily, gives long-winded answers, and/or is likely to come unglued under cross-examination, the attorney might choose to object frequently. On the other hand, frequent objections may serve to agitate rather than protect the child. In any event, the attorney should forewarn the child that there may be heated argument and describe what it might be like, and advise the child to remain calm.

An attorney may not present testimony that he/she knows is false, but may present testimony that he/she merely believes is false. See NY Rules of Professional Conduct, Rule 3.3, and Comment. Thus, the decision whether to call to the stand a child whose story does not hold together, but is not known by the attorney to be false, is a strategic one; will the testimony help, or hurt, the defense cause?

D-7. Make Summation

The attorney should make a summation, and, in order to preserve issues for appeal, should be specific in pointing out deficiencies in the Presentment Agency's proof.

Commentary

The child has a right to have the attorney deliver a summation. While the attorney delivers an opening address after the Presentment Agency, the defense goes first during summations. F.C.A. § 342.1(5), (6). Thus, when a defense case has been presented, the attorney should renew the legal insufficiency claim at the close of the evidence and before making a summation.

Many judges, certain that they have command of the facts and adequate knowledge of the law, do not want to hear lengthy summations during which the attorneys review the testimony in detail. Indeed, after a relatively short, one-day trial, the child's attorney might be well-advised to

focus on legal argument and the crucial facts. However, when a trial has been conducted over a long period of time on multiple dates, the attorney should not assume that the court has taken adequate notes and recalls accurately what has happened previously in the proceeding. In such cases, the attorney should include more facts in the summation.

D-8. Raise Appropriate Objections to the Court's Order

When the court renders a decision at the conclusion of trial, the attorney should make appropriate objections. The attorney should obtain a copy of the court's written order and ascertain whether there are any errors.

Commentary

Possible objections to the court's findings, which must be made immediately, include: the court has made a finding as to a lesser included offense without advance notice to the defense; the verdict is repugnant; and the court's finding reflects an impermissible change in the theory of prosecution.

D-9. Motion for New Trial

When appropriate, the attorney should make a motion for a new trial based on a substantial change of circumstances or the court's inherent power to vacate its order.

Commentary

Family Court Act § 355.1 permits the court, upon finding a substantial change of circumstances, to grant a new fact-finding hearing, or stay execution of, set aside, modify, terminate or vacate any order. A motion for relief pursuant to F.C.A. § 355.1 must be in writing, and be determined in accordance with the procedures in F.C.A. § 355.2. The court also has inherent authority to vacate its own orders that extends beyond the authority in F.C.A. § 355.1. Matter of Delfin A., 123 A.D.2d 318 (2d Dept, 1986).

The most common ground for a request for a new trial is newly discovered evidence. See Matter of Jonathan C., 51 A.D.3d 559 (1st Dept, 2008). The attorney also should consider moving for a new trial when it appears that the child was prejudiced because the Presentment Agency withheld exculpatory evidence in violation of F.C.A. § 331.2(1)(g) and Brady v. Maryland, 373 U.S. 83 (1963) or withheld prior statements of a witness in violation of F.C.A. § 331.4(1)(a), or the court lacked jurisdiction (see CPL .§ 440.10[1][a]), or the judgment was obtained in violation of the child's constitutional rights (see CPL § 440.10[1][h]).

E. ACTIONS TO BE TAKEN BEFORE THE DISPOSITIONAL HEARING

E-1. Prepare a Dispositional Recommendation and Plan

Prior to any Probation investigation or mental health evaluation, the attorney should, together with the child, begin developing a dispositional recommendation and plan. In doing so, the attorney should review relevant records, including mental health, drug/alcohol treatment,

medical, school, and social service agency and other service provider records, and interview potential witnesses.

Commentary

Development of a dispositional plan should commence at the beginning of the proceeding (see Commentary to Standard B-3), with the child's attorney operating under the prudent assumption that there will be a fact-finding made by the court. The plan should be refined and updated as the case nears conclusion.

The attorney must respect the wishes of the child in selecting a dispositional plan, but should discuss with the child the likelihood that the judge will adopt the plan preferred by the child and the advisability of preparing and/or consenting to alternative plans. The attorney also should bring the child's parent or guardian into the planning process since his/her cooperation will be important, and, indeed, will be critical in those cases in which the child is objecting to a recommendation of placement.

When there is a viable argument that the child needs no supervision, treatment or confinement, the attorney should prepare an argument for dismissal of the petition along with a back-up argument and a dispositional plan.

