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Focus on Family Court: Holistic & Effective Family Representation

Friday, June 5, 2015
New York State Bar Association
Albany, NY

Presented by:

The New York State Bar Association's Committee to Ensure Quality of Mandated Representation

NYSBA

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New York State Bar Association

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Focus on Family Court: Holistic & Effective Family Representation

Friday, June 5, 2015, 10:20am – 4:45pm

New York State Bar Association, Albany NY

Name: _____

(Please print)

I certify that I was present for the entire presentation of this program

Signature: _____ Date: _____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

Focus on Family Court: Holistic & Effective Family Representation

New York State Bar Association

Friday, June 5, 2015
Albany, NY

SURVEY

Number of years admitted?
- 0 (less than 1)
- 01-03
- 04-05
- 06-07
- 08-14
- 15-19
- 20-29
- 30-39
- 40+

Are you a Member of the New York State Bar Association?
- NYSBA Member
- Non Member
- Not Sure

How many attorneys are in your office?
- 01 (Solo)
- 02-05
- 06-09
- 10-19
- 20-49
- 50-99
- 100+

Was the meeting site acceptable?
- Yes
- No

What was your overall evaluation of today's program?
- Excellent
- Good
- Average
- Fair
- Poor

Please rate the speakers regarding CONTENT of presentation and ABILITY to present the subject?
- Excellent
- Good
- Average
- Fair
- Poor

The printed course materials were:
- Excellent
- Good
- Average
- Fair
- Poor

The registration, organization, and administration were:
- Excellent
- Good
- Average
- Fair
- Poor

How did you learn of this program?
- E-mail
- Internet Search
- Facebook
- Twitter
- Other
- NYSBA Website
- Word of Mouth
- Brochure
- Postcard

Why did you choose to register for this program?
- Need MCLE credits
- Topics covered
- Faculty
- Other

OVER

Please list your primary area(s) of practice:

Describe any parts of the program that should be expanded or shortened:

Suggestion for new programs or topics you would like offered:

Comments

Meeting Site:

Materials:

Registration, organization and administration of the program:

Additional Comments:

NEW YORK STATE BAR ASSOCIATION

FOCUS ON FAMILY COURT: HOLISTIC & EFECTIVE FAMILY REPRESENTATION

AGENDA

5.5 Transitional CLE Credits (2.0 Skills; 3.5 Professional Practice)
Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted

9:30-10:15 am REGISTRATION

10-20-10:25am WELCOME

Chair Andrew Kossover, Esq.
Committee to Ensure Quality of Mandated Representation

10:25 - 11:25am WORKING WITH EXPERTS IN ARTICLE 10 AND TPR CASES

Lauren Shapiro, Esq., Brooklyn Defenders Services

11:30 – 12:20pm DISCOVERY IN ARTICLE 10/TPR/CUSTODY PROCEEDINGS

Adele M. Fine, Esq., Monroe County Public Defenders Office
Emma S. Ketteringham, Esq., Bronx Defenders

12:20 – 1:05pm LUNCHEON AND AWARDS CEREMONY

1:05-1:55pm STANDARDS OF PRACTICE FOR PARENT'S ATTORNEY'S IN STATE INTERVENTION CASES: FOCUS ON EARLY INVOLVEMENT OF COUNSEL

Angela Olivia Burton, Esq., NYS Office of Indigent Legal Services
Linda Gehron, Esq., Frank H. Hiscock Legal Aid Society

2:00-3:30pm INTERSECTION OF CRIMINAL, FAMILY AND IMMIGRATION PROCEEDINGS

Joanne Macri, Esq., NYS Office of Indigent Legal Services
Sophie I. Feal, Esq., Erie County Bar Association Volunteer Lawyers Project

3:40 -4:30pm CORNERSTONE ADVOCACY: AN INTERDISCIPLINARY APPROACH

Erin Browne, Esq., Senior Staff Attorney, Center for Family Representation
Anastasia Rivera, Esq., Litigation Supervisor, Center for Family Representation
Sara Rivera, LMSW, Senior Staff Social Worker, Center for Family Representation

4:35-4:45pm CLOSING REMARKS

Chair Andrew Kossover

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CLE NotePad®
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New York State Bar Association

FOCUS ON FAMILY COURT: HOLISTIC & EFECTIVE FAMILY REPRESENTATION

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New York State Bar Association
One Elk Street
Albany, NY 12207

Friday, June 5, 2015
10:20am – 4:45pm

5.5 Transitional CLE Credits (2.0 Skills, 3.5 Professional Practice)

WORKING WITH EXPERTS ARTICLE 10 AND TPR CASES

Lauren Shipiro, Esq., Director, Family Defense Practice, Brooklyn Defenders Services

This workshop provides an overview of working with experts in Article 10 and TPR cases. The workshop will explore retaining experts and preparing them for trial, as well as developing a theory of the case. We will also look at discovery issues in cases involving experts and questions of admissibility of expert testimony. Finally, the workshop will examine how to challenge the qualifications and credibility of your adversary's expert and cross-examination techniques.

WORKING WITH EXPERTS IN ARTICLE 10 AND TPR CASES: THE APPLICABLE LAW

OULTINE

Submitted by
Lauren Shapiro, Esq.
Director, Family Defense Practice
Brooklyn Defenders Services

WORKING WITH EXPERTS IN ARTICLE 10 AND TPR CASES: THE APPLICABLE LAW

Brooklyn Defender Services, Family Defense Practice

June 2015

I. INTRODUCTION: CALLING AN EXPERT/WHEN IS EXPERT TESTIMONY PERMISSIBLE BY THE COURT?

Working with experts is a crucial part of family defense work. Experts are frequently called as witnesses by child protective agencies to prove their case, particularly medical experts in *res ipsa* cases; psychiatrists or psychologists in mental illness cases; and validators, forensic experts or therapists in sex abuse cases. Likewise family defense attorneys should rely on their own experts to defend their clients in *res ipsa,* mental illness and sex abuse cases. Experts also can be used to show that a parent's standard of care was appropriate in a medical neglect or *res ipsa* case.

Family defense attorneys should be creative about using experts to defend their clients even when child protective agencies are not calling an expert. For example, in our practice we have called domestic violence experts in Termination of Parental Rights cases where domestic violence is alleged as a reason for failure to plan and a psychologist in an Article 10 case alleging that a mother should not have left her autistic 12 year old at home alone. In both cases, the experts were instrumental in helping us to get the cases dismissed.

The issue of whether expert testimony will assist the trier of fact is in the discretion of the judge. *See* CPLR 4011. An expert's testimony is admissible if it will assist the trier of fact in clarifying an issue calling for professional or technical knowledge not possessed by the trier of fact. *Delong v. County of Erie*, 60 N.Y.2d 296 (1983) (Upholding trial court's decision to allow expert testimony on the monetary value of a housewife's services because such testimony would aid the jury in determining the value of those services and also to dispel the notion that what is provided without financial reward may be considered of little or no financial value in the marketplace.); *Matott v. Ward,* 48 N.Y.2d 455 (1979) (Expert testimony must involve information or questions beyond the ordinary knowledge and experience of the trier of fact).

II. PRE-TRIAL ISSUES

A. Finding an expert witness to aid in your defense

1. Should you consult with an expert witness?

Practice tip: Even if you don't ultimately call an expert witness as part of your case, you probably want to consult with an expert if the child protective agency is calling one or if your case involves medical or mental health issues. You can try calling doctors

or other professionals who are involved in the case by looking at the medical records in a case involving medical or mental health issues. There is no reason that you can't speak to them about the case since they haven't been retained by counsel. Some will want to be neutral and will speak to you and many will be resistant. You can also speak to your client's treating provider and consider calling them as an expert witness or a fact witness (you would be calling the provider to testify to the facts of your client's treatment rather than asking for an opinion.)

Practice tip: In any case involving hospital or mental health issues, you should *request the relevant records* with your client's HIPPA authorization immediately so that you can provide your expert with the full set of records and review the records as soon possible, which will also help identify potential witnesses the agency may call. Make sure that you get digital imaging scans if relevant.

2. What type of an expert is needed?

The first question to consider is what type of expert is needed to prove your defense. Child protective agencies often call "child abuse specialists" who don't actually specialize in an area of medicine. By calling a specialist, such as a pediatric radiologist or neurologist, you will make it more likely that the judge will find your expert more credible. *See cases below on credibility issues.*

When investigating an expert, make sure you fully research the expert on the internet. Get a copy of the expert's CV early on and review it carefully to make sure that there are no damaging issues that could come out on cross. For example, if your expert hasn't seen patients in some time, you might decide that this is not the right expert for your case or be prepared to discuss why it isn't relevant for the expert's opinion.

Once you have identified an expert, you should sign a retainer agreement with the expert setting forth the terms of the agreement. *See sample expert consulting agreement.* Even if you have obtained approval for 722-c funds from the Court to hire the expert, the expert should sign a confidentiality agreement so that the expert won't speak to the other attorneys about your case. Without such an agreement, opposing counsel could try to call the expert to discuss the case.

3. How to prepare your expert to reach an opinion regarding your case

The most important part of consulting with an expert is properly preparing them to reach an opinion in your case. In addition to showing your expert all of the medical records in your possession and scans if applicable, you should consider showing the expert the abuse or neglect petition, ORT, and the agency records so that the expert is fully informed and not vulnerable on cross that he or she reached an opinion without having all the facts. You should also consider having your expert interview, examine or evaluate your client and/or the child (ren). You should also ask your expert about treatises or articles on which the expert can base his or her opinion.

B. Discovery under CPLR 3101(d)

1. Right to discovery about expert's opinion

The Family Court Act authorized liberal disclosure in child protective proceedings by adopting the provisions and limitations of Article 31 of the CPLR. *See* FCA § 1038(d). You have a right to notice if the agency is calling an expert witness and to information about what the expert is going to testify about. CPLR § 3101(d)(1)(i) provides that:

> "Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. …"

See Silverberg v. Community General Hosp. of Sullivan Co., 290 A.D.2d 788, 788 (3d Dept. 2002): "CPLR 3101(d)(1)(i) was intended to provide timely disclosure of expert witness information between parties *for the purpose of adequate and thorough trial preparation*." (Emphasis supplied).

Practice tip: Serve a notice pursuant to § 3101(d) as soon as the Article 10 is filed or well in advance of trial to ensure sufficient time to get the information, discuss the information with your expert and deal with any issues related to the disclosure. Likewise if any of the parties serve a notice for expert information on you, be prepared to sufficiently disclose information regarding your expert and the basis of his or her opinion. If you do not, the court could preclude your expert, limit the information about which your expert can testify and/or give your adversary an adjournment to prepare sufficiently.

2. Can an expert be precluded from testifying based on insufficient discovery under CPLR 3101(d)?

CPLR 3101(d)(1)(i) does not "mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute." *Lillis v. D'Souza*, 174 A.D.2d 976, 976 (4th Dept. 1991); see also *Corning v. Carlin*, 178 A.D.2d 576, 577 (2d Dept. 1991). Although you or your adversary can file a motion to preclude the testimony of an expert witness for failing to disclose sufficient information, an expert will rarely be precluded from testifying. This is especially true in Family Court, where long adjournments offer opportunities to limit the prejudice to the litigant who doesn't get sufficient information.

Although the court has broad discretion to decide whether to preclude testimony, preclusion occurs in extreme cases. *See Lyall v. City of New York*, 228 A.D.2d 566, 567 (2d Dept. 1996) (defendant failed to provide explanation for failure to disclose testimony until the eve of trial, seven years after plaintiff's demand); *Vigilant Ins. Co. v. Barnes*, 199 A.D.2d 257, 257 (2d Dept. 1993) (plaintiff did not reveal expert's name until three weeks before trial and did not provide "adequate explanation for its failure.") The "penalty of preclusion is extreme and should be imposed only when the failure to comply with a disclosure order is the result of willful, deliberate, and contumacious conduct or its equivalent." *Gendusa v. Yu Lin Chen*, 71 A.D.3d 1085, 1085 (2d Dept. 2010). *See also Bermudez v. Laminates Unlimited*, 134 A.D.2d 314 (2d Dept. 1987); *Maillard v. Maillard*, 243 A.D.2d 448 (2d Dept. 1997).

In order for an expert to be precluded for insufficient disclosure under CPLR § 3101(d), the disclosure of the expert testimony must be highly "general" and "non-specific". In *Saar v. Brown & Odabashian, P.C.*, 527 N.Y.S.2d 685 (Sup. Ct. Rensselaer Co. 1988), the Court precluded the expert's testimony in a medical malpractice case finding that the defendant hospital's response to plaintiff's discovery demand was "inadequate and [did] not fulfill the minimal purpose for which CPLR 3101(d)(1) was intended." *Id*. at 688. "The information provided is so general and non-specific that the plaintiff has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony. Although the court cannot delineate the exact contents of a satisfactory disclosure, the court will state that any reply must represent a good faith effort to comply with the statutory mandates." *Id*. at 690.

Similarly, in *Chapman v. State*, 593 N.Y.S.2d 104 (3rd Dept. 1993) the Court precluded expert testimony for failure to comply with 3101(d) where a plaintiff's disclosure only identified the treating physician and said he would testify to the plaintiff's "current physical condition," "the effect of the injuries that were inflicted upon him at the time of the events [alleged in the claim]," and that it was "anticipated" that the physician would "describe the nature and extent of the injuries that were sustained." *Id*. at 105. *But see Williams v. Way*, 735 N.Y.S.2d 170, 172 (2d Dept. 2001), relying on *Saar*, which held that "the plaintiff's responses were sufficient to give the defendant notice of the content of the expert's anticipated testimony."

Practice tip: If you are going to make a motion to preclude opposing counsel's expert testimony, do so well before trial. In a recent case, *Rivera v. Montefiore Medical Center*, 2014 N.Y. Slip Op. 08469 (1st Dept. 2014), the Court denied plaintiff's motion to preclude the testimony of an expert based on lack of specificity in the 3101(d) expert disclosure, finding that the objection was untimely because it was made *during* trial, where the plaintiff had made pretrial objections to the 3101(d) disclosure but on other grounds than lack of specificity, and those objections were cured. You should file motions to preclude expert testimony in writing before trial.

The testimony of treating physicians is not likely to be precluded. In *Ryan v. City of New York*, 703 N.Y.S.2d 90, 90-91 (1st Dept. 2000): "[w]hen the plaintiff's intended

expert witness is a treating physician whose records and reports have already been fully disclosed pursuant to CPLR 3121 and 22 NYCRR 202.17, the failure to serve a CPLR 3101(d) notice regarding that physician does not justify a preclusion of that expert's testimony[.]" The court said this would "neither surprise nor prejudice" the defendant. *Id*.

Courts disparage the "dilatory tactics" of parties, such as delays in providing information or waiting until the eve of trial. *See Salander v. Cent. Gen. Hosp*. 496 N.Y.S.2d 638, 642 (Sup. Ct. Nassau Co. 1985). However, this is not fatal to presenting expert testimony. See *Lillis v. D'Souza*, 174 A.D.2d 976, 976 (4th Dept. 1991) ("CPLR 3101(d)(1)(i) does not require a party to retain an expert at any specific time[.]"); *see also Gallo v. Linkow*, 255 A.D.2d 113, 117 (1st Dept. 1998) ("Preclusion is an inappropriately severe sanction when the failure to serve a timely notice is neither willful nor prejudicial to the adversary."); *Ramsen A. v. New York City Housing Auth*., 976 N.Y.S.2d 73, 74 (1st Dept. 2013).

3. What are the limits on discovery in expert cases?

Although the CPLR allows broad discovery under 3101, there are limits to what is discoverable. The work of an expert retained by one party is not discoverable if protected *as attorney work product or material prepared for purposes of litigation*. *See* 3101(c).

a) Work product/material prepared for litigation is not discoverable

In *Binke v. Goodyear*, 55 A.D.2d 632 (2d Dept. 1976), a report prepared by a party's expert is work product and therefore not discoverable by adversary. *See also Lisa W. v. Seine W.,* 9 Misc.3d 1125(A) (Fam. Ct. Kings Co. 2005) (report prepared by expert retained by respondent's 18b attorney pursuant to County Law 722-c is not discoverable by adversary as it is work product. The fact that the expert is paid for by the county does not affect the privilege.)

In *Cushing v. Seamann*, 238 A.D.2d 950 (4th Dept. 1997), the Court upheld the trial court's denial of defendants' motion for disclosure "of documents containing or reflecting communications between plaintiff's attorneys and plaintiff's treating psychiatrist and expert witness. After reviewing the documents *in camera*, the Court concluded that Supreme Court properly determined that they are immune from disclosure as the work product of an attorney. Moreover, the documents were protected against disclosure as materials prepared for litigation as they contained the 'mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.' CPLR 3101(d)(2)

In *Matter of Rosalie S*., 172 Misc.2d 131 (Fam. Ct. Kings Co. 1997), the Court granted respondent's motion to quash ACS's subpoena for the records and testimony of respondent's retained expert on grounds that both records and testimony are protected

as work product and material prepared for litigation pursuant to CPLR section 3101 because respondent did not intend to offer expert's report or testimony in evidence.

Practice tip: Make sure you sign an agreement with your expert stating that any work of the expert done for you is confidential and attorney work product. The expert should be instructed not to speak to the other side's attorneys. Opposing counsel can notice your expert for a deposition if they want to find out more information than what is in your 3101 (d) statement.

b) When is the expert's privilege waived?

A party may partially or fully waive the privilege if the expert's opinion has already been disclosed by pretrial discovery or other means. However, in *Matter of Lenny McN.*, 183 A.D.2d 627 (1st Dept. 1992), the Appellate Division reversed the family court's order that the lawyer for the child's social worker should disclose her entire file because she waived privilege by testifying. The Court found that her vague testimony did not waive privilege entirely and the lawyer for the child had already disclosed the notes of her interviews. The Appellate Division did hold that if the social worker was being called as an expert, the attorney would be required to comply with the provisions of CPLR section 3101(d)(1)(i) regarding disclosure of expert opinions.

4. Discoverability of expert's notes?

While documents created in preparation for trial may not be discoverable, if a witness uses notes to refresh his or her memory before testifying, those notes may be available for use on cross examination. *See Dempski v. State Farm Mut. Auto. Ins. Co.* 249 AD2d 895 (4th Dept. 1998) (Court erred in denying motion for in camera inspection of notes where substantial need for notes was demonstrated); *Chabica v. Schneider,* 213 AD2d 579 (2d Dept. 1995) (defendant entitled to notes kept in diary where notes read prior to trial); *Doxtator v. Swarthout,* 38 AD2d 782 (4th Dept. 1972); *But see Nyhlen v. Millard Fillmore Hosps.*275 AD2d 943 (4th Dept. 2000) (Lower court did not abuse discretion in denying motion to compel discovery after in camera review of notes).

C. Preparing to challenge an expert based on whether scientifically reliable under Frye

1. The Frye standard for admissibility

New York courts adhere to the *Frye* standard for determining admissibility for scientific theories and methodologies. *See People v. Wesley*, 83 N.Y.2d 417, 422-23 (2004), *citing Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923); *New York Practice*, Expert Testimony, New York - Novel scientific theories and methods, §7:5 (2013). The purpose of the test set forth in *Frye v. U.S.*, *supra,* is to ensure that scientific evidence is reliable and is generally accepted in the scientific community. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 (2006); *New York Practice* §7:5, *supra*. "[T]he Frye test asks 'whether the

accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.'" *Parker*, *supra* (quoting *Wesley*, 83 N.Y.2d at 422). Under *Frye*, scientific evidence should only be admissible at trial if the procedure and results are generally accepted as reliable in the scientific community.

In *People v. Wesle*y, 83 N.Y.2d 417 (1994), the Court adopted *Frye* test for determining admissibility of scientific evidence: "…expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field." (Citing *Frye*). "…[T]he particular procedure need not be 'unanimously indorsed' by the scientific community but must be 'generally acceptable as reliable'" (citing *People v. Middleton*, 54 N.Y.2d 42 (1981)). After pre-trial *Frye* hearing, held that DNA evidence is admissible because it is accepted as reliable in the field.

The *Frye* standard applies to Article 10 proceedings in Family Court. *See Matter of Jennie EE*, 210 A.D.2d 744 (3d Dept. 1994).

2. Filing a Motion for a Frye hearing.

a) The Court should hold a hearing:

The trial court should hold a pretrial *Frye* hearing at which the proponent of the evidence must show that the scientific principles and methodology upon which the expert based his or her opinion have gained general acceptance in the applicable field. If the reliability of the methodology has already been established in prior cases, then no *Frye* hearing is necessary, unless the party seeking the hearing can show that subsequent discoveries have led to a *change* in the scientific field such that the procedures used are no longer generally accepted as reliable.

A *Frye* hearing is required when there is an issue of fact as to the general acceptance of a scientific theory. *Cf. Saulpaugh v. Krafte*, 5 A.D.3d 934 (3d Dept. 2004). A theory may be novel or experimental even if not recently developed. *See Frye*, 293 F. at 1013 (the relevant distinction is between scientific principles which are "experimental" and those which are "demonstrable"). *See, e.g., People v. Anderson*, 13 Misc. 3d 1242(A) (N.Y. Just. Ct., Monroe Co. 2006) (holding that the proper foundation for the reliability of a sobriety test had not been established, even though other courts had ruled on that sobriety test as early as 2001); *U.S. v. Lewis*, 220 F. Supp. 2d 548, 554 (S.D. W. Va. 2002) ("If courts allow the admission of long-relied upon but ultimately unproven analysis, they may unwittingly perpetuate and legitimate junk science.").

b) The burden of proving scientific reliability is on the proponent of the evidence.

The burden of proving "general acceptance" is borne by the party offering the testimony. *Saulpaugh v. Krafte*, 5 A.D.3d 934, 935 (3d Dept. 2004). Importantly,

"[b]road statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance." *Id.* at 935-936 (citing *Stanski v. Ezersky*, 228 A.D.2d 311, 312 (1st Dept. 1996)). General acceptance of a theory must be demonstrated by "controlled studies, clinical data, medical literature, peer review or supportive proof." *Saulpaugh*, 5 AD.3d at 936 (citations omitted).

c) Even if the methodology is found to be reliable, at trial a foundation for the methodology used in that case must be laid.

A Frye hearing is separate from the foundation which must be laid at trial to establish that the accepted procedures were followed by the expert in the particular case. Once the methodology has been established, the party seeking to offer the evidence must still lay a foundation at trial to demonstrate that the expert properly applied the methodology in arriving at his or her opinion. Weaknesses in application of the procedures go to weight of the evidence.

d) If the party opposing the evidence fails to request a *Frye* hearing, the issue is waived and is unpreserved for appeal.

In *People v. Angelo*, 88 N.Y.2d 217 (1996), the Court of Appeals upheld trial court's ruling excluding polygraph evidence "[b]ecause defendant did not demonstrate that polygraph test results are generally accepted by the scientific community as reliable." Defendant's argument that the trial court erred in failing to hold a Frye hearing was unpreserved because they did not request one. Polygraph evidence has previously been held to be inadmissible and defendant did not argue or make an offer of proof in the trial court that the science on this subject has changed since that ruling so this argument is unpreserved.

3. The state of Sex Abuse Validation Testimony Under the Frye Standard

a) **Use of Validators to Corroborate Sex Abuse allegations:**

Sex abuse validation testimony is expert testimony diagnosing a child who has allegedly been sexually abused with a set of symptoms said to constitute a syndrome suffered by sexually abused children. Courts have routinely allowed sex abuse validation testimony as corroboration for a child's out of court statement of abuse. In *Matter of Nicole V.*, 71 N.Y.2d 112 (1987), the Court of Appeals permitted a therapist to testify that a child had symptoms consistent with sexually abused child syndrome as corroboration of child abuse. The Court held that the syndrome is a recognized diagnosis based upon comparisons between the characteristics of individuals and relationships in incestuous families, as described by mental health experts, and the characteristics of the individuals and relationships of the family in question. Expert diagnoses on children have thus been accepted to validate out-of-court statements, particularly when an independent expert is employed for the purpose.

Matter of Nicole V. was distinguished by a New Jersey court in *State v. J.Q.*, 599 A.2d 172 (N.J. Super A.D. 1991) where court declined to analogize Sexually Abused Child Syndrome with Battered Child Syndrome/Battered Woman Syndrome. Court also said *Nicole*, among other cases, failed to note that the syndrome does not detect sexual abuse but rather assumes the presence of abuse and explains the child's reactions and behaviors as a response.

b) **Challenging Validators or other Experts to Corroborate Sex abuse**

i) **Frye Hearings to challenge validation testimony:**

Family Defense attorneys are now trying to challenge whether validation testimony is scientifically reliable. An argument can be made that allowing such testimony violates the general rule that expert testimony regarding typical psychological reactions to events is admissible to explain behavior but not to prove that the event occurred. To the extent that the court permits the expert to testify to an opinion that the child was abused, it also violates the rule against experts testifying to credibility as discussed below.

It is unlikely that the Court will order a Frye hearing or exclude the testimony where the validator or other expert followed forensic protocols. For example, In *Matter of Bethany F.*, 85 A.D.3d 1588 (4th Dept. 2011), the Court upheld a finding of sexual abuse where the lower court denied father's application for a Frye hearing to determine the admissibility of validation testimony. The validator had followed the Sgroi method of interviewing, which has been cited by the Court of Appeals and other NY courts, and testified that "all" validators follow this method. "Inasmuch as a Frye hearing is required only where a party seeks to introduce testimony on a novel topic, and there is no indication in the record that the methods used by the court-appointed counselor to validate the allegations of sexual abuse in this case were novel, the father's motion for a Frye hearing was properly denied." *Id.* at 1589. Once a scientific procedure has been proved reliable, a Frye inquiry need not be conducted each time such evidence is offered [, and courts] may take judicial notices of [its] reliability. *See also Matter of Nikita W.* 77 AD 3rd 1209, 1210 (3rd Dept. 2010) (finding Yuille Step Wise protocol to be reliable and admitting expert's testimony regarding typical dynamics in sexual abuse victims.)

Recent attempts to challenge validation testimony through *Frye* hearings have not been successful. *See e.g. Matter of Wendy P.,* NY Slip OP 50365 (Bronx Co. Fam. Ct. 2015) (Denying motion for Frye hearing where agency presented expert validation testimony and finding that deviation from accepted protocol goes to the weight of the testimony but is not a basis to preclude the testimony or hold a Frye hearing.)

ii) Even if validation or other expert testimony is admissible, the expert testimony can be challenged if the expert did not follow accepted protocols

Child protective agencies may try to call experts, including treating therapists, to corroborate child abuse allegations through the therapist's opinion that the child has symptoms consistent with being sexually abused. Even if such testimony is accepted by the court, the expert must follow accepted forensic protocols. *In Matter of Kayla J.*, 74 A.D.3d 1665 (3rd Dept. 2010), the Court upheld the Family Court's dismissal of a sex abuse petition where the only corroboration of the child's out of court statements came from two therapists who had been treating the child and had not followed accepted validation protocol. "Family Court noted that because their goals were therapeutic rather than forensic, neither expert followed interviewing protocols designed to avoid tainting or influencing the child's testimony." *Id.* at 1669.

Similarly, in *Matter of R./M. Children*, 165 Misc.2d 441 (Kings Co. Fam. Ct. 1995), the Court excluded validation testimony where petitioner failed to establish that the validator followed procedures accepted as reliable in the field, and therefore. The expert was unable to describe the procedures generally accepted in the validation field as reliable, or to explain how the procedures she used comported with the accepted methodology, or her reasons for using those procedures. "Rather, Dr. Andrews opined that sexual abuse is insufficiently 'documented' and stated that her purpose as validator is only to determine 'whether or not a child's [out-of-court allegations of sexual abuse] are credible' – not to address the existence of the syndrome itself." "…Dr. Andrews did not seek to address the central issue identified in *Matter of Nicole V*...., upon which expert validation testimony is authorized: whether the subject child(ren) suffer from sexual abuse syndrome. Because Dr. Andrews focused on the 'credibility' of the children instead of addressing whether they manifest the syndrome, her proffered testimony, if admitted, would usurp the role of the trier of fact; as such, it is also inadmissible as a matter of law." *Id.* at 447. *See also Eli v. Eli*, 159 Misc.2d 974 (Fam. Ct. Kings Co. 1993): "The validator as witness does not give a personal opinion as to whether the abuse occurred. This witness relates the behavioral indicators observed in the child to those recognized as displayed by children who have been sexually abused. It is for the Judge to decide whether the abuse occurred." *Id.* at 977.

Practice tip: Whether to ask for a Frye hearing when the agency is presenting an expert in a sex abuse case is a strategic decision that depends on the facts and timing of each case. Although the case law is not supportive at this time, by continuing to challenge the use of validation testimony eventually there may be success in showing that it is not acceptable in the scientific community. You will probably need your own expert to testify that this is true. Even if you don't file a Frye motion or your motion is denied, there are many opportunities during cross examination to challenge the expert's opinion based on how the expert reached that opinion.

4. **Filing a Motion for Frye Hearing in involving Mental Health Evaluations**

The American Psychological Association (APA) has developed guidelines for forensic evaluators to follow in child protective matters, including Termination of Parental Rights cases. The APA last updated these Guidelines in January 2013. *See* https://www.wpa.org/practice/guidelines/child-protection.pdf. Most psychologists will

agree that these guidelines constitute what is generally accepted by psychologists as best practices for conducting forensic evaluations in child protective matters in the field. You should consider filing a Frye motion in order to challenge the methodology used by a psychologist in conducting a mental health evaluation if the APA guidelines were not followed. These guidelines can also be used very effectively on cross examination.

III. LITIGATION ISSUES

A. Criteria for certifying a witness as an expert

"[T]he expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward,* 48 N.Y.2d 455 (1979). The expert witness' expertise may come from experience, observation or study. *Meiselman v Crown Hgts. Hosp.,* 285 N.Y. 389 (1941). There are no requirements that a medical witness have a medical license or degree as long as it is shown that s/he has the necessary expertise. *See Guzman v. 4030 Bronx Blvd Assoc. LLC*., 54 A.D.3d 42 (1st Dept. 2008).

A witness's qualification to testify as an expert rests in the discretion of the trial court, and its determination will not be disturbed in the absence of serious mistake, an error of law or abuse of discretion. *People v. Greene*, 153 A.D.2d 439 (2d Dept. 1990) (In order to qualify as an expert, 'a showing [must be] made that the witness was skilled in the profession to which the subject relates.' However, the 'skill [may be acquired] either from study, experience or observation. No precise rule has been formulated and applied as to the exact manner in which such skill and experience must be acquired. Long observation and actual experience, though without actual study of the subject, qualify a witness as an expert in that subject.' Likewise, a witness, for example, a physician, may qualify himself or herself from the 'study of the subject alone.'" (internal citations omitted.))

A therapist who has a relationship with a party can testify as an expert and render an opinion. *See Matter of Nicole V*., 71 N.Y.2d 112 (1987)("An expert's relationship to the party offering her does not disqualify the witness from giving opinion evidence and any bias [the child's treating therapist] may have had could be addressed on cross-examination.")

Even after an expert witness is qualified by the court, his or her qualifications are still relevant because they go to the weight of the testimony. Therefore, it was error for the trial court to preclude plaintiff from presenting qualifications of her medical expert simply because defendant had conceded that the expert was qualified. *Counihan v. Werbelovsky's Sons*, 5 A.D.2d 80 (1st Dept. 1957).

B. Information Upon which Experts can base their opinion

about which the expert has personal knowledge; and/or

facts and material in evidence, real or testimonial; and/or

out of court statements of a witness subject to full cross-examination; and/or

material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion **and** the out-of-court material is accompanied by evidence establishing its reliability.

1. Expert can rely on hearsay if it is considered acceptable in the profession and opinion is not based solely on the hearsay or if the witness is available for cross examination.

In *People v. Sugden*, 35 N.Y.2d 453 (1974), the Court found that a psychiatrist expert witness "may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion…. it is important that the expert witness distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely. He may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to full cross-examination on the trial."

In *People v. Stone*, 35 N.Y.2d 69 (1974), an expert psychiatrist who testified for the prosecution regarding defendant's sanity was allowed to discuss statements of several witnesses who were not called to testify at trial because the statements were not the basis of his opinion and only confirmed the opinion he reached from speaking to the defendant himself. *See also People v Wlasiuk,* 32 A.D.3d 674 (3d Dept. 2006) ("It is well settled that 'hearsay testimony given by [an] expert . . . for the limited purpose of informing the jury of the basis of the expert's opinion and not for the truth of the matters related' is admissible.' However, a prerequisite to admission of such out-of-court material is a showing by the proponent that it is reliable as a basis for expert opinion in the given field. Moreover, however reliable the evidence is shown to be, it may not be the 'principal basis' for an opinion on the ultimate issue in the case, and may only form a link in the chain of data which led the expert to his or her opinion." (internal citations omitted.))

See also Matter of Arianna M. 105 AD3d 1401 (4th Dept. 2013) (Court erred in admitting into evidence written report of a social worker who performs sexual abuse assessments because it contained prior consistent statements that bolstered her trial testimony.)

2. If testifying about medical findings, these should be in evidence.

In *Wagman v. Bradshaw,* 292 A.D.2d 84 (2d Dept. 2002), the Court found that it was error for trial court to admit expert testimony based on hearsay MRI report interpreting MRI films *which were not in evidence*, where maker of report did not testify. "[W]hile the expert witness's testimony of reliance upon out-of-court material to form an

opinion may be received in evidence, provided there is proof of reliability, testimony as to the express contents of the out-of-court material is inadmissible."

In *Lisa W. v. Seine W.*, 9 Misc.3d 1125(A) (Fam. Ct. Kings Co. 2005), the Family Court applied the *Wagman* factors to the report of an expert psychologist in a custody case and held that motion to preclude expert's report pretrial was premature. Citing *Stone,* the Court held that admissibility depends on a determination at trial of whether expert's interviews of collateral sources were the basis for her opinion, and whether those collateral sources are being called as witnesses. If neither of these exceptions apply, then the report is not admissible under the "professional reliability" exception unless the proponent presents additional, independent evidence of the reliability of the information from collateral sources.

3. Reports prepared for the purpose of litigation are inadmissible.

Reports prepared for the purpose of litigation are inadmissible under the business records exception to the hearsay rule. *Wilson v. Bodian*, 130 A.D.2d 221, 229 (2d Dept. 1987). Such reports do not meet the foundational requirement of being made in the "regular course of business" because reports prepared for litigation "are not the systematic, routine, day-by-day type of records envisioned by the business records exception." *Carter v. Rivera*, 24 Misc.3d 920, 925-26 (Kings Co. Sup. Ct. 2009). The rule has been applied to Family Court proceedings to exclude psychiatric reports as evidence. *See Bronstein-Becher v. Becher*, 25 A.D.3d 796, 797 (2d Dept. 2006) (psychiatric report summarizing diagnosis, treatment, and opinion regarding ability to work is not admissible in child support proceeding under CPLR 4518(a)); *In re Ashley Lisa D.*, 46 A.D.3d 359, 360 (1st Dept. 2007) (Family Court properly excluded VIPS (Very Intensive Preventive Services program) closing summation and the psychological evaluation by an unnamed preparer because they did "not fall under the business record exception to the hearsay rule.")

