NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children

2011

NYSBA

PREFACE

The New York State Bar Association Standards and Commentaries for Representing Children were first published in 1988. Widely disseminated through the generosity of the Association and the Appellate Divisions, the Standards have guided and assisted attorneys in representing children throughout the wide spectrum of child and family litigation in the Family and Supreme courts, and have been cited widely in trial and appellate decisions. New York's pioneering endeavor has also contributed to the adoption of comparable guidelines in several states and, nationally, the American Bar Association.

In 1996 the Bar Association promulgated the second edition. The intervening years had brought significant statutory and caselaw changes reflecting the evolution of children's law and the role of the child's attorney. The Committee then and now believes that the bench and the bar should possess the most current material when representing and determining issues involving the most important albeit vulnerable members of our society.

We trust that the same spirit and intent has infused the current third edition. Amongst the many twenty-first century changes reflected in the Standards, perhaps two merit special mention. The first is the evolution from a "best interests" representation paradigm to one in which, barring exceptional circumstances, "the attorney for the child must zealously advocate the child's position" (Rule 7.2(b), Standards and Administrative Policies, Rules of the Chief Judge). The second is the recent legislative replacement of the always misleading and now archaic title "law guardian" by the accurate and far more descriptive title "attorney for the child".

Many committee members contributed to this volume. Special thanks are owed to the respective subcommittee chairs, in alphabetical order Janet R. Fink, Karen J. Freedman, Sarah H. Ramsey, Betsy R. Ruslander, Michael Scherz, and Gary S. Solomon. We are especially grateful to Katherine Suchocki, who managed and coordinated the project. Finally, the NYSBA itself merits gratitude and thanks; the Association's support has been crucial throughout the cycles of developing and maintaining contemporary representation standards.

Merril E. Sobie, Chair
New York State Bar Association
Committee on Children and the Law

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NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children in Juvenile Delinquency Proceedings

June 2009

Approved by the Executive Committee of the New York State Bar Association on June 18, 2009.

Standards for Attorneys Representing Children in Juvenile Delinquency Proceedings

(June 2009)

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009)

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COMMITTEE ON CHILDREN & THE LAW STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009)

PREFACE

Standards for Attorneys Representing Children in Juvenile Delinquency Proceedings (2009) is a revised edition of the Standards that were issued in 1996. These Standards apply to all attorneys representing children in juvenile delinquency proceedings.

The term "law guardian" is not used because the October 17, 2007 Administrative Order of the Chief Judge of the State of New York indicates that "attorney for the child" means a law guardian and because the term "attorney" reflects the current understanding of the function of the child's representative. Although the efforts of the NYSBA to have the term "law guardian" deleted from the Family Court Act have not yet been successful, perpetuating the use of "law guardian" in this new edition of the Standards seems inappropriate.

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

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

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009)

A. ROLE OF THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship. Whether retained or assigned, and whether called "counsel" or "law guardian," the child's attorney should maintain a traditional attorney-client relationship with the child and zealously defend the child. The attorney owes a duty of undivided loyalty to the child; the attorney shall keep client confidences and secrets, and shall advocate the child's position. In determining the child's position, the attorney for the child should consult with the child and advise the child in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. Pursuant to Rule 1.2(a) of the New York State *Rules of Professional Conduct* (eff. 4/1/09), there is a presumption that the attorney will abide by a client's decisions concerning the objectives of representation. This presumption should apply in representation of a child client.

Commentary

Under the Rules of the Chief Judge, § 7.02 (b) & (c):

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

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

Case law makes it clear that children are entitled to more than the mere presence of an attorney; the constitutional right to the effective assistance of counsel extends to children charged in juvenile delinquency proceedings. See, e.g., Matter of Jeffrey V., 82 N.Y.2d 121 (1993).

A-2. Counseling and Advising the Child. The attorney has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the attorney with meaningful input and guidance. A child may be more susceptible to intimidation and manipulation than an adult client, and therefore the attorney should ensure that the child's decisions reflect his/her actual position. The attorney has a duty not to overbear the will of the child.

The attorney's duties as counselor and advisor include:

(1) Explaining the attorney's ethical obligation to defend, and seek the best possible outcome for, the child, and the nature and limits of attorney-client confidentiality.
(2) Developing a thorough knowledge of the child's circumstances and needs;
(3) Explaining the relevant facts, including the role of the other persons and agencies involved in the proceeding, and the applicable laws;

(4) Explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings;

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

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

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

(8) Evaluating the child's need for services and treatment, such as drug or mental health treatment or educational services.

