

NYSBA

Committee on Children and the Law

Standards for Attorneys
Representing Children in
Person in Need of Supervision
Proceedings

2015

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**NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW**

**STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK
PERSON IN NEED OF SUPERVISION PROCEEDINGS (2014)**

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PERSON IN NEED OF SUPERVISION PROCEEDINGS (2014)**

PREFACE

Standards for Attorneys Representing Children in Person in Need of Supervision Proceedings (2014) is a revised edition of the Standards that were issued in 2008.

These Standards apply to all attorneys representing children in Person in Need of Supervision (PINs) proceedings.

Attorneys and judges who are familiar with the 2008 edition of the Standards will find a number of changes in the 2014 edition. PINS law now requires that diligent efforts be made to divert the child from being the subject of a PINS petition. The child's attorney is not appointed until a petition has been filed, which would be after these diversion efforts have been made. Diversion has resulted in a substantial decrease in the number of PINS petitions being filed; in some counties almost all potential PINS cases are diverted. All Departments now provide training for attorneys representing children in PINS proceedings, and hence the extensive, substantive commentary for each stage in a proceeding is no longer needed.

The other significant change since the 2008 edition of the Standards was published has to do with criminal cases being converted to PINS cases. The Criminal Procedure Law was recently amended in 2013 and became effective in January of 2014. C.P.L. § 170.80 was added by the laws of 2013, c. 555, to remedy that failure to provide ready access to PINS treatment for all sexually exploited children arrested for "prostitution" or "loitering for the purpose of engaging in a prostitution offense." Thus, for a person who at 16 or 17 years of age is "arrested," as an adult, for one of those crimes, a criminal court judge "may," upon consent of the defendant, convert the case to a PINS proceeding, retain the matter, and "have the authority to grant any relief available under article seven of the family court act." C.P.L. 170.80(1).

The **Standards for Attorneys Representing Children in New York Person in Need of Supervision Proceedings (2014)** are intended to define generally what constitutes effective representation.

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

**STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN
PERSON IN NEED OF SUPERVISION PROCEEDINGS (2014)**

A. THE CHILD’S ATTORNEY

A-1. The Attorney-Client Relationship

Whether retained or assigned, and whether called “counsel” or “attorney,” the child’s attorney shall 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, shall keep client confidences, 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 and 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 must zealously defend the child.

Case law makes plain that children are entitled to more than the mere presence of an attorney; they deserve effective representation and the failure to provide effective representation constitutes reversible error. In re Chad H., 278 A.D.2d 601, 717 N.Y.S.2d 725 (3d Dept, 2000).

The attorney should explain to the child that representation will continue until the child is no longer under court jurisdiction and should ensure that the child knows how to contact the attorney should problems arise.

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 S.S.L. § 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.

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

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

Commentary

The attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when the attorney and the child disagree. Particularly when representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise in counseling the client to make sound decisions.

The child's attorney, like any attorney, must perform the vital role of being an advisor and counselor. In that role, the attorney may attempt to 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 client's initial position. To do so effectively, the attorney needs to determine what factors have been most influential in the child's thinking, what the child does not know, and what may be confusing to the child, and then work diligently to help the child understand the attorney's perspective and thinking. While explaining why the attorney believes a different outcome, or route to the outcome, may be preferable, the attorney must take care not to overwhelm the client's will, and thus override the child's actual wishes. The attorney must 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 must understand that the attorney will advocate the child's position in 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 only be disclosed by the child's attorney 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, 584 N.Y.S.2d 17 (1st Dept, 1992).

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

of the disclosure to the child's legal interests. 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.

B. GENERAL AUTHORITY AND DUTIES

B-1. Meet With Child

Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet with the child as soon as possible and on a continuing basis, prior to court hearings and when apprised of emergencies or significant events impacting on the child. Additionally, if appropriate, the attorney should maintain telephone contact. The attorney should undertake training to be reasonably culturally competent regarding the child's ethnicity and culture.