4. Relying on Scientific Literature for an Expert Opinion

Scientific books or reports are excluded as hearsay when offered as proof of facts asserted but may be used on cross examination of the expert. In *Ithier v Solomon*, 59 A.D.2d 935 (2d Dept. 1977), the court found that it was error to allow plaintiff's counsel to question expert generally on what texts he considered authoritative because question was too broad. "[A]n expert may be questioned through the use of a scientific work or treatise. However, in order to lay a foundation for the use of such material, he must first admit to its authoritativeness." *But see Ciaccio v Housman*, 97 Misc. 2d 367, 369 (Sup Ct Qns Co. 1978), the Court held in a medical malpractice action, the plaintiff's attorney could not ask, in the course of the direct examination of the defendant doctor, whether defendant recognized a certain medical text as authoritative, in order to lay a foundation for asking the witness a subsequent question as to whether he agreed or disagreed with material in the medical text which might be at variance with the doctor's treatment. The court cites *Egan v Dry Dock, E. Broadway & Battery R.R. Co.*, 12 A.D. 556 (1st Dept. 1896)

Practice Tip: When preparing experts for direct, you should ask them whether they relied on any authoritative literature to support their opinion. If you ask about it on direct, the expert will have to testify that the text is generally accepted in their professional community. The text does not have to be introduced into evidence although it helps to have copies for the court and counsel – especially because many of these texts are not easy to find. Books, articles and treatises are not themselves admissible for their truth.

Opposing counsel may cross examine about any articles that the expert relied on or even their knowledge about other articles so your expert should be prepared to testify regarding this, even if you don't ask about them about it on direct. If an expert testifies that a specific source is reliable or authoritative, s/he can be cross-examined and impeached based on its contents. You also may want to ask your opponent's expert about any articles or treatises that support the expert's opinion as a way to discredit the opinion.

C. Reasonable degree of medical certainty is not required.

Although "a reasonable degree of medical certainty" is one way to express the degree of certainty necessary for an expert's opinion to be admissible, that set of words is not necessary if the expert expressed an acceptable level of certainty through other words. "[I]t is not a dictionary dilettantism that is to govern, but whether it is 'reasonably apparent' that 'the doctor intends to signify a probability supported by some rational basis.'" *Matott v. Ward,* 48 N.Y.2d 455 (1979), *citing Miller v. Nat'l Cabinet Co*., 8 N.Y.2d 277, 282 (1960).

D. An expert cannot testify regarding a witness' credibility.

The common law rule is that an expert cannot testify to a witness' credibility because credibility is a determination for the trier of fact. *People v. Williams*, 6 N.Y.2d 18 (1959); *Kravitz v. Long Is. Jewish-Hillside Med. Ctr*., 113 A.D.2d 577 (2d Dept. 1985) (precluding a treating doctor's opinion of his former patient's veracity and stability); *People v. Fogarty*, 86 A.D.2d 617 (2d Dept. 1982) (Sex abuse conviction overturned where trial court erred in permitting child psychiatrist to testify to child witness' credibility, improperly bolstering his testimony and unduly influencing the jury's credibility determination);

E. Experts cannot generally testify to the ultimate issue to be decided by the trier of fact.

In *People v. Robinson*, 191 A.D.2d 595 (2d Dept. 1993), the trial court erred in allowing the prosecution to question expert on whether the complainant's injury could have resulted from "an accidental poke in *the* eye" because whether the defendant *intended* to strike a blow to the complainant was an ultimate issue of fact which did not

involve professional knowledge outside the range of ordinary training or intelligence. *See also Berger v Tarry Fuel Oil Co.,* 32 A.D.3d 409 (2d Dept. 2006).

An expert can only testify to the ultimate issue in controversy if the facts are such that they cannot be presented directly to the finder of fact in a way that allows them to make a decision on that issue without the help of an expert. *People v. Cronin*, 60 N.Y.2d 430 (1983) (Trial court erred in excluding expert testimony on the ultimate issue of whether defendant was able to form the requisite intent to commit the crime in spite of being under the influence of alcohol and drugs. The trial court was required to exercise discretion to determine whether "the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is obtainable.")

F. <u>You can call the other party's expert as a witness if there was no confidential relationship established.</u>

If a confidential relationship was formed between the first party and the expert, **and** the first party shared confidential or privileged information with the expert, then the opposing party cannot call the expert as their own witness. In *People v. Greene*, 153 A.D.2d 439 (2d Dept. 1990), the prosecution was permitted to call palm print expert who was consulted by the defense because "what is involved herein is merely the expert's opinion concerning non-testimonial evidence, which was properly acquired by the prosecution; and not any confidential communications between the defendant or his counsel and the retained expert. The expert's testimony about the palm prints was not 'inextricably intertwined with communications which passed between him and his client,' and we do not confront testimony that necessarily comprehended conclusions drawn in the course of an association that is uniquely regarded in the law." (citations omitted.) The decision cites *People v. Speck*, 41 Ill.2d 177 (1968) ("A witness is not the property of either party to a suit and simply because one party may have conferred with a witness and even paid him for his expert advice does not render him incompetent to testify for the other party.") *See also Byczek v City of N.Y. Dept. of Parks*, 81 A.D.2d 823 (2d Dept. 1981); *Gilly v. City of N.Y.,* 69 N.Y.2d 509 (1987); *Roundpoint v. VNA, Inc*., 207 A.D.2d 123 (3d Dept. 1995).

G. <u>Is the expert required to disclose the basis for his or her opinion/hypothetical questions?</u>

CPLR 4515 states: "Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion." In other words, although the expert must testify to the facts upon which her opinion is based, the CPLR and some case law suggest that this testimony may take place after she has already stated her opinion, or even not until cross examination. However, if an expert fails to give the reasoning behind his or her opinion (as opposed to factual basis), that failure goes to the weight not admissibility.

People v. Jones, 73 N.Y.2d 427 (1989): "[A]n expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion. Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded." "Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw 'conclusions from the facts.' It is a kind of authorized encroachment in that respect. But, to insure that the jury is not doubly displaced, it 'must [at least] have the facts upon which the expert bases his opinion in order to evaluate the worth of that opinion,' as well as to judge the reliability of extrajudicial material, if that is the plank upon which the expert's opinion rests." (internal citations omitted)

Caton v. Doug Urban Constr. Co., 65 N.Y.2d 909 (1985): "[A]lthough CPLR 4515 permits an expert witness to state an opinion without specifying the data upon which it is based, it does not avoid the necessity for presentation of such data. Its purpose is, rather, to make the expert's presentation more readily understandable by permitting the opinion to be stated on direct, and leaving the development of the data on which it is based for cross-examination. It does not, however, change the basic principle that an expert's opinion not based on facts is worthless." (internal citations omitted.)

Tarlowe v. Metropolitan Ski Slopes, Inc., 28 N.Y.2d 410 (1971): "an expert need not give technical reasons or bases for his opinion on direct examination. The matter may be left for development on cross-examination…. The extent to which he elaborates or fails to elaborate on the technical basis supporting the opinion affects only the weight of the expert testimony."

Although CPLR 4515 states that "questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based," parties are not prohibited from using hypothetical questions. Hypothetical questions can be a good way to ask an expert his or her opinion regarding issues in controversy where the expert *does not have knowledge of the facts upon which the opinion is based.* For example, if an expert is testifying about whether an injury could have been caused by accidental means, you can ask the expert to testify about his or her opinion regarding facts which are based on a good faith basis. Hypothetical questions do not have to include only facts in evidence. They may be based on a version of the facts that corresponds to one party's theory of the case, even if that version is not established by the evidence beyond all doubt, as long as it is based on a version of events that "the evidence fairly tends to justify." *Stearns v. Field*, 90 N.Y. 640 (1882).

H. <u>Credibility of Experts</u>

When preparing your expert for trial and arguing summation, remember that the court is going to be assessing your expert's credibility in relation to the opposing

counsel's expert. You must persuade the court why your expert is more credible than the other side's expert. Factors that increase the likelihood that a court will find an expert witness credible include:

1) extensiveness of education, training and experience;
2) relevant positions of authority, publications and accomplishments;
3) has testified and been certified as expert in similar cases;
4) specialization – i.e. whether expertise is specific to the issue in the case;
5) familiarity with currently accepted literature and protocol in field of expertise;
6) appearing open to and having considered all possible explanations;
7) familiarity with the parties – i.e. having met and spent time with the family; and
8) familiarity with all the material facts in evidence and able to explain clearly how opinion takes into consideration all facts credited by the court.

In contrast, factors courts have used to discount an expert's credibility include:

1) lack of specific experience or expertise;
2) appearing more like an advocate for a party rather than a neutral observer;
3) focusing exclusively on one theory to explain the facts instead of considering all possibilities;
4) lack of familiarity with the parties and/or if the underlying facts;
5) reliance on sources that the court deems incredible; and
6) lack of familiarity with current literature or accepted protocol in the field.

Determinations of credibility are in the discretion of the trial court and most cases involving experts on both sides are decided based on who the court finds to be more credible:

Julia BB., 837 N.Y.S.2d 398 (3d Dept. 2007)("Simply put, even though [Doctors] Sanchez and Slavin each opined that Julia's injuries were the product of abuse, Sanchez's lack of experience with OI, deductive analysis and quest to divine a single solution to the complex host of Julia's various maladies and Slavin's transition from the role of physician to advocate and his resulting crusade to deprive respondents of their children all but eviscerates the value of their medical testimony.)

Peter R., 799 N.Y.S.2d 137, 8 AD 3d 576 (2d Dept. 2004) ("…our review of the record convinces us that the Family Court placed undue weight on the testimony of the independent expert, who had no personal contact with the R. family, did not review the parents' hearing testimony, and reached his conclusion that the skull fracture could have been caused either by the fall from the couch or the kitchenette incident without specifically considering relevant factors such as the height and velocity of these reported falls and the force used.")

Zachary "MM," 276 A.D.2d 876 (3rd Dept. 2000) ("In light of the variation in the expert testimony on this issue, we do not discern error in Family Court's apparent

refusal to credit the testimony of [respondents' expert] over that of [petitioner's expert].")

Christine F., 513 N.Y.S.2d 47 (4th Dept. 1987) ("Although this evidence, if accepted, may have been sufficient to prove a prima facie case of child abuse…, Family Court was not bound to accept the pediatrician's expert opinion.")

Matter of Lou R., 131 Misc.2d 138 (Fam. Ct. Onondaga Co. 1986) ("The expertise of the petitioner's medical witness was challenged by respondents on the grounds that his knowledge of "shaken baby syndrome" prior to the instant case was derived solely from reading and attending lectures, and that this was the first such case he had seen or treated. The acceptance of a witness' expertise is a matter of discretion for the court… and the opinion of a licensed physician based on either study or experience alone may be admissible… [T]his court now finds that "shaken baby syndrome" …is a generally recognized medical condition, and "the state of the pertinent art or scientific knowledge [is] sufficiently developed to permit a reasonable opinion to be asserted.")

Matter of John W., 7 Misc.3d 1020A (Fam. Ct. Queens Co. 2004): In a 1028 hearing in which ACS argued the respondent mother suffered from Munchausen's Syndrome by Proxy, family court discredited the testimony of the respondent and therefore discredited the opinions of the respondent's experts, Dr. Weiner and Dr. Dudley, because they were based on the assumption that respondent was telling the truth. The Court also found that Dr. Weiner "was very emotional in her testimony" and acted more like an advocate for the respondent than an expert.

Eli v. Eli, *supra*: Finds court-appointed expert to be most credible of several experts because she "had the most formal education, the most knowledge of the literature in the sexual abuse area, and was the only one who had an extensive opportunity to see the child interact with both parents and to interview both parents on sexual abuse issues." The court found the therapist less credible than the court-appointed expert because "she relied almost entirely on the clinical method, the least reliable of the three bases for expert opinions." Also, "a good deal of the information she considered to be important indicators of sexual abuse were discounted by [the court-appointed expert] based on current literature in the field. [The therapist,] who has a psychoanalytic orientation, gave considerable weight to symbolism and the child's plan with certain dolls, including a bear with a long nose, which nose she saw as a phallic symbol. [Her] qualifications to draw such conclusions are questionable, particularly in light of the evidence I received that interpretation of doll play, even when made by experts using anatomically detailed dolls and accepted protocols, is of questionable value. Indeed, the state of California does not permit such evidence at all." (citations omitted.)

I. Rebuttal Evidence by the Presentment Agency

Although this whether the presentment agency can present rebuttal testimony is in the trial court's discretion, the case law leans towards denying rebuttal evidence that

bolsters the prosecution's case rather than responds to some new affirmative assertion made by an opposing party in its defense:

Marshall v. Davies, 78 N.Y. 414, 420 (1879): A party holding the affirmative of an issue is bound to present all the evidence on his side of the case before he closes his proof and may not add to it by the device of rebuttal evidence.

Hutchinson v. Shaheen, 55 A.D.2d 833, (4 Dept. 1976): He may not hold back some evidence and then submit it to bolster his case after defendant has rested, for rebuttal evidence is not contradictory or corroborating evidence of facts already presented but "evidence in denial of some affirmative fact which the answering party has endeavored to prove."

Costigan v. Third Ave. R. Co., 124 Misc. 165 (1st Dept. 1924) After defendant had rested, testimony of plaintiff's witness as to happening of accident was not proper rebuttal, and court had discretion, on objection, to reject it.

DISCOVERY IN ARTICLE 10 TPR/ CUSTODY PROCEEDINGS

Adele M. Fine, Esq., Special Assistant Public Defender, Monroe County Public Defenders Office
and
Emma S. Ketteringham, Esq., Managing Attorney, Family Defense Practice, Bronx Defenders

This session will explain the various devices that are available to respondent and non-respondent party attorneys in Article 10 and ancillary proceedings, e.g. custody proceedings, the categories of document normally necessary to fully prepare an Article 10 case, including a review of relevant case law. Practical advice and strategies for the use of discovery to maximize trial readiness will be discussed. The program will also discuss requesting and defending against the use of protective orders under the family court act and CPLR and attorneys' obligations under the rules of professional conduct and federal and state statute regarding storage of documents received in discovery. Sample discovery forms and motions will be provided.

DISCOVERY IN ARTICLE 10 TPR/ CUSTODY PROCEEDINGS: THE APPLICABLE LAW

OUTLINE

Submitted by:

Adele M. Fine, Esq., Special Assistant Public Defender,
Monroe County Public Defender's Office

Emma S. Ketteringham, Esq.,
Managing Attorney, Family Defense Practice, Bronx Defenders

DISCOVERY IN ARTICLE 10/TPR/CUSTODY PROCEEDINGS

June 5, 2015 11:30 – 12:20

Adele Fine
Emma Ketteringham

The program will explain the various devices that are available to adult respondent and non-respondent party attorneys in Article 10 and ancillary proceedings, e.g. custody proceedings, the categories of documents normally necessary to fully prepare an Article 10 case, including a review of relevant case law. Practical advice and strategies for the use of discovery to maximize trial readiness will be discussed. The program will also discuss requesting and defending against the use of protective orders under the family court act and CPLR and attorneys' obligations under the rules of professional conduct and federal and state statute regarding storage of documents received in discovery. Sample discovery forms and motions will be provided.

INTRODUCTION

I. Thorough discovery is important in Article 10 and ancillary family court proceedings.

II. Normally the entire discovery process in Article 10 cases consists of the CPS or ACS turning over its case records to the other parties and whatever records obtained via so ordered subpoenas being made available for copying.
   a. *In re Carla L.*, 45 A.D.2d 375 (1st Dept. 1974), a first department case from 1974, established the right to discovery in child protection proceedings. This case consolidated several appeals and concerned disclosure of foster care records and the procedure for handling disclosure and preserving confidentiality.

III. But the Family Court Act, by specifically adopting the provisions of CPLR in FCA § 165, permits the liberal discovery in Article 31 of the CPLR and there are many discovery devices available to us.

IV. FCA § 1038 also authorizes liberal disclosure in child protective proceedings and underlying this statute is a legislative policy that full and complete due process rights, including discovery, must be accorded before a family may be separated by court order.

V. Debate exists over whether some discovery devices might require leave of court because CPLR §§ 401-402 defines special proceedings as cases that start with a petition, rather than a complaint. That is true of article tens, family offense petitions, and custody petitions.
   a. This could mean our cases are governed by CPLR § 408, which provides more judicial oversight of discovery and limits the discovery available.
   b. CPLR § 408 provides that leave of court is required for all types of discovery except for notices to admit.

c. There is one case from 2010 – *In Re: K.Z. v. P.M.*, decided by the family court in Orange County that limits the discovery allowed in a family offense petition by reasoning that it is a special proceeding.
    i. That court denied the respondent's motion to compel discovery including interrogatories and certain documents.
d. You should argue that the legislature has recognized the importance of broad disclosure, broad disclosure is a significant safeguard against erroneous determinations in such sensitive matters and helps to ensure that determinations affecting a child's welfare be based on the most complete record possible. The court should evaluate requests for disclosure by considering whether (1) the request is material and necessary and (2) the need for disclosure outweighs its potential harm to the child.
e. *Matter of Amelia RR*, 112 AD3d 1083, 977 NYS.2d 762 (Third Dept. 2013), is a good case to rely upon for the argument that although abuse and neglect proceedings (and arguably ancillary proceedings concerning custody of children), the specific provisions of the Family Court Act override the general discovery limitations placed on special proceedings under CPLR § 408 which require leave of court for any disclosure." Also *see Matter of John H*., 56 A.D.3d 1024, 1026 (3d Dept. 2008). Only the Third Department has said this definitively.

OVERVIEW OF DISCOVERY DEVICES

I. The Discovery Demand (easiest and most utilized method)
    a. This is a request made under CPLR § 3120 and FCA § 1038
        i. This device is authorized by the FCA.
    b. CPLR § 3120 provides "after commencement of an action, any party may serve on any other party a notice or on any other person a subpoena *duces tecum*: … (i) to produce or permit the party seeking discovery … to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served; … 2. Production shall be not less than twenty days after service of the notice…
    c. FCA § 1038 (b) says: Pursuant to a demand under CPLR § 3120, a petitioner or social services official shall provide to a respondent or the child's attorney any records, photographs or other evidence demanded relevant to the proceeding, for inspection and photocopying. …may delete the identity of the persons who filed reports pursuant to section four hundred fifteen of the social services law, unless such petitioner or official intends to offer such reports into evidence at a hearing held pursuant to this article.
        i. A demand requests all of the records and physical evidence in possession of ACS or CPS – must give you everything they will offer at trial and even that which will not be offered at trial if it won't endanger the life or health of the child.

ii. Only limit is the qualified protective order language to protect against harm to the child so discovery is broad.
iii. Under the CPLR, discovery is due within 20 days of receipt of the demand.
iv. What you will demand and receive with this device arguably is very broad – anything "relevant to the proceeding"

EXPERT DISCOVERY DEMAND

I. CPLR § 3101(d) provides upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.
a. Should be included in EVERY discovery demand
b. If ACS of the agency or your adversary in a custody proceeding fails to respond, the court can preclude the expert from testifying but will most likely grant an adjournment.
c. In *Tienken v. Benedictine Hosp.*, 110 A.D.3d 1389, 974 N.Y.S.2d 166 (3d Dep't 2013), the plaintiff was precluded from calling his expert witness because plaintiff did not "provide any excuse, much less good cause, for the nondisclosure," the supreme court did not abuse its discretion in precluding plaintiff's expert testimony and granting defendants' motion for summary judgment.
d. The key factors in determining whether to preclude expert testimony after a failure to comply with CPLR § 3101(d) are whether (1) moving party can demonstrate prejudice, and the (2) non-moving party can demonstrate good cause for its failure to timely disclose.
    i. Critical to the analysis of whether to preclude an expert is the amount of prejudice that a party will suffer as a result of the failure to comply with 3101(d)
    ii. The inability of a party to articulate good cause is also key to the determination of whether to preclude

BILL OF PARTICULARS

I. Demand for a Bill of Particulars is a list of written questions from one party to another asking for details (particulars) about a claim or defense. Although not technically discovery, it can be used to get information about a claim or defense.
a. Attorneys for parents should serve these whenever ACS's petition contains vague allegations.
b. Phrases like "inadequate guardianship" or "inadequate supervision" are alleged or a non-specific even such as "parent has misused drugs,"

an attorney should demand the type of drugs and exact dates of use that are alleged.

c. Also very helpful with a *res ipsa* case when numerous caretakers are named or not named
    1. This can be helpful when determining whether to file a motion to dismiss or motion for summary judgment so that you can determine whether there are any other facts ACS/CPS has to add.
    2. Very helpful in a proceeding for the termination of parental rights to make the agency identify its diligent efforts.

d. Timing: Party has 30 days to respond to a demand and must either answer each question or object.

e. CPLR § 3041 specifically provides that a party can move to compel a party to answer if they have not and get sanctions if lack of response was willful

INTERROGATORIES

I. Interrogatories are a formal set of written questions served by a party upon another party in order to clarify matters of fact and narrow the issues to be tried.

a. Depositions in family court are rare so this is a more economical way of obtaining information from various parties.

b. CPLR § 3132 provides "After commencement of an action, any party may serve written interrogatories upon any party. Interrogatories may not be served upon a defendant before that defendant's time for serving a responsive pleading has expired, except by leave of court granted with or without notice. A copy of the interrogatories and of any order made under this rule shall be served on each party.
    i. Must serve each party even if only requesting responses from one party.

c. CPLR § 3133 provides "within twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity.
    i. Interrogatories must be answered under oath and in writing.
    ii. Each question must be answered separately and fully and be preceded by the question to which it responds.

d. Attorneys for parents can serve them upon law guardians to help obtain sworn statements from older children who have given inconsistent accounts of events that underlie the petition.

e. Attorneys for parents can serve interrogatories upon ACS to fill in gaps in the case record or the facts.

f. Responses must be verified (sworn under oath) so they can be used to impeach at trial.

g. Responding to interrogatories is an ongoing obligation: CPLR § 3101(h) explicitly provides that a party shall amend or supplement a response previously given to a request for disclosure if they receive information that a response is incorrect when made or though correct and complete when made, no longer correct or complete. Otherwise, amendments to answers may only be done by leave of court.

NOTICES TO ADMIT

I. CPLR § 3123 provides that A party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonable believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

II. Notices to Admit can be served upon a party at any time between 20 days after service of the summons and 20 days before trial.
   a. If the opposing party does not respond to the notices to admit within 20 days, all matters therein are deemed admitted
   b. Notices to admit can establish certain facts without the need for testimony or documents
   c. If a fact is denied that is later proven at trial, the party who requested the admission can ask for costs associated with proving the fact
   d. Do not need leave of Court because even though article ten and custody cases are special proceedings, Article 408 says these are allowed without leave of Court.

DEPOSITIONS

I. Depositions are the most controversial in Article 10 cases although common in civil trials due to liberal discovery rules
   a. These are rarely used because expensive and time consuming and likely need to get leave of court in an article ten or custody case but a growing number of courts recognize that they are permitted.
   b. They are helpful because: 1) you can discover evidence you don't already know; 2) may know what witness will say but you can depose him so as to lock it in in writing and then use the deposition as impeachment; 3) you can gather the evidence you need to file a motion for summary judgment; and 4) you can create admissible evidence at trial.
   c. Who can be deposed:
      i. Parties and their agents (including the case planner) – you can designate which employee or agent you want to depose and

that person must show up unless party responds in 30 days saying they will produce someone else but you can litigate this
   ii. Prisoners but only with leave of court
   iii. Non-party witnesses and CPLR § 3101 sets out the six categories of these witnesses -

d. CPLR § 3107 provides "a party desiring to take the deposition of any person upon oral examination shall give to each party twenty days' notice, unless the court orders otherwise. The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice need not enumerate the matters upon which the person is to be examined. …
e. CPLR § 3117 provides all of the categories of information one can obtain via a deposition. You can gather evidence for:
   i. Impeachment
   ii. Can use it as evidence in certain situations when the witness is unavailable including far away.
f. Very helpful in a case with complex medical issues – should consider noticing the deposition of the pediatrician, the medical examiner, or psychiatrist.
g. To request serve a notice and a subpoena or arrange by agreement or stipulation
   i. For a nonparty serve on everyone else
   ii. Employ a stenographer who is a notary and can do a video or a tape recorder
   iii. No limit on how long
   iv. Parties can object but witness must answer
   v. Party taking the deposition bears the expenses
h. The test for whether a deposition will occur is different depending on whether it is noticed of a party or a nonparty.
   i. The general test is so long as a party can show that a deposition is material, relevant, and necessary, and will assist in trial preparation, that deposition may proceed.
   ii. Arguably for a third party, must show it cannot be discovered from other sources or otherwise is necessary to prepare for trial.
   iii. The court should always consider the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from discovery. (FCA § 1038(d))
   iv. In the materials is a redacted unpublished decision from Kings County regarding the parent's request to depose a caseworker – In the *Matter of Ariela B*, granting the respondent's deposition of a caseworker. Says the proper way is without leave of court – merely the serving of a subpoena along with a notice of deposition, at least twenty days prior to the

deposition. A party opposing the deposition, must move for a protective order.

1. In this case the witness list by ACS did not include the name and title of a caseworker but identified Ms. Kelly as an individual with information about the case and no updated discovery was provided.
2. The court rejects the petitioner's request for a protective order because petitioner failed to identify harm to the children under FCA § 1038(d) and failed to establish "unreasonable annoyance, expense, embarrassment, disadvantage or any other prejudice to them or the courts under the CPLR § 3103.

i. Special considerations regarding depositions of children – more likely that the court will grant a protective order in opposition.
   i. *Matter of Tricia K*, 611 N.Y.S2d 978 (Kings Co. 1994) addresses deposing a child. In that case a father was charged with sexually abusing and beating his 16 year old daughter and the mother moved to compel the deposition of her daughters. The Court held the mother was entitled to the deposition. Great discussion regarding the need for liberal disclosure. Ordered that the depositions be conducted before the Court and under its direct supervision as permitted under the CPLR.
   ii. In 2000, the third department reversed a family court's decision permitting the deposition of the child and held that the court did not consider special circumstances. The Court reasoned the child is not a party but a subject and thus governed by CPLP § 3101(a)(4) pertaining to the taking of depositions of "any other person." See *Matter of Crystal AA*, 271 A.D.2d 771, 706 N.Y.S.2d 208 (3d Dept. 2000)

EXAMINATION OF THE CHILD

I. Might want to consider requesting an examination of the child to dispute the results of CPS's examination – this is often done in cases of sexual abuse where there is no physical evidence of abuse and the court is relying on the testimony of a validator.

II. FCA § 1038(c) provides that "a respondent or the child's attorney may move for an order directing that any child who is the subject of a proceeding under this article be made available for examination by a physician, psychologist or social worker selected by such party or the child's attorney. In determining the motion, the court shall consider the need of the respondent or child's attorney for such examination to assist in the preparation of the case and the potential harm to the child from the examination. Nothing in this section shall preclude the parties from agreeing

upon a person to conduct such examination without court order. (A sample motion for a child to be examined is included)

III. There is a two-prong test to determine whether a child will be examined: (1) a review of the need of the respondent to have the exam in assist in preparing the case and (2) the potential harm to the child in submitting.
   a. *In re Nicole*, 146 Misc.2d 610 (Rockland Co. 1990) examines the legislative history of this section which appear to favor the granting of examinations. Discusses a memorandum that the point of the provision was so that examination would happen. But then goes on to deny the request!
   b. *In re Fatima M*, 16 AD3d 263 (1st Dept. 2005) is a First Department decision where the appellate division reversed a family court's finding of abuse, in part, because the trial court denied the father's request to have his children examined impacted the "fundamental fairness" of the proceeding.

IV. Also consider requesting that any CAC interview or examination of the child for purpose of a validation interview be videotaped if it has not already happened when you are assigned
   a. FCA § 1038(c) provides "any examination or interview, other than a physical examination, of a child who is the subject of a proceeding under this article, for purposes of offering expert testimony to a court regarding the sexual abuse of the child, as such term is defined by section 1012 of this article, may, in the discretion of the court, be videotaped in its entirety with access to be provided to the court, the child's attorney and all parties. In determining whether such interview or examination should be videotaped, the court shall consider the effect of the videotaping on the reliability of the examination, the effect of videotaping on the child, and the needs of the parties, including the attorney for the child, for the videotape."

V. Always make sure you receive a copy of the video if one was done
   a. NYCRR § 205.86 provides that in any case in which pursuant to 1038(c) a video recording has been made, the attorney for the party requesting the video shall cause to be prepared a duplicate video and deposit the original with the court.

ENFORCING DISCOVERY DEMANDS

I. Motions to Compel and Preclude – A motion to compel is asking the Court to compel the party from whom discovery was sought to produce the discovery. It can be used for everything.
   a. CPLR § 3124 provides that: If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the

party seeking disclosure may move to compel compliance or a response.

b. It should be an extremely rare case in which a judge would grant an order under CPLR § 3124 compelling discovery before: (1) a party served a notice and (2) attempted to resolve the dispute before making the motion. *See* 22 NYCRR § 202.7(a), (c) (requiring party moving to compel disclosure (moving for anything) to demonstrate good faith attempt to resolve dispute) so that is why serving a discovery demand is important, rather than relying on CPS to provide discovery as a matter of course and you should always document efforts to receive the discovery prior to the trial date.
c. CPLR § 3126 provides that "if any party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders . . . as are just among them: 1. An order that the issues to which the information is relevant shall be deemed resolved. . . ; or 2. An order prohibiting the disobedient party from supporting or opposing designated claims of defenses, from producing in evidence designated things or items of testimony. . . or from using certain witnesses; 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment of default against the disobedient party.
d. Also, a CPLR § 3126 motion for sanctions, including to preclude, must be accompanied by an affirmation of a good-faith effort to resolve the issues raised by the motion. *See again* 22 NYCRR § 202.7(a)(2).

SUBPOENAS

I. There are categories of documents from third parties that can be obtained via a personally served subpoena or a judicial subpoena.
II. Article 23 of the CPLR governs subpoenas.
    a. Subpoenas can be served by an attorney without leave of court - CPLR § 2302(a) provides that subpoenas may be issued without a court order by an attorney of record for a party to an action
    b. Subpoenas can be for the personal appearance of a person or for documents or things. CPLR § 3120 provides "after commencement of an action, any party may serve on any other party a notice or on any other person a subpoena *duces tecum*: … 2. The notice or subpoena *duces tecum* shall specify the time for response, which not be less than twenty days after service of the notice or subpoena, …. 3. The party issuing a subpoena *duces tecum* as provided herein above shall at the same time service a copy of the subpoena upon all other parties and, within five days of compliance… give to each party notice that the items produced in response thereto are available …

c. CPLR § 2302(b) Issuance by court: A subpoena to compel production of … a document where a certified … copy is admissible in evidence … shall be issued by the court. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the person having custody of the record, document … In the absence of an authorization by a patient, a trial subpoena *duces tecum* for the patient's medical records may only be issued by a court. (This is consistent with HIPAA, which provides that "protected health information" may be released without an authorization in response to the court")
d. CPLR § 2303 governs service of a subpoena – A subpoena shall be served in the same manner as a summons . . . the filing of proof of service shall not be required. … A copy of any subpoena *duces tecum* served in a pending civil judicial proceeding shall also be given to each party so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things.
    i. If it is not served on the other parties, you run the risk of the documents produced being precluded.
e. Documents you might want to get via subpoena include
    i. Documents maintained by social service agencies
    ii. Mental health records
    iii. Alcohol/drug treatment records
    iv. Health care records
    v. Documents from third parties not hospitals or treatment providers
    vi. Police paperwork

III. Foster Care Agency and OCFS Records
a. Reports and other documents maintained by social service agencies.
b. Foster care records are governed by SSL § 372. Documents maintained by OCFS are governed by SSL § 422.
c. SSL § 422(4)(A)(d) provides that these records may be disclosed to any person who is the subject of the report or to any person who is named in the report – it's easy if the records were about you or if you were in the household and named.
d. You can often obtain OCFS records that pertain to your client via a release.
e. Unfounded records: SSL § 422(5)(b) prohibits the disclosure of "unfounded reports" except by the subject of the report.
f. Records that do not pertain to your client or unfounded reports must be requested by OTSC or motion to the court.
    i. Under SSL § 422(f)(A)(e) the Court must find that these records are necessary for the determination of an issue before the court.

1. In *Matter of Maria S*, 43 Misc.3d 689, 982 N.Y.S.2d 841 (Bronx Fam. Ct. 2014), the respondent PLR requested OCFS records concerning the household of the PLR and the child, including records of a 2007 service case that was unfounded. We learned of this case from the CPS records where the caseworker referred to speaking to the worker in 2007. ACS refused to provide the records because they were unfounded. PLR subpoenaed them and ACS moved to quash. In this decision which was summarily affirmed by the First Department, the court held "the information gathered by ACS during its 2007 investigation of the family has direct bearing on the current case" because ACS is alleging that the child was sexually abused during this time period.
2. The Court determined that it would conduct an in camera review.
3. It held that considering the reasonable probability that exculpatory material may be found in the investigative documents, the interest of judgment required disclosure.
4. The court held that 422(f) prohibiting the disclosure of unfounded reports did not apply to the investigative materials even though the regulation, 18 NYCRR § 432.9 referred to the sealing of this related material.

IV. Hospital Records – FCA § 1038(a), Public Law § 104-191, 45 CFR § 164.512

a. Health care records are frequently necessary and usually provided to us by CPS who subpoenas them.
b. FCA § 1038(a) provides that "each hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect, upon the subpoena of the court, the corporation counsel, the county attorney, district attorney, counsel for the child or one of the parties to the proceeding, shall be required to send such records, photographs or evidence to the court for use in any proceeding relating to abuse or neglect under this article"
c. Because HIPPA governs, these records must be requested upon notice to the subject of the protected health information
d. Records may be disclosed by court order, by subpoena or by discovery demand on CPS
e. Each court will do it differently if you subpoena them – often the records go to the court and the parties pick them up and distribute

V. Mental Health Records – governed by MHL §§ 33.13, 33.16, CPLR §2302(a)

a. Consider requesting your own client's mental health records via release.
b. If you want the mental health records of another party, including the child must meet the standard under MHL § 33.13 and show that the interests of justice significantly outweigh the need for confidentiality
    i. This is easier if the person from whom you are seeking the discovery has put their mental health at issue in the case
    ii. Then you can use CPLR § 3121(a) to argue that the party has put their mental health at issue in the case
c. A parent can obtain their child's mental health records with a release as well, but you should be aware that MHL §§ 33.13 and 33.16 together say that although parents have an independent right to access their children's psychiatric records, a parent or guardian shall not be entitled to the record where the treating practitioner determines that access would have a detrimental effect on the practitioners professional relationship with the child or on the care and treatment of the child or on the child's relationship with his or her parents.
d. Generally, if they are not your own mental health records or the mental health records of your own child, MHL § 33.13 restricts their availability and they may only be released "pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality"
e. Likewise, CPLR § 2302(a) provides that a subpoena to compel production of a patient's clinical records maintained pursuant to MHL § 33.13 shall be accompanied by a court order that says these are necessary. Can always try to work out a court order with the parties beforehand.
f. More often, we are defending against a request for our client's records. These are requested via order to show cause or upon notice of motion. There are arguments to prohibit or limit the production of mental health records and these should be made.