E-2. Prepare the Child for Probation and Mental Health Interviews

The attorney should prepare the child and family members for interviews with Probation officers or mental health professionals during the dispositional process.

Commentary

While they are worth undertaking, the attorney's efforts to "coach" the child to perform well at dispositional interviews do not guarantee a good result. Yet the possibility that the child will give incriminating answers to questions posed by a Probation officer or by a mental health examiner should be discussed with the child before the interviews take place. Probation reports often highlight the fact that the child still refuses to take responsibility for his/her behavior, and mental health examiners, reasonably or not, often conclude that an unremorseful child poses a threat to the community. Thus, the attorney may conclude that the judge is more likely to be lenient if the child "comes clean" in the interviews and expresses "remorse" for having committed the instant offense, and that the recommendations will be skewed negatively if the child seems evasive. On the other hand, if the child has very damaging information to give – such as admissions to numerous uncharged crimes – the attorney should consider advising the child not to answer certain questions and to state that he/she is doing so on advice of counsel.

The best means of protecting the child's interests is for the attorney to be present at the interviews. In Matter of Jose D., 66 N.Y.2d 638 (1985), the Court of Appeals held that Miranda warnings were not required at a pre-disposition mental health examination, and also held that the examination is not a "critical stage" of the proceeding at which the right to counsel attaches. Other courts have held that the Probation interview is not a critical stage. Thus, it does not appear that there is an across-the-board right to counsel at a Probation interview or mental health examination. However, the court has discretion to allow the attorney to be present (which, the child's attorney needs to keep in mind, is likely to result in the presence of the prosecutor as well). Moreover, in Jose D., the Court of Appeals expressly relied on an assumption that the

child will have the option of obtaining an independent mental health evaluation. When the child is not given that option, the attorney should argue that the child has a right to have counsel present at the interviews.

E-3. Contacts With Probation and Mental Health Examiner

The attorney should engage in contacts with Probation, and with any mental health examiner, that are designed to influence the dispositional recommendations.

Commentary

The attorney should communicate directly to the assigned investigative Probation officer, and to any assigned mental health examiner, any positive information regarding the child that the attorney believes may not already have been provided. It is not enough to present such information at the dispositional hearing after the Probation officers and mental health examiner's recommendations have already been formulated and committed to writing; indeed, it is far more difficult to counter a formal recommendation than it is to help shape the recommendation while it is being formulated. The attorney should make an effort to develop positive working relationships with Probation personnel and with the mental health professionals who conduct evaluations for the family court in juvenile delinquency proceedings.

While there may be certain judges who routinely bar attorneys from engaging in ex parte *contacts with Probation and with mental health examiners, generally these examiners are not represented by counsel in the proceeding and thus Rule 4.2 of the NY Rules of Professional Conduct does not prevent an attorney from engaging in such "lobbying." Kenneth C. v. Delonda R., 10 Misc. 3d 1070(A) (Fam. Ct., Kings Co., 2006).*

E-4. Prepare to Challenge Dispositional Reports and Recommendations

The attorney should review the Probation investigation report and any mental health evaluation ordered by the court, as well as notes and other documents prepared or utilized by Probation or the mental health examiner.

Commentary

Pre-dispositional Probation investigations (which may include a victim impact statement) and diagnostic assessments are governed by F.C.A. § 351.1. Probation and mental health reports must be made available by the court for inspection and copying by the Presentment Agency and the respondent at least five court days prior to commencement of the dispositional hearing. F.C.A. § 351.1(5)(a). The attorney should discuss with the child in general terms the conclusions and recommendations contained in the reports, and, as necessary and in a manner that takes account of the sensitive nature of certain information, review the reports with the child to determine whether any information can be challenged as inaccurate or misleading. However, the reports are otherwise confidential under F.C.A. § 351.1(6), and the attorney should get the court's permission before showing them to defense experts.

When appropriate, the child's attorney should object to commencement of the hearing and introduction of reports when the required five-day notice has not been provided. The attorney also should seek disclosure, via subpoena if necessary, of handwritten or typed notes

prepared by Probation or the mental health examiner, and any records and other documents upon which they relied in formulating their recommendations.

Reports may not contain references to a prior juvenile delinquency proceeding if the records of that proceeding were sealed. Matter of Alonzo M., 72 N.Y.2d 662 (1988).

E-5. Protect the Child's Right to a Speedy Dispositional Hearing

The attorney should monitor and, when appropriate, attempt to enforce compliance with statutory speedy disposition requirements.