Commentary

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

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

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

In that role, the attorney may attempt to persuade the child to adopt a course of action that, in the attorney's view, will promote the child's legal interests, even when this course of action differs from the child's initial position. To do so effectively, the attorney needs to determine what factors have been most influential in the child's thinking, what the child does not know, and what may be confusing to the child, and then work diligently to help the child understand the attorney's perspective and thinking.

While explaining why the attorney believes a different outcome, or route to the outcome desired by the child, may be preferable, the attorney should take care not to overwhelm the child's will, and thus override the child's actual wishes. The attorney should remain aware of the dynamics of power inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests. Ultimately, the child should understand that the attorney will represent the child's position to the court, even if the attorney does not personally agree with that position.

B. ATTORNEY-CLIENT CONTACTS

B-1. Meet With the Child. Establishing and maintaining a relationship with the child is the foundation of representation. Therefore, the attorney should meet with the child as soon as possible and on a regular basis, including prior to court hearings and when apprised of emergencies or significant events affecting the child, so that the attorney will be aware of and can address the child's concerns. Additionally, if appropriate, the attorney should maintain telephone contact. The attorney should undertake training so as to become reasonably familiar with child clients' ethnicity and culture.

Commentary

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

The attorney should recognize that the child's situation may be fluid. As a result, the attorney should remain in close communication with the child throughout the proceedings. The attorney should make reasonable efforts to visit the child in his or her current living situation whenever such a visit would facilitate communication with the child and enable the attorney to obtain facts with which he or she can formulate positions prior to court appearances.

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

B-2. Interview the Child Regarding the Charges. The attorney should explain to the child the nature of the charges, and the manner in which the Presentment Agency will attempt to establish the child's guilt; elicit detailed information regarding the alleged incident(s), the conduct of the child and any alleged accomplices, and related issues such as suppression, and possible defenses and weaknesses in the Presentment Agency's case; and attempt to ascertain the identity of witnesses, and their location and/or means by which to contact them. The child's parent should not be present during these discussions unless the child consents.

Commentary

It is critical that, during the <u>initial</u> interview, the attorney obtain as much detailed information as possible. Motions in which the attorney may have to include allegations that derive from the child must be filed within thirty days after the child's initial appearance in court, and it is not always possible to conduct a timely follow-up interview. If the child raises a defense to the charges, the attorney should attempt to elicit the names, addresses or other locations, and/or phone numbers of any witnesses identified by the child, and set up follow-up contacts with

the child if the information is not yet available. This is particularly important when the child is raising an alibi defense and the attorney will need to file timely notice of alibi. In order to determine whether a suppression motion should be made, the attorney should discuss with the child the circumstances under which physical evidence was recovered, or statements were elicited from the child by the police, or an identification was made by a witness.

During the initial interview, at a time when the fact-finding hearing is not imminent and the child does not yet have to decide whether to accept a plea bargain proffered by the Presentment Agency, the attorney may have no need to act on any doubts regarding the veracity of the child's denial of guilt and version of the facts. The need may arise when the child is in detention and a hearing is, in fact, imminent, or the Presentment Agency is proposing a favorable plea bargain early in the case. And, of course, by the time the attorney needs to file motion papers that include information derived from the child, and conduct a fact investigation, the attorney will want to be operating with accurate information. In any event, it is appropriate for the attorney to disclose to the child his/her doubts regarding the child's version of events rather than be hampered in defending the child or let the child lose out on a good plea bargain. (Criminal defendants may enter a nolo contendre, or "Alford," plea without admitting guilt; few family court judges permit children to enter such a plea, but the possibility should be explored when appropriate.) Experienced attorneys employ different methods when exploring with a child the truth of his/her statements. Some attorneys state bluntly that the story is unbelievable. But this could suggest to the child that the attorney is disloyal and will mount a defense only half-heartedly. A more common, and prudent, approach is to point out problems with the child's story in a less harsh and judgmental manner. The attorney can point out that one or more witnesses have signed sworn statements, and ask the child whether he/she knows of any reason the witnesses would lie. Or, the attorney can conduct a polite and informal "cross-examination," and attempt to lay bare for the child the story's inconsistencies and flawed premise. Often, over time, the attorney's use of these strategies will succeed in convincing the child of both the attorney's sincerity and the wisdom of revealing the truth.