VI. MH Documents of the Child
a. You might want the mental health records of the child
b. It is the same test as discovery from a third party with the added protection of the mental hygiene act.
c. The statute requires that the court weigh the need of the moving party for the discovery to assist in the preparation of the case against any potential harm to the child arising from the discovery.
    i. In *In re Dean T.*, 117 AD3d 492, 985 N.Y.S.2d 518 (1st Dept. 2014), the first department ruled that the Bronx Family Court should have permitted the discovery and reviewed the mental health records of the subject child in camera. Ruled that automatic disclosure was not appropriate because the

therapist objected to the disclosure under the mental hygiene act. The court reasoned that the records may assist the respondent in arguing that the abuse did not occur but the child's mental health was not at issue in the case.

ii. On remand, the Bronx Family Court found that there was nothing helpful to the defense.

VII. Alcohol and Drug Treatment Records – MHL § 22.05(b), 42 CFR § 2.1(b)(2)(C), N.Y. Pub. Health L. § 18

a. You might want your own client's alcohol and drug treatment records in which case you should request them via a release so they are not automatically made available to the court and other parties.
b. If you want the drug and alcohol treatment records of someone else you must proceed upon notice of motion or order to show cause. A subpoena is not sufficient.
c. Under 42 CFR § 2.1, a drug treatment facility may disclose drug abuse patient records if authorized by "an appropriate order" of the court. In issuing the order, the court must weigh "the public interest and the need for disclosure against the injury of the patient, to the physical-patient relationship and the treatment services"
d. Most decisions when considering challenges to the production of these records emphasize the public interest in having all relevant information to best achieve permanency for the children.
e. Usually the court will find good cause for these records to be produced, particularly if the motion is properly brought since every judge pretty much things drugs and alcohol use is relevant.
f. It is a challenge to defend against the production of your client's drug abuse treatment records when CPS is seeking them. A practice tip is, however, that you appear and attempt to limit the records – don't need all the counseling notes, don't need records beyond the filing date of the petition, etc.
g. MUST PROTECT THESE RECORDS AND NOT REDISCLOSE TO ANYONE:
    i. The Mental Hygiene Law requires "all records of identity, diagnosis, prognosis or treatment in connection with a person's receipt of chemical dependence services" to be kept confidential and to be released only in accordance with the law.
    ii. NY Public Health Law § 18 provides that information so disclosed should be kept confidential by the party receiving such information and the limitations on such disclosure in this section shall apply to such party – cannot re-disclose these records and should story them confidentially)

VIII. Documents in Possession of a Third Party, Not A Hospital or Public Facility

a. You might need to get documents that you know exist and are in the hands of a third person, not a party to the proceeding and not a hospital or public agency covered by FCA § 1038. Special rules that apply to discovery of a nonparty apply.
b. You can use a subpoena *deuces tecum* without notice of motion or OTSC but you might defend against a motion to quash
    i. General tests is: disclosure from a third non-party is available only if the requesting party establishes "special circumstances, namely that the information sought is material and necessary and cannot be discovered from other sources or otherwise is necessary to prepare for trial." The court should determine the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from discovery. (FCA § 1038(d))
    ii. Documents from a non-respondent parent. *Matter of Amelia RR*, 112 AD3d 1083, 977 N.Y.S.2d 762 (3d Dept. 2013). In this case, the Third Department affirmed a family court's denial of a mother seeking photographs and other documents in the possession of the father. The mother served the non-respondent father with a notice of deposition and a subpoena *duces tecum* and the father told the family court he had given everything he had to the petitioner. The court held that although leave of court was not required, disclosure from the father was available only if the mother established "special circumstances, namely that the information sought is material and necessary and cannot be discovered from other sources or otherwise is necessary to prepare for trial." The Court reasoned that the mother can get the discovery from the father if the petitioner does not provide it.

IX. Police Records and School Records
a. You might want police records pertaining to an arrest or domestic incident reports
b. These are public documents, not private documents
c. CPLR § 2304 applies because these are municipal organizations.
d. Must file by order to show cause or by motion and serve the city or the school (or the attorney) one day before the motion or order to show cause is made returnable to the court

PROTECTIVE ORDERS

I. There is authority for protective orders in the FCA and the CPLR and it is good practice to request a qualified protective order to protect your client's privacy.
a. CPLR § 3103(a) - Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from

whom discovery is sought, **make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.** (b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute. (c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

b. FCA § 1038(d) provides grounds for a protective order for children's records "unless otherwise proscribed by this article, the provisions and limitations of article thirty-one of the civil practice law and rules shall apply to proceedings under this article. In determining any motion for a protective order, the court shall consider the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from the discovery."
c. Federal and state privacy laws have their built in restrictions on re-disclosure.
d. There is potential for these orders to be used as a sword to prohibit zealous representation. ACS has requested these orders in order to prohibit a parent from sharing discovery with an expert, with his or her attorney in a concurrent criminal, housing or immigration proceedings. But it is good practice to request one to protect your client's privacy.
e. As for protective orders as to other categories of records, i.e. health records for the child or another respondent, mental health records for the child or another respondent, validator reports regarding the child, various agency records governed by SSL, make sure these protective orders do not go further than privacy laws and make sure they do not inhibit your client's right to an attorney.
    i. Should not limit your ability to show documents to an expert
    ii. Should not limit your client's ability to use them in a housing or criminal court case.

DEFENDING AGAINST A DISCOVERY DEMAND FILED BY PETITIONER INCLUDING REQUESTS UNDER 1038-A

I. These are civil proceedings so the petitioner or attorney for the child could serve a demand for discovery upon the respondent as well.
II. We have been receiving more discovery demands from CPS and AFCs than in the past. We normally object to these and there is support for this response.

a. OBJECTIONS:
    i. CPLR § 3101(b) provides: Privileged matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable. (c) Attorney's work product. The work product of an attorney shall not be obtainable. (d) Trial preparation…. 2. Materials. …materials otherwise discoverable… prepared in anticipation of litigation or for trial… may be obtained only upon a showing… substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. …when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.
    ii. Generally FCA § 1038 – speaks in terms of discovery from the petitioner, not the respondent
    iii. Rules of Professional Conduct: Rule 1.6 (c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed… through an employee
    iv. In child protective proceedings, the parent is involuntarily brought before the court and charged with allegations of neglect. The State wields its power to intervene in the parent-child relationship, an action which for the present may lead to temporary removal of the child from the home, and which could later result in a permanency severance of the respondent's parental rights. In child-protective proceedings, therefore, it is the burden of the accuser to prove, by a preponderance of the evidence, that the allegations are true before the stigma of neglect attaches. The respondent should not be compelled by the court to facilitate her own adjudication of neglect." *In the Matter of Commissioner of Soc. Servs*. o/b/o Verena E., 163 Misc.2d 464, 467 (Kings County Family Court, 1994), *emphasis added*.

I. Family Court Act 1038-a provides, however, that "upon motion of a petitioner or attorney of the child, the court may order a respondent to provide non-testimonial evidence, only if the court finds probable cause that the evidence is reasonably related to establishing the allegations in a petition filed pursuant to this article. Such order may include, but not be limited to, provision for the take of samples of blood, urine, hair, or other materials from the respondent's body in a manner not involving an unreasonable intrusion or risk of serious physical injury to the respondent."

a. There are a few cases involving § 1038-a that you should consult:
    i. One involved dental molds of parents where a child had a bite mark. In this case the request was granted because the evidence was viewed as establishing allegations in petition and no unreasonable intrusion or injury was presented. (Appeared either not to have been argued or not to have mattered that dental mold impressions are junk science usually not admissible in criminal cases). *In re Pederson*, 187 Misc.2d 486, 723 N.Y.S.2d 344 (2001).
    ii. A few cases involve requests for HIV testing. A man with whom an eight-year-old boy had been living could not be compelled to submit blood sample for HIV in action brought by county department of social services, alleging that man sexually abused boy, were results of test could not establish allegations of petition, since proof that man was infected with HIV was not probative of whether he perpetrated charged acts of sexual abuse and only way to determine whether the boy was infected was to test the boy. *Matter of Michael WW*, 203 AD 763, 611 NYS2d 47 (3d Dept. 1994); *see also Matter of Harry G.*, 157 Misc.2d 599 (NY Fam. Ct. 1993)
    iii. This issue comes up with drug tests. If the test is not a pre-requisite to visits or release of the child, object to the test. This provision requires the evidence to be reasonably related to the allegations in the petition. The Second Department upheld a family court's order that a respondent submit to a hair follicle - relied generally on a family court *parens patriae* theory. *In the Matter of Maria C.*, 111 A.D.3d 874, 987 N.Y.S.2d 236 (2d Dept. 2014).
b. FCA § 1038-a refers to *nontestimonial* evidence, but the question remains whether a court can order pre-trial *testimonial* evidence such as pre-trial mental health evaluations of your client. Courts are all over the place but there are some good decisions.
c. These questions require an examination of the interplay between CPLR § 3121(a), FCA § 1047 and FCA § 1038-a:
    1. FCA § 251 gives the Family Court general authority to "order any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for that purpose by the court when such an examination will serve the purposes of this act . . . ."
    2. By virtue of FCA § 1038, the CPLR applies. CPLR § 3121(a) provides that a party to a civil action whose mental condition is sufficiently in controversy may be compelled to submit to a forensic mental health examination upon motion of a party opponent.

Petitioner for an evaluation must show that the respondent suffers from a mental health evaluation and courts have said that when a petition alleges neglect based on mental health that is sufficient to put mental condition in controversy.

   a. Parties have used CPLR § 3121 to request a pre-trial mental health evaluation of a respondent.
   b. *In re Tyler S.*, 192 Misc.2d 728 (NY Fam. Ct 2002), a decision in Kings County, the family court held that where a neglect petition alleges neglect based on mental health that is sufficient grounds for the court to order the respondent to submit to a mental health evaluation.
   c. The test is: (1) whether the respondent's mental health or emotional condition is at issue and whether the evaluation will serve the purpose of Article 10 cases and (2) the court must determine whether the evaluation is "material and necessary in the instant proceeding"

3. Some courts have found that no testimonial evidence is permitted pre -trial: This is based on the absence of a statute permitting a pre-trial psychiatric, psychological or psychosocial examinations or reports, the limits on pre-trial evaluations in FCA § 1047(b); and the recognition that respondents are brought before the court against their will and these are not evenly matched proceedings.
   a. FCA § 1047(b) provides the authority to the court to order reports for the purpose of disposition and it says specifically that such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing.
   b. In *In re Trevor McK.*, 120 AD3d 416, 991 N.Y.S.2d 312 (First Dept. 2014), the First Department affirmed the family court's denial of a request by the AFC to have the respondent mother evaluated during fact finding.

DEFENDING AGAINST SPECIFIC DEMANDS FOR THE NOTES OF A PARENT ADVOCATE OR A SOCIAL WORKER

I. What about the discoverability of notes of parent advocates or social workers who work with attorneys?
   a. An attorney's agent's communications, work product, and materials made in contemplation of litigation are encompassed under the

protections of attorney-client privilege. *See* C.P.L.R. § 3101; *People v. Osorio*, 550 N.Y.S.2d 612, 614-15 (1989).

i. Examples of agents: administrative assistants, specialists providing technical advice or services, such as accountants or translators, investigators, interviewers, experts, psychiatrists, patent agents, and even public relations consultants.
ii. Parent Advocates and Social Workers are our agents. We delegate to them many of our authorities and responsibilities, but as the attorneys we maintain ultimate accountability
iii. Remember that parent advocates and social workers are not our agents simply because they are employed by us or retained by us, although that helps. Whether they are our agents depends on the facts surrounding what they do and at whose direction.
    1. Parent Advocates and Social Workers may not be agents if they are performing a function NOT at the direction of the principal (the attorney). They may not be agents if they are acting for a purpose outside the scope of the client's representation
    2. The lawyer must be able to swear that you were acting on that lawyer's direction. *See* Murray v. Bd. of Educ. of City of New York, 199 F.R.D. 154, 156-57 (S.D.N.Y. 2001).
iv. If the parent advocate or social workers testifies, the rules change and the notes are likely discoverable so this decision must be made carefully.

DISCOVERY IN ARTICLE 10 TPR/CUSTODY PROCEEDINGS

CASE LAW AND STATUTE SUPPLEMENT

DISCOVERY IN ARTICLE 10, TPR AND CUSTODY PROCEEDINGS

CASE LAW AND STATUTE SUPPLEMENT

Presented by: Adele Fine, Esq. and Emma Ketteringham, Esq.

FOCUS ON FAMILY COURT: HOLISTIC AND EFFECTIVE FAMILY REPRESENTATION

1. DISCOVERY IN FAMILY COURT "SPECIAL PROCEEDINGS"

Statutes:

CPLR §§ 401-402 – defines special proceedings as proceedings in which a "petitioner" files a petition against a "respondent."

CPLR § 408 - Notice to Admit pursuant to CPLR § 3123 is the only discovery device available without Court permission in a special proceeding.

FCA § 165 - specifically incorporates the CPLR into Family Court proceedings, including liberal discovery pursuant to Article 31, "to the extent that they are appropriate to the proceedings involved."

FCA § 1038 – specifically authorizes liberal discovery in child protective cases

- **a) Hospital records shall be made available upon receipt of a judicial subpoena**
- **b) Case record, photos or other documentary evidence per CPLR 3120 demand**
- **c) Physical or mental examination of child by motion**
- **d) Catch-all: any other discovery permitted under Article 31**

Case law concerning "special circumstances" requirement to conduct discovery in special proceedings:

***Matter of K.Z. v P.M.*, 29 Misc. 3d 572 (N.Y. Fam. Ct. 2010) - Motion to depose petitioner in family offense case denied, as was motion for petitioner's psychiatric records since not relevant to whether a family offense occurred.**

***Kunz v. Kunz*, 119 Misc. 2d 80 (N.Y. Fam. Ct. 1983) - Motion to depose petitioner in family**

offense case denied where no showing of "special circumstances"; particularly in the context of domestic violence case, it would be "totally inappropriate" to subject petitioners to EBT.

***Albans v. Albans*, 67 Misc.2d 372 (Queens Co. Fam. Ct. 1971) - Husband did not make out "special circumstances" in evidentiary form sufficient to grant motion to depose wife in child support case.**

Case law to support argument that judicial permission not required in Article 10 proceedings*:*

***In re Carla L.*, 45 A.D.2d 375 (1st Dept. 1974) – Court established right to discovery of foster care records in consolidated appeals involving parents and foster parent who sought access to such records .**

***Matter of Ameillia RR*, 112 AD3d 1083 (3d Dept. 2013) - "This Court has previously held that, although Family Ct Act article 10 proceedings are special proceedings, the specific provisions of that article 'override the general discovery limitations placed on special proceedings under CPLR 408. [citing *Matter of John H.*, 56 AD3d 1024, 1026 (3d Dept. 2008).]"**

But note some contrary case law:

***Matter of Brandon G.*, 5 Misc. 3d 1023(A) (Suffolk Co. Fam. Ct. 2004) - Leave of court to serve interrogatories on agency denied where no showing of "special circumstances"**

***In re Commissioner of Social Serv. ex rel. R./S. Children*, 170 Misc. 2d 126 (Kings Co. Fam. Ct. 1996) - Court denied respondent father's motion to depose child mid-way through trial in sex abuse proceeding because no "special circumstances" shown**

2. BILL OF PARTICULARS

Statutes:

CPLR § 3041 - Bill of Particulars may be served in any case to force opponent to particularize claims. Not a discovery device, therefore no judicial permission or showing of special circumstances required before serving.

CPLR § 3042 - A demand for a Bill of Particulars must be answered within thirty (30) days of service.

CPLR § 3042(c) – Specifically authorizes a motion to compel answers, and authorizes sanctions if refusal was willful

Case law:

Matter of Christine P. v Machiste Q., **124 A.D.3d 531 (1st Dep't 2015) - In family offense proceeding, respondent's motion for summary judgment properly granted where allegations, as amplified by bill of particulars, failed to state cause of action**

Albany County Dep't of Social Servs. v. James T., **172 Misc. 2d 427 (Albany Co. Fam. Ct. 1997) - Article 10 sex abuse case in which respondent had served bill of particulars seeking specific dates, times places of alleged sex abuse; had also served a discovery demand and EBT notice to depose child. EBT prohibited. Agency sought to amend bill of particulars mid-way through trial. Respondent objected. Applying a balancing test of prejudice to respondent vs. excuse for delay, and considering overarching need to protect child's interests, Court sustained in part and denied in part agency's request to amend. Granted continuance to permit respondent time to prepare defense.**

Sharon H. v. Terry P., **648 N.Y.S.2d 599 (1st Dep't 1996) - Lower court properly granted mother's motion for partial protective order against putative father's bill of particulars where demands were more properly suited to a discovery notice**

In re Daniel TT., **169 A.D.2d 951 (3d Dep't 1991) - In sex abuse case, lower court properly denied motions to preclude agency from submitting evidence at trial due to late production of bill of particulars. The delay was not done in "bad faith" and respondent articulated no prejudice to himself.**

Commissioner of Social Services v. Henry, **117 A.D.2d 1005 (4th Dep't 1986) - Family Court improperly directed agency to comply with respondent's demand for bill of particulars where demands sought evidentiary material rather than the particulars of agency's claim against respondent. Order reversed and remitted.**

Reed v. Reed, **93 A.D.2d 105 (3d Dep't 1983) - In tortured matrimonial/Family Court custody and child support proceeding, "contumacious" father who refused to answer Bill of Particulars in Supreme Court was precluded from offering evidence in support of financial and other claims. On transfer he was permitted to do so in Family Court. On appeal the Court found that the Family Court had erred in permitting father to submit evidence. Prior preclusion order was law of case, and since it placed father in default on mother's claims, her requests should have been granted.**

3. THE DISCOVERY DEMAND

Statutes:

CPLR § 3120 and FCA § 1038(b) – both authorize discovery demand for CPS records

FCA § 1038(b) specifically mandates that upon service of CPLR § 3120 demand, CPS/ACS must disclose "any records, photographs or other evidence demanded relevant to the proceeding, for inspection and photocopying."

a) Agency may delete the identity of the person who filed the report unless agency intends to submit report into evidence

b) Agency may move for a protective order to withhold records, photos or other evidence which will not be offered into evidence and the disclosure of which "is likely to endanger the life or health of the child."

c) Demand may be served on opposing counsel at any time after the commencement of the action, and responses are due within 20 days.

CPLR § 3120 permits the service of a subpoena duces tecum on third parties without prior judicial authorization, so long as the procedures spelled out in the statute are followed.

a) Serve all other parties with subpoena at the same time it is sent to the third party

b) State the address where the documents are to be produced and inspected

c) Documents must be produced no less than 20 days after service of the demand

d) Within 5 days of receipt of documents, notify all other counsel that documents are available for inspection and photocopying

Case law:

***In re Brian S.*, 718 N.Y.S.2d 632 (2d Dep't 2000) - Family Court's *sua sponte* order directing agency to comply with respondent's discovery demand seeking police records in its possession was affirmed on appeal; Family Court's denial of agency's motion for polygraph records related to respondent also affirmed.**

***In re M.J.*, 176 Misc. 2d 446 (Westchester Co. Fam. Ct. 1998) - Respondent's counsel did not ask for records until day of trial. Law guardian had previously made a CPLR 3120 demand, but neglected to serve respondent. Court held that agency was not automatically obligated to make case record available to respondent upon law guardian's request, therefore respondent's motion to dismiss was denied. Trial adjourned to permit**

respondent's counsel to review records.

***In re Danielle G.*, 155 A.D.2d 731 (3d Dep't 1989) - Finding of sex abuse against stepfather reversed because Family Court erred in denying stepfather's discovery motion for records pertaining to prior unfounded sex abuse allegations by same child against him, which would have been used in his defense.**

***In re Leon R.R.*, 48 N.Y.2d 117 (1979) - In dismissing a termination of parental rights petition, the COA held it was improper for the lower court to accept the entire agency case file into evidence, first because it contained inadmissible hearsay and second because the respondent parents had no opportunity to review the file.**

***In re Carla L.*, 45 A.D.2d 375 (1st Dept. 1974) – (discussed above) - Foster care records pertaining to the parent's children are subject to disclosure; burden is on the agency to move for protective order to prevent disclosure**

4. EXPERT DISCOVERY DEMAND

Statute:

CPLR § 3101(d) - provides that upon request, a party shall identify each person whom the party expects to call as an expert witness, "and shall disclose in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."

CPLR § 3101(d)(iii) – Further disclosure concerning expected testimony requires court order upon showing of special circumstances

Case law:

***Tienken v Benedictine Hosp.*, 110 A.D.3d 1389 (3d Dep't 2013) - Plaintiff's failure to identify experts until after being forced to do so in response to defendant's summary judgment motion, and having failed to "provide any excuse, much less good cause, for the nondisclosure," justified the lower court's refusal to accept plaintiff's expert affidavits and thus grant summary judgment for the defendant.**

5. DEPOSITIONS

Statute:

CPLR 3101(a)(1) – permits examination before trial of opposing party

CPLR 3101(a)(4 – permits examination before trial of "any other person, upon notice stating the circumstances or reasons such disclosure is sought or required". No requirement of a showing of special circumstances

FCA 1038(d) – the provisions of Article 31 shall apply to Article 10 proceedings, and in determining any motion for a protective order the Court must consider the need for the discovery and any potential harm to the child from the discovery.

Case law:

***Dominick R. v. Jean R.*, 7 Misc. 3d 1027(A), 1027A (Kings Co. Fam. Ct. 2005) – Court prohibited petitioner father from deposing respondent mother in bitter custody modification proceeding involving 13 year old son. Father's showing of special circumstances insufficient: the matters to be discussed are not capable of factual determination through discovery but rather will be resolved through an assessment of credibility, some matters are within the father's personal knowledge. His argument that EBT will shorten the trial was not persuasive, as "custody trials all too [often] become a forum to air long-smoldering wrongs ranging from petty gripes to the most painful breaches of trust and become an opportunity to 'even the score." Granting the deposition "would simply give the parties two opportunities to do this instead of one."**

***Catalano v. Moreland*, 299 A.D.2d 881 (4th Dep't 2002) – The Court rejected the defendant's claim in a medical malpractice action that the plaintiffs were required to show special circumstances before deposing a nonparty. The Court specifically held that the "special circumstances" requirement was eliminated from CPLR 3101(a)(4) in 1984, and now applies only if disclosure sought from a nonparty expert witness.**

***In re Crystal "AA"*, 271 A.D.2d 771 (3d Dep't 2000) – Family Court had permitted EBT of child alleged to be sexually abused. Even though EBT had already occurred, appellate court took the opportunity to say it should not have occurred. No special circumstances were shown, nor the relevance and materiality of the information sought to be obtained through the EBT. Even if this burden met, Court must still balance need for discovery against potential harm to the child. Factors in child protective proceeding include, but are not limited to "the age of the child, the emotional and physical health of the child, the nature of the family relationship, the nature of the allegations at issue in the proceedings and the need of the respondent to obtain information from the child."**

***In re Commissioner of Social Serv. ex rel. R./S. Children*, 170 Misc. 2d 126 (Kings Co. Fam. Ct. 1996) – Since children are not "parties" they are not subject to deposition under CPLR 3101(1)(1); they are non-parties under CPLR 3101(a)(4). No "special circumstances" to depose children demonstrated in physical abuse case where Respondent parent had copy of child's statements from case record, he had already deposed caseworker concerning child's statements, and statements, if corroborated, are admissible in evidence without necessity of direct testimony from children. Case has lengthy discussion of depositions of children in Article 10 cases, and concludes that depositions of children should be discouraged since whole structure of statute is to protect children from the litigation.**

***In re Tricia K.*, 160 Misc.2d 935 (Kings Co. Fam. Ct. 1994) – Respondent father charged with sexually abusing and beating 16 year old daughter. Respondent mother served EBT notices on law guardian to depose 16 year old and her 15 year old sister. Law guardian moved for protective order. Court denied protective order, reasoning children were eye witnesses, should be no presumption that older adolescents would suffer harm if deposed, and no specific showing that the teenagers in this case would be psychologically damaged. Deposition would be conducted in Court's presence, and delayed for 30 days to give anyone time to appeal order.**

***In re Trisha M.*, 150 Misc. 2d 290 (Rockland Co. Fam. Ct. 1991) – Family Court granted law guardian's motion to prohibit Respondent stepfather from deposing his now 15 year old stepdaughter in a sex abuse case, but permitted stepfather to submit written interrogatories. When the law guardian filed subsequent motion for protective order with respect to interrogatories, Court reviewed each interrogatory question and refined its order with respect to which interrogatory questions would be permitted. The Court stated it controlled discovery "in such a way so as not to permit inquiry into private, sensitive areas of this child's sexual history and knowledge unless those inquiries are shown to be necessary and relevant to permit the respondent a reasonable opportunity to present his answer to the petition."**

***In re Vanessa R.*, 148 A.D.2d 989 (4th Dept. 1989) - In a sex abuse case, Appellate Court affirmed denial of Respondent father's motion to depose the mother and one of the therapists. "Absent special circumstances not present here, such depositions are not appropriate in child protective proceedings."**

***In re Eva B.*, 160 A.D.2d 457 (1st Dep't 1990) – Lower court properly restricted depositions of medical personnel who treated the respondent because she had made no showing of special circumstances for the discovery sought.**

***Slawiak v. Hollywood*, 123 Misc. 2d 435 (Eric County. Sup. Ct 1984) – Court denied Petitioner father's motion to depose ex-wife and current husband in custody mod proceeding. Father seeks no information he can't obtain at the hearing, and makes no allegation that pre-trial discovery will lead to more discovery. Court also considers child's best interests to avoid delay in resolution of case, given the "unfortunate bitterness and tension between these parties."**

***In Re Maria F.*, 104 Misc. 2d 319 (Bronx County Fam. Ct. 1980) – Court granted agency motion for protective order to prohibit Respondent parents from deposing handicapped child. Respondent mother accused of beating her handicapped child, and forcing younger sibling to participate. Respondent stepfather accused of doing nothing to stop the abuse. The court held that in an abuse proceeding involving children of tender years or young adolescents, it was not appropriate to direct the child to appear for an examination before trial, especially when the child is handicapped, had resided almost her whole life in foster care, and had resided with mother and stepfather only a short time.**

6. INTERROGATORIES

Statute:

CPLR § 3130 - allows written interrogatories to be served by one party on another party after commencement of an action. Interrogatories and bill of particulars may not be served on the same party in the same action (except matrimonial actions)

CPLR § 3131 – interrogatories may encompass any matters set forth in CPLR §3101, and the answers may be used like depositions of a party. Interrogatories may also require production of documents, photographs, etc. as relevant to the answers.

CPLR §3133 – Answers or objections are due within 20 days of service

Case law:

***In re Esther II.*, 256 A.D.2d 936 (3d Dep't 1998) – In a TPR proceeding, Family Court properly denied respondent parents' motion to compel discovery which consisted in part of interrogatories. Agency answered the interrogatories in part but refused to furnish much of the information demanded, "on the grounds that it encompassed legal theories or conclusions, related solely to matters that had been previously adjudicated or entailed hypothetical inquiries that were not proper subjects for pretrial discovery."**

In re David E., 176 Misc. 2d 363 (Orange County Fam. Ct. 1998) – The Court denied the respondent parents' motion for a protective order as to interrogatories served on them by the children's counsel. The parents claimed the information was within the AFC's knowledge by virtue of prior interviews with the parents. The Court held that interviews are not the same thing as interrogatories, and the parents made no showing that the interrogatories were unnecessary, improper, unreasonable or prejudicial.

***Tobi F. v. Bruce N.*, 229 A.D.2d 392 (2d Dep't 1996) – Court properly denied mother's demand that the putative father in a paternity case answer her interrogatories as he was not required to testify or provide evidence at the pre-trial stage of the case.**

***In re Trisha M.*, 150 Misc. 2d 290 (Rockland Co. Fam. Ct. 1991) – Family Court permitted respondent stepfather in sex abuse case to submit interrogatories to the alleged victim, his 15 year old stepdaughter. When the law guardian filed subsequent motion for protective order with respect to interrogatories, Court reviewed each interrogatory question and refined its order with respect to which interrogatory questions would be permitted. The Court stated it controlled discovery "in such a way so as not to permit inquiry into private, sensitive areas of this child's sexual history and knowledge unless those inquiries are shown to be necessary and relevant to permit the respondent a reasonable opportunity to present his answer to the petition."**

***In re B.*, 52 Misc. 2d 400 (Kings County Fam. Ct. 1966) – A now ancient pre-statutory disclosure case in which the Family Court denied the agency's motion to vacate the Respondent parents' interrogatories. The Court permitted the interrogatories because the agency's neglect petition was too broad, and was insufficient to apprise the respondents of what specific allegations they would have to defend against at trial. The Court did narrow the scope of the interrogatories.**

***Matter of Brandon G.*, 5 Misc. 3d 1023(A), 1023A (Suffolk County Fam. Ct. 2004) – Family Court struck respondent parents' interrogatories in their entirety. The parents had been given the entire case file, and their arguments concerning judicial economy and calendar congestion were unpersuasive as the basis for a showing of "special circumstances."**

7. PHYSICAL EXAMINATIONS

Statutes:

FCA § 1038(c) – the respondent or AFC may make a motion for an order directing a child to be made available for examination by a physician, psychologist or social worker selected by the respondent or AFC. The Court must consider the need for the examination to prepare for trial and the potential harm to the child from the exam.

Any exam except a physical exam may be videotaped according to procedures set forth in FCA § 1038(c).

FCA § 1027(g) – in all abuse cases the court shall, and in neglect cases the court may, order a physical examination of a child pursuant to FCA §251 or by physician appointed by the Court. The Court may dispense with this requirement if the proceeding was commenced as a result of a physical examination of the child.

Case law:

***In re Jessica R.*, 78 N.Y.2d 103 (1991) – This appeal of a sex abuse case arrived at COA just after statute amended to permit physical examination of subject children in Article 10 proceeding. Court remitted case to family court for consideration of father's request to have his daughter submit to a psychological examination by father's expert. Discussing FCA 1038(c), the Court stated, "The statute is designed to enhance procedural fairness and the fact-finding process, particularly in cases where the petitioner's proof will depend substantially on expert opinion." But the Court also stated that "examination of the child by the respondent's expert is not to be routinely granted upon demand." The matter is left to the discretion of the courts.**

***Matter of Vivienne Bobbi-Hadiya S.*, 126 A.D.3d 545 (1st Dep't 2015) – On appeal, Family Court's denial of mother's motion to conduct independent physical examination of 3 month old baby affirmed. Child "was already examined and her injuries documented by x-rays, an MRI, and skeletal exams, where other causes of her injuries were ruled out by tests and exams, and where she even had a hole drilled in her skull to alleviate her head injuries…" Motion had been made in context of TPR proceeding based on severe abuse.**

***Matter of Ameillia RR.*, 112 A.D.3d 1083 (3d Dep't 2013) – Family Court properly denied mother's request for physical examination of her 3 year old child in neglect case where child had suffered numerous bruises on her body and head. In support of her motion mother submitted an affidavit from her expert opining as to multiple causes of bruises, based in part on mother's and grandmother's claims that they bruise easily. Mother did not submit child's medical records, although presumably she had access to them, and expert's opinion was too weak to justify IME.**

***Matter of Shernise C.*, 91 A.D.3d 26 (2d Dep't 2011) – AFC moved for an order vacating the Family Court's prior order under FCA § 1027(g) that a child be made available for a forensic medical evaluation. ACS opposed motion. On appeal, Court held that, where there was conclusive proof through DNA testing that stepfather was father of 13 year old stepdaughter's baby, further forensic examination of the child violated her 4th amendment rights.**

***Penny B. v. Gary S.*, 61 A.D.3d 589 (1st Dep't 2009) – Family Court properly denied mother's request in a custody case for a "sexuality expert" to examine daughter. The reason Family Court modified prior order to give custody to father was that mother made numerous baseless allegations of sex abuse by father, and had previously subjected child to medical exams, none of which showed the child had been sexually abused.**

***Matter of Fatima M.*, 16 A.D.3d 263 (1st Dep't 2005) – Finding of abuse against father as to 2 teenage twin daughters reversed and remitted for further proceedings. Father should have been permitted to have his expert do a psychological evaluation of one of the girls to prove that her accusations were an outgrowth of her psychological condition. Agency had expert testify at trial, child had accused others in past, her allegations were inconsistent with her own physical examination, and she had recanted allegations to multiple sources.**

Need for eval. outweighed any potential harm to child. "By not allowing respondent father to present an expert, he was effectively precluded from fully exploring the possibility that Aquellah's accusations were a manifestation of her psychiatric problems. As such, his ability to present a defense was severely curtailed."

***Otsego County Dep't of Soc. Servs. v. Savannah "KK",* 295 A.D.2d 644, 646 (3d Dep't 2002) – In a sex abuse case, Family Court properly denied father's request for a psychological examination of a 4 year old child. Child had already been questioned extensively and had undergone an "invasive" physical examination which documented physical signs of sex abuse. This evidence, plus testimony from other witnesses, established that father's need for the psychological exam was outweighed by harm to the child.**

***Matter of D.T.*, 9 Misc. 3d 1118(A) (Rockland County Fam. Ct. 2005) – Respondent father accused of sexually abusing his 2 ½ year old child. Father's application to have child submit to psychological examination granted where petitioner agency intended to call expert, and father's defense rested on child's ability to accurately convey past events. However, although child had yet to be interviewed by anyone, expert would be "neutral" person chosen by the Court from a list of suggested experts submitted by all counsel.**

***In re Child Protective Servs. ex rel. Heather J.*, 183 Misc. 2d 242 (Suffolk County Fam. Ct. 1999) – Family Court properly barred County agency from conducting a second validation in interview with a child during the dispositional phase of a sex abuse proceeding.**

8. NOTICE TO ADMIT

Statutes:

CPLR § 408 – Notice to Admit permissible in special proceedings without leave of court

CPLR § 3123 – No later than 20 days before trial, a party may serve a notice to admit re: genuineness of documents, accuracy of photographs, or the truth of any matters of fact.

Factual matters are those the requester believes to be without substantial dispute and are within the knowledge of the other party.

If there is no sworn answer either answering, denying or qualifying the requests within 20 days, the matters of which an admission is requested shall be deemed admitted.