Commentary

When the respondent is not in detention, the dispositional hearing must commence no later than 50 days after the entry of a fact-finding order. F.C.A. § 350.1(2). For good cause shown, the hearing may be adjourned for up to 30 days on the respondent's motion, or up to 10 days on motion of the Presentment Agency or the court. F.C.A. § 350.1(3). Successive adjournments may be granted upon a showing of special circumstances. F.C.A. § 350.1(5). The court must justify an adjournment on the record. F.C.A. § 350.1(4).

When the respondent is detained, the hearing must commence within 10 days after entry of the fact-finding order. F.C.A. § 350.1(1). Adjournments may be granted according to the rules applicable in non-detention cases, but the 10 day remand limit does not apply when the respondent has been found guilty of a designated felony.

As appropriate, the attorney should make objections and motions to dismiss when it appears that the child's right to a speedy dispositional hearing has been violated. If the family court does order dismissal at disposition, the Presentment Agency may not appeal. Matter of Leon H., 83 N.Y.2d 834 (1994).

However, the family court does have substantial discretion under Matter of Jose R., 83 N.Y.2d 388, 394 (1994), in which the Court of Appeals held that dismissal is not a statutorily required remedy for delays in the dispositional process, but did concede that "[i]n unusual circumstances where the juvenile is not solely responsible for the delay, the Family Court retains the authority to dismiss."

F. ACTIONS TO BE TAKEN AT THE DISPOSITIONAL HEARING

F-1. Cross-Examine and Present Witnesses at the Dispositional Hearing

At the dispositional hearing, the attorney should, as appropriate, call and cross-examine witnesses.

Commentary

The dispositional hearing can be a formal hearing at which the parties present evidence according to the procedures set forth in F.C.A. § 350.4. Evidence must be material and relevant, but does not have to be competent. F.C.A. § 350.3(1).

A hearing that includes the calling and cross-examination of witnesses and presentation of other evidence should not be requested every time the child is challenging a dispositional

recommendation. When the recommendation is based on a demonstrable pattern of misconduct, it may not be wise for the attorney to focus on discrediting the witness making the recommendation – a trained professional who may be voicing defensible conclusions drawn from the evidence and may take the opportunity to buttress his/her opinion. Except in the rare case in which the recommended disposition is based on inaccurate and unreliable information, or on conclusions that are easily discredited on cross-examination, a better strategy may be to focus the judge's attention on the child's positive attributes, achievements and life circumstances, and outline for the judge a plan of supervision and services that will help the child succeed at home and at school and refrain from criminal conduct.

When cross-examining a Probation officer, the attorney should be concerned less with the officer's bottom-line opinion than with the facts uncovered during the officer's investigation. Nothing the attorney does during cross-examination is going to change the officer's opinion or the facts stated in the report. The attorney should focus on what the officer has failed to do during his/her investigation, and if possible establish that the officer, having decided at the outset that placement is appropriate, has made no effort to uncover or follow up on favorable information and has failed to even consider an alternative plan that would allow the child to remain at home.

Like the Probation officer, the mental health examiner may be open to attack on the ground that he/she failed to conduct a thorough evaluation. The expert's conclusions may lack sufficient foundation in the record. The expert's arrogance, tendency to overstate the case or unwillingness to make reasonable concessions should be exposed and exploited. On the other hand, experts usually are skillful witnesses. The best way to challenge the expert may well be to present the testimony of another, apparently more qualified and perceptive expert.

Defense witnesses may include a defense mental health evaluator; representatives from agencies that already are or would in the future provide rehabilitative services, who should describe in detail any services that will be provided and explain why the child appears to be a good candidate for rehabilitation; persons in the community, such as school personnel, who would make good character witnesses; and family members. Any recent progress the child has made should be detailed and highlighted. Usually, at least one of the child's parents should testify. While judges understand that parents do not always make good witnesses, the failure to present a parent's personal expression of faith in the child and willingness to provide a high level of supervision, and expose the parent to cross-examination, usually is taken by the judge to be an indication that the attorney is hiding something or lacks confidence in the parent.

Finally, the witness with the most potential – and the witness from whom the judge most wants to hear – is the child. While the judge will understand counsel's reluctance to expose the child to cross-examination, cases can be won when the child testifies and wins over the judge.

In sum, the attorney should attempt to change the focus from the child's past behavior to changed circumstances that will minimize the risk of future misconduct.