B-3. Interview The Child Regarding the Child's Life Circumstances. In the initial interview and thereafter, the attorney should elicit detailed information regarding all aspects of the child's family history, social, health, educational and legal history, and assist the child and his/her family in obtaining necessary services.

Commentary

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

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

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

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

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

C-1. Advocacy at the Initial Appearance. When preparing for and advocating on behalf of the child at the initial appearance, the attorney should:

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

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

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

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

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

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

Commentary

At the initial appearance, the possibility that the court will order pre-trial detention is the attorney's most pressing concern. The attorney must focus on whether, under FCA § 320.5, detention is precluded because "available alternatives to detention, including conditional release, would be appropriate"; whether detention is authorized because "there is a substantial probability that [the child] will not appear in court on the return date" or "a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime"; whether, even if the court finds that detention is necessary, the child should be released with an electronic monitoring condition; and whether reasonable efforts have been made to prevent or eliminate the need for detention.

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

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

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

As the court is selecting a trial date, the attorney should keep in mind statutory speedy trial rules, which require that the fact-finding hearing commence within three or fourteen days after the conclusion of the initial appearance when detention is ordered and within sixty days when the child is released (see Commentary to Standard C-13), and the requirement that when detention is ordered for more than three days, a probable cause hearing must be held within three days following the initial appearance or four days after the petition is filed, whichever is sooner (FCA § 325.1[2]), or on an even earlier date if pre-petition detention was ordered pursuant to FCA § 307.4. The attorney should insist upon compliance with these time limits unless there is a strategic reason not to and the child has agreed to waive his/her rights. For instance, the attorney may believe, and the child may agree, that more time is needed to adequately prepare a defense.

The attorney also should determine whether a favorable resolution of the case can be achieved at the initial appearance. For instance, a child in detention is entitled to an initial appearance no later than seventy-two hours after a petition is filed or the next day the court is in session, whichever is sooner, and if the child is not detained, the initial appearance must be held as soon as practicable and, absent good cause shown, within ten days after a petition is filed. The initial appearance may be adjourned for no longer than seventy-two hours or until the next

court day, whichever is sooner, to enable an attorney to appear for the child. If a warrant has been issued, the period during which the warrant is outstanding is excluded from the calculation if the Presentment Agency has exercised due diligence in attempting to secure the child's appearance. FCA § 320.2(1). The remedy for an untimely initial appearance is dismissal, but the petition may be refiled. Matter of Robert O., 87 N.Y.2d 9 (1995). To preserve the issue, the attorney should raise it at the initial appearance even if the facts are not fully known and the attorney needs to conduct further investigation before filing a written motion; the attorney should specifically identify the alleged violation and either make an oral motion to dismiss or state on the record that a written motion to dismiss will be forthcoming.

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

Whenever the judge appears to be leaning towards ordering detention, the petition and supporting depositions should be carefully scrutinized for facial insufficiency. Although motions to dismiss ordinarily must be made in writing and judges generally will insist upon a written motion, the judge might consider releasing the child if there appears to be a valid argument for dismissal.

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

C-2. Advocate for the Child at a Probable Cause Hearing. The attorney should cross-examine witnesses and otherwise challenge the Presentment Agency's case at the probable cause hearing, make appropriate attempts to obtain discovery, and advocate for the child's release at the conclusion of the hearing.

Commentary

Probable cause hearings are governed by FCA §§ 325.1, 325.2, and 325.3.

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

Except in an unusual case, it will not be difficult for the Presentment Agency to establish reasonable cause as long as the available evidence has been produced in court. Consequently, there are goals other than winning that must be considered. The probable cause hearing offers an invaluable opportunity to learn about the Presentment Agency's case. The discovery function

of a probable cause hearing was recognized as a legitimate defense interest by the United States Supreme Court when it held in Coleman v. Alabama, 399 U.S. 1 (1970) that the hearing is a critical stage requiring the appointment of counsel. The hearing also provides an opportunity to elicit the testimony of prosecution witnesses for use as impeachment material at trial and to otherwise "nail down" the witnesses' testimony. If the judge is inclined to restrict the scope of cross-examination, the attorney should remind the judge that FCA § 325.2(2) gives the child the right to cross-examine witnesses, which necessarily includes an opportunity to explore a witness's direct testimony and impeach the witness by showing inconsistencies, bias, an inability to observe, a failure to recall details, etc.