Case law:

***In re David E.*, 176 Misc. 2d 363 (Orange County Fam. Ct. 1998) – the Court granted the parents' motion for a protective order as to most of the AFC's notice to admit wherein the father was asked to admit that he had 3 indicated reports against him; the reports involved issues which were going to be litigated at trial, and thus were not admissible in evidence. Father was also not required to admit what amounted to ultimate or conclusory issues of**

fact that were to be proven at trial. However, the parents were required to admit whether one of their children was residing in a shelter for a specific period of time.

STANDARDS OF PRACTICE FOR PARENTS' ATTORNEYS IN STATE INTERVENTION CASES: FOCUS ON EARLY INVOLVEMENT OF COUNSEL

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STANDARDS OF PRACTICE FOR PARENTS' ATTORNEYS IN STATE INTERVENTION CASES: FOCUS ON EARLY INVOLVEMENT OF COUNSEL

OUTLINE

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Standards of Practice for Parents' Attorneys in State Intervention Cases: Focus on Early Involvement of Counsel

Presenters: Angela Burton, NYS Office of Indigent Legal Services
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Prepared for:
Focus on Family Court: Holistic and Effective Family Court Representation
New York State Bar Association, Committee to Ensure the Quality of Mandated Representation, Albany, New York
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PART ONE: Introduction and Overview
Office of Indigent Legal Services – Improving the Quality of Mandated Representation (https://www.ils.ny.gov/)

I. Background – ILS created in 2010 pursuant to Executive Law § 830-832. Its 9-member Board consists of the Chief Judge of the Court of Appeals (chair of the Board), and eight (8) gubernatorial appointees chosen from nominees recommended by the president of the senate, the speaker of the assembly, the New York State Bar Association, the New York State Association of Counties; a sitting or retired judge or justice recommended by the Chief Judge; an experienced public defender; and an attorney of the governor's choice. Executive Law §833.

(https://www.ils.ny.gov/files/Executive%20Law%20832-833.pdf).

Current Board members - https://www.ils.ny.gov/content/board

A. Quality Enhancement. Purpose of ILS and Board is **"to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law."** Executive Law Article 30, Section 832(1).

Under the direction of and pursuant to policies established by the Board, ILS assists county governments in the exercise of the responsibility, delegated to them by the State, to provide effective assistance of counsel to persons who are legally entitled to counsel, but cannot afford to hire an attorney. ILS's purview includes both criminal court and family court representation.

B. Context. Created in part in response to 2006 report issued by the Commission on the Future of Indigent Defense Services, (https://www.ils.ny.gov/files/Kaye%20Commission%20Report%202006.pdf).

Appointed in 2004 by then-Chief Judge Judith Kaye, Commission identified deficiencies in the quality of indigent legal services provided by counties, including:

- excessive caseloads

- inability to hire full-time defenders
- lack of adequate support services for attorneys
- lack of adequate entry level and ongoing training
- lack of adequate supervision and oversight
- minimal client contact
- in some courts, outright denial of the constitutional right to counsel.

C. Problems in Criminal and Family Court Representation. Kaye Commission Report focused primarily on mandated representation in criminal cases, but found that: "the criminal defense programs studied . . . were, in many instances, inseparable from the programs providing Family Court representation … [f]amily court matters are an integral part of New York's indigent defense system and cannot be completely removed from an overall consideration of the current system . . . [t]hese factors suggest that the Indigent Defense Commission that we propose also oversee services providing for Family Court representation." (p. 20, note 33).

D. Family Court mandated representation included in oversight purview of ILS.

Executive Law § 832 requires ILS to "monitor, study and make efforts to improve the quality of" all mandated representation under County Law Article 18-B, including representation of parties before the Family Court.

ILS works closely with state and county officials, legal services providers and other interested organizations and individuals to address the obstacles to high quality mandated family court representation. ILS Family Court Practice website: https://www.ils.ny.gov/content/family-court-representation.

E. Funding. ILS is responsible for distributing State funds to the counties from the State's Indigent Legal Services Fund (ILSF). As a condition of funding, county officials must consult with their mandated representation providers in determining how the funds will be used to improve the quality of representation.

> **Examples**: hiring of additional experienced family law practitioners and/or upgrading existing staff from part-time to full-time; establishing specialized assigned counsel panels of assigned counsel with family law-specific qualification, training, supervision, and continuing legal education requirements; establishing dedicated family court units within existing public defender offices to handle all or some mandated family law matters; contracting with institutional providers to do family law cases; adding social workers, client liaisons, and investigators to assist lawyers and clients; and developing processes to ensure appointment of counsel for clients in Article 10 abuse and neglect cases in advance of the client's first appearance in court.

F. Standards. ILS is authorized to establish standards and performance measures by which the quality of indigent legal services can be monitored and improved. **ILS standards include**:

- *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* – June 2012; extended to all trial level representation as of January 2013 (https://www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf)

- *Appellate Standards and Best Practices*, effective November 2014 (https://www.ils.ny.gov/files/Appellate%20Standards%20Final%20010515.pdf)

- *Standards and Best Practices for Attorneys Representing Adults in New York Child Protective, Permanency and Termination of Parental Rights ("State Intervention") Proceedings*, pending Board approval (June 2015)

II. Standards for Attorneys Representing Adult Clients in State Intervention Cases

A. Need for standards identified: "Standards to guide the legal representation of children, child welfare agencies, and parents accused of child maltreatment are key to improving professional practices and assuring timely decisions on permanent placement of children." U.S. Department of Health and Human Services, Administration for Children and Families – *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children* (1999) - http://www.archive.org/stream/guidelinesforpub00duqu/guidelinesforpub00duqu_djvu.txt

American Bar Association - *Promoting Quality Parent Representation through Standards of Practice*, Child Law Practice, Vol. 26, No. 1 (March 2007), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/promotingquality.authcheckdam.pdf (The [ABA Parents' Attorneys] standards are one tool to improve parents' attorneys' representation and make it consistent across the country.")

National Association of Counsel for Children - Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases, by National Association of Counsel for Children. 2nd ed. Donald Duquette and A. M. Haralambie, co-editors (2010)

B. ILS Parents' Attorney Standards

- Developed by a diverse group of seasoned professionals with deep experience in the child welfare system – Working Group members here - https://www.ils.ny.gov/node/55
- Working Group reviewed numerous examples, including: NYSBA *Standards for Providing Mandated Representation* (Committee to Ensure Quality of Mandated Representation, rev. April 2013); American Bar Association *Standards of Practice for Attorneys Representing Parents in Abuse and*

Neglect Cases (2006); NYSBA *Standards for Attorneys Representing Children in Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings* (rev. Jan. 2015); Parent attorney standards from numerous jurisdictions

- Purposes: provide guidance for ILS statutory mandate to assist counties and providers to improve the quality of representation; establish best practices and provide guidance for practitioners; promote greater professionalism and uniform standards of practice in this highly complex area of practice throughout New York State

- Recognizes that currently, sufficient resources are not available to ensure that every attorney can comply on a consistent basis; will work with State, counties, judges, institutional providers, assigned counsel programs and individual attorneys to create conditions necessary for compliance (e.g., reasonable compensation, caseload caps, structure for supervision and professional support, suitable and adequate working conditions, private meeting space, etc.).

C. Summary – Standards establish a model of representation with focus on client-centered, multidisciplinary approach and competent, zealous, and thorough representation.

III. DRAFT OF THE TABLE OF CONTENTS FOR THE PROPOSED ILS STANDARDS OF PRACTICE FOR PARENTS' ATTORNEYS

QUALIFICATIONS, EXPERIENCE, TRAINING AND OVERSIGHT

- **A.** Basic Qualifications
- **B.** Experience and Training
- **C.** Continuing Legal Education and Periodic Evaluation of Attorneys

DUTIES AND OBLIGATIONS OF COUNSEL

- **D.** Basic Duties and Obligations of Counsel
- **E.** Protecting the Client's Rights and Advancing the Client's Interests and Goals
- **F.** Relationship with the Client
- **G.** Model of Representation – Multidisciplinary Practice
- **H.** Scope of Representation
- **I.** Pre-petition Representation
- **J.** Continuity and Duration of Representation
- **K.** Preliminary Protective Proceedings
- **L.** Investigation
- **M.** Discovery
- **N.** Court Preparation
- **O.** Hearings
- **P.** Post Hearings
- **Q.** Appeals

OBLIGATIONS OF ATTORNEY MANAGERS

PART TWO - Implementing the Standards to Protect Client's Rights and Advance the Client's Interests and Goals

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Part Two of this presentation will focus on **early involvement of counsel** as an essential component of meaningful representation and effective assistance of counsel in state intervention cases.

IV. Constitutional and Statutory Underpinnings of the Right to Counsel for Parents in State Intervention Proceedings

A. Parental Rights to Family Autonomy and Family Integrity. A parent's right to the care, custody and management of his or her children, and parents' and children's rights to familial unity and familial integrity are fundamental liberty interests protected by the United States Constitution.

- "[T]he interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters, 268 U.S. 510* (1925).

- The Supreme Court of the United States has frequently emphasized "the importance of the family," and the "integrity of the family unit has found protection" in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. *Stanley v. Illinois,* 405 U.S. 645 (1972).

- Parents' fundamental liberty interest in the companionship, care, custody, and control of their children "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745,753 (1982).

- Until the state demonstrates parental unfitness, "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745,760 (1982).

- NYS Social Services Law §384-B: "The legislature recognizes that the health and safety of children is of paramount importance. To the extent it is consistent with the health and safety of the child, the legislature further hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually be best met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child is already left home; and

(iv) when it is clear that the birth parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

B. Parental Right to Counsel in State Intervention Cases

a. **No categorical right to counsel under federal law** - *Lassiter v. State Department of Social Services*, 452 U.S. 48 **(1981)**

- **Majority, by Justice Burger**: Appointment of counsel not categorically required in every termination of parental rights case because, unlike in criminal cases, no loss of personal physical liberty is at stake. "In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."

  Dissent, by Justice Blackmun, joined by Justices Brennan and Marshall: "It is not disputed that state intervention to terminate the relationship between petitioner and her child must be accomplished by procedures meeting the requisites of the Due Process Clause. . . At stake here is "the interest of a parent in the companionship, care, custody, and management of his or her children. This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility . . . parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men. . . "

> "Surely there can be few losses more grievous than the abrogation of parental rights. Yet the Court today asserts that this deprivation is somehow less serious than threatened losses deemed to require appointed counsel, because in this instance the parent's own "personal liberty" is not at stake."
>
> "Faced with a formal accusatory adjudication, with an adversary – the State – that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's "expertise," the defendant parent is plainly outstripped if he or she is without the assistance of "the guiding hand of counsel." When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable."

- Majority did recognize, however, that it would be "wise public policy" to "require that higher standards be adopted than those minimally tolerated under the Constitution."
  - "33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases"
  - "Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well.

BUT:

b. **New York State – a pioneer**: ***In re Ella B.,*** 30 N.Y.2d 352 **(1972)**: Court of Appeals held, on both due process and equal protection grounds, that "[a] parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer."

Noting the "gross inherent imbalance of experience and expertise" between the State and the parent, the Court of Appeals concluded that it is "fundamentally unfair, and a denial of due process of law for the State to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel.

c. **Statutory - Family Court Act §§ 261 and 262 (enacted 1975)**: "Persons involved in certain family court proceedings may face infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges", and therefore counsel is essential in protecting the due process rights of litigants and in assisting the court to make "reasoned determinations of fact and proper orders of disposition." N.Y. Fam. Ct. Act §261.

V. Meaningful Representation and Effective Assistance of Counsel

A. Zealous and active participation by counsel at all stages of the litigation.

"We recommend that an attorney representing a parent be legally and ethically bound to exercise diligence, zealousness, and thoroughness at each stage of the child protection process." *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, Guideline VII-7. Zealous and Diligent Representation, p. VII-7, HHS, ACF, Children's Bureau (1999).

"A danger exists in child protection cases that personal rights of parents and children will be infringed in the well-intentioned zeal to help children and parents. Even before an attorney is appointed to represent the parents, government intervention in the family may have been initiated that has not been reviewed by any court or magistrate. **The goals of the child protection system do not alter the need to recognize and respect the personal integrity and autonomy of parents. Protective State intentions do not justify any relaxation of the legal safeguards or procedural protections for parents or children**." Commentary to Guideline VII-7.

B. The right to counsel in child protective proceedings assumes meaningful representation and effective assistance of counsel comparable to that to which criminal defendants are entitled.

"With respect to father's contention that he was denied effective assistance of counsel at the hearing, we note at the outset that, because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings. **Thus, to the extent that previous decisions of this Court have required a showing of actual prejudice to prevail on a claim of ineffective assistance of counsel under the New York Constitution, those cases are no longer to be followed."** *Brown v. Gandy*, 125 A.D.3d 1389, 3 N.Y.S.3d 486 (2015) (4th Dep't, Erie Co.) (cites omitted).

"The phrase "effective assistance" is not, however, amenable to precise demarcation applicable in all cases . . . this Court has long applied a flexible standard to analyze claims based upon a deprivation of rights guaranteed under the New York State Constitution due to counsel's alleged ineffectiveness. As we have held, so long as the evidence, the law, and the circumstances of a particular

> case, viewed in totality and as of the time of the representation, reveal that the attorney provided **meaningful representation**, the constitutional requirement will have been met." *People v. Benevento*, 91 N.Y.2d 708 (1998).
>
> "Finally, we reject defendant's contention that he was denied the right to effective assistance of counsel. The record establishes that defense counsel made a **clear and cogent opening statement** directed at the Peoples' inability to prove that the victim was incapable of appraising the nature of her conduct, conducted **meaningful cross-examination**, lodged **objections** consistent with the **defense theory**, presented the **testimony of an expert** who highlighted the inconsistencies in the victim's medical records with respect to her coherency and awareness, and obtained an acquittal on the top count of the indictment . . . Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that **defendant received meaningful representation**." *People v. Adsit*, 125 A.D.3d 1430 (2015) (4th Dep't, Onondaga Co.).

***Matter of Jaikob O.*, 88 A.D.3d 1075, (3rd Dep't 2011);** "[A]s a result of deficiencies in the representation provided by [father's] assigned trial counsel at the fact-finding hearing, he was denied meaningful representation."

> Failed to make an opening statement or to cross-examine petitioner's witnesses
>
> Cross- examination of the mother and the wife, both clearly young victims of disturbing domestic violence, was at points tasteless and irrelevant, even prurient.
>
> Made no motions at the close of petitioner's case and no closing arguments.
>
> Never submitted proposed findings of fact and conclusions of law
>
> "Notably, at the close of the fact-finding hearing, Family Court merely stated that it found petitioner's witnesses to be "credible," but made no finding of neglect, deferring its decision thereon. . . Surprisingly, counsel then consented to immediately proceeding to a dispositional hearing."
>
> At dispositional hearing, counsel failed to object to petitioner's oral motion to dispense with its duty to make diligent reunification efforts for respondent and the children; agency's motion was required to be in writing, on notice to respondent.
>
> Offered "absolutely no proof" at the dispositional hearing addressing the children's "best interests" either on the propriety of terminating reasonable reunification efforts or on the ultimate disposition upon the neglect finding.
>
> Did not file a notice of appeal from the resulting dispositional order.

***Matter of Eileen R.*, 79 A.D.3d 1482 (3rd Dep't 2010):** Incarcerated parent denied right to be present at TPR hearing. Due Process Clauses of US and NY Constitutions protect a

parent's right to be present throughout a proceeding implicating the termination of parental rights. Due process considerations are relevant to protecting the rights of parents who are unable, because of their incarceration, to personally attend proceedings concerning parental rights. Respondent's counsel did not "fully participate" in the hearing, resulting in a violation of respondent's due process rights.

> Did not object to court's blanket policy denying incarcerated respondent's telephonic participation, or request that respondent be able to present evidence or his own testimony, either by telephone, deposition or any other means.
>
> Did not attempt to use other permissive alternatives designed to reduce the prejudice caused by respondent's absence, such as requesting adjournments to permit counsel to review transcripts of testimony with respondent prior to cross-examining petitioner's witnesses.
>
> Did not present any evidence on respondent's behalf.
>
> Not only failed to object or make a request for some accommodation, he essentially waived his client's right to be present, stating, "I've had contact with [respondent] and he understands, judge, that this matter is going forward without his participation."
>
> "Despite Family Court's assignment of counsel, respondent did not enjoy a meaningful opportunity to participate in this case. By neglecting to seek any accommodations to protect respondent's right to be present or participate in some way, counsel's representation was less than meaningful and respondent was prejudiced by counsel's ineffectiveness . . . Because respondent's counsel cannot be deemed to have "fully participated" in the hearing under the circumstances here, the assignment of counsel was insufficient to protect respondent's due process rights. Accordingly, respondent is entitled to a new hearing, with new counsel assigned to represent him."

VI. Meaningful and Effective Assistance of Counsel Requires Early Entry of Counsel, Vigorous Advocacy, and Active Participation in Preliminary Protective Proceedings, including Imminent Risk ("removal" or "return of child") Hearings

A. Thorough preparation and active participation in the FCA §1027 hearing is essential to meaningful and effective assistance of counsel. The imminent risk hearing is a "critical stage" of the litigation in which the judge must determine whether the child's interests require protection, and, if so, whether removal of the child from his or her parent or other person legally responsible is necessary to avoid imminent risk to a child's life or health.

"Parents are entitled to effective representation at all critical stages of legal proceedings" in a child protective case. *Court Performance Measures*, p.107. The emergency removal hearing is a critical stage of the litigation in which the parent's attorney should play an active role if it is in the client's interests. Id., p. 101.

"Hearings held under Section 1027 of the Family Court Act are intended to be preliminary procedures to determine whether imminent risk to a child's life or health exist so as to warrant court-ordered removal of the child from the home. Upon such hearing, the court may also enter a temporary order of protection, another matter of major impact on the family. However, the 1027 hearing, as disclosed in this study, is often a vehicle to validate earlier pre-petition removals of children, as described above, (mostly removals without court order pursuant to Family Court Act 1024). At such hearings, the research showed that the respondent often is not present (the records showed respondent's presence in only 37 percent of the cases). In addition, the respondent, when present, is not always represented by counsel (the Family Court Act does not require such representation). Absence of representation may be attributed to the fact that the 1027 hearing occurs, on the average, six days before the initial court appearance where counsel for respondent is normally appointed. All of these matters raise serious due process concerns." *Goodhue Report*, pp. 278-279).

See also Oglala Sioux Tribe, et al. v. Van Hunnik, et al, 2015 WL 1466067 (March 30, 2015) (declaratory and injunctive relief granted against judge, secretary of department of social services and state's attorney for violations of Indian Child Welfare Act and Due Process in child protective cases).

Judge Viken, Chief Judge of the United States District Court (South Dakota), reasoned that even though parents have the right to a subsequent hearing at which they may appear with counsel to request return of the child**, judges' practice of appointing counsel <u>after</u> entry of foster care placement order at emergency removal hearing "defies logic because the damage is already done – Indian parents have been deprived of counsel during the course of what should have been an adversarial evidentiary hearing conducted in advance of a court order imposing out-of-home custody for an Indian child."** (at *18.)

"Appointing counsel and continuing the [emergency removal] hearing for a few hours or even a day to allow court-appointed counsel to confer with the Indian parents and become familiar with the critical documents upon which the 48-hour hearing is based would result in an 'equal contest of opposing interests.' This process undoubtedly will require additional time and more county and judicial resources but these concerns are not adequate reasons to forego rights mandated by ICWA and fundamental due process. 'A parent's interest in the accuracy and justice in the decision . . . is . . . a commanding one.'" (cites omitted). (at *19.)

B. **ILS Trial Level Standard 5**. In all trial level mandated representation cases, "[*c*]*ounties must ensure, through their plans for providing public defense representation and other provisions, that attorneys and programs providing mandated legal services* . . . :

> Provide representation for every eligible person at the earliest possible time and begin advocating for every client without delay, including while client eligibility is being determined or verified. . . . Lawyers should have the time and resources needed to ensure that they:

a. Are present at arraignment or first appearance, or earlier when an individual has invoked a constitutional or statutory right to counsel in an investigatory stage of a case, and at every stage thereafter, and in all other proceedings for which a right to counsel exists;

b. Interview the client as soon as possible, and in a setting in which client confidentiality can be maintained and a client/attorney relationship can be established;

c. Review initial charging documents or petitions as soon as possible, and challenge inadequacies in documents and proceedings unless doing so would harm the client;

d. Zealously advocate for pretrial release and/or diversion and for dismissal of proceedings whenever warranted;

e. Aggressively pursue discovery in individual cases and seek to secure improved policies for the timely disclosure of information to which their clients are entitled; and

f. Immediately begin preparations for trial and sentencing/disposition.

C. NYSBA 2013 *Revised Standards for Providing Mandated Representation*, Standard B, Early Entry of Representation,
http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644

B-1(a). Effective representation includes representation at the early stage of a Family Court proceeding, including the provision of social work, counseling, mental health, and other services.

B-2. Eligible persons shall have counsel available for any court appearance.

B-3. Counsel shall be available when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated.

B-4. Systematic procedures shall be implemented to ensure that prompt mandated representation is available to all eligible persons, particularly those held in detention facilities, and where a child has been removed by a governmental agency from the person's home.

D. ILS Parents' Attorney Standards – Early Involvement of Counsel

I-1. Where possible, represent clients during child protective service investigations before an abuse or neglect petition is filed with the court.

I.5. Where pre-petition representation during a CPS investigation is not possible, take steps to ensure that the attorney is provisionally assigned to the client upon the first filing in court.

K-3. Assert and protect the client's right to a preliminary hearing pursuant to Family Court Act §§1022, 1027, or 1028, as appropriate, unless the client waives the right upon informed consent.

K-5. Consistent with the client's interests and goals, thoroughly prepare for and actively participate in an imminent risk hearing unless there is a sound tactical reason not to do so.

VII. Purposes of Early Involvement of Counsel in State Intervention Cases

A. Protect Constitutional Rights of Parents against "Awesome Power of the State"

"Parents and their children have, 'in general terms, a substantive right under the Due Process Clause to remain together without the coercive interference of the awesome power of the state.'" Hollenbeck v. Boivert, 330 F.Supp.2d 324 (United States District Court, S.D. New York, 2004). (internal cites omitted).

Parents' fundamental liberty interest in the companionship, care, custody, and control of their children "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745,753 (1982).

"Faced with the formal accusatory adjudication, with an adversary – the State – that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or defer to the State's "expertise," the defendant parent plainly is outstripped if he or she is without the guiding hand of counsel." *Lassiter*, Justice Blackmun, dissenting.

"Removal of a child from parental care is perhaps the most significant governmental form of intrusion into a family. Most parents do not understand what happens in a child abuse and neglect proceeding. They require assistance when facing the state with all its resources and power. They need someone who understands the issues before the court, what the agency and court expect as the case proceeds, and how best to advise them to achieve their goals. They also need someone who understands how to reinforce messages from the court and agency that are designed to assist them, and to speak up and challenge the positions taken by the child protection agency and its attorney when those positions are not supported by the law or evidence." Edwards, *The Importance of Early Appointment*, pp. 26-27.

B. Promote fundamental fairness, due process, and safety, stability and well-being of children.

"[A] number of highly significant events occur prior to the initial appearance and prior to the initial appointment of representation for the respondent. All of these events occur on an ex parte basis and many of the events are of a magnitude to shake the family structure of the respondent." Jules Kerness and Constance R. Warden, *Child Protection and the Family Court: A Study of the Processes, Procedures, and Outcomes Under Article Ten of the New York Family Court Act*, pp. 131-132, New York State Senate Committee on Child Care, Sen. Mary Goodhue, Chair (National Center on Child Abuse and Neglect, December 1989); *see also* 1990 Annual Report of the Senate Standing Committee on Child Care, p. 6, *accessible at* https://www.ncjrs.gov/pdffiles1/Digitization/129495NCJRS.pdf.

"A danger exists in child protection cases that personal rights of parents and children will be infringed in the well-intentioned zeal to help children and parents. Even before an attorney is appointed to represent the parents, government intervention in the family may have been initiated that has not been reviewed by any court or magistrate. The goals of the child protection system do not alter the need to recognize and respect the personal integrity and autonomy of parents. Protective State intentions do not justify any relaxation of legal safeguards or procedural protections for parents or children." *ACF Guidelines*, p. VII-8.

"[T]he State cannot presume that a child and his parents are adversaries . . . .[u]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky*, 455 U.S. at 760.

"We conclude that the defendants' threat to remove John Jr. and his sister from the custody of their parents violated the Does' right to familial relations, which includes a liberty interest in the maintenance of the family unit. This protection is especially important where, as here, "we are concerned with the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state. The interest being protected is not only that of the "parent in the 'companionship, care, custody and management of his or her children,' [but also] of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent." *Doe v. Heck***,** 327 F.3d 492 (United States Court of Appeals, 7th Cir., 2003).

C. POLICY: Extra-judicial removal should be a last resort – Nicholson v. Scoppetta, 820 N.E.2d 840 (2004): Article 10 creates a "continuum of consent and urgency and mandate a hierarchy of required review" before a child is removed from home.

- **Consent Removal: FCA §1021** - child may be removed with the written

consent of his parent or other person legally responsible for his care, if the child is an abused or neglected child under this article; "significant because many parents are willing and able to understand the need to place the child outside the home and because resort to unnecessary legal coercion can be detrimental to later treatment efforts."

- **Post petition Removal: FCA §1027**: Section 1027 provides for preliminary orders after the filing of a neglect (or abuse) petition. "Thus, according to the statutory continuum, where the circumstances are not so exigent, the agency should bring a petition and seek a hearing prior to removal of the child."

- **Ex Parte Removal by Court Order - FCA §1022:** If the agency believes that there is insufficient time to file a petition, the next step on the continuum should not be emergency removal, but ex parte removal by court order.

  - "The Practice Commentaries suggest that section 1022 may be unfamiliar, or seem unnecessary, to those in practice in New York City, "where it is common to take emergency protective action without prior court review. . . **Section 1022 ensures that in most urgent situations, there will be judicial oversight in order to prevent well-meaning but misguided removals that may harm the child more than help. As the comment to the predecessor statute stated, "[t]his section ... [is] designed to avoid a premature removal of a child from his home by establishing a procedure for an early judicial determination of urgent need."**

- **Emergency Removal Without Court Order - FCA §1024:** Permits removal without a court order and without consent of the parent if there is reasonable cause to believe that the child is in **such urgent circumstance or condition that continuing in the home or care of the parent presents an imminent danger to the child's life or health, and there is not enough time to apply for an order under section 1022**. Thus, emergency removal is appropriate where the danger is so immediate, so urgent that the child's life or safety will be at risk before an ex parte order can be obtained. The standard obviously is a stringent one. The evidence presented to the court as the basis for removal of a child "should be as reliable and thoroughly examined as possible to avoid unnecessary harm to the family unit."

  Prof. Sobie's Commentary to FCA §1024 - "An emergency removal without court order, pursuant to Section 1024, raises the most serious issues. The decision is made by a child protective service without judicial review or oversight, not to mention an opportunity for the parent to challenge the need for removal. For that reason, the section permits removal only when there exists "an imminent danger to the child's life or

health" [§1024(a)(i)], and "there is not time enough to apply for a [judicial] order under section one thousand twenty-two" [§ 1024(a)(ii)]."

- "The Court also cautioned that the so-called "safe course" theory, whereby Social Service officials (or the Court in a Section 1022 situation) believe it should err in favor of child protection in doubtful circumstances, "should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption". The decision states that when there is insufficient time to file a petition prior to seeking removal (obviously the most preferred route), the agency should whenever possible seek an ex parte court order rather than resort to emergency removal under 1024." (cites omitted).

- *"Nicholson* virtually eliminates the emergency 1024 removal of children in cases where the allegations are limited to emotional harm or the risk of emotional harm to the child who has witnessed or has been in the presence of domestic violence. But the Court of Appeals interpretation affects a far larger number of situations in which a Section 1024 removal may occur. *Nicholson* is clearly applicable in any case where the charge relates to emotional harm, whether caused by or unrelated to domestic violence. The principles are applicable across the board, including cases in which the perceived imminent danger may be physical, although of course an imminent physical danger is more readily apparent and proven (the totally unwatched young child or the severely malnourished child, for example). **Post-Nicholson, Section 1024 should be employed sparingly, but of course remains available when the only plausible alternative to a demonstrably dangerous home is an immediate temporary removal."**

"The plain language of [FCA §1027] and the legislative history supporting it establish that a blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests." *Nicholson v. Scoppetta* at 852.

D. REALITY: <u>Extra-judicial removal is routinely used as first resort</u>.

1. **District of Columbia Citizen Review Panel**, *An Examination of the Child and Family Services Agency's Performance When it Removes Children from and Quickly Returns them to their Families: Findings and Recommendations from the Citizens Review Panel* (September 2011), *accessible a*t http://www.dc-crp.org/Citizen_Review_Panel_CFSA_Quick_Exits_Study.pdf;

2. **Goodhue Report** – "However, the 1027 hearing, as disclosed in this study, is often a vehicle to validate earlier pre-petition removals of children, as described above, (mostly removals without court order pursuant to Family Court Act 1024)."

3. **Family Court Stats on Removals of Children** –overreliance on emergency removals, http://www.courts.state.ny.us/publications/#f1 (Family Law, Family Court Statistics, Tables 10 and 11, Temporary Removal of Children from Home). 2014 numbers show Statewide:

Original NA & NN Petitions – 24,720
Removed – 10,264

FCA §1021 (consent removal) – 1,699 (16.5%)
FCA §1022 (ex parte, nonconsensual court ordered) – 666 (6.5%)
FCA §1024 (extra-judicial agency removal) – 2,750 (27%)*
FCA §1027 (court ordered removal after hearing) – 5,149 (50%)

***** **Note**: Under heading "Removed Pursuant to F.C.A. 1027 (court-ordered removal after hearing) that the numbers *"[m]ay include removals that occurred prior to the hearing on that same day and, therefore, could be considered a 1024 removal.")*

VIII. Best practice is that all parties have access to legal counsel "very early in the state intervention process, but no later than the point at which legal proceedings are initiated." Donald Duquette and Mark Hardin, *Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children*, p. VII-1 (U.S Dep't of Health and Human Services, Administration for Children and Families, Children's Bureau (June, 1999), *accessible at* http://archive.org/details/guidelinesforpub00duqu .

"The earlier appointment occurs, the sooner the interests of the parent begin to be represented. Early appointment may enable the case to proceed faster, minimizing the length of separation between parent and child and clearing the way for delivery of needed services earlier rather than later." Mark Hardin & Susan Koenig, *Early Appointment of Counsel for Parents*, in Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide, U.S. Department of Justice, Office of Justice Programs (2nd Printing, 2009).

A. New York law recognizes value of early entry of counsel for children:

FCA §1016 - court **shall** appoint AFC *at the earliest occurrence of*: the court receiving notice of an extra-judicial emergency removal under Family Court Act §1024; the filing of an application for a pre-petition order of removal under Family Court Act §1022; or the filing of a petition alleging abuse or neglect.

Prof. Merril Sobie's Commentary to FCA §1016: "Section 249 mandates the appointment of a law guardian in every Article 10 case (also referred to as the attorney for the child). Section 1016 prescribes the timing, and is designed to ensure appointment at the earliest possible date, including the pre-petition stage (if the child has been removed or is about to be removed from his home.)"

FCA §1016 was enacted in 1990, based on findings of two year Federal grant study by Senate Standing Committee on Child Care entitled Child Protection and Family Court – A Study of Processes, Procedures and Outcomes Under Article 10 of the New York Family Court Act.

> "Among the findings of the study was that appointment of the law guardian for the child, which is mandated by law, routinely occurred after the filing of the abuse and neglect petition resulting in some cases in substantial adjournments and delays. . . **This bill will provide for the appointment of a law guardian upon the earliest contact of any aspect of the child abuse proceeding with the court (e.g., an emergency removal . . . [i]t is anticipated that increased law guardian involvement will improve the efficacy of the court's orders and more actively protect the best interests of children who should be served by such orders**." Senator Mary B. Goodhue, Sponsor, Memorandum in Support, June 22, 1990.

But for parents:

> **FCA §262 -** "When such person first appears in court, the judge shall advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same."
>
> **FCA §§1021, 1022, 1022-A** – requires notice to parent of right to counsel and procedures to obtain counsel if indigent.
>
> **FCA § 1033-A:** "Initial appearance" means "the proceeding on the date the respondent first appears before the court after the petition has been filed and any adjournments thereof."
>
> **FCA §1033-B**: At the initial appearance, the court shall appoint counsel for indigent respondents pursuant to FCA §262.

B. Ineffective Assistance of Counsel?

Given the significant events that precede a client's first appearance in court, **if a lawyer does not have the opportunity to meet with the parent "well**

before the initial hearing . . . the representation will likely be ineffective." Edwards, *Importance of Early Appointment*.

The Goodhue Report outlined the critical events occurring before petition filed and attorney appointed for parent: "Essentially, these data support a pattern that has been emerging through the previous chapters for the preliminary stages in an Article 10 petition. In many cases, it would appear that the following sequence of events occurs:

• a child is removed from the home on a §1024 emergency removal

• an Article 10 child protective petition is filed with the family court

• a §1027 preliminary order of removal is issued (retro-actively granting judicial approval for the previous removal) along with other preliminary orders, such, as an order of protection

• a child protective summons is served one week after the filing of the petition

• three weeks after the petition was filed, the respondent makes his or her initial appearance in the courtroom

• four days after the respondent first appears in the court, an attorney is appointed for the respondent.

The data show that a number of highly significant events occur prior to the initial appearance and prior to the initial appointment of representation for the respondent. All of these events occur on an *ex parte* basis and many of the events are of a magnitude to shake the family structure of the respondent. Although technically the respondent's due process rights may not be violated by this sequence, the entire procedure raises significant policy concerns which will be explored in the concluding chapter of this report." *Goodhue Report*, pp. 131-132.

IX. Standards-In-Action: Early Involvement of Counsel and Expedited Preparation of Defense

A. CONDUCT AN IN-PERSON INTERVIEW OF THE CLIENT IMMEDIATELY UPON ENGAGEMENT OF COUNSEL.

Counsel should meet sufficiently in advance of the attorney's first appearance in the case. The meeting should take place in a confidential setting (not within earshot of opposing parties, opposing counsel, or the judge). When emergent circumstances necessitate the need to meet

with the client at court, a request for a second call or a continuance may be necessary in order to properly consult with the client.

Unless there is a clear strategic benefit in proceeding, the attorney should oppose on the record the conduct of any hearing for which the attorney and client have not had sufficient time and adequate conditions with which to prepare.
At the initial meeting, counsel should:

1. Explain to the client the role of counsel, the Judge, the County Attorney, the AFC and the presentment agency;

2. Thoroughly explain the confidential nature of attorney-client conversations, and instruct the client not to make statements to anyone concerning the case;

3. Explain the agency's allegations;

4. Ascertain the client's version of the reasons for the agency's intervention and of the events leading to the removal or threatened removal of the client's child.