F-2. Advocate for the Least Restrictive Alternative

At the dispositional hearing, the attorney should argue in support of a dispositional order that constitutes the least restrictive alternative.

Commentary

An adjudication of delinquency, which results from a finding that the respondent requires supervision, treatment or confinement (F.C.A. § 352.1[1]), must be based on a preponderance of

the evidence. F.C.A. § 350.3(2). If the court cannot make the required finding, the petition must be dismissed. F.C.A. § 352.1(2).

The possible orders the court can issue upon an adjudication of delinquency are conditional discharge (F.C.A. § 353.1); probation (F.C.A. § 353.2); placement in the respondent's own home or in the custody of a suitable relative or other private person (F.C.A. § 353.3[1]); in a social services district operating "Close to Home" services pursuant to Social Services Law § 404 (New York City is the only jurisdiction affected by the "Close to Home" legislation), placement with the Commissioner of Social Services for a non-secure or (if available) a limited secure level of care, or placement with the New York State Office of Children and Family Services for a limited secure (if not available with the Commissioner) or secure level of care (F.C.A. § 353.3[2], [2-a]); in non-Close-to-Home social services districts, placement with the Commissioner of Social Services, which may include specification of a particular agency or class of agencies (F.C.A. § 353.3[2]); in non-Close-to-Home social services districts, placement with the Office of Children and Family Services, with authorization to place the respondent in a non-secure, limited secure or secure OCFS facility (F.C.A. § 353.3[3]), or with a direction to place the respondent with a particular agency or class of agencies (F.C.A. § 353.3[4]); or placed with the Office of Children and Family Services or with the Commissioner of Social Services with a direction for the temporary transfer of the respondent to the custody of the Commissioner of Mental Health or the Commissioner of Mental Retardation and Developmental Disabilities (F.C.A. § 353.4). Restrictive placements in designated felony cases are governed by F.C.A. § 353.5.

Restitution and/or or services for the public good may be ordered in connection with one of the above-described dispositional orders. F.C.A. § 353.6. The attorney should raise an objection when the child does not have the financial means to make restitution, or when an order requiring services for the public good involves an excessive time commitment that threatens to undermine the child's school attendance and other important activities.

"In determining an appropriate order the court shall consider the needs and best interests of the respondent as well as the need for protection of the community." Except in designated felony cases, which are governed by F.C.A. § 353.5, the court "shall order the least restrictive available alternative . . . which is consistent with the needs and best interests of the respondent and the need for the protection of the community." F.C.A. § 352.2(2)(a). Moreover, when placing the child, the court is required to determine "that, where appropriate, and where consistent with the need for protection of the community, reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his or her home, or if the child was removed from his or her home prior to the dispositional hearing, where appropriate and where consistent with the need for safety of the community, whether reasonable efforts were made to make it possible for the child to safely return home." F.C.A. § 352.2(2)(b)(ii).

Accordingly, when challenging a placement recommendation, the attorney should cite these statutory requirements while arguing that the Presentment Agency has failed to establish that any risk to the community posed by the child cannot be adequately addressed while the child resides at home. In some cases, the least restrictive alternative is an adjournment in contemplation of dismissal. See In re Juan P., 114 A.D.3d 460 (1st Dept, 2014). Matter of Teriyana A. Mc., 100 A.D.3d 902 (2d Dept, 2012); In re Israel M., 57 A.D.3d 274 (1st Dept, 2008); In re Joel J., 33 A.D.3d 344 (1st Dept, 2006); In re Justin Charles H., 9 A.D.3d 316 (1st Dept, 2004).

In the case of a child who already is in a foster care placement pursuant to F.C.A. Article 10 or 10-A, the attorney should, unless there is a strategic reason not to, consider asking that a representative of the local Department of Social Services appear at the dispositional hearing, and then argue that no placement order is necessary, and perhaps that dismissal or an adjournment in contemplation of dismissal is appropriate, because the child's needs are already being adequately addressed. If the child is ultimately placed with the Office of Children and Family Services, the attorney should, where appropriate, ensure that the child's placement in the Article 10 or 10-A proceeding is not terminated merely because the child has been placed with OCFS. In Matter of Peter R., 171 Misc.2d 278 (Fam. Ct., Kings Co., 1996), the court denied the Administration for Children's Services' application for leave to allow a foster care placement to lapse where there was a concurrent OCFS placement. The court noted that it had far more discretion to address the needs of the child under Article 10.

