

# Standards and Best Practices for Attorneys Representing Adult Clients in State Intervention Cases: Focus on Early Involvement of Counsel

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# ILS Authority for Standards

- NY Executive Law § 832(3) “The office shall, in consultation with the indigent legal services board established pursuant to section 833 of this article, have the following duties and responsibilities:
- (d) to establish standards and criteria for the provision of such services . . .”

# Why Standards for Attorneys in State Intervention Cases?

“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.”

*Adoption 2002: The President's Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children (1999)*

## Why Standards for Attorneys in State Intervention Cases?

### **Effective representation of parents can help:**

- Prevent unnecessary removal of a child from home by carefully evaluating the level of danger in the home and considering possible safe alternatives to removal.
- Limit the trauma both the child and parents (as well as other family members, including siblings) may experience because of their separation by proposing early and frequent parent-child visits (supervised only as necessary).
- Speed casework when a child must be removed, by proposing early evaluations, identifying necessary and appropriate services for the child, parent, and family unit, and by making a more complete record, during the hearing, of the facts leading up to the removal of the child.
- Protect the client's right to information and decision-making while the child is in foster care.

# ILS Standards for Attorneys in State Intervention Cases

- Three parts:
  - Qualifications, Experience, Training and Oversight
  - Duties and Obligations of Counsel
  - Obligations of Attorney Managers

# ILS Standards for Attorneys in State Intervention Cases

- Assist ILS in working with counties and providers to improve the quality of representation
- Promote consistency of practice
- Help attorneys prioritize and manage practice in ways that will benefit clients
- Clarify the role of parent's counsel in state intervention cases
- Support legislative and practice reform initiatives
- Enhance timeliness and quality of decision-making
- Encourage competent, zealous, and diligent representation
- Promote client-centered, multidisciplinary, comprehensive/holistic model of representation

## Focus on Early Involvement of Counsel in State Intervention Cases

**Office of Indigent Legal Services 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.

## Focus on Early Involvement of Counsel in State Intervention Cases

### ***NYSBA 2013 Revised Standards for Providing Mandated Representation, Standard B, Early Entry of Representation***

**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.



## Focus on Early Involvement of Counsel in State Intervention Cases: ILS Standards for Attorneys in State Intervention Cases

- Where possible, represent clients during child protective service investigations before an abuse or neglect petition is filed with the court.
- Where pre-petition representation during an investigation is not possible, take steps to ensure that the attorney is assigned to the client upon the first filing in court.
- 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.
- 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.

# WHY FOCUS ON EARLY INVOLVEMENT OF COUNSEL?

- ▶ Because All Families Matter: Parent, Child, and Family Substantive Due Process Rights
- ▶ Because Clients Deserve to be Treated With Professionalism, Dignity and Respect
- ▶ To Promote Effective Assistance of Counsel, Procedural Due Process, and Accurate Decision-Making
- ▶ To Ensure Proper Enforcement of the Law

# Because All Families Matter: Constitutional Underpinnings

No State shall . . . Deprive any person of life,  
liberty, or property, without due process of  
law.

U.S. Constitution, amendment XIV, § 1.

# Because All Families Matter:

Protecting Substantive Rights of Parents, Children,  
and the Family Unit

Because All Families Matter:  
Protecting Fundamental, Constitutional Liberty Interest of  
Parents

"[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)

## Because All Families Matter: Protecting Children's Interests

“[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 v. Kramer*, 455 U.S. at 760.

“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 (U.S. Dist. Ct., SDNY, 2004).

# Because All Families Matter: Family rights

- 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).
- *Doe v. Heck*, 327 F.2d 492 (U.S. Ct. of Appeals, 7<sup>th</sup> Cir. 2003) - Parents and children have “right to familial relations, which includes a liberty interest in the maintenance of the family unit.”
  - “[T]he right of the family to remain together without the coercive interference of the awesome power of the state” is “the most essential and basic aspect of familial privacy.”
  - Encompasses not only the parent’s constitutionally protected liberty interest in the “companionship, care, custody and management of his or her children,” but also child’s interest “in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.”