5. If the child has been removed, determine:

    a. Services provided prior to removal or intervention;

    b. Services that could have prevented the need for removal;

    c. Alternatives to removal, including relative placements, in-home services, or removal of an alleged perpetrator;

    d. Current efforts to reunify the family;

    e. Family history including identify of prior caretakers of the child;

    f. Services needed by the child or client;

    g. The client's concerns about placement;

    h. The client's short and long-term goals; and

    i. Current visitation and the client's desires concerning future visitation.

6. Obtain signed releases from the client for all relevant records.

7. Advise the client of the potential use of this information and the privileges that attach to this information.

8. Advise the client about the merits of the case.

9. Explain what will happen at the hearing, and the potential results legal consequences of such results.

B. PRESERVE ALL CONSTITUTIONAL, STATUTORY, AND REGULATORY RIGHTS OF THE CLIENT

Advise the client of and take action to preserve all of his or her constitutional, statutory, and regulatory rights. As soon as practicable, revoke any waivers of rights and releases of information given by the client without the advice of counsel.

Counsel should advise the client of his or her rights, and discuss the relative advantages and disadvantages of exercising each right, including but not limited to:

1. The right to refuse entry by an agent of the presentment agency or law enforcement without a court order or warrant;

2. The right to refuse to speak to an agent of the presentment agency or law enforcement;

3. The right to refuse testing for drug or alcohol use;

4. The right to have an attorney or advocate at any conference or meeting with an agent of the presentment agency or law enforcement;

5. The right to refuse to sign releases for information about the client or the client's child; and

6. The right to refuse to sign a temporary removal by consent ("three-day hold") pursuant to Family Court Act §1021.

The attorney should counsel the client about the relative advantages and disadvantages of exercising these rights. For example, even though the parent's cooperation with agents of the presentment agency or law enforcement could prevent the filing of a petition or the removal of the client's child, it may be too early in the investigation for the parent and attorney to able to anticipate fully how such cooperation may impact the client's interests and goals long term.

The attorney should immediately communicate with the agency concerning the parent's exercise of his or her rights and revoke any waivers given by the client without the advice of counsel as soon as practicable.

Considerations to take into account when assessing whether the client should waive any rights include:

1. The pendency of or potential for criminal charges and the severity of the potential penalties;

2. The weight of the known and potentially available admissible evidence in support of the presentment agency's theory of the case;

3. Whether the child has been removed, and, if so, whether there has been a "pre-adoptive placement", relative, or other type of placement;

4. Whether leniency (such as an ACD or the return of a removed child) in exchange for cooperation with the presentment agency is a realistic enforceable expectation;

5. Whether a petition has already been filed; and

6. The type and severity of the factual allegations.

Serious deliberation and the client's informed consent are required before any of these rights can be waived. The potential long-term consequences to the parent may be too serious to justify a waiver in the absence of a concrete, enforceable benefit in exchange. Even during the preliminary stages of an investigation and court proceedings, each waiver of rights without the receipt of a tangible benefit in return can swiftly and irrevocably bring the client closer to a termination of parental rights proceeding for which there is little or no defense.

C. ASSESS THE CLIENT'S NEEDS AND SECURE APPROPRIATE SERVICES

Make or obtain an assessment of necessary and appropriate services, and secure or make timely referrals to appropriate service providers.

Early and on-going identification and provision of services specifically tailored to ameliorate the conditions which resulted or may result in the need for placement of the child are critically important during a child protective investigation and at all stages of a state intervention case. Appropriate services can prevent removal or lead to speedy reunification of the family. Thus, the attorney should begin as early as possible to vigorously advocate for appropriate services. See Regulations of the Department of Social Services, 18 N.Y.C.R.R. 423.2.[1]

[1] The regulations define "preventive services" broadly to mean "those supportive and rehabilitative services provided to children and their families . . . for the purpose of: averting a disruption of a family which will or could result in placement of a child in foster care; enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care." The types of services listed include: educational counseling and training, vocational diagnosis and training, employment counseling, therapeutic and preventive medical care and treatment, health counseling and health maintenance services, vocational rehabilitation, housing services, speech therapy and legal services; day care services; homemaker services; housekeeper/chore services; family planning services; home management services; clinical psychotherapy, psychological or psychiatric services; parent aide services; day services to children; parent training; transportation services; emergency cash or goods; emergency shelter; and housing services, including rent subsidies, payment of rent arrears, security deposits; finder's or broker's fees; household moving expenses; exterminator fees; mortgage arrears on client owned property which place the family at imminent risk of losing their home; and/or essential repairs of conditions in rental or client owned property which create a substantial health or safety risk.

When the child welfare agency is required by law to provide or secure these services pursuant to its obligation to make reasonable efforts to prevent removal or to reunify a child with its family, the attorney should vigorously advocate with the agency and the court to enforce this obligation. The attorney should also make independent, timely, and appropriate referrals for services for the client to expedite the client's progress in services and to support meritorious theories of the case in opposition to the presentment agency.

D. ENFORCE THE CLIENT'S RIGHT TO AN IMMINENT RISK HEARING

Assert and protect the client's right to an "imminent risk hearing" pursuant to Family Court Act §§1022, 1027, or 1028, as appropriate, unless the client waives the right upon informed consent.

An imminent risk hearing is an event of crucial strategic importance in child welfare cases. Because of the potential for serious intrusion into the parent-child relationships and for the safety and well-being of the child, due process demands that clients receive diligent, zealous representation of counsel at such hearings. This is true whether the client supports or opposes a temporary transfer of custody.

1. General Considerations:

a. Postponement by Court: The trial court may inform counsel of the need to postpone an imminent risk hearing. If such a continuance is inconsistent with the client's interests or goals, counsel should object to any such postponement. If necessary, counsel should consider pursuing the client's rights to a timely hearing by taking an interlocutory appeal.

b. Continuances: In some instances, counsel may not receive notification of his or her assignment in time to prepare adequately to represent the client at an imminent risk hearing. Should this occur, counsel should advise the client of the need for additional time to prepare. Provided that the benefit of a continuance outweighs the prejudice of not going forward, counsel should object to proceeding with the hearing and seek a short continuance, if the client consents.

c. Denial of Right to Hearing: If the court denies a client the right to an imminent risk hearing, and such denial is inconsistent with the client's interests and goals, counsel should consider enforcing the client's right to a hearing by taking an appeal from this intermediate order.

d. Presence of Client. If a client is not present at an imminent risk hearing because of improper notice by the court of the presentment agency, counsel should object to proceeding without the client and preserve the client's right to a hearing. If a client is incarcerated or involuntarily committed, counsel should file a habeas corpus petition seeking transportation for the client to court. If such a petition is impracticable or a habeas order is unenforceable (as it may be in cases where the client is incarcerated outside the state or in the federal system), counsel must file a motion asking the court to accommodate the client's right to participate in the proceedings through closed circuit television, telephone, or by some other means.

e. Counsel Without Direction from Client: If counsel is without direction as to the client's goals at the hearing, he or she should protect and preserve the client's due process rights. Depending on the circumstances, counsel should consider a request for a postponement of the hearing, or take such other steps as are necessary to preserve the client's right to an imminent risk hearing.

2. The Imminent Risk Hearing

A. Preparation for the Imminent Risk Hearing

Consistent with the client's interests and goals, thoroughly prepare for and actively participate in the imminent risk hearing unless there is a sound tactical reason not to do so.

Active participation by counsel in the imminent risk hearing is essential to protect the client's rights and interests, and to advance the client's goals in the case. The imminent risk hearing "is a critical stage of child abuse and neglect litigation, in that it can affect the ultimate outcome of the case . . . [a]ctive and effective representation of the parents is important to ensuring that the emergency removal hearing fulfills its functions."[2] Counsel should take all necessary and appropriate steps to prepare for such hearings, including but not limited to:

1. Conduct a preliminary investigation and obtain any necessary and beneficial discovery. If necessary, seek a brief adjournment of the hearing or negotiate a temporary order while preserving the client's right to an imminent risk hearing to allow for adequate investigation prior to the hearing.

2. Ascertain the client's goals and the best strategy for achieving those goals, including challenging the evidentiary basis for the allegations in the petition; presenting evidence of other appropriate means to protect the child; and offering appropriate relative placements for consideration. Counsel should consider the tactical advantages and disadvantages of contesting the factual allegations at such an early stage in the proceedings, including the possibility that the client may be prejudiced by evidence that is elicited.

3. Develop a theory of the case.

4. Ensure that an incarcerated client is present, or arrange for participation of the client by appropriate means, according to his or her wishes.

5. Prepare the client for the hearing. Discuss client's right to refuse to give certain testimony under the U.S. and New York State constitutions, and any

[2] U.S. Department of Justice, Office of Justice Programs, *Early Appointment of Counsel for Parents*, p. 101, Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide (2008).

applicable presumptions in the absence of the client's testimony. If the client will testify, prepare the client for testimony.

6. If consistent with the client's interests and goals, identify and interview potential witnesses, prepare such witnesses for the hearing, and subpoena documents and/or witnesses to appear at court for the hearing.

7. If consistent with the client's interests and goals, identify the child's other parent, relatives, family friends, or other persons who are potential placement or custody options. Take such steps as may be necessary to offer such persons to the agency and/or to the court for placement or custody options.

8. Consult with any immediately available experts to determine what services should be provided to prevent a removal or enable the child to return home. Determine whether these services are available in the community and whether they can be provided by the agency.

9. Attempt to contact individuals who have had contact with the family and can testify to the efforts the agency made (or did not make) to keep the child in the home, or who can testify to services that should have been provided but were not. If appropriate, subpoena these witnesses to testify at the hearing.

B. Imminent Risk Hearing Issues

Where appropriate, seek to admit evidence demonstrating:

1. Jurisdictional sufficiency of the allegations in the petition;

2. Adequacy of notice provided to parties;

3. The absence of safety factors requiring removal;

4. The lack of reasonable efforts by the presentment agency to eliminate the need to remove the child;

5. That the alleged imminent risk of harm to the child from remaining with the client does not outweigh the harm that removal might cause the child;

6. The alternatives to placement, such as release to the non-custodial parent, a relative placement, or intensive in-home services;

7. The placement proposed by the client is the least disruptive and most family-like setting that meets the needs of the child; and

8. It is in the best interests of the child to remain with the client.

C. Conclusion of the Imminent Risk Hearing

1. Request a written court order for all necessary services. In the event the court will not issue a written order, request that the agency place on the record a statement of all services it asserts are required to prevent a removal or for the child to be returned.

2. If the court grants the agency's request for removal:

    a. Challenge unnecessary supervision and restrictions on visitation (advocating for the least intrusive supervision);

    b. Advocate for the most liberal and extensive visitation (not limited by caseworker availability); and

    c. Request an order directing an agency investigation of relatives and suitable individuals to be considered for placement.

3. Request scheduling and notice of case plan meeting;

4. Request the date and time for the fact-finding and permanency hearings; and

5. Make any and all appropriate motions and submit legal memoranda, including but not limited to motions regarding:

    a. Relative and other suitable person placement or custody for the child;

    b. Provision of "Family–Friendly" visitation arrangements; and

    c. Assertion of privileges and confidential relationships.

D. Post Imminent Risk Hearing:

1. Advise the client of the right to appeal an adverse intermediate order;
2. Assist the client with effectuating an intermediate appeal of an adverse order;
3. Monitor the implementation of any intermediate order;
4. Ensure that agreed upon or court ordered services are being provided by the responsible agencies; and
5. File any and all appropriate motions and legal memoranda, including but not limited to motions regarding:

    a. Relative or other suitable person placement or custody for the child;

b. Provision of the least restrictive necessary "Family–Friendly" visitation;
c. Assertion of privileges and confidential relationships;
d. Dismissal of the petition (or striking of one or more allegations);
e. Pre-trial discovery;
f. The admission, exclusion, or limitation of evidence;
g. Services including (but not limited to):

- Assessments (Psychological and Substance Abuse)
- Housing
- Case Management Services
- Mental Health Counseling or Treatment (Individual & Family)
- Substance Abuse Treatment
- Parenting Skills Training
- Parent Aide
- Parenting Coach
- Visitation
- Anger Management classes
- Domestic Violence counseling or classes
- Transportation
- Medical insurance
- Income maintenance

h. To vacate or modify any prior temporary order of placement, visitation or order of protection; and
i. To terminate placement.

CONCLUDING REMARKS

Q & A

Thank you for your interest and attention! Please feel free to contact us with any comments, questions, suggestions, etc. at:

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INTERSECTION OF CRIMINAL FAMILY AND IMMIGRATION PROCEEDINGS

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Supervising Immigration Attorney
Erie County Bar Association
Volunteer Lawyers Project

Joanne Macri, Esq.
Director of Regional Initiatives
NYS Office of Indigent Leal Services

Part I of this session will focus on the immigration consequences that may arise during the representation of noncitizen clients in family and criminal court proceedings with information on how to alleviate or eliminate those consequences through direct criminal or family court representation.

Part II will focus on the types of immigration relief (i.e., Special Immigrant Juvenile Status, Domestic Violence waivers – cancellation of removal, VAWA, U and T visas,) and other waivers, visas and forms of relief that may be available in immigration proceedings to protect the noncitizen client from possible removal from the United States.

PART I

INTEGRATING IMMIGRATION INTO FAMILY LAW: THE PATHWAY TO PADILLA

OUTLINE

Submitted by:
Joanne Macri, Esq.
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INTERGRATING IMMIGRATION INTO FAMILY LAW:
THE PATHWAY TO *PADILLA*

OVERVIEW OF THE PRESENTATION:

PART I: (PRESENTED BY Joanne Macri)
Applying principles introduced in *Padilla v. Kentucky* to address issues involving potential unintended immigration consequences for noncitizen clients dealing with family law offenses, juvenile proceedings and custody and matrimonial matters.

PART II: (PRESENTED BY Sophia Feal)
Discussing several immigration remedies (i.e., relief available to alleviate or avoid removal) available in domestic violence cases.

I. LEARNING FROM THE PADILLA PRINCIPLES

The Supreme Court issued a landmark decision on March 31, 2010 regarding the Sixth Amendment right to counsel. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that, pursuant to the Sixth Amendment, criminal defense counsel has a **duty to provide affirmative and competent advice** to a noncitizen defendant regarding the immigration consequences of a guilty plea. **Absent such advice,** the noncitizen client may raise a **claim of ineffective assistance of counsel.**

THE "TAKE AWAYS": WHAT HAS *PADILLA* TAUGHT US?

- **Clients are entitled to affirmative, competent advice as to the immigration consequences of a particular legal (i.e., criminal or family) matter**

    - **NY Lawyer's Code of Professional Responsibility - Duty of the Lawyer**
      EC 7-8: A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

- **Deportation is a Penalty!**
  - The consequence of possible civil immigration detention leading up to removal and permanent expulsion from the U.S. is more than just a collateral consequence – it is a PENALTY.
  - Padilla references deportation as a "particularly severe penalty"

- **Remaining silent as to immigration consequences may no longer be an option when providing effective assistance of counsel**

  - The Court expressly rejected option of limiting application of *Strickland* to claims of affirmative misadvice recognizing that a "holding limited to affirmative misadvice…would give counsel an incentive to remain silent on matters of great importance…when answers are readily available."

- **Preserving the client's right to remain in the U.S. may be more important to the client than any potential jail sentence."**

  - The duty of effective assistance of counsel pursuant to the Sixth Amendment includes providing affirmative, competent advice and seeks ways of **preserving discretionary relief from deportation** for a noncitizen defendant.
  - "[P]reserving the possibility of discretionary relief from deportation…would have been one of the principle benefits sought by defendants deciding whether to accept a plea offer or instead of proceed to trial."

- **"Informed consideration" of deportation consequences may be necessary in client negotiations and case resolutions**

  - The Court recognized the benefits and importance of considering the immigration consequences during negotiations between defense counsel and opposing counsel and the court.

- **Effective Assistance should incorporate accepted professional standards**

  - Professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to citizenship/immigration status.
  - The USSC in *Padilla* cited to professional standards of the American Bar Association and the National Legal Aid and Defender Association in establishing the duty to (1) be informed of a client's immigration status and when possible to investigate and advise on possible immigration consequences.

II. HOW TO ADDRESS IMMIGRATION CONSEQUENCES IN FAMILY LAW MATTERS:

- **STEP ONE: COMMIT TO THE CAUSE: CREATE AN OFFICE POLICY, PROCEDURE OR PROTOCOL TO ADDRESS THE LEGAL REPRESENTATION OF A NONCITIZEN CLIENT**

    - Design & Implement a Screening Method to Identify the Immigration Status of All Clients – Consult "Protocol for the Development of a Public Defender Immigration Service Plan" written by Peter Markowitz, NYSDA and IDP and published at www.nysda.org.
    - Create and Follow an Immigration Worksheet When Representing a Noncitizen Client.
    - When necessary, schedule a consultation with an Immigration Expert **Before Accepting Any Offers** On Behalf of a Noncitizen Client – See "Helpful Resources" below.

- **STEP TWO: CONDUCT A PRELIMINARY ASSESSMENT OF YOUR CLIENT'S IMMIGRATION STATUS - Investigate the Facts**

    - Identify client's Immigration Status – obtain client's Alien Registration Number (8 or 9 digit number assigned by immigration authorities beginning with the letter "A"), if available
    - Identify if client at risk for removal from the United States – includes anyone who is NOT a United States citizen
    - Learn of client's U.S. Family Ties – obtain information relating to U.S. immigration status of grandparents, parents, spouse, partner and children
    - Inquire into client's length of residence in the United States – including any dates of departures from the U.S. since first arrival
    - Determine client's duration of immigration status in the United States – determine if client has any upcoming expiration dates of status
    - Determine if there is any lodged ICE/immigration Detainer against your client
    - Review with client any pending or prior immigration matters/applications and/or any prior criminal history (i.e., that may trigger immigration enforcement directly related or unrelated to the family matter)

Hint: Helpful Questions to Ask:
Where were you born?
When did you first come to the United States?
How did you enter the United States?
What documents, if any, did you receive from immigration authorities after you arrived to the United States?

- **STEP THREE: DETERMINE YOUR CLIENTS GOALS (IMMIGRATION AND NON-IMMIGRATION) AS TO RESOLVING THE FAMILY MATTER**

    - Prioritize client's goals and represent your client according to his/her defense priorities.
    - Preserve eligibility to get future immigration benefits, when possible.

- **ANALYZE THE IMMIGRATION CONSEQUENCES**

    - Determine likelihood that allegations or admissions may trigger removal or other immigration consequences
    - Advise client of these consequences
    - When possible, seek alternative measures that will alleviate or avoid the potential for immigration consequences
    - Seek assistance on immigration analysis, when necessary
    - Educate opposing counsel and/or the court on possible unintended immigration consequences (i.e., only after client consent to do so and if it is likely to support your client's outcome goals

III. IDENTIFYING CLIENT'S NEEDS: ESTABLISHING PROTOCOL AND PRACTICES

- **CITIZENSHIP** or **NATIONALITY**
- **IMMIGRATION STATUS** and/or **PENDING IMMIGRATION APPLICATIONS**
- **MANNER OF ENTRY** and **LENGTH OF TIME** in the U.S. (i.e., first and last trip into the U.S.)
- Any **PRIOR FAMILY LAW VIOLATIONS** and/or **CRIMINAL HISTORY**
- Any "**IMMEDIATE FAMILY**" in the U.S.

DETERMINING IMMIGRATION STATUS OF CLIENT

- As a standard preliminary inquiry when representing *any* new client, an attorney should determine whether the client is a U.S. citizen or not. Whether a client is subject to removal or the other possible negative immigration consequences of a family law case depends entirely on whether the client is a U.S. citizen or other "national" of the United States.
  (Note: "National" is the broader term that includes not only a U.S. citizen but also a person who, though not a citizen, "owes permanent allegiance" to the United States, such as persons born in "outlying possessions" of the United States.)

- Do not make the U.S. citizenship inquiry only with respect to those who appear or sound "foreign," as many noncitizens may not look foreign to you and may have no accent whatsoever. In fact, many noncitizens have lived

virtually their whole lives in the United States. Everybody else in their families may be a citizen. However, either by choice or oversight, their parents or they themselves may have never filed the necessary paperwork for them to obtain citizenship.

- If your client is a U.S. citizen, s/he will not be subject to removal from the country. This is true even if your client was born outside the United States and immigrated to this country as long as, at some point, s/he naturalized and became a U.S. citizen.

- If your client is not a U.S. citizen, however, s/he may be subject to removal and the other possible immigration-related consequences of criminal proceedings even if s/he is here in the United States lawfully and has been here lawfully for decades.

DETERMINING U.S. CITIZENSHIP

- Generally, your client is a U.S. citizen and *not* subject to removal if s/he was:

  - Born in the United States, Puerto Rico, the U.S. Virgin Islands, Guam, or American Samoa and Swains Island, or

  - Born outside the United States but "acquired" U.S. citizenship automatically at birth through birth to U.S. citizen parent(s), or

  - Born outside the United States but "derived" U.S. citizenship during childhood through naturalization of parent(s) as U.S. citizen(s) before your client reached age 16, 18, or 21 depending on the law in effect at the time, or

  - Born outside the United States but "naturalized" as a U.S. citizen (either by your client's own application as an adult, or during your client's childhood by application of a U.S. citizen parent, generally followed by a swearing in ceremony).

- Adoption of Foreign Born Children and U.S. Citizenship

  - **GENERAL RULE:** Petitioning for permanent resident status or acquiring citizenship through a U.S. citizen parent may depend upon lawful adoption – legal adoption must be **before** the child is 16 years of age (INA §101(b)(1)(E); 8 U.S.C. §1101(b)(1)(E))

    (**Note:** natural parents of adopted child cannot obtain immigration benefits through natural child if adopted pursuant to INA §101(b)(1)(E); 8 U.S.C. §1101(b)(1)(E))

- Child Citizenship Act
  - The law on acquisition and derivation of citizenship at birth is complicated and depends on what the law was at the time of your client's birth (for acquisition of citizenship), or at the time of the naturalization of your client's parent(s) or of your client's lawful admission for permanent residence, whichever came later (for derivation of citizenship).

- Which Children Automatically Become Citizens Under the New Law?
  - Beginning February 27, 2001, certain foreign-born children—including adopted children—currently residing permanently in the United States will acquire citizenship automatically. The term "child" is defined differently under immigration law for purposes of naturalization than for other immigration purposes, including adoption. To be eligible, a child must meet the definition of "child" for naturalization purposes under immigration law and must also meet the following requirements:
    - The child has at least one United States citizen parent (by birth or naturalization);
    - The child is under 18 years of age;
    - The child is currently residing permanently in the United States in the legal and physical custody of the United States citizen parent;
    - The child is a lawful permanent resident;
    - An adopted child meets the requirements applicable to adopted children under immigration law.
    - Acquiring citizenship automatically means citizenship acquired by law without the need to apply for citizenship. A child who is currently under the age of 18 and has already met all of the above requirements will acquire citizenship automatically on February 27, 2001. Otherwise, a child will acquire citizenship automatically on the date the child meets all of the above requirements.

WHO IS SUBJECT TO REMOVAL
Any individual client who is NOT a U.S. Citizen!

- **"Alien"** is defined in 8 U.S.C. 1101 is any person who is not a citizen or national of the U.S.

The following is a limited listing of the various types of immigration status that may be encountered when representing noncitizen clients:

- "**Immigrant**" – person residing in the U.S. on a permanent basis (i.e., also known as a "lawful permanent resident ("LPR" or "green card holder").

- "**Nonimmigrant**" – person lawfully admitted to the U.S. by CBP for a temporary period of time to engage in a temporary activity (i.e., visitor, student, temporary worker, diplomat, as defined in 8 USC §1101(a) (15)).

- "**Visa-overstay**" – person was lawfully admitted to the U.S. and has overstayed or has not complied with the conditions of his/her immigration status.

- "**Undocumented**" – person who was not inspected and lawfully admitted to the U.S. by CBP – including, but not limited to, individuals who are admitted to the U.S. under false identification or physically enter the U.S. at a place that is not a designated U.S. port of entry or and those who enter the U.S.

- "**Refugee and Asylee**" - Refugee status or asylum may be granted to people who have been persecuted or fear they will be persecuted on account of race, religion, nationality, and/or membership in a particular social group or political opinion. Refugee status is a form of protection that may be granted to people who meet the definition of refugee and who are of special humanitarian concern to the United States. Refugees are generally people outside of their country who are unable or unwilling to return home because they fear serious harm as defined in 8 U.S.C. 1101(a)(42). Refugees are granted entry to the U.S. after being classified abroad as refugees under UNHCR standards and guidelines. Asylum status is a form of protection available to people who meet the definition of refugee who are already in the U.S. or seeking admission at a U.S. port of entry. In order to be granted asylum, he/she must establish a timely filing of the request for asylum and that he/she has a fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion. Both refugee status and asylum provide a path to LPR status.

- "**Other**" – include individuals who are in the U.S. without lawful immigration status but are permitted to remain either permanently or temporarily under humanitarian relief that is not related to refugee or asylum status in the U.S. Often times, attorneys will encounter individuals who are in the U.S. without authorization/undocumented. It is especially important to screen undocumented individuals because a family court determination may prohibit potential immigration benefits that are unknown to exist to the client. Immigration benefits can include, but not be limited to, eligibility for the following:

    - **Temporary Protected Status** – DHS may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. (i.e., from Haiti, El Salvador, Honduras, Nicaragua, Somalia, Sudan, South Sudan and Syria).

    - **Battered Spouse, Children and Parents** - granted temporary protection under VAWA. VAWA provisions in the INA allow certain spouses,

children, and parents of U.S. citizens and permanent residents (Green Card holders) to file a petition for them, without the abuser's knowledge. This allows victims to seek both safety and independence from their abuser, who is not notified about the filing.

- **Victims of Human Trafficking and other Crimes** – DHS will issue special visas to protect victims of human trafficking (T visas) and other crimes (U visas) by providing immigration relief. Human trafficking is defined as a form of modern-day slavery in which traffickers lure individuals with false promises of employment and a better life. Individuals and their families may also obtain a U visa if victim to many types of crime in the United States which include, but are not limited to crimes of rape, murder, manslaughter, domestic violence, sexual assault, robbery, etc.

- **Deferred Enforced Departure** – certain individuals offered deferred prosecution or for those ordered removed and placed on an order of supervision or are offered "parole" to remain in the U.S. indefinitely (i.e., Mariel Cubans/"Marielitos" and citizens of Vietnam and Laos (i.e., who entered the US pre-1996 and subject to Vietnam MOU with DHS).

- **NACARA** - applies to certain individuals from Guatemala, El Salvador, and the former Soviet bloc countries who entered the United States and applied for asylum by specified dates or registered for benefits under the settlement agreement in the class action lawsuit American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (ABC).

- **Deferred Action for Childhood Arrivals** (DACA) - certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not provide an individual with lawful status. DACA requires the following eligibility criteria:

    - **Under 31 years of age** as of June 15, 2012
    - Arrived in the U.S. while **under 16 years of age**;
    - Continuously resided in the U.S. since **June 15, 2007 to present time;**
    - Present in the U.S. on **June 15, 2012**;
    - Currently **in school**, have **graduated** or obtained a certificate of **completion or a GED** or an honorable discharge from the **Coast Guard or Armed Forces;**
    - **No valid immigration status** as of **June 15, 2012;** and

- **Not** convicted of a **felony, a significant misdemeanor, or 3+ misdemeanors**) or posing a **threat to public safety** or **national security** (i.e., gang membership).

SAMPLES OF IMMIGRATION IDENTIFICATION – AND HOW TO INTERPRET THEM FOR SCREENING

PERMANENT RESIDENT CARD – identifies lawful permanent resident status. The Permanent Resident card is issued in 10-year increments. It is important to note the File Number ("A" number that is an 8 or 9 digit number beginning with the letter "A") assigned on the front of the card as that file number will provide access to immigration history of any client who has a pending or prior immigration proceeding. It also important to note the issuance and expiration date that is necessary when computing possible immigration consequences regarding deportation grounds of removal.

EMPLOYMENT AUTHORIZATION DOCUMENT – is commonly issued to individuals who have pending immigration applications of relief/immigration status (i.e., pending adjustment of status, asylum or other types of immigration applications that allow for temporary employment pending adjudication) or the card may indicate some form of humanitarian relief that has been granted (i.e., Temporary Protected States, DACA, relief pursuant to the U.N. Convention Against Torture Treaty, U visa- victim of crime, T visa-human trafficking victim, etc.). It is important to note the "category" code of employment on the card as that category may be located in the employment authorization form instruction booklet available at www.uscis.gov which will identify the type of immigration status issued to the client.

"CONDITIONAL" LAWFUL PERMANENT RESIDENT CARD – This sample document identifies the importance of reviewing client immigration documentation or copies thereof when representing a client in a family law matter. A "conditional" lawful permanent resident will receive a "temporary" Permanent Resident card that has a 2-year rather than the normal 10-year expiration date on the front of the card. Conditional lawful permanent resident status is often available to individuals who have obtained their lawful permanent resident status based on marriage to a U.S. citizens that is less than 2 years old at the time of applying for lawful permanent resident status.

IV. IDENTIFYING IMMIGRATION AUTHORITIES – STAKEHOLDERS IN THE PROCESS OF ENFORCEMENT (VISUAL MAP)

➢ U.S. DEPARTMENT OF HOMELAND SECURITY

As of March 1, 2003, the U.S. Department of Homeland Security (DHS) became responsible for the duties formerly undertaken by the U.S. Immigration and Naturalization Service (INS). DHS has several branches of agencies that are involved in immigration matters which include, but are not limited to the following:

- **U.S. CITIZENSHIP AND IMMIGRATION SERVICES (CIS)** – responsible for adjudicating all affirmatively-filed immigration applications from within the United States. For family court purposes, these applications include Special Immigrant Juvenile Status (SIJS) applications, immigrant visa petitions (i.e., to petition or to benefit from a family-based application for immigrant/LPR status, VAWA-based and other types of waivers designed to excuse/waive any issue that may make a person inadmissible to enter or to remain in the US, LPR and citizenship applications, humanitarian applications (i.e., asylum, withholding of removal, protection under the UN Convention Against Torture Treaty), nonimmigrant visa applications (i.e., for those having to enter or to remain in the US for a temporary period of time for a specific reason).

- **U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)** – responsible for immigration enforcement of violators of U.S. immigration law. ICE's primarily responsibility is to detect, apprehend, detain, charge and prosecute and, if applicable, remove any individual not in compliance with U.S. immigration laws. For purposes of family court proceedings, ICE is sometimes contacted to report an individual who is in the U.S. in violation of immigration laws. Most often, however, ICE is involved when a foreign person does not renew his/her temporary green card (i.e., while on conditional LPR status) following 2 years of marriage to a U.S. citizen. Most frequent occurrences follow a divorce proceeding. If LPR status is not removed in a timely fashion, the LPR will be charged with removal for remaining in the U.S. without valid immigration status. ICE will also be involved in issuing "parole" status to individuals who are removed from the U.S. but are seeking temporary entry into the U.S., usually under safeguard, to attend a family court custody proceeding. ICE will often work with U.S. Customs and Border Protection to secure the temporary entry of the individual into the U.S. under ICE security.

- **U.S. BORDER PATROL – U.S. CUSTOMS AND BORDER PROTECTION (CBP)** – responsible for determining the admissibility of every person seeking lawful admission to the U.S. These officers are stationed at U.S. ports of entry. CBP will conduct inspections of each individual and of all goods that are seeking to enter the U.S. to determine if lawful admission should be granted or denied. CBP has authority to refuse a person's lawful admission or physical entry even if the individual has been granted a visa or a parole document to enter the U.S. by another federal agency.

- **U.S. DEPARTMENT OF JUSTICE**

  - **EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)** – responsible for adjudicating all removal hearings in immigration court and on appeal before the administrative panel of judges compiling the Board of Immigration Appeals (BIA).

- **U.S. STATE DEPARTMENT**
  - **NATIONAL VISA CENTER & U.S. CONSULATES** – responsible for issuing both immigrant (permanent residence) and nonimmigrant (temporary admission) visas to foreigners wishing to be admitted to the United States. The State Department is also responsible for the adjudication of family-based immigrant petitions (i.e., LPR petitions) for family-members residing outside of the U.S. who wish to join their family members within the U.S. Consulates are responsible for adjudicating all U.S. immigration visa applications for persons residing abroad.

- **U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES**
  - **OFFICE OF REFUGEE RESETTLEMENT (ORR)** - Will oversee all matters involving unaccompanied noncitizen children in the U.S. who are placed into immigration detention status awaiting removal proceedings. U.S. Dept. of Health and Human Services is also responsible for all medical examinations required for visa processing and for regulations relating to medical inadmissibility to the U.S. (i.e., setting vaccination requirements and establishing grounds of inadmissibility to the U.S. for diseases such as AIDS, active TB, syphilis, etc.).

- **U.S. DEPARTMENT OF SOCIAL SERVICES**
  - DSS works in collaboration with DHS to determine lawful immigration status to establish eligibility for federal benefit programs.

- **U.S. DEPARTMENT OF LABOR**
  - DOL will often be involved in determining periods of unlawful employment that may be used to prohibit granting LPR status. DOL is also responsible for providing employment verification and approving labor condition and labor certification applications for immigrants wishing to be admitted to the U.S. for temporary or permanent employment opportunities.

V. IMMIGRATION ENFORCEMENT – AS IT PERTAINS TO FAMLY LAW OFFENSES

Sophie Feal will be discussing the various immigration remedies in domestic violence cases in the second half of the presentation. The following is a discussion of the negative immigration consequences that may result from a family law offense.

REFERRAL TO THE IMMIGRATION CONSEQUENCES SUMMARY OF CONVICTIONS SUMMARY CHECKLIST AS A VISUAL AID (applies primarily to "convictions" in criminal court or IDV court but also includes family law offenses as they related to crimes of domestic violence)

INTERPRETING THE CHART

Chart is separated into "criminal" grounds of deportation (found at 8 USC § 1227 – Deportable Aliens) and "criminal" grounds of inadmissibility (found at 8 USC §1182 – Inadmissible Aliens) that support a basis for removal.

CRIMINAL GROUNDS OF DEPORTATION

- **AGGRAVATED FELONY OFFENSES -** FAMILY LAW OFFENSES THAT MAY BE REFERRED FOR CRIMINAL PROSECUTION

Aggravated Felony Conviction – "Aggravated Felony" defined in 8 USC §1101(a)(43) which, if convicted, will make the client permanently ineligible for most waivers of removal, voluntary departure and will subject the client to mandatory immigration civil detention pending the client's likely removal from the U.S. and permanent inadmissibility as well as significant criminal penalties if subsequently prosecuted and convicted of illegal reentry after removal from the U.S. (i.e., up to 20 years imprisonment). The crimes covered do not necessarily involve felony convictions (i.e., such as sexual abuse of a minor misdemeanor offenses).