F-3. Request Rehabilitative Services for the Child in Placement

If the child is placed by the court, the attorney should, as appropriate and with the consent of the child, ask the court to order that rehabilitative services, such as substance abuse or mental health treatment, be provided or arranged by the agency with which the child is placed.

Commentary

The statutory scheme does not allow the court to designate the particular facility or place where the child will be housed while placed under "Close to Home" or with the Office of Children and Family Services, or select the type of program in which the child will be enrolled. Matter of Lavar C., 185 A.D.2d 36 (4th Dept, 1992).

However, the child has a constitutional due process right to receive necessary and appropriate treatment and services in order to prevent serious physical or emotional harm while confined by the State. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 199-200 (1989); Matter of Lavette M., 35 N.Y.2d 136, 142-143 (1974); Matter of Ellery C., 32 N.Y.2d 588, 591 (1973). Potential authority for court-ordered services appears in F.C.A. § 255, which provides, in pertinent part, that "[i]t is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act." See Usen v. Sipprell, 41 A.D.2d 251, 259 (4th Dept, 1973); Matter of Nicholas M., 189 Misc.2d 318 (Fam. Ct., Onondaga Co., 2001); Matter of Joseph I., 2001 WL 1328620 (Fam. Ct., Suffolk Co.).

The attorney should insure that any services ordered by the court are provided in a timely fashion. In order to ascertain whether there are problems with implementation of the order, the attorney should stay in touch with the child and should make necessary applications, such as a motion for contempt, to compel compliance with the order.

Routine medical, dental and mental health services and treatment are addressed in F.C.A. § 355.4, which provides that at the conclusion of the dispositional hearing, the court must inquire as to whether the child's parent or legal guardian, if present, will consent for the OCFS or the district to provide such services and treatment. F.C.A. § 355.4(1). If no consent is obtained, the OCFS or the social services district is still deemed to possess the required consent.

F.C.A. § 355.4(2). The parent or guardian may later make a motion objecting to services or treatment. F.C.A. § 355.4(4).

F-4. Undocumented Children/SIJS

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 (SIJS) 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 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.

A child may petition the United States Citizenship and Immigration Services for Special Immigrant Juvenile Status. An alien is eligible for classification as a special immigrant if: (1) The alien is under 21 years of age; (2) the alien is unmarried; (3) the alien has been declared dependent in a juvenile court located in the United States or has been legally committed to or placed under the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunifications with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law; (4) it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence. The child also must obtain consent from the Secretary of Homeland Security. See 8 U.S.C. § 1101(a)(27)(J); see also Matter of Marisol N.H. 115 A.D.3d 185, (2d Dept, 2014) (family court has statutory authority to appoint biological parent to be guardian in proceeding brought for purpose of pursuing special immigrant juvenile status); Matter of Marcelina M.-G., 112 A.D.3d 100 (2nd Dept, 2013) (statute requires only finding that reunification is not viable with one parent; here, child established that reunification with father in Honduras was not viable due to abandonment and that it would not be in her best interests to return to Honduras).

G. ACTIONS TO BE TAKEN POST-DISPOSITION

G-1. Discuss the Dispositional Order With the Child

The attorney should review the dispositional order to ensure that it conforms to the court's oral directives and complies with statutory requirements. The attorney should discuss the order and its consequences with the child, and assist the child in preparing to comply with conditions of behavior that are contained in the order. The attorney should discuss the end of the formal legal

representation and determine what contacts, if any, the attorney and the child will continue to have.

Commentary

Unless the case is dismissed at disposition, the court's order will contain conditions of behavior that must be followed by the child. Thus, even when the child has not been placed by the court, the possibility of placement looms close at hand. Accordingly, the attorney should advise the child in clear terms regarding the likely result of a failure to comply with the dispositional order.

The attorney should explain in a developmentally appropriate manner why the formal representation is ending and how the child can obtain assistance from the attorney in the future should it become necessary. The attorney should provide the child with contact information, such as a business card, and encourage the child to contact the attorney if any problems arise. As appropriate, the attorney should initiate contact with the child, third party caretakers, case workers and service providers to ensure that the child's needs are being met.

If the child has been placed by the court without specification of a particular home or facility, the attorney should ascertain the child's location, and contact the child to determine whether the child is satisfied with the placement and whether any further court action is necessary, such as a motion for a modification of the dispositional order. Indeed, at any time, the attorney may ask the court to conduct a hearing under F.C.A. § 355.1 to determine whether there is a need for continued placement. F.C.A. § 353.3(6).