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

C-3. Request for Competency Determination. When it appears that the child may be an "incapacitated person," the attorney should consider requesting that the court order a competency examination. Such a request should not be made until after the attorney has discussed the matter with the child.

Commentary

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

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

Given their lack of maturity and experience, children do not have the same capacity as adult criminal defendants to comprehend the nature of the proceeding, or assist in the preparation of a defense and in the making of crucial litigation decisions. Moreover, many children charged in delinquency proceedings suffer from educational and mental health deficiencies that further hamper their ability to participate effectively in the proceeding. The child's attorney may have difficulty communicating with the child, and, when the problems are severe, may be justified in requesting a competency determination.

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

C-4. Obtain Pre-Trial Discovery. The attorney should make appropriate use of all discovery methods authorized by statute or case law, issue or request court-issued subpoenas, and seek sanctions for the violation of discovery requirements.

Commentary

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

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

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

The attorney also should be familiar with non-statutory discovery authorized by case law. Among the types of discovery that may be obtained in appropriate circumstances are: names, addresses and other information about prosecution witnesses [People v. Rivera, 119 A.D.2d 517 (1st Dept. 1986)]; police records related to the arrest of the child [People v. Giler, 19 Misc.3d 1137(A) (Crim. Ct., N.Y. Co., 2008)]; the identity of a police informant who played an important role in the case [People v. Darden, 34 N.Y.2d 177 (1974); People v. Goggins, 34 N.Y.2d 163 (1974), cert den'd 419 U.S. 1012]; search warrant documents [People v. Nottage, 11 Misc.3d 1052(A)ie (Crim. Ct., Kings Co., 2006)]; a mental health examination of a prosecution witness [People v. Earel, 89 N.Y.2d 960 (1997)]; and records protected by statutory confidentiality rules, such as child welfare agency records relating to a child complainant [Pennsylvania v. Ritchie, 480 U.S. 39 (1987)], police disciplinary records [People v. Gissendanner, 48 N.Y.2d 543 (1979)], a witness's mental health records [People v. Rivera, 138 A.D.2d 169 (1st Dept. 1988), lv denied 72 N.Y.2d 923], a witness's court records [People v. Harder, 146 A.D.2d 286 (3rd Dept. 1989)], and media records [People v. Combest, 4 N.Y.3d 341 (2005)].

The attorney also should be vigilant and timely in responding to Presentment Agency demands for disclosure, in order to avoid the risk of court-ordered preclusion of evidence. This is particularly important when the Presentment Agency has served a demand for notice of alibi witnesses pursuant to FCA § 335.2, or a demand for notice of a defense of mental disease or defect pursuant to FCA § 335.1. When the attorney has provided untimely notice, and the Presentment Agency has moved for preclusion of the evidence, the attorney should present an

argument premised on the constitutional right to present a defense. Noble v. Kelly, 246 F.3d 93 (2d Cir. 2001), cert denied 534 U.S. 886.

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

C-5. Conduct Factual Investigation. In order to develop a theory of defense, prepare for effective cross-examination of the Presentment Agency's witnesses, and identify witnesses and obtain physical and documentary evidence supporting the theory of defense, the attorney should conduct and/or direct an independent investigation which may include a visit to the crime scene, witness interviews, the preparation of photographs and diagrams, and conversations with the prosecutor. The attorney should discuss the investigation with the child, elicit the child's assistance when appropriate, and keep the child up to date on the progress of the investigation.

Commentary

The discovery authorized by statute and case law in criminal/juvenile delinquency proceedings is remarkably limited given the liberty interests at stake, and rarely provides the defense with a genuine preview of the prosecution's case. Recorded witness statements, often received by the defense shortly before trial, usually contain scant detail since police officers and prosecutors are trained and/or naturally inclined to write little. Discovery through a bill of particulars also is severely limited. Witness depositions do contain some detail, but only enough to satisfy pleading requirements.

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

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

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

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

C-6. Pretrial Motions. The attorney should determine what pretrial motions should be made, and file them in a timely fashion.