NY Family Law § 812.Procedures for family offense proceedings – Jurisdiction:
The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning family law offenses. Family law offenses that are subsequently referred for criminal prosecution and result in a criminal conviction will result in an aggravated felony ground for removal include the following:

- AGGRAVATED CONVICTION OF "Sexual Abuse of a Minor" (pursuant to 8 USC §1101(a)(43)(A) and 8 USC §1227(a)(2)(A)(iii))
  sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree §130.60(1)

- AGGRAVATED CONVICTION for a "Crime of Violence" if a sentence of 1 year or more of imprisonment is imposed (pursuant to 8 USC §1101(a)(43)(F) and 8 USC §1227(a)(2)(A)(iii))
  stalking in the first degree, stalking in the second degree, stalking in the third degree, criminal mischief, menacing in the second degree, (intentional) assault in the second degree and attempted assault (intentional) assault in the third degree,

- AGGRAVATED CONVICTION for a "Theft Offense**"** if a sentence of 1 year or more of imprisonment is imposed (pursuant to 8 USC §1101(a)(43)(G) and 8 USC §1227(a)(2)(A)(iii))

  identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree

- AGGRAVATED CONVICTION for an "Offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000**"** (pursuant to 8 USC §1101(a)(43)(M)(i) and 8 USC §1227(a)(2)(A)(iii))

identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny (i.e., theft by fraud) in the fourth degree, grand larceny (i.e., theft by fraud) in the third degree

- AGGRAVATED CONVICTION for an "offense relating to forgery)**"** if a sentence of 1 year or more of imprisonment is imposed (pursuant to 8 USC §1101(a)(43)(R) and 8 USC §1227(a)(2)(A)(iii))

- FAMILY LAW OFFENSES THAT IF REFERRED FOR CRIMINAL PROSECUTION AND RESULTING IN A CONVICTION CAN RESULT IN A CHARGE OF DEPORTATION AND REMOVAL FOR "**CRIMES INVOLVING MORAL TURPITUDE**" as follows:

Conviction of a crime involving moral turpitude committed within five years of admission to the United States and punishable by a year in prison (8 USC
This immigration law term-of-art could include crimes in many different New York offense categories, e.g., crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses); crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses); and most sex offenses. In New York, Class A misdemeanors as well as felonies are punishable by a year so they could, if deemed to involve moral turpitude, make your client deportable if s/he committed the offense within five years after admission.

CIMTs covers crimes in many different criminal offense categories, including but not limited to:

- Crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses);
- Crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by an act of recklessness(such as murder, rape, and certain manslaughter and assault offenses); and
- Most sex offenses.

DEPORTABLE FOR CIMT: if committed within five years of the date of the resident's admission to the United States

or

DEPORTABLE FOR TWO OR MORE CIMTS, whether felony or misdemeanor, committed at any time and regardless of actual or potential sentence.

(ex. harassment in the first degree, harassment in the second degree (sub 1)
aggravated harassment in the second degree,
sexual misconduct,
forcible touching,
sexual abuse in the third degree,

sexual abuse in the second degree 130.60(1),
stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree,
criminal mischief (except (subsection 3),
menacing in the second degree, menacing in the third degree,
criminal obstruction of breathing or blood circulation,
strangulation in the second degree, strangulation in the first degree (appealed)
assault in the second degree, assault in the third degree, an attempted assault (except reckless assault subsection),
identity theft in the first degree, identity theft in the second degree, identity theft in the third degree,
grand larceny in the fourth degree, grand larceny in the third degree or

DOMESTIC VIOLENCE OFFENSES

Conviction of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, whether felony or misdemeanor, or a finding of a violation of an order of protection, whether issued by a civil or criminal court.

A CODV includes any crime of violence against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with person as a spouse, or other similarly situated individual.

Under certain circumstances, the CODV, stalking, and violation of order of protection deportation grounds may be waived when the individual himself or herself has been battered or subjected to extreme cruelty and is not and was not the primary perpetrator of violence in the relationship. Note: These grounds only apply to convictions or violations occurring on or after October 1, 1996.See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 350(b), 110 Stat. 3009-546 (1996).

COV Includes offenses with **ALL** of the following elements:
(1) a conviction;
(2) after lawful admission to the U.S.;
(3) occurring "after" September 30, 1996;
(4) listed as a **crime of violence offense**, i.e.,
(a) a crime of violence which is a crime against the person as defined in 18 U.S.C.§16(a) and 18 U.S.C. §16(b),
(5) committed against: (a) a DV protected person, or
(b) stalking, or
(c) child abuse, neglect, or abandonment.

Violation of a Protection Order - Section §237(a)(2)(E)(ii) makes a person deportable when a:

> "…court determines [that the person] has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury…"

"ATTEMPTED" DV OFFENSES APPLYING THE CATEGORICAL APPROACH: Congress did not expressly include attempted stalking, attempted child abuse, and attempted child neglect convictions under the domestic violence ground of deportability. Consequently, a noncitizen with a conviction for attempted stalking, attempted child abuse, or attempted child neglect may not be deportable under the domestic violence ground of deportability. A respondent may face consequences under other grounds of deportability for such offenses depending on the statutory language and the record of conviction. See INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (2008).

- **INADMISSIBILITY**

Conviction or admitted commission of a crime involving moral turpitude, whether felony or misdemeanor (subject to a petty offense exception if no prior crime involving moral turpitude, the offense is not subject to a potential prison sentence in excess of one year (i.e., not a New York felony), and actual prison sentence received does not exceed six months.
(See CIMT offenses listed above)

- **"CONVICTION" FOR IMMIGRATION ENFORCEMENT PURPOSES**

Most crime-related grounds of deportability, as well as some crime-related grounds of inadmissibility, require a conviction in order to make the noncitizen deportable or inadmissible. Even where a conviction is not required, the Department of Homeland Security (DHS) may not be able to establish criminal conduct without a conviction. Therefore, if your client obtains a disposition of his or her criminal case that is not a "conviction" under immigration law (or that does not meet other required elements, such as a sentence to a term of imprisonment of a certain length, or finality), s/he may avoid negative immigration consequences such as removal from the United States.

To determine what a conviction is under immigration law, you must look first to the immigration statute that defines "conviction," added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA):
The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld,
where:

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.8 USC 1101(a)(48)

JUVENILE PROCEEDINGS

TRIGGERS FOR IMMIGRATION ENFORCEMENT FOR JUVENILES

- Dept. of Probation Investigation and Report
- OCFS facility placement
- OPERATION COMMUNITY SHIELD (initiated in 2005)
- Juvenile Offender cases in adult criminal court (**note:** recommend motion to transfer in the interest of justice & with DA's consent to Family Court (i.e., to become "designated felony acts"/ "E petitions").

Note: for ICE Enforcement:

- ICE detains accompanied minors
- Office of Refugee Resettlement (ORR) detains unaccompanied minors
- A juvenile court order taking jurisdiction over an abused, neglected or abandoned child in ORR detention, with ORR's consent.

Juvenile Delinquency (D Petitions) & Youthful Offender (ex. issued in NY family courts to youths under the age of 16 or issued to youths in adult court if under the age of 19) are NOT "convictions" for immigration purposes. *See Matter of Devison-Charles*, Int. Dec. 3435 (BIA 2000*).*
But *see, Wallace v. Gonzales* (2nd Cir. 2006), JD or YO adjudication can still be an adverse impact on an application for a discretionary benefit or when seeking "admission" to the U.S.

A New York juvenile offender (J.O.) conviction is a conviction under immigration law. Although New York law defines 16 as the age of general criminal responsibility, New York law also provides that 13-, 14-, and 15-year-old juvenile offenders may be held criminally responsible for certain specified crimes and have their cases prosecuted in adult criminal court rather than in family court juvenile delinquency proceedings.13 (ex.14- or 15-year-old charged with certain murder, kidnapping, arson, assault, manslaughter, rape, sodomy, aggravated sexual abuse, burglary, or robbery offenses, and a 13-year-old charged with certain murder offenses.)

Adjournment in contemplation of dismissal (ACD) disposition is not a conviction under immigration law. An ACD is usually an adjournment of a nonfelony case before entry of a plea of guilty thereto or commencement of a trial thereof without a new date ordered and with a view to ultimate dismissal in furtherance of justice. Thus, an ACD does not meet the requirement under the immigration statutory definition of conviction that "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient
facts to warrant a finding of guilt…"8 USC 1101(a)(48).

NOTE: DV TREATMENT DIVERSION PROGRAMS
A guilty plea made as part of a DV treatment diversion procedure may result in a conviction for immigration purposes. There are risks of negative immigration consequences if the defendant:

(1) is required to plead guilty to criminal charges before being referred to a DV treatment program;
(2) fails to complete the DV treatment program causing the defendant to be convicted of serious criminal charges, often DV-related, that definitely trigger negative immigration consequences; or
(3) completes the DV treatment program but the plea arrangement does not provide for dismissal of all charges that might trigger negative immigration consequences.

Conviction on appeal - Board of Immigration Appeals had also found that a conviction does not count for immigration purposes until direct appellate review has been exhausted or waived

Vacated conviction - The Board of Immigration Appeals has ruled that when a state court acting within its jurisdiction vacates a judgment of conviction for cause, the conviction no longer constitutes a valid basis for removal — Immigration authorities will not question the validity under state law of the vacation of judgment, but will give "full faith and credit" to the state court.

The conviction is not eliminated for immigration purposes, however, if it was vacated for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."

Thus, if a conviction has been vacated on legal or constitutional grounds, such as ineffective of counsel based on the attorney's failure to advise regarding immigration consequences, that vacatur should be respected by the immigration authorities.

- **CONDUCT-BASED FINDINGS THAT MAY BAR IMMIGRATION RELIEF**
  - **Prostitution** (i.e., finding of engaging in sex for money within past 10 years is inadmissible) 8 USC § 1182(a)(2)(D)
  - **Drug Trafficking**. (i.e., "reason to believe" of assisting in or drug trafficking is inadmissible but not deportable) 8 USC § 1182(a)(2)(C)
  - **NOTE:** spouse/children also inadmissible if received any "financial or other benefit" from the drug trafficking within the previous 5 years. 8 USC § 1182(a)(2)(C)(ii)
  - **Drug Addict or Abuser** (i.e., inadmissible if a "current" drug addict or abuser, and deportable if he/she has been one at any time since admission to the U.S. within the past 3 years) 8 USC §1182(a)(1)(A)(iii) (inadmissibility) and 8 USC §1227(a)(2)(B)(ii) (deportability).

- **False Documents** (i.e., finding may provide evidence to support referral to special civil court that may trigger removal from the U.S.) 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(C).
- **Sexual Predator** (i.e., mental condition that poses a current threat to self or others may be inadmissible under a separate medical category). 8 USC § 1182(a)(1)(A)(iii).
- **Crimes Against Minors** (i.e., if convicted pursuant to the Adam Walsh Child Protection and Safety Act of 2006, cannot file family-based immigration petitions **NOTE:** See § 111(a) of Adam Walsh Act which includes certain juvenile delinquency
- **Admission" of a crime involving moral turpitude or drug offense in a juvenile delinquency proceeding (i.e.,** does not provide a basis for removal from the U.S.). *See Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981); *see also Matter of Devison*, 22 I&N Dec. 1632 (BIA 2000)
- **Juvenile disposition of a violent or theft crime, including one or more crimes classed in immigration law as an aggravated felony, crime involving moral turpitude, firearm, or domestic violence offense** (i.e., is not a conviction for immigration purposes, so deportability and inadmissibility grounds that require a "conviction" are not triggered by delinquency findings)

WHAT HAPPENS IF SUBJECT TO REMOVAL?

If, as a result of the criminal disposition, your client becomes removable from the United States — based either on deportability or inadmissibility — s/he will be subject to the issuance of a DHS detainer on the penal custodian or, if your client is not sentenced to imprisonment, to immediate DHS arrest and detention. Removal proceedings before an immigration judge are then to take place expeditiously, generally in the penal institution where your client is serving a sentence of imprisonment or in a DHS detention facility. In fact, if your client is sentenced to imprisonment, the immigration statute now contemplates completion of removal proceedings and the entry of a removal order before the end of the state incarceration.

Even if your client is released from state custody before completion of removal proceedings, however, this does not mean s/he will be released from custody. In most cases, the immigration statute now requires DHS to take and retain your client in custody upon your client's release from criminal custody without even a possibility of release on bond pending completion of the removal proceedings.

Sophie Feal will discuss the ability to preserve the possibility of obtaining relief from removal. Thus, if deportability or inadmissibility cannot be avoided, you should investigate whether your client may be eligible for relief from removal under the immigration law and whether there may be a way to avoid an outcome or disposition that eliminates that possibility.

VII. CUSTODY PROCEEDINGS:

DESIGNATE A PERSON IN PARENTAL RELATION

- Detained immigrant parent can sign a "designator" to act as a parent for 6 months or less – education and medical decisions (i.e., NY General Obligations Law 5-1551-5-1555)
- No court needed
- Parent can revoke designation
- Parent can also supersede any decision
- Parent can specify what action is covered
- Immigration humanitarian protocols now allow immigrants to be free from immigration detention if he/she is the sole caregiver of a young child.

For more information, see Prosecutorial Discretion memorandum issued by ICE Dir. John Morton, June 17, 2011 available at www.ice.gov

ICE FACILITATING PARENTAL INTERESTS

- ICE Parental Interests Directive
- ICE will transfer custody of an immigration detainee parent who is pending custody or termination proceedings involving a child posted at http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/

VIII. DIVORCE PROCEEDINGS

TERMINATION OF CONDITIONAL PERMANENT RESIDENCE

- Conditional LPR (i.e., marriage to US citizen is **less than 2 years old** at the time LPR status is granted).
- Conditional permanent residence is **TERMINATED** if:
  - marriage is judicially annulled or terminated (other than through death of spouse) or
  - if married couple fails to file joint petition (i.e., Form I-751 at www.uscis.gov) within 90 days of 2nd anniversary of issuance of permanent residence

Divorce may result in following immigration consequences:

- Termination of conditional LPR status for spouse and foreign-born child;
- Denial and/or delay of filing for U.S. citizenship through naturalization (i.e., 3 years for LPR obtained through marriage to a U.S. citizen);
- Denial of pending immigrant visa for spouse and/or foreign born child;

FORM I-751 WAIVER OF FILING OF JOINT PETITION

Marriage entered into in **good faith**, but the marriage was terminated because of:

- Divorce; or
- Death of U.S. citizen spouse; or
- Being subjected physical battering and/or extreme mental cruelty; and
- Applicant would suffer extreme hardship if returned to his/her native country.

IX. WHERE TO GET HELP: RESOURCES

- **IMMIGRATION INTERVENTION PROJECT – SANCTUARY FOR FAMILIES, NYC FAMILY JUSTICE CENTER**
  www.sanctuaryforfamilies.org

- **IMMIGRANT DEFENSE PROJECT – HOTLINE**
  (Available Tues. & Thurs. 1:30 p.m.-4:30 p.m.)
  (212) 725-6422; www.immigrantdefenseproject.org

- **ILRC's (2010) Bench Book for Juvenile and Family Court Judges available at http://www.ilrc.org/files/2010_sijs_benchbook.pdf**

- **NYS OFFICE OF INDIGENT LEGAL SERVICES – REGIONAL IMMIGRATION RESOURCE CENTERS** (summer of 2015)

Immigration/Criminal/Family Law Website Resources

- **NYSDA www.nysda.org**
- **Sanctuary for Families www.sanctuaryforfamilies.org**
- **Immigrant Defense Project www.immigrantdefenseproject.org**
- **Defending Immigrants Partnership www.defendingimmigrants.org**
- **NLG National Immigration Project www.nationalimmigrationproject.org**
- **Immigrant Legal Resource Center www.ilrg.org**
- **Columbia Law School Collateral Consequences Calculator**
  http://ccnmtl.columbia.edu/portfolio/law/collateral_consequen.html

INTEGRATING IMMIGRATION INTO FAMILY LAW: THE PATHWAY TO PADILLA

POWER POINT PRESENTATION

Submitted by:
Joanne Macri, Esq.
Director of Regional Initiatives
NYS Office of indigent Legal Services

INTEGRATING IMMIGRATION INTO FAMILY LAW:

THE PATHWAY TO *PADILLA*

The New York State Bar Association

Committee to Ensure Quality of Mandated Representation

Albany, NY **June 5, 2015**

EFFECTIVE ASSISTANCE OF COUNSEL

- Due process and equal protection grounds require representation by counsel when a parent's concern for the liberty, care and control of their child may be relinquished to the State.

In re Ella B., 30 N.Y.2d 352 (1972)

- Loss of a child's society and the possibility of criminal charges infringe upon such fundamental interests and rights as to require counsel in order to protect due process rights .

N.Y. Fam. Ct. Act §261

EFFECTIVE ASSISTANCE OF COUNSEL

- The right to counsel in child protective proceedings assumes **meaningful representation** and **effective assistance of counsel** comparable to that to which criminal defendants are entitled.

"*…because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings*." *Brown v. Gandy*, 2015 NY Slip Op 01086 (4th Dep't, 2/6/2015).

EFFECTIVE ASSISTANCE OF COUNSEL???

QUESTION: Can meaningful representation and effective assistance of counsel include providing **affirmative, competent advise** to a noncitizen client regarding the immigration consequences that may result from a specific family court disposition?

EFFECTIVE ASSISTANCE OF COUNSEL

Padilla v. Commonwealth of Kentucky 599 U.S. __,130 S. Ct. 1473 (2010); (Docket No. 08-651)

6th Amendment guarantee of effective assistance requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.

EFFECTIVE ASSISTANCE OF COUNSEL

- Non-advice (silence) by defense counsel is insufficient (ineffective)
- Deportation is a "penalty," not a "collateral consequence"
- "Informed consideration" of deportation consequences required during client negotiations and legal representation
- Professional standards require counsel to determine citizenship/immigration status

IDENTIFYING IMMIGRATION STATUS

BEGINNING THE ANALYSIS

ASKING THE FIRST QUESTION…

INVESTIGATE & RECORD THE FACTS

- **QUESTION: "WHERE WERE YOU BORN?"**
- **ANSWER:** UNITED STATES 

- **ANSWER:** NOT THE UNITED STATES?

Determine if NATURALIZED U.S. CITIZEN or DERIVATIVE U.S. CITIZEN

ACQUIRING U.S. CITIZENSHIP

- 3 ways to acquire U.S. citizenship:
  - Birth in the US or Puerto Rico;
  - Birth to US citizen parent(s); (i.e., may include grandparents);
  - Naturalization Process (applying to become a US citizen)
- US citizens cannot be removed (i.e., deported) from the U.S.

(NB: Many young people born outside of the US are not aware that they are U.S. citizens)

ACQUIRING CITIZENSHIP

- **Child Citizenship Act of 2000** – derive U.S. citizenship if, after lawful admission to the U.S., residing in the legal and physical custody of US citizen parent while under the age of 18 (i.e., on or after 02/21/2001)
- **Adoption** by U.S. citizen parent - legal adoption must be **before** the child is 16 years of age (INA §101(b)(1)(E); 8 U.S.C. §1101(b)(1)(E))

WHO CAN BE REMOVED?

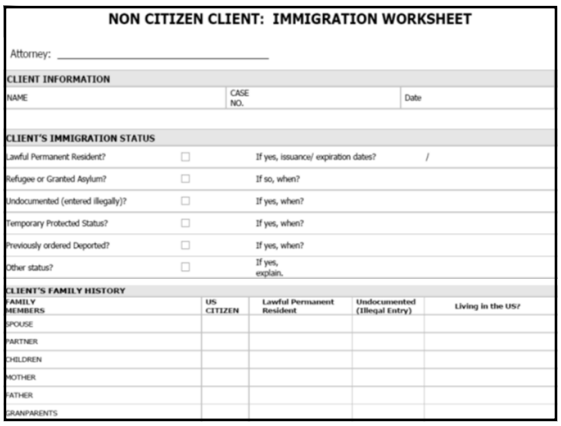
Lawful Permanent Resident	**Admitted** to the U.S. as a green card holder
Refugee or Asylee	Granted refugee status outside of the U.S. or asylum status from within the U.S.
Nonimmigrant	**Admitted** to the U.S. on a temporary basis (i.e., to visit, attend school, work, etc.)
Humanitarian Relief	Granted temporary protection within the U.S. (i.e., TPS, DACA, T, U or S visa, etc.)
Undocumented	Entered the United States illegally (i.e., without being inspected and admitted)

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

- **Under 31 years of age** as of June 15, 2012
- Arrived in the U.S. while **under 16 years of age**;
- Continuously resided in the U.S. since **June 15, 2007 to present time;**
- Present in the U.S. on **June 15, 2012**;
- Currently **in school**, have **graduated** or obtained a certificate of **completion or a GED** or an honorable discharge from the **Coast Guard or Armed Forces;**
- **No valid immigration status** as of **June 15, 2012;** and
- **Not** convicted of a **felony, a significant misdemeanor, or 3+ misdemeanors**) or posing a **threat to public safety** or **national security** (i.e., gang membership).

INVESTIGATE & RECORD THE FACTS

- "**WHERE WERE YOU BORN?**"
- **IMMIGRATION STATUS**
- **DATE AND MANNER OF ENTRY**
- **LENGTH OF TIME IN U.S.** (include all trips abroad)
- "**IMMEDIATE FAMILY**" IN US
- **PRIOR HISTORY** of **VOP's, IMMIGRATION VIOLATIONS** and **CRIMINAL HISTORY** (i.e., if facing potential incarceration)



NON CITIZEN CLIENT: IMMIGRATION WORKSHEET

Attorney: _____

CLIENT INFORMATION

NAME	CASE NO.	Date

CLIENT'S IMMIGRATION STATUS

Lawful Permanent Resident?	☐	If yes, issuance/ expiration dates? /
Refugee or Granted Asylum?	☐	If so, when?
Undocumented (entered illegally)?	☐	If yes, when?
Temporary Protected Status?	☐	If yes, when?
Previously ordered Deported?	☐	If yes, when?
Other status?	☐	If yes, explain.

CLIENT'S FAMILY HISTORY

FAMILY MEMBERS	US CITIZEN	Lawful Permanent Resident	Undocumented (Illegal Entry)	Living in the US?
SPOUSE				
PARTNER				
CHILDREN				
MOTHER				
FATHER				
GRANPARENTS				

HELPFUL INFORMATION

- **NAME, DATE AND COUNTRY OF BIRTH**
- **ALIEN REGISTRATION NUMBER ("A" #)**
- **COPY OF ANY IMMIGRATION DOCUMENTS**
- **PRIOR CRIMINAL HISTORY –** Criminal History Report (RAP Sheet) will contain prior orders of removal/deportation with A# and helps assess immigration consequences

USEFUL INFORMATION:

- **Locating Client:** ICE Locator https://**locator**.**ice**.gov/
- **Pending or Prior Immigration Hearing:** Immigration Court (EOIR) hotline at **1-800-898-7180**

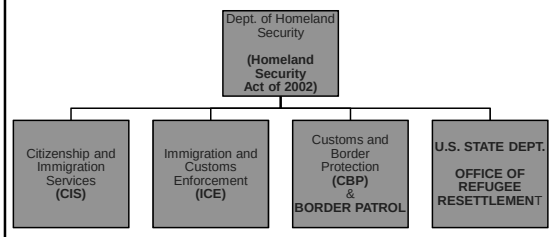
HYPOTHETICAL: DETERMING STATUS

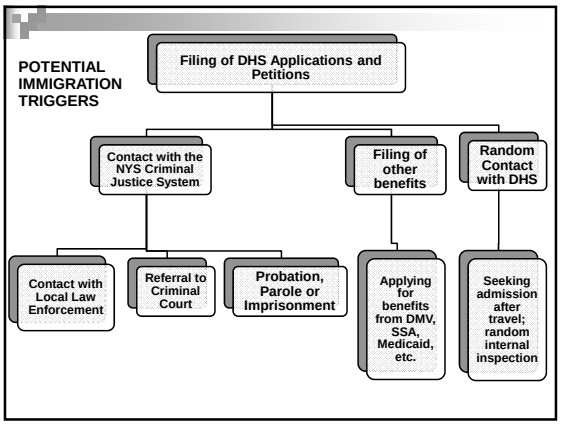
- In 2008, Jane Doe was admitted to the U.S. to reside in the physical and legal custody of her LPR mother and father when she was 10 years of age.
- Jane's parents are battling over custody of Jane following a divorce proceeding.
- Jane's biological mother is currently in the process of applying for and obtaining her U.S. citizenship through naturalization.

IMPACT OF IMMIGRATION DETENTION ON FAMILY COURT MATTER?

DE-MYSTIFYING THE IMMIGRATION DETAINER/"warrant"

IMMIGRATION ENFORCEMENT





IMPACT OF AN IMMIGRATION "HOLD"/DETAINER?

- Pursuant to 8 C.F.R. Sec. 287.7(a):

  "…is a request that such agency advise the Department prior to release of the alien, in order for the Department to arrange to assume custody." *(emphasis added)*

(See NYSDA Advisory, "Immigration Detainers: What You Need to Know" at http://www.nysda.org/docs/PDFs/CIDP/NYSDA%20DETAINER%20ADVISORY.pdf)

ICE "HOLDS" ARE NOT MANDATORY

"While immigration detainers are an important part of ICE'S effort to remove criminal aliens who are in Federal, state or local custody, they are not mandatory as a matter of law."

Letter to Congressman Mike Thompson (CA -5th District)
From ICE Deputy Director, Daniel Ragsdale
February 25, 2014

***See also* Liranzo v United States (690 F3d 78, 82 [2d Cir 2012]) ; Galarza v Szalczyk (No. 12-3991, 2014 US App LEXIS 4000 [3d Cir 3/4/14]); Miranda-Olivares v. Clackamas County, 2014 WL 1414305 (D. Or.)**

ICE PROSECUTORIAL DISCRETION

- MILITARY VETERAN OR MEMBER OF U.S. FORCES;
- LONG TIME LAWFUL PERMANENT RESIDENT (i.e., green card holder);
- VICTIM OF DOMESTIC VIOLENCE, TRAFFICKING OR OTHER CRIME;
- PERSON IN THE WITNESS PROTECTION PROGRAM OR POLICE INFORMANT
- PREGNANT OR NURSING WOMEN;
- ELDERLY PERSON OR PERSON PRESENT IN THE U.S. SINCE CHILDHOOD (i.e., Deferred Action for Childhood Arrivals); or
- PERSON SUFFERING FROM SERIOUS MENTAL HEALTH OR MEDICAL ISSUES OR FROM A PHYSICAL DISABILITY

See "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" dated June 17, 2011 issued by former ICE Director, John Morton.

Facilitating Parental Interests

- ICE Parental Interests Directive
- Frequently Asked Questions (FAQs)
- Parental Interests Directive Fact Sheet in English and Spanish
- Both of these resources are posted at http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/

HYPOTHETICAL: IMPACT OF AN ICE HOLD

- Mr. and Mrs. X and their 2 minor age children enter the U.S. without inspection and authorization and make a claim for asylum upon arrival to the U.S. Mr. X is detained while Mrs. X and her two children are released from immigration custody. Due to Mrs. X's abuse and neglect, the two children are eventually placed into foster care. A TPR hearing is scheduled to begin in NY while Mr. X is currently detained by DHS in another state.

FAMILY OFFENSES

IMMIGRATION CONSEQUENCES

DEPORTATION vs. INADMISSIBILITY

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)
LPR's ("Greencard Holder)	**Refugees & Asylees, Undocumented, Non-LPRs**
Nonimmigrants (ex. visitors, students, workers on valid status)	**Returning LPR's (Green Card Holders)** (i.e., even after brief departure from U.S.)
Visa "Overstayers" (ex. overstayed authorized period of stay in U.S.)	**Nonimmigrants** (i.e., persons seeking permission to visit, work or go to the school in the U.S.)

DEPORTATION vs. INADMISSIBILITY

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)
Criminal "Convictions"	Admission to Committing or "Conviction" of CSO and CIMT offenses
DV-related "Convictions"	Admission to committing DV-related offense or "conviction" (i.e., if offense is a CIMT)
Violations of DV-related Orders of Protection (Civil and Criminal Court Findings of a Violation)	NOT APPLICABLE

What Is a "Conviction" for Immigration Purposes?

"**Conviction**" (8 USC 1101(a)(48)(A), INA 101(a)(48)(A)):

FORMAL JUDGMENT OF GUILT entered by a court;

or

IF ADJUDICATION HAS BEEN WITHHELD, where:

a. **A judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt;**

and

b. **The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.**

WHICH NEW YORK DISPOSITIONS ARE "CONVICTIONS" ?

CONVICTION	NOT A CONVICTION
Formal judgment of guilt in adult criminal court (including NY Juvenile Offender conviction)	Youthful offender disposition (even though entered in adult court) and juvenile delinquency* dispositions (*possibly not "conduct" grounds)
Integrated Domestic Violence Court or drug court IF PLEA OR ADMISSION OF GUILT made by defendant	IDV, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT WAIVED** NYPL 216.05(4)
Conditional Discharge Sentence or *Alford* Plea	Adjournment in contemplation of dismissal OR Family Offense (i.e., if adjudicated in Family Court)
Post Conviction Relief/Motion pending on collateral challenge	Conviction on direct appeal or NYS late notice of appeal (460.30)
Disposition vacated/expunged in the "interest of justice" – based on rehabilitation ONLY!	Disposition vacated based on legal defect in criminal case (i.e., NYCPL 440.10 motion)

DEPORTATION GROUNDS

LPR's ("Greencard Holder)

Nonimmigrants
(ex. visitors, students, workers on valid status)

Visa "Overstayers"
(ex. overstayed authorized period of stay in U.S.)

Criminal "Convictions"

DV-related "Convictions"

Violations of DV-related Orders of Protection
(Civil and Criminal Court Findings of a Violation)

CRIMINAL GROUNDS OF DEPORTABILITY

VERY BAD!!!

Requires a Criminal "Conviction"

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)

Aggravated Felony Conviction

- *Consequences* (in addition to deportability):
  - Ineligibility for most waivers of removal
  - Ineligibility for voluntary departure
  - Permanent inadmissibility after removal
  - Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal
- *Crimes covered* (possibly even if not a felony):
  - Murder
  - Rape
  - Sexual Abuse of a Minor
  - Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)
  - Firearm Trafficking
  - Crime of Violence + 1 year sentence**
  - Theft or Burglary + 1 year sentence**
  - Fraud or tax evasion + loss to victim(s) > $10,000
  - Prostitution business offenses
  - Commercial bribery, counterfeiting, or forgery + 1 year sentence**
  - Obstruction of justice or perjury + 1 year sentence**
  - Certain bail-jumping offenses
  - Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
  - Attempt or conspiracy to commit any of the above

FAMILY LAW CHARGES REFERRED FOR CRIMINAL PROSECUTION: POTENTIAL CRIMES OF VIOLENCE

- Assault
- Menacing
- Reckless Endangerment
- Sexual Misconduct or Abuse
- Forcible Touching
- Unlawful Imprisonment
- Harassment
- Burglary

HYPOTHETICAL: DEPORTATION GROUNDS

Maria, age 13, has a baby and identifies David, an 19-year old lawful permanent resident, as the biological father. The baby is temporarily removed from Maria's care and David is referred for criminal prosecution based on a charge of one count of violating a class A misdemeanor of sexual abuse in the second degree pursuant to NY PL §130.60(2). He will likely receive probation if convicted.

NOTE: *In re Small*, 23 I & N Dec. 448 (BIA 2002)

CRIMINAL GROUNDS OF DEPORTABILITY

(continued)

Requires a Criminal "Conviction"

Controlled Substance Conviction
- EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude (CIMT) Conviction
- For crimes included, see Grounds of Inadmissibility
- One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)
- Two CIMTs committed at any time "not arising out of a single scheme"

Firearm or Destructive Device Conviction

CRIMINAL GROUNDS OF DEPORTABILITY

(continued)

****ONLY** REQUIRES A "FINDING" IN CRIMINAL OR CIVIL/FAMILY COURT

Domestic Violence Conviction or other domestic offenses, including:
- Crime of Domestic Violence
- Stalking
- Child abuse, neglect or abandonment
- Violation of order of protection (criminal or civil) **

DEPORTABLE CRIMES OF DOMESTIC VIOLENCE

Deportable for conviction (on or after October 1, 1996) of any "crime of violence" against a person committed by:

- **Current or former spouse;**
- **Individual with whom person shares a child in common;**
- **Individual now or before cohabiting with person as a spouse;**
- **Individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or**
- **Any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the US or any State, Indian tribal government, or unit of local government.**

(NOTE: Similar to Section 812 of the Family Court Act)

CRIMES OF DOMESTIC VIOLENCE

Includes offenses with **ALL** of the following elements:

(1) a "conviction";
(2) after lawful admission to the U.S.;
(3) occurring "after" September 30, 1996;
(4) listed as a **crime of violence offense**, i.e.,
    (a) a crime of violence which is a crime against the person as defined in 18 U.S.C.§16(a) and 18 U.S.C. §16(b),
(5) committed against: (a) a DV protected person, or
    (b) stalking, or
    (c) child abuse, neglect, or abandonment.

STALKING "CONVICTIONS"

Although **stalking** is not defined in federal immigration law, it may include the following NY PL offenses that result in a **"conviction":**

- Stalking pursuant to NYPL § § 120.45 to 120.60
- Menacing (misdemeanor) – NYPL § 120.14 and § 120.15
- Harassment – NYPL § 240.25 (violation) to § 240.31

CRIMES AGAINST A CHILD

- Includes offenses that are intentional, knowing, reckless and criminally negligent or involve an omission that constitutes maltreatment of a child under the age of 18 or impairs a child's physical/mental well-being

.

(ex. a "conviction" of patronizing a prostitute under the age of 18 pursuant to NYPL § 230.04 can qualify as a CAC offense for deportation purposes)

VIOLATION OF AN ORDER OF PROTECTION

- Section 237(a)(2)(E)(ii) makes a person deportable when a:

"…court determines [that the person] has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury…"

VIOLATION OF AN ORDER OF PROTECTION

- "protection order" means **any injunction** issued for the purpose of preventing violent or threatening acts of domestic violence, **including temporary or final orders issued by civil or criminal courts** (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

VIOLATION OF AN ORDER OF PROTECTION

VOP applies to persons who:

- violate a protection order (i.e., by way of harassment or threats to a protected person) that may result in such harassing or threatened behavior

(In re Szalontai, 2014 WL 3889482 (BIA July 11, 2014) ("no contact" condition violation supports deportability). *But also see, Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011) in reference to non-threatening behaviors that result in VOP)

VIOLATION OF AN ORDER OF PROTECTION

- **Violation of an Order of Protection** – if issued as a protective measure on behalf of a DV-related victim can be considered grounds for deportation (ex. violation of criminal order of protection pursuant to NYCPL § § 530.11 - 530.13; pursuant to Article 8 proceeding following evidence a "family law" offense pursuant to §812 and Article 10 proceeding when safeguarding a child against abuse).