In addition, whenever appropriate, after consulting with the child, the attorney should assist in the filing of a notice of claim, obtain counsel for a client who was abused or injured while in placement, 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.

G-2. Appeal From Dispositional Order

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 attorney should take all steps necessary to perfect the appeal and seek interim relief necessary to protect the interests of the child during the pendency of the appeal. The attorney's assignment continues pursuant to F.C.A. § 1220(b). Because statewide uniformity is lacking in regards to procedures for the attorney to follow when the child is to be represented on appeal, the attorney should be aware of applicable Appellate Division rules. If the attorney determines that he/she cannot or is unwilling to handle the appeal, the attorney should notify the court and seek to be discharged and replaced as soon as possible.

Commentary

When the court has issued a dispositional order, the attorney must advise the child and his/her parent or guardian in writing, of the right to appeal, the time limitations, the manner of initiating the appeal and obtaining a transcript and the right to apply for leave to appeal as a poor person, and explain the procedures for instituting an appeal, the possible reasons upon which the appeal may be based and the nature and possible consequences of an appeal. F.C.A. §

354.2(1). The attorney also must ascertain whether the child wishes to appeal and, if the child does wish to do so, file the necessary notice of appeal. F.C.A. § 354.2(2); see also F.C.A. § 1121. If necessary, the attorney must apply for leave to appeal as a poor person, and file a certification of continued eligibility for appointment of counsel. F.C.A. § 1121(3).

Appeals in juvenile delinquency proceedings may involve risk factors that the attorney must discuss with the child. If prevailing on appeal would necessarily mean that the petition will be dismissed with prejudice (e.g., the child is raising a speedy trial claim, or a suppression claim regarding evidence that is essential to the Presentment Agency's case), there is no risk. However, because of delays in the appellate process, appeals often are decided after the dispositional order has expired and the family court has lost jurisdiction. In such a case, an appeal that could lead to a new trial carries along with it the possibility of a new, liberty-restricting dispositional order.

However, the risk may be illusory, or at least insufficiently consequential to deter an appeal. For instance, the attorney should consider, and discuss with the child, the likelihood that the Presentment Agency will, in fact, want to and be able to re-prosecute the case. Also, given the potential double jeopardy implications and the fact that the court is barred from ordering a more restrictive disposition as "punishment" for the child's decision to appeal [North Carolina v. Pearce (395 U.S. 711 (1969)], the attorney should consider, and discuss with the child, the likelihood that the court would, upon a fact-finding at a new trial, impose additional restrictions after the child already has served out a dispositional order. Appellate counsel can also ask the Appellate Division to dismiss the petition in the interest of justice rather than order a new trial. In re Jerome P., 96 A.D.3d 576 (1st Dept, 2012).

If a new attorney is assigned to handle the appeal, the trial attorney should provide to the appellate attorney all relevant records and other information, and be available for consultation regarding the appeal, including a discussion of potential issues to be raised. The appellate attorney must contact the child directly, and cannot rely upon representations made by the trial attorney regarding the child's position and goals on appeal. See Matter of Lamarcus E., 90 A.D.3d 1095 (3d Dept, 2011).

G-3. 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 attorney should explain, in terms the child can understand, the nature and consequences of the appellate decision. In addition, the attorney should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

G-4. Sealing, Destruction and Expungement of Records

The child's attorney should seek to ensure compliance with statutory provisions requiring sealing or destruction of records, and consider moving for post-adjudication sealing or expungement.

Commentary

Upon termination of a delinquency proceeding in the child's favor, the clerk of court is required to immediately notify the Presentment Agency, the Probation department, and the police department or other law enforcement agency involved in the case, that the proceeding has terminated in favor of the child. Unless the court has directed otherwise in the interest of justice upon the Presentment Agency's motion to prevent sealing, the clerk also must notify those agencies that they must seal their records of the proceeding. F.C.A. § 375.1(1). However, Probation may maintain records and papers for the purpose of complying with statutory provisions governing adjustment. F.C.A. § 375.1(1).

A child who is over the age of 16 may seek post-adjudication sealing pursuant to F.C.A. § 375.2. If possible, the child's former attorney should assist the child if he/she wishes to make a post-adjudication motion to seal.

Sealed records must be made available to the child or his/her designated agent upon request pursuant to F.C.A. § 375.1(3). If possible, the child's former attorney should assist the child if he/she wishes to obtain access to the records.