Commentary

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

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

B-2. Basic Obligations

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

- (1) Review the pre-petition diversion efforts to determine if the diligent efforts required by F.C.A. § 735 have been made to divert the child from being the subject of a PINS petition;
- (2) Review the petition to determine if it meets the requirements of F.C.A. § 732 and § 735;
- (3) Determine if additional diversion efforts should be made post-petition, pursuant to F.C.A. § 742.
- (4) Determine if a conflict of interest exists and observe ethical rules related to conflicts, such as those prohibitions related to co-respondents (including siblings);
- (5) Obtain copies of all pleadings and relevant notices and conduct ongoing discovery;
- (6) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g., judge, parties and their advocates, intervenors, caseworkers, child's attorney), and what to expect in the legal process;
- (7) Develop a theory and strategy of the case, including ultimate outcomes and goals to implement at fact-finding and dispositional hearings and including factual and legal issues;
- (8) Consider whether a neglect petition or child protective investigation under F.C.A. § 1034 should be undertaken, and if appropriate and the client consents, make the necessary motions, unless the court proceeds on its own motion under F.C.A. § 716;
- (9) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification *prior* to case conferences, changes of placement, child interviews, and any changes of circumstances affecting the child and the child's family;
- (10) Participate in depositions, negotiations, discovery, pretrial conferences and hearings;
- (11) Identify (upon consultation with the child) appropriate family and professional resources for the child;
- (12) Obtain and review all court and agency records concerning the child's placement history and consult with all attorneys who had previously represented the child;
- (13) Obtain evaluations and retain expert services if deemed necessary to zealously defend the client; and

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

Commentary

The attorney should not be merely a fact-finder, but rather should zealously advocate a position on behalf of the child. The attorney should assure that the designated lead agency under F.C.A. § 735 has taken all required steps related to diversion, including, for example, ensuring that school district petitioners have followed the diversion requirements of F.C.A. § 735(d)(iii). Delay is endemic to the family court process, but delay is especially harmful to children. The attorney for the child should take the initiative and not wait for service agencies or the parents to take action. The attorney should be fully informed of all facts and circumstances, before considering allowing a client to admit to the petition. The attorney for the child should make all appropriate motions and seek any necessary orders in furtherance of the child's position.

If the client is dissatisfied with the representation provided by his or her attorney, the attorney should inform the child of all of the options available to resolve the child's grievances.

C. ACTIONS TO BE TAKEN

C-1. Investigate

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

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

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. The attorney may need to use subpoenas, court orders, or discovery or motion procedures to obtain the relevant records, especially those records which pertain to the other parties. The attorney should review the child's records (e.g., medical, mental health, law enforcement, and education) and contact the appropriate providers.

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

Commentary

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

- (4) Contacting attorneys for other parties for background information;

Commentary

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

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

Commentary

The attorney "has the right to interview any petitioner or witness who may possess information bearing on the issues before the court." Rapoport v. Berman, 49 A.D. 2d 930, 373 N.Y.S.2d 652 (2d Dept, 1975). The attorney should keep in mind, however, that if the petitioner is represented by counsel, the attorney shall not "communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." Rule 4.2 of the NY State Rules of Professional Conduct. Where the petitioner, parents or other parties are not represented, the attorney should not give them advice. Often the family court judge may assign a corporation counsel or appropriate county attorney to present the case in support of the petition pursuant to F.C.A. §254. The corporation counsel or county attorney does not represent a parent-petitioner, and the parent does not enjoy attorney-client privilege with the appointed counsel. If the parent requests counsel and is indigent, the Family Court Judge has discretion to appoint an attorney to represent the parent under F.C.A. § 262(b) because under F.C.A. § 261, a parent seeking the loss of a child's society has a constitutional right to counsel.

- (6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records;
- (7) Interviewing individuals involved with the child who may be relevant to the case, including school personnel, child welfare caseworkers, non-respondent parents, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary

In some jurisdictions the attorney is permitted free access to agency caseworkers. In others, contact with the caseworker must be arranged through the agency's attorney. For example, in New York City, under Administration for Children's Services policy, caseworkers may communicate information such as information on a child's medical or education programs, but not matters such as interpretations of court orders or positions on case outcome.

- (8) Conducting all necessary discovery;
- (9) Reviewing relevant statements, photographs, video or audio tapes and other evidence;
- (10) Considering whether the child should be examined by a physician, a mental health professional, or a social worker;
- (11) Retaining any necessary expert services;

Commentary

When considering a request for the child to be examined by a physician, mental health professional or social worker, the attorney must consider not just the usefulness of the examination as a fact-finding tool, but must also consider the effect of the examination on the child. In determining whether to support a motion made by another party for an examination, or whether to make a motion seeking an examination, the attorney must balance the need for the information against the effect that the examination would have upon the child. The attorney should consider whether the scope of the examination sought can be limited, and move for such a limit if appropriate. For example, a psychological examination may be less harmful than a physical or complete psychiatric examination.