Commentary

Except as otherwise provided in FCA Article Three, all "pretrial motions" must be filed within thirty days after the conclusion of the initial appearance and before commencement of the fact-finding hearing unless the court grants an extension of time. FCA § 332.2(1). Under FCA § 332.1, the "pretrial motions" subject to the thirty-day deadline are motions seeking an order: transferring a proceeding to another county pursuant to FCA § 302.3; granting separate fact-finding hearings pursuant to FCA § 311.3 or § 311.6, or consolidating petitions pursuant to § 311.6; dismissing a defective petition pursuant to FCA § 315.1; granting a bill of particulars pursuant to FCA § 330.1 or discovery pursuant to FCA § 331.3; suppressing evidence pursuant to FCA § 330.2 (and CPL Article 710); dismissing a petition pursuant to FCA § 302.2 (and CPL § 30.10) because the statute of limitations has expired; or dismissing a petition on double jeopardy grounds pursuant to FCA § 303.2 (and CPL Article 40).

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

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

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

C-7. Motion to Suppress or Preclude Evidence. As appropriate, the attorney should move for suppression or preclusion of physical evidence, identification testimony and/or the child's statements, and/or move for preclusion of evidence of the child's prior crimes and/or bad acts.

Commentary

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

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

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

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

Also subject to pre-trial challenge is evidence of uncharged prior crimes committed by the child, offered as direct evidence of guilt. The general rule is that such evidence may not be admitted unless the court determines that the probative value of the evidence outweighs its

prejudicial tendency to demonstrate criminal propensity. People v. Molineux, 168 N.Y. 264 (1901). To prevent the prosecutor from eliciting uncharged crimes evidence before the accused can object, a court should rule on the admissibility of the evidence out of the hearing of the trial fact-finder, and thus the prosecutor should ask for a pretrial determination. People v. Ventimiglia, 52 N.Y.2d 350 (1981). Thus, the child's attorney should ask that a "Ventimiglia hearing" be held before a judge other than the trial judge.

C-8. Motion to Dismiss Charges. As appropriate, the attorney should move for an order dismissing the petition for facial insufficiency pursuant to FCA § 315.1 or in furtherance of justice pursuant to FCA § 315.2, adjourning the matter in contemplation of dismissal pursuant to FCA § 315.3, or substituting a petition alleging that the child is a person in need of supervision pursuant to FCA § 311.4(1).

Commentary

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

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

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

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

C-9. Conduct Plea Negotiations. The attorney should be active in initiating and participating in plea bargaining discussions with the Presentment Agency. The attorney must communicate to the child any benefit offered by the Presentment Agency, and provide the child with information, guidance and advice that will assist the child in deciding whether to make an admission. The attorney should discuss with the child the direct and collateral consequences of the admission, including possible dispositional and post-dispositional orders.

Commentary

Pleas (or "admissions") are governed by FCA §§ 321.2 and 321.3.

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

The attorney has a duty to present to the child any plea bargain offer that provides some benefit. People v. Fernandez, 13 A.D.3d 271 (1st Dept. 2004), aff'd 5 N.Y.3d 813. The attorney is not required to provide the child with a bottom-line recommendation. But, there is a constitutional right to the effective assistance of counsel at the plea bargaining stage of a proceeding. Hill v. Lockhart, 474 U.S. 52 (1985). Thus, the attorney must ensure that the child makes a well-informed decision.

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

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

Pleading guilty to a misdemeanor offense in a felony prosecution provides two benefits: it avoids a felony finding that could become a predicate for a designated felony adjudication, and it reduces from eighteen to twelve months the term of an initial placement. Yet, there is more to consider. While the incentive may be strong where the child is very young and there is a substantial period of time within which the child may commit additional felonies, the same is not true when the child is nearing sixteen years of age. Also, a placement agency may release a child before the period of placement has expired, and placement may be extended, and thus the length of placement may depend more on the child's behavior while in placement than on the level of the offense.

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

When the attorney is negotiating for a dispositional promise, an adjournment in contemplation of dismissal is a desirable result because it avoids an adjudication of delinquency and results in the sealing of records. Unlike an ACD, a one-year conditional discharge involves an adjudication of delinquency, but is more desirable than probation, which can be for a period

of up to two years and involves the added burden of probation appointments. However, the attorney still has a duty to weigh, and discuss with the child, the chances of securing dismissal of the charges before or after trial, the actual risk of placement, and the likelihood that the child will violate the conditions of an ACD, a CD or probation and be placed anyway.