The court also has inherent power to order the expungement of court records. F.C.A. § 375.3. The child's attorney should consider seeking such relief in appropriate cases; generally, this power is designed to be exercised in cases where the charges prove to be unfounded. See Matter of Todd H., 49 N.Y.2d 1022 (1980).

Fingerprints, palmprints and photographs taken by the police pursuant to F.C.A. § 306.1 must be destroyed pursuant to F.C.A. § 354.1 when an arrest does not result in a felony adjudication (or, in the case of an 11 or 12 year-old child, a class A or B felony adjudication).

G-5. Motion for New Dispositional Hearing or Termination of Placement

When appropriate, the attorney should make a motion for a new dispositional hearing, or for a change in or termination of placement, based on a substantial change of circumstances or the court's inherent power to vacate its order.

Commentary

Family Court Act § 355.1 and the court's inherent authority (see Commentary to D-9 ante), also permit the court to grant a new dispositional hearing, modify a dispositional order to change the child's placement or the terms and conditions of probation or a conditional discharge or terminate an order of placement or any other dispositional order.

Accordingly, the attorney, having provided the child with a means of communicating with the attorney regarding the child's post-dispositional concerns, may file a § 355.1 motion whenever the attorney learns that the child desires a change in, or early release from, placement.

In particular, the attorney should consider filing a motion upon learning that the child has suffered physical or emotional harm due to misconduct by agency staff. Attorneys should keep in mind that in 2009, the United States Department of Justice's Civil Rights Division issued a report finding that conditions at four of the residential facilities established and maintained by the New York State Office of Children and Family Services violated constitutional standards in the areas of protection from harm and mental health care, and that those facilities' staff had engaged in an inappropriate and dangerous use of force, and the Commissioner of the OCFS was quoted in the press as stating that the conditions described in the Department of Justice report should not be considered limited to those four facilities. In 2010, New York State reached a settlement with the Department of Justice.

G-6. Protect Child's Right to Permanency Planning Prior to Release From Placement

The child's attorney should ensure that the placement agency prepares, prior to the child's release from placement, the report required by F.C.A. § 353.3(7).

Commentary

Many children are released from placement without adequate planning by the placement agency. Children often have difficulty gaining admission to school, and accessing needed mental health and other services. Accordingly, the Legislature has imposed a reporting requirement in an effort to insure that such planning is done.

The "place" in which, or the person with which, the child has been placed must submit a report to the court, the child's attorney and the Presentment Agency at the conclusion of the placement period. The report shall include recommendations and such supporting data as is appropriate. Where the Commissioner of Social Services or the OCFS is not seeking an extension of placement, the report must be submitted not later than 30 days prior to the conclusion of the placement.

The report shall contain a plan for the release, or conditional release of the child to the custody of his or her parent or other person legally responsible, to independent living or to another permanency alternative. If the child is subject to Article 65 of the Education Law or elects to participate in an educational program leading to a high school diploma, the plan shall include, but not be limited to, the steps that the agency has taken and will be taking to facilitate the enrollment of the child in a school or educational program leading to a high school diploma following release, or, if release occurs during the summer recess, upon the commencement of the next school term. If the child is not subject to Article 65 and does not elect to participate in an educational program leading to a high school diploma, the plan shall include, but not be limited to, the steps that the agency has taken and will be taking to assist the child to become gainfully employed or enrolled in a vocational program following release.

G-7. Advocate for the Child at Violation and Modification Proceedings

When a petition is filed alleging that the child violated a dispositional order, the attorney should determine whether the filing and the petition satisfy statutory requirements, attempt to negotiate a resolution and, if there is a hearing, zealously advocate the child's position.

Commentary

The violation of an order adjourning the proceeding in contemplation of dismissal, or any non-placement dispositional order, can quickly lead to detention and/or placement. Accordingly, the attorney should be prepared to mount a vigorous defense to the charges.

Proceedings in which a child is charged with violating a conditional discharge or Probation order are governed by F.C.A. §§ 360.1, 360.2, and 360.3. Most notable is the requirement that the non-hearsay allegations of the factual portion of the petition or of any supporting depositions establish, if true, every violation charged. F.C.A. § 360.2(2).

If the child is charged with violating an order adjourning the proceeding in contemplation of dismissal, the court must conduct an inquiry into the allegations, provide the

child with the opportunity to respond to the allegations, determine that there is a legitimate basis for concluding that a violation has occurred and state the reasons for the determination on the record. A hearing is not required in every case. The form and extent of the inquiry will vary according to the particular circumstances. A more detailed inquiry will be required when a child denies the allegations. Matter of Edwin L., 88 N.Y.2d 593 (1996). The child's attorney also should monitor compliance with the rule requiring dismissal if the case is not restored to the court's calendar before the expiration date of the ACD order. See Matter of Traneil B., 43 A.D.3d 1302 (4th Dept, 2007).