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

Commentary

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

- (13) Ensuring that the required efforts to avoid removal of the child from the home have been made;

Commentary

A major goal of current law is that diversion replace removal from home and detention of the child. The attorney should take advantage of the statutory barriers to removal, such as the detention prerequisites in F.C.A. § 720 and the best interests and reasonable efforts requirements in F.C.A. § 739.

- (14) If the child is removed from the home, the attorney should consult with the child and investigate the possibility of placement in the home of a suitable relative or other adult with whom the child has a relationship.

C-2. File Pleadings

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

- (1) A mental or physical examination of the child, or a parent, if the parent is a party;
- (2) A protective order to prevent successive mental health or other evaluations of the child;
- (3) A parenting, custody or visitation evaluation;
- (4) An increase, decrease, or termination of contact or visiting;
- (5) Restraining or enjoining a change of placement;
- (6) Contempt for non-compliance with a court order;
- (7) A request for services for child and/or family; and
- (8) Dismissal of petitions or motions.

Commentary

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

C-3. Request Services

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

- (1) Family preservation-related prevention or reunification services;
- (2) Sibling and family visits;
- (3) Child support;
- (4) Domestic violence prevention, intervention, and treatment;
- (5) Medical and mental health care;
- (6) Drug and alcohol treatment;
- (7) Parenting education;
- (8) Semi-independent and independent living services;
- (9) Foster care placement;
- (10) Education;
- (11) Recreational or social services;
- (12) Housing; and
- (13) Services for victims of human trafficking available under Article 10-D of the Social Services Law.

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

Commentary

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

C-4. Client Competency

In some cases the attorney may feel that the client needs a competency evaluation, which can be ordered by the court or can be arranged by the attorney. The attorney should explain to the client why such an evaluation is needed.

C-5. Adolescent Clients

The attorney who represents a young person, age 14 or older, should be familiar with, among other things, both the federal and state law governing services and discharge resources available to youth aging out of placement.

Commentary

An enormous number of young people age out of the system each year without the resources they need and to which they are legally entitled. The attorney must advocate for effective planning for adolescent clients as early in a case as possible. See 42 U.S.C. §§ 675(1)(D), 677(a); F.C.A. §§ 1089(c)(v), 1089(d)(2)(i); SSL § 358-a(3); 18 NYCRR § 430.12(f).

When clients approach the age of 18, the attorney should be prepared to discuss the advantages and disadvantages of remaining in placement and, if the client decides to remain in care past their 18th birthday, have the client sign a written consent to remain in care. The attorney should also discuss the client's ability to re-enter foster care between the ages of 18 and 21, pursuant to F.C.A. §1091 and Matter of Jefry H., 102 A.D.3d 132, 955 N.Y.S.2d.90 (2d Dept. 2012).

C-6. Undocumented Children/SIJS

The attorney for the child should determine at the outset of the case whether the child is an undocumented immigrant and what impact this might have on the development of the case. Undocumented children who are initially placed on a PINS petition, but continue to remain in care due to abuse, neglect, or abandonment may be eligible for Special Immigrant Juvenile Status (SIJS) under 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 may be SIJS eligible, the attorney should obtain the family court orders required in order to adjust the young person's immigration status and connect the child with appropriate immigration resources so that the child can obtain a green card.

The attorney should be aware that a person who does not have a lawful immigration status is at risk of deportation and that a determination of "good moral character" is part of the process of obtaining legal immigration status and United States citizenship. Care should be taken, therefore, to protect the client from admissions that might put the child's immigration status at risk. Because of the complexity of this area of law, attorneys are advised to consult with an immigration attorney before providing immigration advice.

Commentary

It is estimated that well over one thousand children who enter foster care in New York State each year do not have legal immigration status. This poses a major obstacle to permanency planning for these young people, who are at risk of deportation, not authorized to work, and ineligible for college financial aid and other government benefits. Relief for these children is available in the form of SIJS, a type of visa designated for undocumented children who meet the statutory requirements. While the SIJS application itself is made to the United

States Citizenship and Immigration Services, a prerequisite for the application is an order from the Family Court making specific factual findings that the young person:

- *is under 21 years of age;*
- *is unmarried;*
- *has been declared dependent upon a juvenile court;*
- *has been deemed eligible by the court for long-term foster care due to abuse, neglect or abandonment;*
- *continues to be dependent upon the juvenile court and eligible for long-term foster care in that reunification with either one or both parents is no longer an option; and that*
- *it would not be in the young person’s best interest to be returned to the country of nationality or last residence. See, Immigration and Naturalization Act § 101(a)(27)(J), 8 U.S.C. §1101(a)(27)(J).*

C-7. Negotiate Settlements

The attorney should participate in settlement negotiations to seek expeditious resolution of the case, balancing the effect of continuances and delays on the child. The attorney should use suitable mediation resources and, where appropriate, ask the court to authorize the use of conferencing or mediation.