# Because All Families Matter: The Law Does Not Require Perfect Parents

**“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. at 753.**



# Because All Families Matter: The Law Does Not Require Perfect Parents

“The drafters of Article 10 were “deeply concerned” that an imprecise definition of child neglect might result in “unwarranted state intervention into private family life.” *Nicholson v. Scopetta*.

- Proof of actual (or imminent danger of) physical, emotional or mental impairment to the child “ensures that the Family Court, in deciding whether to authorize state intervention, *will focus on serious harm or potential harm to the child, not just what might be deemed undesirable parental behavior.*”
- The statutory test [for a finding of neglect] is “minimum degree of care” - *not maximum, not best, not ideal* - and the failure must be actual, not threatened.”

# Because All Families Matter: Balancing the Interests

FCA sec. 1027 –In determining whether removal or continuing the removal of a child is necessary to avoid imminent risk to the child’s life or health, the court shall consider and determine in its order:

- Is removal is necessary to avoid imminent risk to the child’s life or health?
- Is continuation in the child’s home contrary to the best interests of the child?
- Did the social services agency make required reasonable efforts prior to the date of the hearing to prevent or eliminate the need for removal of the child from the home or to make it possible for the child to return home if the child has already been removed?

## Because All Families Matter: Balancing the Interests

“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*

# Because All Families Matter: The Reality

Extra-judicial removal still routinely used as first resort.

1989 - The FCA 1027 hearing is “often a vehicle to validate earlier pre-petition removals of children . . . mostly removals without court order pursuant to Family Court Act 1024.”  
*Goodhue Report, 1989.*

2014 - Statewide: Original NA & NN Petitions - 24,720; Children 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:** The 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.”

# Because Clients Deserve to Be Treated With Professionalism, Dignity, and Respect

**Early involvement provides opportunity to immediately begin building a trusting and respectful attorney-client relationship.**

Individuals involved in state intervention cases are most often “poor, uneducated, or members of minority groups,” and, as such, are “often vulnerable to judgments based on cultural or class bias.”

*Santosky v. Kramer*, 755 U.S. 745, 763 (1982).

Guest Appearances: Prof. Martin Guggenheim, Prof. Chris Gottlieb, NYU Family Defense Clinic - <https://www.youtube.com/watch?v=PscVdttME40>,  
<https://vimeo.com/71127830>

# Because Clients Deserve to Be Treated With Professionalism, Dignity, and Respect

## **NYSDA Client Centered Representation Standards-**

[http://www.nysda.org/docs/PDFs/Pre2010/05\\_ClientCenteredStandards.pdf](http://www.nysda.org/docs/PDFs/Pre2010/05_ClientCenteredStandards.pdf)

## **Statement of Client's Rights, Joint Rules of the Appellate Division, 22 NYCRR Part 1210.1 effective April 15, 2013 -**

<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=27830> .

- ▶ **Section 1210.1 Posting.** Every attorney with an office located in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees.

## Because Clients Deserve to Be Treated With Professionalism, Dignity and Respect

**ILS Standards – Relationship With Client:** Attorneys must show respect and professionalism towards their clients. As the client's designated advocate in the system, counsel should support their clients and be sensitive to the client's individual needs.

- Duty of loyalty
- Cultural and socio-economic sensitivity
- Confidentiality
- Conflicts of interest
- Communication
- Attorney's role as both advice-giver and counsel-at-law
- Nature of relationship with clients who have limited capacity, incarcerated clients, non-citizen clients, and missing clients

Because Early Involvement Promotes  
Timely and Accurate Decision-Making,  
Due Process, and Effective Assistance of  
Counsel Throughout the Case



## Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

**“Like child welfare agencies, juvenile and family courts must focus not only on the timeliness of case processing and decisionmaking, but also on the quality of the process and the outcomes resulting from the court’s efforts.”**

*DOJ Technical Guide, Preface*

# Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

## Family Court Act Sec. 261

Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings. *Counsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition.*

# Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

“The emergency removal hearing is a critical stage of child abuse and neglect litigation, in that it can affect the ultimate outcome of the case. At this hearing, the court decides whether to prolong the separation between parent and child following an emergency removal. The separation of parent and child between emergency removal hearing and adjudication may protect the child from serious, long-term harm. On the other hand, this separation may traumatize the child and ultimately make it more difficult for the parent to correct the problems that led to State intervention.”