NOTE: Failure to pay support orders or orders involving **child custody** are excluded unless violations result in related threat of harm to protected DV person. However, failure to pay support orders may result in an immigration finding of "lack of good moral character" necessary for various immigration benefits including naturalization. (See 8 CFR § 316.10(b)(3)(i))

HYPOTHETICAL: DV VOP

- Mr. X pled guilty to Criminal Contempt in the 2nd Degree (NYPL § 215.50(3)) by agreeing to violating that portion of the domestic protection order that his actions resulted in a technical violation (i.e., of being present at a time and place forbidden by the protection order).
- No admission or finding is made of any credible threat or violence, repeated harassment, or bodily injury to the person of the complainant.
- He is sentenced to 3 years probation.

(*See Hoodho v. Holder*, 558 F.3d 184 (2d Cir. 2009))

GROUNDS OF INADMISSIBILITY

Refugees & Asylees, Undocumented, Non-LPRs	**Admission to Committing or "Conviction" of CSO and CIMT offenses**
Returning LPR's (Green Card Holders) (i.e., even after brief departure from U.S.)	**Admission to committing DV-related offense or "conviction" (i.e., if offense is a CIMT)**
Nonimmigrants (i.e., persons seeking permission to visit, work or go to the school in the U.S.)	**NOT APPLICABLE**

CRIMINAL GROUNDS OF INADMISSIBILITY

"CONVICTION" or "ADMISSION"

- **Drugs – NO exception**
- **CIMT – "petty offense" exception**

GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)
Conviction or *admitted commission* of a **Controlled Substance Offense**, or DHS has reason to believe individual is a drug trafficker ➢ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)
Conviction or *admitted commission* of a **Crime Involving Moral Turpitude** (CIMT) ➢ Crimes in this category cover a broad range of crimes, including: ◆ Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery) ◆ Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ◆ Most sex offenses ➢ *Petty Offense Exception*—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months
Prostitution and Commercialized Vice
Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

CONDUCT-BASED FINDINGS THAT MAY BAR IMMIGRATION RELIEF

- **Prostitution** (i.e., finding of engaging in sex for money within past 10 years is inadmissible) 8 USC § 1182(a)(2)(D)
- **Drug Trafficking** (i.e., "reason to believe" of assisting in or drug trafficking is inadmissible but not deportable) 8 USC § 1182(a)(2)(C)
- **NOTE:** spouse/children also inadmissible if received any "financial or other benefit" from the drug trafficking within the previous 5 years
  8 USC § 1182(a)(2)(C)(ii)

CONDUCT-BASED FINDINGS THAT MAY BAR IMMIGRATION RELIEF

- **Drug Addict or Abuser** (i.e., inadmissible if a "current" drug addict or abuser, and deportable if he/she has been one at any time since admission to the U.S. within the past 3 years) 8 USC §1182(a)(1)(A)(iii) (inadmissibility) and 8 USC §1227(a)(2)(B)(ii) (deportability).
- **False Documents** (i.e., finding may provide evidence to support referral to special civil court that may trigger removal from the U.S.) 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(C).

CONDUCT-BASED FINDINGS THAT MAY BAR IMMIGRATION RELIEF

- **Sexual Predator** (i.e., mental condition that poses a current threat to self or others may be inadmissible under a separate medical category) 8 USC § 1182(a)(1)(A)(iii).
- **Crimes Against Minors** (i.e., if convicted pursuant to the Adam Walsh Child Protection and Safety Act of 2006, cannot file family-based immigration petitions

NOTE: See § 111(a) of Adam Walsh Act which includes certain juvenile delinquency

CONDUCT-BASED FINDINGS <u>NOT</u> BARRING IMMIGRATION RELIEF

- **Admission" of a crime involving moral turpitude or drug offense in a juvenile delinquency proceeding (i.e.,** does not provide a basis for removal from the U.S.)

See Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981); *see also Matter of Devison*, 22 I&N Dec. 1632 (BIA 2000)

DIVORCE & DOMESTIC VIOLENCE

IMMIGRATION CONSEQUENCES

CONDITIONAL PERMANENT RESIDENT

= CONDITIONAL LPR

***2-YEAR EXPIRATION DATE OF PERMANENT RESIDENT CARD issued pursuant to INA §216, 8 U.S.C. §1186a.**

Married couple must file a Form I-751, Joint Petition to Remove Conditions, within 90 days of 2nd anniversary of granting of immigration status.

***USUALLY ISSUED IN 10-YEAR INCREMENTS**

TERMINATION OF CONDITIONAL PERMANENT RESIDENCE

- Conditional LPR (i.e., marriage to US citizen is **less than 2 years old** at the time LPR status is granted).
- Conditional permanent residence is **TERMINATED** if:
  - marriage is judicially annulled or terminated (other than through death of spouse) or if
  - married couple fails to file joint petition (i.e., Form I-751 at www.uscis.gov) within 90 days of 2nd anniversary of issuance of permanent residence.

IMMIGRATION PITFALLS INVOLVING DIVORCE

Divorce may result in following immigration consequences:

- Termination of conditional LPR status for spouse and foreign-born child;
- Denial and/or delay of filing for U.S. citizenship through naturalization (i.e., 3 years for LPR obtained through marriage to a U.S. citizen);
- Denial of pending immigrant visa for spouse and/or foreign born child;

FORM I-751 WAIVER OF FILING OF JOINT PETITION

Marriage entered into in **good faith**, but the marriage was terminated because of:

- Divorce; or
- Death of U.S. citizen spouse; or
- Being subjected physical battering and/or extreme mental cruelty; and
- Applicant would suffer extreme hardship if returned to his/her native country.

VICTIM OF DOMESTIC VIOLENCE: Violence Against Women Act (VAWA) Self-Petitions

= A path to LPR status for certain domestic violence victims (child or parent) at the hands of abusive USC/LPR spouses;

- No physical abuse required;
- "Any credible evidence" required and no court, police or other government involvement necessary.

See INA §204, 8 USC §1154; INA §245, 8 USC 1155

VICTIM OF DOMESTIC VIOLENCE: Violence Against Women Act (VAWA) Battered Spouse/Child Waivers

= A path to unrestricted LPR status for conditional LPR's who are victim to domestic violence of USC or LPR spouses or parent:

- No physical abuse required;
- Evidentiary standard is "any credible evidence;"
- No court, police or other government involvement required.

See INA §216(c)(4), 8 USC §1186a(c)(4)

VICTIM OF DOMESTIC VIOLENCE: Violence Against Women Act (VAWA) Cancellation of Removal

= A path to LPR status for certain non-USCs who are domestic violence victims at the hands of abusive USC/LPR spouses, USC/LPR parents and persons with USC/LPR children in common with abusive USCs/LPRs.

- Requires 3 years of continuous presence in U.S.;
- Evidentiary standard is "any credible evidence."
- No court, police or other government involvement required.

See INA §240A(b)(2), 8 USC §1229b(b)(2)

VICTIM OF DOMESTIC VIOLENCE: U VISA – VICTIM OF A CRIME

- Must be **victim** of a qualifying crime/criminal activity (i.e., may include family violence, sexual assault and felony assault).
- Must suffer **substantial harm** as a result of the qualifying crime/criminal activity.
- Must **cooperate** with "Certifying agency (i.e., federal, state, or local law enforcement agency, prosecutor, judge, or other authority responsible for the investigation and/or prosecution of a qualifying crime or criminal activity).

See INA §101(a)(15), 8 U.S.C. §1101(a)(15); INA §214(p), 8 U.S.C. §1184(p); INA §245(m), 8 U.S.C. § 1255(m); *8 CFR §214.14*

VICTIM OF DOMESTIC VIOLENCE: U VISA – VICTIM OF A CRIME

- Must obtain **signed U visa certification** signed within the previous 6 months by:

  (i) The head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency; or

  (ii) A Federal, State, or local judge

VICTIM OF DOMESTIC VIOLENCE: U VISA – VICTIM OF A CRIME

- Required federal certification form available at: **www.uscis.gov/files/form/i-918supb.pdf**
- U certifiers in New York City include:
  - The District Attorneys' Offices;
  - The New York Police Department;
  - The Administration for Children's Services
  - Family Court Judges

T VISA: TRAFFICKING VICTIMS PROTECTION ACT OF 2000

- **Subject to "severe trafficking"**
- **Agree to assist in enforcement or is less than 18 years old and**
- **Would suffer "extreme hardship involving unusual and severe harm upon removal"**
- **Limited waiver for crimes**

S (INFORMANT) VISA

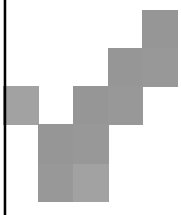
- possess critical and reliable information concerning criminal or terrorist organizations.
- willing to share this information with federal or state authorities.
- individuals whose presence in the US is critical to the success of a criminal investigation or prosecution.
- Granted also to immediate family members
- Agency files the **Form I-854**, Inter-Agency Alien Witness and Informant Record and must include reasons for seeking your cooperation.

DISCRETION IN IMMIGRATION PROSECUTION

ICE MAY EXERCISE DISCRETION ON THE SUSPENDING AN IMMIGRATION DETENTION AND/OR PROSECUTION IF THE NONCITIZEN IS:

- a military veteran or member of the U.S. armed forces;
- a long-time lawful permanent resident (i.e., green card holder);
- a minor or elderly person;
- a person present in the United States since childhood;
- a pregnant or nursing women;
- a victim of domestic violence; trafficking, or other serious crime;
- a person who suffers from a serious mental or physical disability; and/or
- a person with serious health conditions.

See memorandum entitled, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" dated June 17, 2011 issued by ICE Director, John Morton.



WHERE TO GET HELP

Immigration Resources

RESOURCES

IMMIGRATION INTERVENTION PROJECT – SANCTUARY FOR FAMILIES, NYC FAMILY JUSTICE CENTER
www.sanctuaryforfamilies.org

IMMIGRANT DEFENSE PROJECT – HOTLINE
(Available Tues. & Thurs. 1:30 p.m.-4:30 p.m.)
(212) 725-6422; www.immigrantdefenseproject.org

ILRC's (2010) Bench Book for Juvenile and Family Court Judges available at
http://www.ilrc.org/files/2010_sijs_benchbook.pdf

COMING SOON!
REGIONAL IMMIGRATION ASSISTANCE CENTERS

Immigration/Criminal/Family Law Website Resources

- **NYSDA www.nysda.org**
- **Sanctuary for Families www.sanctuaryforfamilies.org**
- **Immigrant Defense Project www.immigrantdefenseproject.org**
- **Defending Immigrants Partnership www.defendingimmigrants.org**
- **NLG National Immigration Project www.nationalimmigrationproject.org**
- **Immigrant Legal Resource Center www.ilrg.org**
- **Columbia Law School Collateral Consequences Calculator http://ccnmtl.columbia.edu/portfolio/law/collateral_consequen.html**

Part II

IMMIGRATION REMEDIES INDOMESTIC VIOLENCE CASES

POWER POINT PRESENTATION

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Immigration Remedies in Domestic Violence Cases

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June 2015

OVERVIEW

- The Immigration and Nationality Act (INA) grants relief to certain noncitizen domestic violence survivors, including victims of human trafficking and crime, an unaccompanied minors who are abused, neglected or abandoned.

Vermont Service Center

- A special unit was created at the VSC by Citizenship and Immigration Services (CIS) to adjudicate cases involving domestic violence in order to ensure uniform implementation of the law. This unit also handles special visas for victims of human trafficking and other crimes.

I. The Violence Against Women Act allows for "self-petitioning"

- The survivor of "battery or extreme cruelty" who is or was previously married in the past *two years* to a U.S. citizen or lawful permanent resident (LPR) may be eligible to self-petition for lawful permanent residency (a "green card") pursuant to INA Section 204(a)(1)(A) and (B).
- **The spouse and child(ren) of an undocumented person or a person in the U.S. on a temporary visa do not qualify for this relief.**

What constitutes "extreme cruelty"?

- "Being the victim of any act or threatened act of violence, including any forceful detention which results, or threatens to result, in physical or mental injury. Psychological or sexual abuse or exploitation… shall be considered acts of violence."
- 8 CFR Sections 216.5(e)(3)(i), 1216(e)(3)(i).
- Extreme cruelty may be supported by any credible evidence.
- INA Section 216(c)(4)

Requirement: (1) A Legal Marriage

- A legal marriage is required (thus a legal termination of all previous marriages is required).
- A self-petitioner may still qualify if she was in a bigamous marriage when she proves that she believed she was entering into a bona fide marriage, a marriage ceremony was actually performed, but such marriage is not legal solely due to bigamy on the part of the abusive spouse. INA Section 204(a)(1)(A)(iii)(II).

The two year rule: INA Section 204(a)(1)(A)(iii)(II).

- If the self-petitioner is no longer married to the abusive citizen or LPR spouse, the marriage must have terminated in the past two years, and she must show that the termination was connected to the domestic violence (for example, a spouse who was incarcerated or deported because of a domestic violence conviction).
- A widow is also eligible within two years of her spouse's death.

Requirement: (2) A good faith marriage

- The marriage must have been entered into in good faith and not solely to obtain an immigration benefit. (this requirement mirrors the "bona fide" marriage requirement applicable to "normal" marriage-based immigration sponsorship).

Requirement: (3) Couple resided together

- The self-petitioner must have resided at some point with the abusive spouse, though not necessarily in the U.S.
- The self-petitioner need not live with the abusive spouse at the time a self-petition is filed.
- A self-petitioner must generally reside in the U.S. at the time the petition is filed, but there are exceptions if the spouse is an employee of the U.S. Government or in the Armed Forces.

Further Requirements:

- (4) Proof of the abusive spouse's status in the U.S. is required. Again, he must be a U.S. citizen or lawful permanent resident.
- (5) The self-petitioner must be of good moral character (No crimes or immigration violations, for example)

A self-petitioning child

- A self petitioner may also be a child who suffered domestic violence at the hands of his/her US citizen or LPR parent, or the parent of such an abused child.
- Under immigration law, a child is defined as a person under age 21 and unmarried.

INA Section 204(a)(1)(A)(iv)

Requirements

- A self-petitioning child must show the parent-child relationship.
- The child must have resided with the abusive parent.
- The parent-child relationship must exist when the self-petition is filed.
- The child must be of good moral character.

NOTE:

- In the case of a self-petitioning spouse, the abuse must have taken place ***during the marriage.***
- This is not a requirement for a self-petitioning child or parent of such child.

II. Conditional Residency

- If a foreign born spouse receives permanent residency within the first two years of the marriage by which she obtained the residence, s/he will receive CONDITIONAL residency. That is, the "green card" will be valid for only two years.
- Immigration and Nationality Act (INA) Section 216(a)

REMOVAL OF CONDITIONAL RESIDENCY

- In a "normal" marriage, prior to the expiration of the two year conditional residency, the couple must file a joint petition and prove to immigration authorities that they still are living as husband and wife. This is another means by which USCIS ensures the bona fides of a marriage.

INA Section 216(c)(1); Section 216(d)(2)(A).

What if there is domestic violence?

- If the couple separates or the marriage terminates or an abusive spouse is uncooperative and the joint petition cannot be filed, the foreign spouse may file a waiver of the requirement to file the joint petition if s/he is the victim of domestic violence.

INA Section 216(c)(4)(C).

Requirements for the waiver

- A showing that the marriage was entered into in "good faith;" and
- That the foreign born spouse or child was battered or suffered "extreme cruelty" during the marriage by the U.S. citizen or permanent resident spouse; and
- That the foreign born spouse was not at fault in failing to timely file a joint petition.
- No final dissolution of the marriage is required.

- The waiver should be filed within 90 days prior to the termination of conditional residence.

NOTE

- There are two other waivers, in addition to the domestic violence waiver, available to remove the conditions on one's residency when a marriage has ended. These include the "good faith" waiver and the "extreme hardship" waivers.
- The former requires proof that the marriage was entered into in good faith but is now legally terminated. INA Section 216(c)(4)(B).

  The latter requires the foreign-born spouse to show extreme hardship if she were not granted permanent residency and thus not allowed to remain in the U.S. INA Section 216(c)(A).

III. Requirements for "U" visas

- Suffer "substantial physical or mental abuse" as the result of a crime;
- Possess "information concerning the criminal activity" and;
- Helpful to investigation or prosecution;
- Certified as helpful by a law enforcement official.

INA §101(a)(13)(U)(i)-(iii)

Who may certify?

- Police officer
  - Supervisor or Officer designated to sign
- Prosecutor
- Judge
- Officer of the Department of Homeland Security (immigration authorities)
- State or Federal Agency Employee such as Child Protective Services, DOL, EEOC

8 CFR 214.14(2)-(3)

"Qualifying" crimes include:

- Torture, trafficking / peonage / slave trade / involuntary servitude, incest, domestic violence, rape / sexual assault/abuse/exploitation, abusive sexual contact, prostitution, kidnapping, abduction, false imprisonment / hostage taking, extortion, felonious assault, murder, manslaughter, witness tampering, blackmail, obstruction of justice, perjury, female genital mutilation.
- Or the attempt, conspiracy, solicitation to commit any of the above offenses.
- Added in VAWA 2013: stalking, fraud in foreign labor contracting

INA §101(a)(13)(U)(iii)

Location of crime

- No requirement that crime occurred in the US.
  - Crimes outside U.S. must be:
    - On military installation or
    - In violation of U.S. law with extraterritorial jurisdiction

INA §101(a)(13)(U)(i)(IV)

Indirect Victims or bystanders

- Victims' relatives or bystanders to crime eligible in some circumstances
  - Typical cases:
    - Parents of children under sixteen
    - Relatives of murder victim affected by crime

INA § 101(a)(13)(U)(i)(II)-(III); 8 CFR 214.14(b)(3)

Proving substantial abuse

- nature of injury
- severity and duration of harm
- permanence of harm
- aggravation of pre-existing condition

8 CFR 214.14(b)(1)

Helpfulness of victim

- Must provide all assistance "reasonably requested"

8 CFR 214.14(b)(3)

- Certifying official can withdraw U certification, even after U visa granted

8 CFR 214.14(h)(2)(i)(A)

IV. Requirements for "T" visas

- Victim of severe form of trafficking;
- Physically present in the U.S. on account of trafficking;
- Compliance with any reasonable requests from a law enforcement agency for assistance in the investigation;
- S/he would suffer "extreme hardship involving unusual and severe harm" if removed from the U.S.

INA §101(a)(13)(T)

Definition of Trafficking Victim

- Person was:
  - Recruited, harbored, moved, or obtained;
  - By means of force, fraud, or coercion;
  - For purpose of involuntary servitude, debt bondage, slavery, or sexual exploitation.

Proving "extreme hardship"

- Factors USCIS will consider:
  - Applicant's age and personal circumstances;
  - Applicant's health treatment needs;
  - Nature / extent of consequences of trafficking;
  - Access to U.S. justice system;
  - Laws, social practices, customs that penalize victims;
  - Risk of re-victimization, availability of protection;
  - Danger of retaliation by trafficker / associates;
  - Dangerous conditions in home country.

8 CFR 214.11(i)

V. The law of asylum

- The authority to apply for asylum is found at Immigration and Nationality Act (INA) Section 208 (8 USC Section 1158), and its interpreting regulations, 8 CFR Section 208.
- NOTE: *The substantive standards in asylum law are also interpreted by case law and may vary from one circuit to another.*

A refugee is

- Any person who is outside his/her country of nationality, or country in which s/he last habitually resided if s/he has no nationality,
- and that person is unable or unwilling to return to, and unable or unwilling to avail himself or herself of the protection of that country because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

A refugee may also be

- Any person who is outside his/her country of nationality, or country in which s/he last habitually resided if s/he has no nationality,
- and that person is unable or unwilling to return to, and unable or unwilling to avail himself or herself of the protection of that country because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Survivors of Violence?

- Certain women forced to undergo female genital mutilation, Bah v. Mukasey, 529 F.3d 99 (2nd Cir. 2008); Abankwah v. INS, 185 F.3d18 (2d. Cir.1999).
- A woman with liberal Muslim beliefs which differ from her father's orthodox Muslim views concerning the proper role of women in Moroccan society. Matter of S-A-, 22 Dec. 1328 (BIA 2000).
- Women who were sold into marriage and who lived in a community in China where forced marriage was condoned and considered valid. Gao v. Gonzales, 440 F.3d 62 (2d Cir.2006).

Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014)

- Depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group that forms the basis of a claim for asylum.

Also…

- Mexican women in domestic relationships who are unable to leave. (by an immigration court).
- Nigerian girl sold by her father into marriage to a polygamous village chief. In an effort to quell her resistance to the forced marriage arrangement, the father left her alone at the village chief's home, where he raped her repeatedly. (by an immigration court)

Matter of S-A-K- & H-A-H-, 24 I&N Dec. 464 (BIA 2008)

- A mother and daughter from Somalia who provided sufficient evidence of past persecution in the form of female genital mutilation with aggravated circumstances are eligible for a grant of asylum based on humanitarian grounds pursuant to 8 C.F.R § 1208.13(b)(1)(iii)(A) (2007), *regardless of whether they can establish a well-founded fear of future persecution*. *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989), followed.
- See also, Matter of L-S-, 25 I&N Dec. 705 (BIA 2012)

Case Theories on DV asylum

- An applicant would have to show that in her country: 1) the society and legal norms tolerate and accept violence against women; 2) the government is unable or unwilling to protect; and 3) there is no place within the home country that the woman could move to in order to escape her persecutor.

VI. Special Immigrant Juveniles

- Available to certain immigrant children who are unable to reunify with one or both of their parents for reasons of abuse, neglect, abandonment or some similar basis under state law.
- SIJS is available to all children who meet the eligibility requirements, regardless of whether or not a child is in removal proceedings, in federal custody or even known to immigration authorities prior to submitting the SIJS petition.

Requirements

1. Child has been *declared dependent of a juvenile court* located in the United States ***or*** is a child whom such a court has *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***

2. *whose reunification 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…***and***

3. for whom it has been determined … 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.

INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J)

What is a "juvenile court"?

A juvenile court is defined under federal law as:

> "A court located in the United States having jurisdiction under State law to make juvenile determinations about the custody and care of juveniles."

8 CFR § 204.11(a)

State and federal laws involved

- No federal guidance as to definitions of abuse, neglect and abandonment
  - Abuse, abandonment, and neglect defined under state law
  - Immigration law relies on state courts to make determinations of abuse, abandonment and neglect
  - State courts regarded as having expertise in questions of child welfare

Relevant Family Court Proceedings

Asking a court to make the findings for a potential SIJS application can happen in various types of proceedings including, but not limited to:

Custody actions
Guardianship/Conservatorship actions
Abuse/Neglect actions
Juvenile Delinquency actions
Divorce/Child Support actions
Termination of parental rights actions

NOTE:

The state court's SIJS findings DO NOT automatically result in immigration status for the child.

- The SIJS findings are required for the child to be able to apply for immigration status.
- The child will still have to file two separate applications with immigration before receiving permission to work and live in the United States legally: one to qualify for SIJS and a second for lawful permanent residence.

CORNERSTONE ADVOCACY: AN INTERDISCIPLINARY APPROACH TO WORKING WITH FAMILIES

Erin Browne, Esq., Senior Staff Attorney, Center for Family Representation
Anastasia Rivera, Esq., Litigation Supervisor, Center for Family Representation
Sara Rivera, LMSW, Senior Staff Social Worker, Center for Family Representation

This program will provide an overview of pertinent law and regulation and advocacy strategies directed to speed reunification of families with children in foster care. The program will describe strategies for attorneys and social workers to promote appropriate and meaningful service plans, placements, participation in conferences, and visitation. It also will provide practice tips for solo practitioners and attorneys who do not work with social workers.

CORNERSTONE ADVOCACY: AN INTERDISCIPLINARY APPROACH TO WORKING WITH FAMILIES

OUTLINE

Submitted by:
Center for Family Representation

Cornerstone Advocacy: An Interdisciplinary Approach to Working with Families
The Center for Family Representation
June 5th, 2015.

1. **Introduction**
    a. What we do-Direct representation to parents against whom ACS files abuse/neglect cases, whose children about to be removed or already removed
    b. Team model-in court and out of court advocacy
        i. Attorneys
        ii. Sw/family advocates
        iii. Parent advocates=parents who successfully reunited with their children and now work w us to help our clients navigate system
        iv. Paralegals
    c. Started by attorneys who represents foster care agencies and children and saw many missed opportunities for reunification-children do better when their families are supported/helped
    d. Training & Technical Assistance- shares our expertise and experience with child welfare practitioners throughout the city, state, and country. Through our Policy & Advocacy work, CFR positively impacts the child welfare system
    e. Always try to answer important questions:
        i. Will this parent be able to parent safely?
        ii. How and when a child can go home safely?
2. **Our Results**
    a. 50% of our clients children do not enter care
    b. Median LOS/FC of 7.5 months (avg over 7 years) compared to 11.5 months (city) prior to becoming the primary defender
    c. 37% of kids returned within six months compared to 28% ; 52% within one year compared to 43% (state)
    d. Re-entry 8% compared to 15% (state)
    e. Dismissal rate of 33% compared to 11% (ACD)
3. **Social Workers roles in teams**
    a. Intake, Ongoing Assessment and Support
        i. Crisis intervention
        ii. Motivational interviewing and goal setting
        iii. Supportive case management
        iv. Safety planning
        v. Trouble shoot problems with visitation
    b. Connect Clients to Services
        i. Parenting support programs
        ii. Mental health services
        iii. Domestic violence programs
        iv. Parent child psychotherapy
        v. Early childhood assistance
        vi. Drug treatment

c. Out of Court Advocacy
    i. Foster care/DSS conferences
    ii. Hospital Discharge/placement meetings for parents children with mental illness
    iii. Public Benefits/Housing
    iv. Educational Advocacy

4. Four Cornerstones

a. placement, services, conferences, visits
    i. they all build on each other and are interrelated to answer that question, can parent parent safely
b. Why first 60 days is important
c. **Placement**
    i. Kinship placements prioritized
    ii. Important for finding permanent homes because is a person related or who at least is known to the child
    iii. Keep in mind maintaining normalcy for child: school concerts, person who is comfortable allowing child to call their parent, allows parent to visit in their home, willing to travel for visits without excuses
        1. Proximity to school/activities
            a. Examples: Neighbor in same building, available to take children to therapy and arts programs
            b. Think about resources that support the child's (and parent's) attachments: Who and what resources are available that can continue to work with a child or parent. (i.e. daycare, school, doctors, early intervention providers, therapists)
            c. Ask parents about /resources that have been helpful to them or the child; too often the system treats parents as though they no longer have anything to offer their children; they do better when engaged in their children's care, even if only to provide some advice on some issues.
                i. *Action Step*: *if you have an interview checklist (written or just in your head) , add a question about other supports, adults involved with the parent, not just family; if you represent children, ask to speak with the parent about this; make an argument in court that references this whenever possible (i.e. to explore a placement option) as it reminds all parties that parent is thinking about the child's well being (humanizes the parent)*

2. Siblings placed together or sibling visits-person willing to endure a bit more inconvenience (turning living into bedroom) for someone they know/relative

iv. Keep in mind placement can assist reunification and motivate parents

v. Sometimes it's a person you don't expect (example: paternal aunt in a DV case) so important to cast wide net and ask on initial meeting and constantly reassess

vi. Regulations provide that "kin" can be people not related to the child by blood but people who have a relationship with the child--Access these people: sometimes neighbors, god parents, etc, can be placement resources;

1. *Action Step: copy the regulation and carry copies with you for a few weeks;*

vii. When reviewing a petition, 'inventory' potential placement resources and supports;

1. *Action Step: make a point of asking a case planner at arraignment who these people are; ask that these people be included in conferences if you identify them and the client consents*

d. **Services**

i. Crucial to engage families, work to meaningfully address concerns, strengthen and reunify families.

ii. Must be tailored to family's needs and allegations in petition

1. What services will be helpful to this specific case?
2. What services have been helpful to them or the child in the past?
3. What are this parent's strengths?
    a. *Action Step: add this to your checklist of items you'll ask the client, the case planner when you meet him/her; if you are a case planner, add 'parents strengths' to your court report template;*
4. Are services duplicative or potentially unnecessary, at least at this particular time? Is the service plan burdensome?
    1. *Action Step: ask a case planner to explain day by day exactly how/when/where the parent can accomplish these things; help your parent client make a calendar or checklist; ask a service provider to provide a short letter to the court regarding what will be covered, for example, in therapy;*

iii. Knowledgeable social work staff essential here

iv. Service plan important because if not appropriate service, children likely to be removed again and that = harmful to parent and child

v. If not appropriate, agency and services in general lose legitimacy for parents and can cause them to disengage
vi. If a service doesn't exist and agency unfamiliar, CFR sw staff will make referrals/educate agency
    1. Services in client's language
    2. Appropriate services are NOT always parenting class and anger management and random drug tests for everyone.
        a. Parenting skills courses: think critically about them and ask what the services in a particular class will be prior to making a referral—ask WHY this particular parenting program is deemed appropriate for this particular parent—too often the referral is formulaic and the program does not match the parents strengths or needs well;
            i. *Action Step: invite a staff person from a parenting class to a brown bag lunch at your office;*
        b. Example: One time excessive corporal punishment with special needs child, at her wit's end and used excessive corp, this mother should have parenting class for children with special needs and family therapy NOT anger management
        c. Example: Even with "difficult clients", just because client is angry or emotional does not mean they need MH eval or anger management.
vii. Being creative-client incarcerated or out of state –builds on placement cornerstone

e. **Conferences:**
    i. Why is this important? There are a lot of decisions made at conferences outside of court. Some are formal, some are informal. It is important to connect what is happening in court with what happens outside of court to ensure progress.
    ii. ACS Conferencing model-strength based
        1. Parent to parent-within 72 hours
        2. Transition conference
        3. Child safety conference before removal
        4. Goal change conference
        5. **Find out about the meetings.** It's difficult to find out about every meeting. At the initial court appearance, you should ask your client to inform you about meetings. You should also ask the ACS and foster care workers about upcoming meetings. This requires perseverance. Attorneys can request, on the record, that the agencies inform us about the meetings.
    iii. Preparing client for conference
        1. **Your client can invite people to the conference for**

support. In a room full of agency workers, family and friends may help a parent stay calm. Your client should invite any resources who are interested in being considered foster parents or visit hosts.

2. Your client should know the meeting's purpose and agenda, format of the meeting, invited players, and documents they may be asked to sign.
3. **Discuss strategies for handling a tense or difficult meeting**, such as stepping outside the meeting to take a break and re-focus.
4. **Bring written information** about any programs or services the client attends to the meeting. As with everything, bring copies! If the client is already in services, it will help minimize the number of referrals the agency makes.
5. **Prepare your client for a discussion of the neglect and abuse allegations.** Every parent should speak with their legal team prior to discussing or responding to the allegations in the meeting. If the team advised not to discuss the allegations, help your client to communicate the reasons (i.e. "on advice of my lawyer" and "due to the pending criminal court case") and help move the discussion to service planning and visits.
6. **Talk to clients about how to present their needs productively.** Unfortunately, sometimes seeking help for problems can result in additional allegations against the client. During the initial conferences, ACS is still conducting an investigation and can ask to amend the petition against a client based on what they learn during their investigation. However, parents often do need help, which you can help frame without compromising their legal case
7. **Anticipate a reasonable service plan and discuss what your client is willing and able to do**. For example, if the allegations are drug abuse, discuss drug assessment, treatment and testing options. With excessive corporal punishment allegations, discuss a range of options from anger management classes to individual therapy. If the services ACS requests are too numerous, require a parent to travel to multiple providers, conflict with work or school schedules, or are not reasonable, help your client speak up at the conference. You don't want your client to sign a service plan that will fall apart immediately.
8. **Help a client disagree with unreasonable or inappropriate services**. Parents should not agree to services that they don't understand, they don't need, or that are impossible to do. There may be a place in a service agreement to express these disagreements so be sure to fill that out. While you can prepare a parent to respectfully disagree, you may suggest a client

speak with their attorney following the meeting to resolve any disagreements.