D. HEARINGS

D-1. Court Appearances

The attorney should attend and fully participate in all hearings, telephone communications, or other conferences with the court.

Commentary

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

D-2. Client Explanation

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

D-3. Motions and Objections

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

Commentary

The attorney should keep in mind that pursuant to F.C.A. § 744:

- (a) Only evidence that is competent, material and relevant may be admitted in a fact-finding hearing.*
- (b) Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on proof beyond a reasonable doubt. For this purpose, an uncorroborated confession made out of court by a respondent is not sufficient.*

D-4. Presentation of Evidence

The attorney should make an opening statement, present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary to support the child's legal position.

D-5. Whether Child Should Testify

The attorney should decide, in consultation with his or her client, whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the attorney is bound by the child's direction concerning testifying.

Commentary

At the initial appearance and at the commencement of any hearing under Article 7, the court must advise the child of the right to remain silent. F.C.A. § 741.

D-6. Questioning the Child

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

Commentary

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

D-7. Conclusion of Hearing

If appropriate, the attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The attorney should ensure that a written order is entered and make any necessary post-trial motions.

Commentary

One of the values of having a trained attorney is that such an attorney can often present creative alternative solutions to the court. Further, the attorney is able to argue the child's legal position from the child's perspective, keeping the case focused on the need for proof beyond a reasonable doubt at a fact-finding hearing and the child's wishes, needs and the effect of various dispositions on the child at dispositional hearings.

D-8. Dispositional Hearing

The attorney should, in consultation with the child, develop a dispositional plan and should request a hearing if necessary to advocate for that plan.

Commentary

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

D-9. Permanency Hearings and Obligations after Disposition

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

Commentary

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the attorney's work often comes after the initial hearing, including ongoing permanency hearings, service plan reviews, committee on special education meetings, and so forth. Often a child's caseworkers, therapists, other service providers or even placements change while the case is still pending. The attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for the agency and court. The attorney should stay in touch with the child, third party caretakers, caseworkers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

D-10. Expanded Scope of Representation

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

- (1) Delinquency or abuse/neglect matters;
- (2) SSI and other public benefits;
- (3) Custody;
- (4) Guardianship;
- (5) Paternity;
- (6) Personal injury;
- (7) School/education issues, especially for a child with disabilities;
- (8) Mental health proceedings;
- (9) Immigration status.

Commentary

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

E. POST-HEARING

E-1. Review of Court's Order

The attorney should review all written orders to ensure that they conform to the court's verbal orders and statutorily required findings and notices. The attorney should file a sealing motion if appropriate.

E-2. Communicate Order to Child

The attorney should discuss each order and its consequences with the child.

Commentary

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

E-3. Implementation

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

Commentary

The attorney should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with implementation, the attorney should stay in touch with the child, caseworker, third party caretakers, and service providers between review hearings. The attorney should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation.

E-4. Protecting the Child's Rights

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

F. APPEAL

F-1. Decision to Appeal

The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If, after such consultation, the child wishes to appeal the order and the appeal would not be frivolous, the attorney should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal. If the child is aggrieved by the order, the attorney should take and perfect an appeal even if a party is also appealing.

Commentary

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

F-2. Withdrawal

If the attorney determines that he or she cannot or is unwilling to handle the appeal, the attorney should notify the court and seek to be discharged or replaced as soon as possible.

F-3. Participation in Appeal

The attorney should participate in an appeal filed by another party unless discharged.

Commentary

If the child's interests are affected by the issues raised in the appeal, the attorney's appointment continues without further court order. The attorney's appointment continues without further court order pursuant to F.C.A. § 1120(b) where the attorney for the child files a notice of appeal or where a party to the original proceeding files a notice of appeal. If the original petitioner files a Notice of Appeal, the Attorney for the Child must advise the child of the differences between responding to an appeal as a respondent, and filing a cross-appeal.

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

F-4. Conclusion of Appeal

When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the 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.

F-5. Cessation of Representation

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

Commentary

When the representation ends, the child's attorney should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the attorney. As noted in A-1, representation for the child continues until court jurisdiction is ended.