*DOJ Technical Guide, Measure 3D – Early Appointment of Counsel for Parents.*

# Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

“Active and effective representation of the parents is important to ensuring that the emergency removal hearing fulfills its functions.”

*DOJ Technical Guide, Measure 3D - Early Appointment of Counsel for Parents*

## Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

*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).

Even though parents have right to subsequent hearing at which they may appear with counsel to request return of the child, **judges' practice of appointing counsel after 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."**

## Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

**The stakes are high** - “In this case, the private interest – parents’ right to the care and custody of their child – is a fundamental liberty interest that “undeniably warrants deference and, absent a powerful countervailing interest, protection. The risk of erroneous deprivation can be alleviated if parents are provided with the allegations against them and given a meaningful opportunity to present evidence and cross-examine witnesses about whether the emergency removal was, and continues to be, justified. “

*Oglala Sioux Tribe v. Van Hunnik*, **Amicus Brief of the United States**

Accessible at:

[https://www.aclu.org/sites/default/files/assets/122-1\\_amicus\\_brief\\_of\\_the\\_united\\_states\\_8-14-2014.pdf](https://www.aclu.org/sites/default/files/assets/122-1_amicus_brief_of_the_united_states_8-14-2014.pdf)

## Early Involvement of Counsel Promotes Timely and Accurate Decision-Making

- **Advocates have a major impact during hearings.**
- **Parties need knowledgeable representation.**
- **Advocates make valuable contributions to judicial decisions.**
- **Advocates need to be present in court to build or shape the record.**

*DOJ Technical Guide, Measure 3G - Presence of Advocates During Hearings.*

## Due Process of Law Requires Early Involvement of Counsel

Counsel is “indispensable to a “practical realization of due process of law.”

Family Court Act 261



## Due Process of Law Requires Early Involvement of Counsel

### ***In Re Ella B., 30 N.Y.2d 352 (1972)***

- ▶ “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.”
- ▶ The “gross inherent imbalance of experience and expertise” between the State and the parent makes it “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.”

## Due Process of Law Requires Early Involvement of Counsel

“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.**”

*Adoption 2002, Commentary to Guideline VII-7.*

# Due Process of Law Requires Early Involvement of Counsel

*Lassiter v. State Department of Social Services*, 452 U.S. 48 (1981)  
(Justice Blackmun, dissenting, joined by Justices Brennan and Marshall):

“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.”

## Due Process of law Requires Early Involvement of Counsel

Parental interest in custody of their children “is not to be lightly interfered with, even following an emergency situation. While an emergency [removal hearing] may not permanently deprive parents of their custody rights, even a temporary deprivation of physical custody requires a *prompt and meaningful hearing*.”

## Due Process of Law Requires Early Involvement of Counsel

“[T]o meet the requirements of due process, the opportunity to be heard must not only be held at a meaningful time; it must be conducted in a meaningful *manner*. The [emergency removal] hearing cannot be treated as an informal or insignificant proceeding, because it results in judicial findings that can lead to removal of a child from her parents for several months. Providing due process to parents at the hearing requires ensuring that they have . . . a meaningful opportunity to be heard regarding the basis for the emergency removal and the continued need for state custody of their children.”

*U.S. Department of Justice (Oglala Sioux Tribe Amicus Brief)*

## Due Process of Law Requires Early Involvement of Counsel

“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.

However, the 1027 hearing . . . is often a vehicle to validate earlier pre-petition removals of children . . . mostly removals without court order pursuant to Family Court Act 1024.