9. **Know what happened in court and about current court orders**. Be aware that the participants may not have been in court, but make sure your client is informed. Bring court orders related to Orders of Protection, visiting and Orders to explore relatives for foster care or Visit Hosts, if they exist.

iv. During the conference

1. What's the first thing discussed? ASFA. Imagine how parents feels, be prepared to diffuse this, remind the parent that being at the meeting is "actively planning" and participating.
2. When the facilitator discusses the "ground rules," **suggest that participants talk *to* the parent rather than *about them,*** while they are sitting there. You should model this approach.
3. Many decisions made outside of court and attorneys must be connected/informed
4. Social work staff essential here to assist in developing effective service plan
    a. Example: Cognitive delays v. mental illness
    b. Example: suicide by OD on heroin and never drug use before, service plan should be MH, not necessarily drug treatment.
5. SW staff and parent advocates essential to point out strengths of parents.
6. There to say "no" to help client advocate for him or herself and not to agree to everything ACS suggests because of fear of looking noncompliant
7. Use meetings to create relationships with caseworkers and after that's accomplished, help to maintain calm in chaotic environment
8. **Request to *explore* a service recommendation**. If ACS recommends something that the client does not know if he should agree to, such as a drug test or a psychiatric evaluation, he can ask to postpone the decision until he speaks with his attorney.
9. **Hold the agencies accountable for concrete timeframes**. The service plans require timeframes for the implementation of each service. Ask for very specific dates and then follow up.
10. **Take advantage of the conference by asking for help with concrete problems** like Public Assistance or the shelter system. If a parent needs a letter for PA or housing help, make that part of the service plan with a date attached to it. Providing Metro Cards should be part of the service plan if the parent needs transportation assistance.

v. Debriefing after a conference

1. Speak with parent about what worked, what didn't, how they felt. A debrief reminds the parent that you are on their side, even if the meeting didn't go how you or the parent wanted.
    a. If you can't attend, call your client on the phone, discuss what happened.
2. **Consider sharing copies of the Service Plan generated at this conference**. The service plan is not often provided to the Court, but if your client agrees, you can use it to present your client in a positive and participatory light to other parties or to ask the Court to hold the agency accountable for what they have agreed to do for the client.

f. **Visiting**

i. Visits are crucial to reunification. Regular and meaningful visitation helps ease the adjustment into foster care for children, and keeps parents engaged in the process.
ii. As a parents' attorney, making visitation applications is a way to keep forward momentum towards reunification: making a visit application is an opportunity to remind everyone of the urgency all parties should have regarding this and the positive aspects of our client's case (services, close bond with the child). Think of visits as something that is on the table to be raised at *every* court appearance.
iii. Directly linked to reunification/improving parents' relationships with their children
iv. Single best predictor of safe and lasting reunification
v. Even in a TPR phase, there is often the ability to keep improving visits
vi. Visit hosts-when children can see their parents in comfort and with frequency, continue relationship==talk about important events, parents can attend them with supervisor if necessary
    1. Try to identify a visit host in appropriate cases
        a. *Action Step: add to your standard questions of young people and parents those that will help identify a visit host; ask the agency to 'explore and report' if you identify a particular visit host; read the NYC guidelines (or assign an intern to do this) and list the people who might help develop similar guidelines if necessary;*

vii. Keep in mind requesting more than standard duration and frequency
viii. Depends on case by case basis and client's capacity
ix. Asking for specific orders
x. Often topic for motion practice
xi. Practice Tips

    1. Always argue that meaningful visits are a "reasonable effort" in support of reunification!

2. At the first court appearance or as soon as possible thereafter, request that a visit take place within 48-72 hours.
3. Ask WHY regarding visiting plans: Why exactly is supervision necessary? Why at this level? When can it change? **Is the visiting plan treating all the children as similarly situated when perhaps they are not?
    a. *Action Step: ask that court reports include specific reasons for supervision; ask about visiting at every court appearance; ask: when will visits become unsupervised?*

4. Surface philosophical and professional development issues pertaining to visiting—do we think increased visiting should be a reward for compliance with a service plan? Are we formulaic in our approach to visit plans? Do we need additional training?
    a. *Action Step: set up a meeting to begin discussing this;*

5. Practitioners in the custody/matrimonial areas are probably familiar with the move towards the term "parenting time" rather than "visitation". Keeping this term in your mind (and even using it out loud) can help solidify the concept that visitation should be as natural as possible, as well as centered on normal family activities, such as birthday celebrations, doctor visits, school conferences, bedtime routines, etc.
6. Ask about visiting at *every* court appearance.
7. Think about developmental needs of the child in supporting attachment to parents
8. Ask if the kids/youth can talk on the phone with their parents; think about whether or not older kids and parents can exchange cell phone numbers or whether a parent can give a child a pre-paid phone
9. Ask parents what they would like to do on a visit; can't make promises, but can ask

10. Request that the court direct foster care providers to investigate potential visiting hosts as well as possible activities that could be integrated into visits.
11. Raise the visitation issue in court: one hour/once a week = only 2 days per year (reframe)—argue this is not enough; if the county says it does not have the staffing to provide more visits, and you can identify a visit host, ask that person to be explored;

12. Be sure that placement options are explored that maximize the child and the family's ability to spend time together, i.e. kinship placements or those with someone with a significant prior relationship to the family, i.e. godparents.
13. Ask that court orders clearly outline an agency's responsibility for visiting, i.e., to provide reimbursements for transportation costs. Also ensure that orders are clear regarding the current visitation schedule, as well as the need to update parties and the court on the reasons for supervision, whether the visiting plan can progress and/or whether and to what extent an agency will have discretion to modify visiting plans.
14. Draft the visitation orders you would like issued, and submit them to counsel prior to court appearances for review and feedback. Provide these proposed orders to the court as well -- they may be willing to sign them over the objection of other parties.
15. Ask in court to be provided with updated visiting plans generated at conferences or reviews that are required by law and/or agency policy.
16. Reference applicable regulations in oral argument and in motion practice and keep copies of pertinent regulations handy, i.e., 18 NYCRR 430.12 which states that visits should be conducted in a manner that assures the 'privacy, safety and comfort' of the family.
17. Obtain copies of any pertinent social service policy memos or guidelines and reference them as well! What the guidelines state can often be different than what is actually taking place.
18. If the family identifies someone who can assist with visiting, ask that person to come to court to address the judge on his/her ability to assist with the visit and assure the well-being of the child.
19. ASK: at our particular agency or within our particular practice, could we benefit from additional training on how to interview parents about visiting? So that we can feel more comfortable with "hard" conversations, but also get more information so we can be more creative?
    a. *Action Step: schedule a meeting to discuss this and whether we'd like help in doing this;*
20. ASK: if you represent the county/social services/foster care agency: do we need any additional training in how to talk with caseworkers who are OUR clients about these issues? how do we view the 'client counseling' role in this regard? Do we see ourselves as ethically (and from a knowledge standpoint) able to talk about these issues with them? What skills do we need to do that? Do we even see this as part of our role, or are we

mainly here to prosecute the case? (no right answers, and often about resources);

a. *Action Step: schedule a meeting to discuss this; make a list of who you'd invite on your way home*;

5. Legal Architecture

a. Reasonable efforts under ASFA and FCA 1089 and sometimes ACS's own policies (refer to PP)
   i. Reasonable Efforts Language (FCA §1027, §1028, §1052, §1089)
   ii. FCA §1015-a *("…court may order a social services official to provide or arrange for the provision of services or assistance to the child, and his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care…")* and/or
   iii. FCA §255 (*"family court ….may order any …county, municipal….officer and employee to render such assistance and cooperation as may be within his legal authority…to further the objects of this act….")*
   iv. and/or other applicable statutes, i.e. 1017 (all through placement) and/or
   v. Pertinent Regulations
      1. 18 NYCRR 427.3
         a. Agency can be reimbursed for the costs of long distance travel for visits to children in foster care from birth parents, siblings and relatives
         b. Agency can be reimbursed for the cost of long distance telephone communications between children and parents or siblings
      2. 18 NYCRR 428.6
         a. Family assessment and service plans must include visiting plans for children with parents, siblings, relatives, any potential permanency resource and persons of significance to child
         b. Service plans must include the family's views of its needs and concerns; plans should be based on a family's strengths as well as its needs
      3. 18 NYCRR 430.11
         a. Placement should permit child to maintain connections with people and institutions from which child was removed, including school
         b. First Visiting Plan must include plan for visits with parents and at least biweekly visits with "significant others."
      4. 18 NYCRR 430.12

a. Visiting should take place in a manner that assures comfort, safety and privacy
b. Child over the age of 10 must be included in Family Team Conferences (SPR); Parents can bring supports
c. "Adult Permanency Resource" is committed to providing emotional support, advice and guidance to the youth

vi. Pertinent Policies
1. O4-OCFS-INF-04: Family Visiting for Children in Out-of-Home Care
2. Preparing Youth for Success: Services for Foster Care Youth and former Foster Care Youth (published by OCFS and Center for Development of Human Services)
3. 12-OCFS-ADM-03 (educ. stability for children in care)
4. 11-OCFS-ADM-04 (religious affiliation of child placed in care)
5. 98-OCFS-INF-03: ASFA (Compelling Reasons)
6. ACS Visiting Guidelines #2013/02: Determining the Least Restrictive Level of Supervision Needed
7. ACS "A Bridge Back Home" (Visit Hosts)

vii. Examples:
1. Visit Host
2. Placement with Godparent

6. **Small Adjustments in your Practice**
a. Always ask WHY?
b. Learn to REFRAME
c. ARGUE from Common Sense and Compassion
d. LEARN a few regs or policy directives
e. Develop Reasonable Efforts "scripts"
f. Do an 'internal' survey of your own perspective/gather with people who may want to try something NEW
g. Schedule quarterly meetings to discuss any one or all of the Cornerstones—lunch meetings, etc., not necessarily 'extra' meetings, just put a Cornerstone discussion on your agenda within your own agency; within your court house—if the latter, make sure to invite child welfare people too, not just attorneys, as Cornerstone issues straddle both systems…….whenever possible, serve food—it always improves attendance (!)
i. Action Step: Send around a sign-up sheet TODAY or at your next large 'stakeholder' or court improvement meeting just asking who would like to be involved in more targeted work on any/all of the Cornerstones……things get done, even if slowly, when you start with the people who feel energized (and it is okay if you don't)…..
h. Think about an informal strategy—if you know five people (judge, attorney, advocate, case worker, CASA) that thinks like you do and you want to

advance any/all of these, have an informal lunch, coffee, first. Brainstorm about how to proceed next and who else to include;

i. Start small if you can: ask your CIP liaison (!) or supervising judge about piloting something—in a part, in a particular group of cases, etc.
    i. *Action Step:—ask for TA help; if you want to work on something, ask your CIP liaison to handle scheduling*……many great ideas die on the vine not because we don't have time to meet, but simply because most of us don't have people to handle coordination and scheduling of meetings.

j. Don't reinvent any wheels…i.e. if you like the idea of developing Visit Host Guidelines in your county, start with those developed by ACS in NYC……they were the result of more than two years of collaboration between court personnel, child protective and foster care personnel, parent and youth reps, all members of the advocacy and legal community, and focus groups.

k. Use a regulation to call a caseworker and let them know they can do something they think they can't; do the same with a policy directive

l. Specify that you want a Family Services Plan in the proposed order of discovery if you are representing parents or children; create routines in the court conferencing process to all look at /discuss these together. Note that SSL 409 a-f *require* that children's and parents' attorneys receive service plans via mail within 10 days of completion.

m. Advocates: Always consider short orders to advance a Cornerstone…….they create a blueprint, avoid delay, and keep things on top of the pile (but appreciate that a county attorney may feel compelled to object to an order against an agency)

n. Assign interns, whenever available, to do the work we can't find time for: outline of applicable regs., compendium of applicable policy directives, collecting research on parent engagement, support for children, visiting outcomes; free community resources for families, write sample papers to enhance visiting, gather Cornerstone resources from other states to serve as jumping off point (i.e. PA has written a visiting handbook, the ABA has numerous resources on its website from a variety of states, MI has a foster care manual that addresses many of the Cornerstone issues, while not of course naming them that way)—build on the work and ideas of others……..it always saves time. Let the intern 'present' on what they found to your staff/at a meeting; good for their resume and saves you time

o. Make a **common sense argument**—for example, if a single therapist can help a parent with anger management and parenting issues, argue that a parent should not have to attend three distinct programs (therapy, anger management

and parenting) and that a parent will do better if not be pulled in so many directions

p. Learn a regulation! Show and Tell works best with a regulation—once you show it to parties and judge or referee once, you may not have to again…….keep copies of regs you like in your briefcase; case file. Learn a policy directive or guideline…….also Show and Tell and keep copies with you if you find it helpful in moving a case along
    i. *Action Step: ask a summer intern to catalogue any Cornerstone regs;*
q. Gather with like minded people to identify a 'bite size' goal to further Cornerstone Advocacy (or just one Cornerstone) in your jurisdiction;
    i. *Action Step: on the ride home, make the list; send an email to someone with formal (or informal) authority who will host a first meeting; brainstorm about how to serve food……*

CORNERSTONE ADVOCACY: AN INTERDISCIPLINARY APPROACH TO WORKING WITH FAMILIES

POWER POINT PRESENTATION

Submitted by:
Center for Family Representation

Cornerstone Advocacy: Interdisciplinary Approach to Working with Families

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Center for Family Representation

What do we Mean in the CP context?

- **Develop a Legal Theory and Strategy to Advance other Objectives** of your client (in addition to defending the petition—they have others) especially: **visits** that speed reunification, well tailored **services** that make it more likely you will secure reunification; **placement** options that support a child's attachment to the parent; and ways to leverage **out of court opportunities for advocacy**---
- **Advocate in and Out of Court—**to advance their objectives even before adjudication;
- **Find opportunities to do "small" litigation,** i.e. an oral application well supported in facts/law and **motions** directed toward objectives
- **Make the Goal** this being your client's last contact with the system

The Four Cornerstones

Our Results

- 50% of our clients children do not enter care
- Median LOS/FC of 7.5 months (avg over 7 years) compared to 11.5 months (city) prior to becoming the primary defender;
- 37% of kids returned within six months compared to 28% ; 52% within one year compared to 43% (state)
- Re-entry 8% compared to 15% (state)
- Dismissal rate of 33% compared to 11% (ACD)

CFR THE CENTER FOR FAMILY REPRESENTATION

What do Social Work Staff do for our clients?

- **Intake, Ongoing Assessment and Support**
- **Connect Clients to Services**
- **Out of Court Advocacy**

CFR THE CENTER FOR FAMILY REPRESENTATION

You don't need CFR's model to pursue Cornerstone Advocacy

- We have a high volume practice and continually have to find ways to do more with less
- We'll focus on "small adjustments" and "next actions" for the solo practitioner
- Tried and Tested suggestions
- Applies to Youth and Parents

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Cornerstone Advocacy

1. **Always ask WHY?**
2. **REFRAME**
3. **ARGUE from Common Sense and Compassion**
4. **Learn a few regs or policy directives**
5. **Think about "Small Adjustments" and "Next Actions"**

Why 60 Days?

The 60th day is a best practices benchmark for the trial phase of a dependency case to be complete.	To take advantage of the sense of urgency and optimism at the beginning of the case	To set the direction of the case towards reunification from the outset.

While Cornerstone Advocacy should begin on day one, it can and should continue throughout the case, regardless of when a trial date is set.

Placement: Ask about the whole constellation of possible supports, not just relatives; advocate for the one that supports your client/child's attachment or your client's goals for her child

Appropriate placement eases the child's transition to foster care

- A placement that helps children stay connected to teachers, friends, and other community supports like therapists or physicians minimizes the disruption in a child's life.

Appropriate placement keeps parents engaged

- Foster parents who are willing to support a parent and child's relationship play a critical role in maintaining family ties that inspire parents to stay engaged in services.

Appropriate placement supports reunification

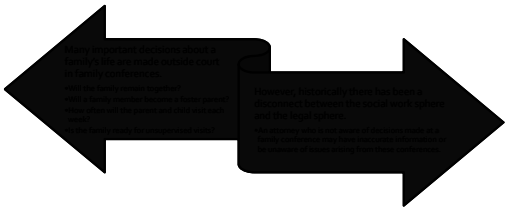
- A placement which appropriately supports a child's connection to family promotes reunification and eases the transition home.

Services: should not be formulaic or duplicative—should be practical, achievable, and make sense to the client

Poor or Inappropriate Services	Creative and flexible services
may be ill-suited to the family and may create unnecessary demands on a parent who must attend programs, court appearances, and visits.	will keep parents engaged by ensuring that the services are meaningful and manageable given the parents' other commitments
may lose legitimacy for parents and can cause them to disengage or "fail to comply."	will move the family towards reunification more quickly by addressing their needs and building on their strengths

CFR THE CENTER FOR FAMILY REPRESENTATION

Conferences: So much happens out of court (and so much of what happens in court gets lost in translation at the agencies); if you can't be at a planning conference, help your client identify a support who can; make sure they have orders and send them with letters if need be



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Preparing Clients for Conferences

- Find out about meetings: on the record in court, from clients, and agency caseworkers
- Identify and invite client supports
- Explain expectations to the client
- Prepare for a discussion about the allegations
- Bring written information about services
- Anticipate a reasonable service plan

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Advocating for Clients at Conferences

- Suggest people talk *to the parent, not about*
- Ensure strengths are also discussed
- Help client disagree when necessary
- Explore service recommendations by asking questions out loud
- Suggest time frames, and hold the agency accountable.
- Get a copy of the service plan

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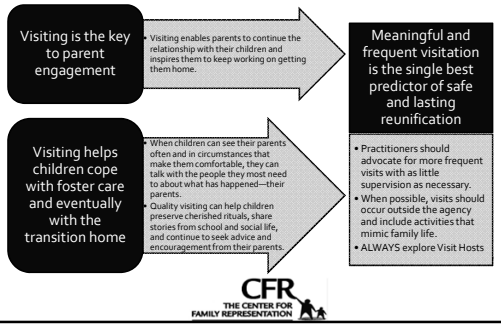
Debriefing with Clients after Conferences

- Take 10 minutes with your client
- Ask how they experienced the conference—successes and challenges.
- Discuss next steps for you, as well as for your client.
- Make calendar reminders about any follow up

CFR THE CENTER FOR FAMILY REPRESENTATION

Visiting: the key to everything else—huge motivator for parents, gives the client the chance to keep "parenting"—ALWAYS explore a Visit Host



CFR THE CENTER FOR FAMILY REPRESENTATION

The Legal Basis for Cornerstone Advocacy

"Reasonable efforts"	• The passage of ASFA prompted a renewed focus on the agency's duty to make reasonable efforts to safely reunify families. Think about how the Cornerstone applications can fairly be deemed 'reasonable efforts' in support of reunification.
State child welfare statutes	• These address services and assistance. Also look to any issue-specific sections of your state statute (i.e. the portion that deals with services, visits, or placement). Argue that your advocacy fulfills the spirit if not the letter of that section.
State regulations	• These detail the obligations that agencies owe parents and children. For example, most states have regulations which include specific agency obligations regarding visits, conferences and services, and placement.
Administrative directives, memos, and guidelines	• Find these on state and county web sites. While not law per se, they typically represent social service providers' interpretation of best practices and legal obligations and thus can be persuasive in convincing an agency or a judge to move on a Cornerstone issue.

CFR THE CENTER FOR FAMILY REPRESENTATION

NYS Cornerstone Architecture

Reasonable Efforts Language
(FCA §1027, §1028, §1052, §1089)

plus

FCA §1015-a (*"…court may order a social services official to provide or arrange for the provision of services or assistance to the child, and his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care…"*)

and/or
§255 (*"family court ….may order any …county, municipal….officer and employee to render such assistance and cooperation as may be within his legal authority…to further the objects of this act…."*)

and/or other applicable statutes, i.e. 1017 (all through placement)
and/or

Pertinent Regulation(s)

and
Applicable Policy Statements, Administrative Memos, etc.

CFR THE CENTER FOR FAMILY REPRESENTATION

Example: Application for Visit Host

- **FCA 1027, 1028, 1052, 1089**
- **" 'Reasonable Efforts'** …..ACS/DSS has an ongoing obligation to make reasonable efforts to reunify children safely with their parents—visitation that is frequent and long enough to help parents and children maintain and potentially improve their relationship should be viewed as such a reasonable effort
- *-plus-*
- **FCA 1030:** a Parent is entitled to reasonable and regular visitation unless a child's life or health would be endangered
- *-plus-*
- **18 NYCRR 430.12**: "…Visitation shall take place in a setting that affords a family 'comfort, safety and privacy.' and **18 NYCRR 430.11**: agency is supposed to develop a visiting plan for a child that includes visiting with "significant others"
- *-plus-*
- **04-OCFS-INF-04:** Visiting should occur in settings that encourage the most natural interaction between family members while minimizing any risk that may exist to the children or communities. It can and should include parental and family participation in normally occurring events in the children's lives; for example, school conferences, medical appointments, church programs, and extracurricular activities.
- *-and/or-*
- **ACS Visit Guidelines 2/2013 :** …As soon as possible, visits shall move from the agency into the community…where Visit Hosts may facilitate visits…."

CFR THE CENTER FOR FAMILY REPRESENTATION

Example: Application for Child to be in the Care of God Parent

FCA 1027, 1028, 1052, 1089.:
"[R]easonable Efforts" determinations must be made when the Court is considering removal or placement of the child and if the goal remains return to parent, DSS /ACS must demonstrate that reasonable efforts were made to reunify the child—

-plus-

FCA 1017: Family Court has the authority to direct placement with a particular person even if in foster care; **FCA 1015-a:** Court can order DSS to provide "assistance" to the child to "protect" the child and to "facilitate…..discharge"

-plus-

18 NYCRR 430.11: Placement should permit child to maintain connections to people and institutions from which child was removed and to which child will likely be returned; **18 NYCRR 443.1 and 443.7:** any person with a "significant prior relationship to a child" is entitled to an expedited home study for FC certification in the same manner as a biological relative

-plus-

12-OCFS-INF-4: The initial placement of the child into foster care… must take into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's foster care placement location.

When it is in the best interests of the foster child to continue to be enrolled in the same school in which the child is currently enrolled, the agency … must coordinate with applicable local school authorities to ensure that the child remains in such school.

"Litigating" the Cornerstone Application to have a child placed with a godparent and thus remain in her after-school program

Remember: You rarely have to have an extensive hearing to make a good record and/or be persuasive on a Cornerstone application—
think "mini litigation." (i.e. asking a few questions on the record of a parent, caseworker, or interested party or handing in a report)
And Remember…..SHOW AND TELL is the rule of thumb when raising any Cornerstone issue: you may have to provide copies of regulations and/or Policy bulletins or Administrative Directives to convince the Agency or Judge

Oral Application:
•Argue that helping your client's child to remain in her school/afterschool program should be deemed **a "reasonable effort" in support of reunification** and in support of your client's child's emotional health best interests and that an educational plan is expected to be addressed at disposition at a minimum, that a policy of educational stability is well established in regulations (430.11), in that child will adjust better to foster care if she can stay among familiar teachers and peers, remain in any established school services, sports or clubs AND that future reunification will not be delayed due to the desire to preserve a school placement until the end of the academic year
•Argue that application regulations (443.1 and 443.7) make clear that "kin" are those with a "significant prior relationship" so a godparent qualifies and the agency is obligated to preserve educational stability whenever possible (430.11)
•Present brief testimony on this issue, i.e. have the godmother present to tell the court under oath about her relationship; have the parent tell the court about the relationship; (this takes only a few minutes and makes the record); have a letter from the afterschool program
•Show and Tell: hand up copies of the applicable regulations

Great Cornerstone Regs

18 NYCRR 427.3

- Agency can be reimbursed for the costs of long distance travel for visits to children in foster care from birth parents, siblings and relatives
- Agency can be reimbursed for the cost of long distance telephone communications between children and parents or siblings

18 NYCRR 428.6

- Family assessment and service plans must include visiting plans for children with parents, siblings, relatives, any potential permanency resource and persons of significance to child
- Service plans must include the family's views of its needs and concerns; plans should be based on a family's strengths as well as its needs

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Great Cornerstone Regs Cont'd

18 NYCRR 430.11

- Placement should permit child to maintain connections with people and institutions from which child was removed, including school
- First Visiting Plan must include plan for visits with parents and at least biweekly visits with "significant others."

18 NYCRR 430.12

- Visiting should take place in a manner that assures comfort, safety and privacy
- Child over the age of 10 must be included in Family Team Conferences (SPR); Parents can bring supports
- "Adult Permanency Resource" is committed to providing emotional support, advice and guidance to the youth

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Other Helpful Policy Statements (examples only)

- 04-OCFS-INF-04: Family Visiting for Children in Out-of-Home Care
- Preparing Youth for Success: Services for Foster Care Youth and former Foster Care Youth (published by OCFS and Center for Development of Human Services)
- 12-OCFS-ADM-03 (educ. stability for children in care)
- 11-OCFS-ADM-04 (religious affiliation of child placed in care)
- 98-OCFS-INF-03: ASFA (Compelling Reasons)
- ACS Visiting Guidelines #2013/02: Determining the Least Restrictive Level of Supervision Needed
- ACS "A Bridge Back Home" (Visit Hosts)

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Safety Planning in the Team and Handling Prejudicial Information

- Communicate within the team and with Supervisors
- Communicate frequently with Client
- (With Permission) Collaborate with Others
- Review the limits of your Representation with Team and with Client

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Practice Shifts you can Make Now—some are just "Small Adjustments"

1. **Always ask WHY?**
2. **Learn to REFRAME**
3. **ARGUE from Common Sense and Compassion**
4. **LEARN a few regs or policy directives**
5. **Develop Reasonable Efforts "scripts"**
6. **Do an 'internal' survey of your own perspective/gather with people who may want to try something new….put Cornerstones on the agenda**

Resources

Center for Family Representation 212-691-0950 www.cfrny.org info@cfrny.org	Office of Children and Family Services (search "Administrative Directives " and "Info Letters" www.ocfs.ny.gov	Administration for Children's Services http://www.nyc.gov/html/acs/html/staff/staff_resources.shtml
http://www.americanbar.org/publications/child_law_practice/vol_31/july_2012/maintaining_familyrelationshipsforchildreninthechildwelfaresyste.html	Children's Bureau Administration on Children, Youth and Families www.childwelfare.gov /info@childwelfare.gov	National Project to Improve Representation for Parents Involved in the Child Welfare System www.abanet.org/child/parentrepresentation/home.html

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BIOGRAPHIES

Erin E. Browne, ESQ., Senior Staff Attorney joined the Center for Family Representation (CFR) in May of 2008. Ms. Browne received her J.D. in May of 2006 from Albany Law School where she was actively involved in the Health Law Clinic. During law school, Ms. Browne interned at the New York State Attorney General's Office as well as at the Center for Family Representation in 2005. Following graduation, Ms. Browne worked at the Administration for Children's Services in the Bronx. Prior to law school, Ms. Browne worked at the Massachusetts's Attorney General's Office. She graduated in 2001 from Loyola College with a B.A. in Political Science.

Angela Olivia Burton, Esq., is the Director of Quality Enhancement for Parent Representation at the New York State Office of Indigent Legal Services (ILS). Ms. Burton joined ILS in 2012. Established in 2010, the statutory purpose of ILS is to "monitor, study and make efforts to improve the quality of" legal representation provided for indigent persons pursuant to New York County Law Article 18-B. Since its inception, ILS has worked with counties and practitioners to improve family court mandated representation, such as providing funding to hire additional family court lawyers to reduce caseloads, adding social work and client liaison staff, enhancing attorney training, establishing institutional, multidisciplinary family court units within existing public defender offices or contracting with institutional providers to do family law cases; and developing trainings to improve the quality of representation of adults in Family Court Article 10 child protective proceedings. Ms. Burton is currently working with a group of seasoned professionals from across the state to develop standards for attorneys representing adults in child protective proceedings, and she administers a listserv for attorneys, social workers and other defense staff who represent indigent clients in family law matters.

Prior to joining ILS, Ms. Burton was an Associate Professor at the City University of New York (CUNY) School of Law, where she taught courses in lawyering practice, family law, children's rights, and the child welfare system. She directed the Children's Rights and Family Law Clinic at Syracuse University College of Law, where she supervised students in the representation of children and adults in Family Court and in administrative proceedings, and was an Instructor in the Lawyering Program at New York University School of Law. She clerked for New York State Court of Appeals judge Fritz W. Alexander II (deceased), and was an associate at the law firm of Debevoise and Plimpton. Ms. Burton has published and presented on a range of topics relating to clinical legal education, children's rights, and the child welfare system. She is a member of the New York State Child Welfare Court Improvement Project Statewide Multidisciplinary Team and the New York State Permanent Judicial Commission on Justice for Children. Ms. Burton is a graduate of New York University School of Law and Cornell University's School of Industrial and Labor Relations.

Sophie I. Feal, Esq., has practiced immigration and nationality law for 25 years. Since 1999, she is the Supervising Immigration Attorney at the Erie County Bar Association Volunteer Lawyers Project (VLP), Inc. where she concentrates her practice in deportation defense, asylum, family-based immigration cases and naturalization. She is also responsible for a project that provides

legal orientations and *pro se* training to individuals detained by the Department of Homeland Security, and recruiting, training and mentoring pro bono attorneys to represent immigrants before the Immigration Court.

Ms. Feal was recently elected to a three year term as a Director of the Bar Association of Erie County (BAEC). She has also served as Chair of BAEC's Human Rights Committee and Immigration Law Committee. She was also member of the NYSBA's Special Committee on Immigration Representation. She is currently a member of the National Immigration Project.

Ms. Feal has been recognized by the Business First/Buffalo Law Journal as one of the area's best lawyers in 2014, 2008 and 2007. In May 2008, she received the John R. Long Award from VIVE/La Casa, a Buffalo agency that assists those seeking refuge in Canada. While briefly in private practice, Ms. Feal received VLP's 2005 annual pro bono award for her volunteer work in the area of immigration law.

Ms. Feal has published extensively on immigration law in Bender's Immigration Bulletin, Interpreter Releases, and has updated several chapters on asylum and removal proceedings for Matthew Bender's Lexis/Nexis legal treatise, Immigration Law and Procedure: Desk Edition. From 2003 to 2006, Ms. Feal was a regular columnist on immigration issues for Rochester's Daily Record. She received her J.D. from Buffalo Law School and is admitted to practice in New York State, the U.S. District Courts for the Northern and Western Districts of New York and the U.S. Court of Appeals for the Second Circuit.

Adele Fine, Esq., is a Special Assistant Public Defender with the Monroe County Public Defender's Office in Rochester, NY and chief of the office's Family Court bureau. The Family Court bureau represents petitioners and respondents in all Family Court matters for which assigned counsel is mandated, including parent defense in child abuse and neglect matters. Adele received her J.D. in 1987 from the University of Montana Law School in Missoula. She joined Montana Legal Services and practiced poverty, family and Indian law until she moved back to New York and was admitted to the New York bar in 1990. Thereafter she was in private practice with the law firm of A. Vincent Buzard, Esq. in Rochester. In 1995 she became the executive director of Main West Attorneys at Law, Inc., a not-for-profit law firm representing low-income clients in family and matrimonial matters. She oversaw the transformation of Main West into the Limited Means program of the Legal Aid Society of Rochester in 1998, and then joined the Public Defender's Office in 2000.

Linda Gehron, Esq., is the Supervising Attorney for the Family Court Program at the Frank H. Hiscock Legal Aid Society, Syracuse, New York: Linda received her law degree from Syracuse University College of Law with honors. She came to HLAS after many years in private practice representing parents as an 18-b attorney, and children as an Attorney For the Child in the family and criminal courts of Onondaga County. She also served as a Supervising Attorney and Lecturer in Law in the Juvenile Advocacy Clinic at Syracuse University College of Law. Linda is a member of the NYS ILS Parent Representation Standards Working Group and

the local Child Welfare Court Improvement Project Stakeholders and Legal Issues Subcommittee. She has written about Family Court for the Onondaga County Bar Reporter and presented on parent representation topics for the NYSDA. Linda was a 2004 recipient of the Dillon Award from the Fourth Department for Law Guardian representation of children.

Emma S. Ketteringham, JD, is the Managing Attorney of the Family Defense Practice of The Bronx Defenders, an institutional provider of criminal defense, family defense, and civil legal services in the South Bronx. Ms Ketteringham started at The Bronx Defenders as a criminal defense attorney. As Managing Attorney, Ms. Ketteringham supervises attorneys, social workers and out-of-court advocates for parents accused of child abuse and neglect and facing possible termination of parental rights. She participates in numerous court-based and independent coalitions to develop pro-family policies and practices in New York City, including the committee devoted to reducing racial disproportionality in foster care. In her career, Ms. Ketteringham has worked as the Director of Legal Advocacy for National Advocates for Pregnant Women where she was counsel and strategist on criminal and civil child welfare cases at the intersection of the wars on women and drugs. She has also worked as a litigation associate at Lansner and Kubitschek, where she represented parents and children in state and federal court, and at Paul, Weiss, Rifkind, Wharton & Garrison LLP, where she worked on complex civil litigation. Ms. Ketteringham clerked for two federal judges, first in the U.S. District Court for the District of Maine, then at the U.S. Court of Appeals for the Second Circuit. She has also worked as a Legal Assistant at the National Abortion and Reproductive Rights Action League and as a law clerk at the American Civil Liberties Union for Southern California. She is a graduate of Northeastern University School of Law, and holds a B.A. in Political Science from Trinity College.

Joanne Macri, Esq., currently serves as the Director of Regional Initiatives for the New York State Office of Indigent Legal Services where she is currently engaged in the agency's development of Regional Immigration Assistance Centers. Prior to joining ILS, Ms. Macri served as the director of the Criminal Defense Immigration Project (CDIP) and the Immigrant Defense Project of the New York State Defenders Association (NYSDA). On behalf of NYSDA, she provided immigration support to criminal and family law attorneys across New York State and conducted numerous continuing legal education trainings on the immigration consequences of New York criminal convictions and family court dispositions. For her service, Ms. Macri was recognized by the New York State Bar Association Criminal Justice Section for her Outstanding Contribution to Criminal Law Education. Ms. Macri is also an adjunct professor at the State of New York University at Buffalo Law School where she has taught courses on U.S. immigration law, immigration law practice and criminal/immigration law.

Ms. Macri is also currently serving as the co-chair of the NYSBA Special Committee on Immigration Representation which published standards for providing immigration representation approved by the New York State House of Delegates in 2012. Ms. Macri is also a Fellow of the New York Bar Foundation. Ms. Macri has also previously served on the NYSBA Immigration

Litigation Committee, the New York City Bar Association Criminal Justice Operations Committee and the Western New York American Immigration Lawyers Association Chapter Subcommittees for Immigration and Customs Enforcement and Customs and Border Protection. Ms. Macri received her Honors Bachelor degree from the University of Ottawa and her Juris Doctorate from Albany Law School.

Anastasia Rivera, Esq., is a Litigation Supervisor who joined the Center for Family Representation (CFR) in February 2011. She directly supervises staff attorneys. Ms. Rivera also participates in various trainings and presentations for staff and outside agencies. Prior to joining CFR, Ms. Rivera was a member of the Assigned Counsel Plan representing litigants and children in various proceedings in Bronx Family Court. Ms. Rivera also worked as an Assistant Supervisor with the Administration for Children's Services, appearing on behalf of the agency on abuse and neglect, custody and visitation petitions. Ms. Rivera received her Juris Doctor from the City University of New York School of Law. While in law school, she participated in the Battered Women's Clinic and served as a legal intern with Lawyer's For Children. She received her B.B.A. from the Pace University.

Sara V. Rivera, LMSW, is a Senior Staff Social Worker at The Center for Family Representation Inc. and has been employed at the agency since 2008. She is bi-lingual in English and Spanish. Sara supervises two family advocates and a social work intern, assists with transitioning new staff to their assigned roles, and participates in various policy initiatives throughout the city. In addition, Sara is a certified sexual assault/survivor advocate in the Bronx and is employed part-time as a psychotherapist at Brooklyn Center for Families in Crisis. Sara earned her Master of Social Work degree from Fordham University in 2008 and her Bachelor of Science degree in Legal Studies with a minor in English from John Jay College of Criminal Justice in 2004. While at Fordham, Sara interned at Saint Dominic's Home providing individual and collateral therapy sessions to children in foster care and their caregivers, as well as with Fordham University's Interdisciplinary Center for Family and Child Advocacy working on policy initiatives for young mothers in foster care. Sara also is a Recipient of the Dr. Edward Curran Award, given to one student from the Lincoln Center Campus of Fordham GSSS each year on the basis of grades, practice competence and school service.

Lauren Shapiro, Esq., is the director of the family defense practice at Brooklyn Defender Services, a public defense office that represents over 40,000 Brooklyn residents each year in criminal, family, housing and immigration court. The family defense practice, an interdisciplinary and innovative law practice, is dedicated to representing low income parents in the child welfare system. Ms. Shapiro founded the project in 2007 and currently oversees a staff of 32 attorneys, 12 out-of-court advocates and 7 administrative staff.

Ms. Shapiro has devoted her legal career to representing low income communities. After graduating from New York University School of Law in 1986, she worked at South Brooklyn Legal Services for over 20 years. She founded and directed the office's HIV Unit – one of the

first in the country - for over seven years and was the director of the Family Law Unit for over 10 years. Ms. Shapiro co-chairs the ASFA Ad hoc Task Force, a collaboration of child welfare advocates and agencies. For many years, she co-chaired the Kings County Family Court Domestic Violence Working Group. She taught a civil externship class at Brooklyn Law School for six years and has published extensively on child welfare and family law related topics.