In some cases, the attorney's preferred strategy is to negotiate an extension or modification of the dispositional order – with, if necessary, an admission by the child that he/she violated the order – rather than fighting the charges at a hearing.

A placement order issued under F.C.A. § 353.3 may, upon a showing of a substantial change of circumstances, be set aside, modified, vacated or terminated upon motion of the Commissioner of Social Services or the Office of Children and Family Services. F.C.A. § 355.1(2). A motion procedure appears in F.C.A. § 355.2. When the OCFS seeks the transfer of a child from its custody to a "Close to Home" placement with the New York City Commissioner, or the Commissioner seeks the transfer of the child from a "Close to Home" placement to the OCFS, a petition must be filed. In any case in which the application is contested by the child, the attorney should request a formal hearing unless there is a strategic reason not to.

G-8. Advocate for the Child at Extension/Permanency Proceedings

When a petition is filed requesting an extension of placement, the attorney should determine whether the filing and the petition satisfy statutory requirements, attempt to negotiate a resolution and, if there is a hearing, zealously advocate the child's position. The attorney also should zealously advocate the child's position at a permanency hearing.

Commentary

The attorney should monitor compliance with statutory requirements in extension of placement proceedings. A petition to extend placement must be filed at least 60 days prior to the expiration date of the prior placement order. Unless the agency shows good cause for a late filing, dismissal of the extension petition is required. F.C.A. § 355.3(1). Thus, the child's attorney should, while keeping in mind any period of detention time credit to which the child was entitled when the court previously ordered placement, and any tolling that resulted from the child being AWOL, determine whether the filing is timely so that a motion to dismiss may be made if the child opposes further placement. The attorney also should be alert to delays that result in the temporary extension of placement for a period in excess of 45 days; such delays require dismissal pursuant to F.C.A. § 355.3(5). At an extension of placement (or permanency proceeding), the court also must make reasonable efforts determinations.

In some cases, the attorney's preferred strategy is to negotiate an extension of placement that includes an on-the-record commitment by the agency to release the child by a date certain, and a follow-up period of agency after-care.

The attorney should utilize statutory requirements, and any information provided pursuant thereto, when asking the court to issue orders directing the agency to take action to expedite release of the child from placement or the achievement of some other permanency goal. For instance, a release (or conditional release) plan report required by F.C.A. § 353.3(7) (see

Commentary to F-5 ante) must be submitted not later than 60 prior to the date on which a permanency hearing must be held and shall be annexed to the petition for a permanency hearing and extension of placement. F.C.A. § 353.3(7). At a permanency proceeding, the court must consider and determine, inter alia*, whether and when the respondent will be returned home, placed for adoption, referred for legal guardianship, placed permanently with a relative or placed in another permanent living arrangement, and specify "the steps that must be taken by the agency with which the respondent is placed to implement the plan for release or conditional release . . . the adequacy of such plan and any modifications that should be made to such plan." In the case of a respondent who has attained the age of 16, the court also must determine the services needed, if any, to assist the respondent to make the transition from foster care to independent living. F.C.A. § 355.5(7). See also Fostering Connections to Success and Increasing Adoptions Act of 2008 (Public Law 110-351) (conditions state receipt of federal Title IV-E funding on,* inter alia*, imposition of requirement that aging-out youth's caseworker, and other representative as appropriate, help youth develop personal transition plan during 90 day period immediately before youth exits care).*

When a client approaches the age of 18, the attorney should discuss with the child the advantages and disadvantages of remaining in placement and, if the client decides to remain in care past his/her 18th birthday, have the client sign a written consent to remain in care (except where there has been a designated felony finding and placement may be extended without consent until the child is 21). The attorney also should discuss with the child his or her eligibility to make a motion to return to foster care pursuant to F.C.A. Article 10-B. See Matter of Jefry H., 102 A.D.3d 132(2d Dept, 2012).

At a permanency hearing, the court must consult with the respondent in an age-appropriate manner regarding the permanency plan. F.C.A. § 355.5(8). The attorney should prepare the child for any inquiry by the court, and, when appropriate, argue that the statute is satisfied when the attorney communicates the child's wishes and that the child cannot be compelled to speak.