- respondent often not present
- when present, not always represented by counsel
- 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.”**

# Early Involvement is Required for Meaningful and Effective Assistance of Counsel Throughout the Case

## Early Involvement is Required for Meaningful and Effective Assistance of Counsel Throughout the Case

“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.”

*Adoption 2002: 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).



## Early Involvement is Required for Meaningful and Effective Assistance of Counsel Throughout the Case

**“Because advance appointment of an attorney is necessary for effective representation,”** States should require appointment prior to the emergency removal hearing.

Where state law prohibits or does not require early appointment, the argument can be made that early appointment actually is necessary under the State constitution, **because parents are entitled to effective representation at all critical stages of legal proceedings.”**

*DOJ Technical Guide, Measure 3D, Early Appointment of Counsel for Parents*

## Early Involvement is Required for Meaningful Representation and Effective Assistance of Counsel Throughout the Case

“Unless the court appoints the attorney well before the initial hearing and the client receives representation from the beginning of the case, *the representation will likely be ineffective.*” Judge Leonard Edwards, *Representation of Parents and Children in Child Abuse and Neglect Cases: The Importance of Early Appointment.*

*ABA Indicators of Success for Parent Representation (2015): Infrastructure, Measure A.2. – Timely Appointment* (percentage of attorney appointments for parents made before removal hearing; percentage of attorneys appointed at the first hearing)

*US Department of Justice, Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide (2008): Measure 3D: Early Appointment of Counsel for Parents*

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# Early Involvement is Required for Meaningful Representation and Effective Assistance of Counsel Throughout the Case

## **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. Merrill 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.)”

**Senator Mary B. Goodhue, Sponsor, Memorandum in Support, June 22, 1990** -“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 . . . **[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.**”

## Early Involvement is Required for Meaningful Representation and Effective Assistance of Counsel Throughout the Case

Effective assistance of counsel in state Intervention cases requires good lawyering at every stage of the litigation. ILS Standards contemplate:

- Multi-disciplinary approach - Advocate for clients both in and out of court. To the extent possible, use a multidisciplinary approach to representation and retain or involve a social worker as part of the legal team.
- Comprehensive representation – Evaluate all legal and non-legal issues impacting the client’s case. At a minimum, counsel should provide advice on basic rights and responsibilities attendant to those issues, explain how an issue may impact the state intervention case, explain how the client can advocate for herself, and either advocate directly on the client’s behalf, assist the client in obtaining an advocate, or refer the client to an appropriate service or agency for assistance.
- Investigation, discovery, court preparation, attendance and active participation in all court hearings and pre-trial conferences; case planning and attendance at agency meetings; negotiation or mediation; appeals, including intermediate appeals

## Meaningful and Effective Assistance of Counsel Throughout the Case Requires Early Involvement

### **Early involvement by parent's counsel can help:**

- Prevent unnecessary removal of a child from home by carefully evaluating the level of danger in the home and considering possible safe alternatives to removal.
- Limit the trauma both the child and parents by proposing early and frequent parent-child visits (supervised only as necessary).
- Speed casework when a child must be removed, by proposing early evaluations of the parents and the family unit and by making a more complete record, during the hearing, of the facts leading up to the removal of the child.
- Ensure that the child receives services that are needed immediately, such as medical care, psychological evaluation, and trauma counseling.
- Prevent any unnecessary interruption in the child's education and ensure that educational services for the child will be appropriate.
- Protect client's right to information and decision-making while the child is in foster care.

# Early Involvement of Parent Counsel Is Necessary To Enforce the Law

Guest Appearances: Prof. Martin Guggenheim, NYU Family Defense Clinic - <https://www.youtube.com/watch?v=PscVdttME40>,

Standards and Best Practices: Empowering Advocates To Begin Parent  
Defense At the Earliest Opportunity Possible

**TOP TEN UNDER-ENFORCED PARENTAL RIGHTS  
IN PRELIMINARY PROCEEDINGS**

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