Generally, the attorney's failure to advise the child of the collateral consequences of an admission does not constitute ineffective assistance of counsel. People v. Ford, 86 N.Y.2d 397 (1995). However, erroneous advice regarding collateral consequences may constitute ineffective assistance. People v. McDonald, 1 N.Y.3d 109 (2003). In any event, the attorney should not strive to achieve only the constitutionally required minimum. The attorney should alert the child to <u>any</u> significant consequences of an admission. In juvenile delinquency proceedings, the consequences of an admission may include loss of Youthful Offender eligibility upon a designated felony finding; HIV testing upon a felony sex crime finding (FCA § 347.1); consideration of the finding in proceedings involving the child's immigration status; disclosure of the information in a criminal proceeding brought against the child; required registration in another state as a sex offender; and use in a landlord-tenant eviction proceeding. In addition, an admission results in a waiver of various claims that otherwise could be raised on appeal, including inadequate notice of intent to offer evidence pursuant to CPL § 710.30; the prosecution's improper failure to preserve evidence; improper denial of a motion to dismiss in furtherance of justice; improper denial of a severance motion; the violation of statutory speedy trial rules; non-jurisdictional pleading defects; and a violation of the statute of limitations.

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

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

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

C-10. Prepare the Child for a Plea Allocution. Before the child makes an admission in court, the attorney should explain to the child in detail the constitutional and statutory rights the child will be waiving.

Commentary

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

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

C-11. Develop a Theory of Defense. In order to identify a theory or theories of defense, the attorney should: review the statutory elements of the charged offenses and any applicable statutory presumptions, and identify possible deficiencies in the Presentment Agency's proof; consider the availability of Penal Law and other defenses; and evaluate the probative value and credibility of defense and prosecution witnesses and other evidence. The attorney should keep in mind that the Presentment Agency must prove its case beyond a reasonable doubt.

Commentary

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

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

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

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

C-12. Presentation of Expert Testimony. The attorney should determine whether expert testimony should be presented. If the child is financially unable to retain an expert, the attorney should make an application pursuant to County Law § 722-c for an order authorizing the attorney to obtain an expert's services for the child at public expense. When the Presentment Agency will be presenting expert testimony, the attorney should take appropriate steps to prepare to cross-examine the expert and otherwise challenge the evidence.

Commentary

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

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

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

C-13. Preserve the Child's Right to a Speedy Trial. The attorney should be fully familiar with statutory and constitutional speedy trial rules, monitor compliance with those rules, and move for dismissal of the petition on speedy trial grounds in appropriate circumstances.

Commentary

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

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

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

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

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

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

D-1. Opening Address. If appropriate, the attorney should deliver an opening address.

Commentary

"The Court shall permit the parties to deliver opening addresses." If the prosecutor wishes to do so, he/she must go first. FCA § 342.1(1). Thus, delivering an opening address may secure for the child's attorney useful information about how the Presentment Agency intends to prove its case and the evidence it intends to use.

D-2. Make Appropriate Objections. The attorney should be fully familiar with common law and statutory rules of evidence. As appropriate, the attorney should make timely objections to the introduction of evidence, while stating in detail the specific grounds for the objection in order to preserve the issue for appeal.

Commentary

"Only evidence that is competent, material and relevant may be admitted at a fact-finding hearing." FCA § 342.2(1). Thus, hearsay is not admissible unless it fits within a State law hearsay exception. Appellate courts enforce strict and often arcane preservation requirements, and so the attorney should be as specific as possible when raising an objection. Even if an objection has been raised before trial, the attorney should make a timely and specific objection again during trial.

The court may allow rebuttal and surrebuttal evidence. In fact, "[i]n the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically

of a rebuttal nature but more properly a part of the offering party's original case." FCA § 342.1(4).

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

When making hearsay objections, the attorney should determine whether an argument can be made that the hearsay is "testimonial" and thus is barred by the Confrontation Clause. Melendez-Diaz v. Massachusetts, _U.S_, 2009 WL 1789468 (2009); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

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

D-3 Cross-Examine Prosecution Witnesses. The attorney should cross-examine prosecution witnesses to the extent necessary and in a manner designed to support the theory of defense. When appropriate, the attorney should forgo cross-examination. The attorney should be fully familiar with the means of impeaching prosecution witnesses and any required foundation for such impeachment.

Commentary

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

It is not uncommon for the judge to take the entire direct testimony of a prosecution witness before adjourning the case. This is an opportunity for reflection and preparation that the child's attorney should exploit. A transcript of the direct testimony should be obtained. Transcripts also should be ordered when a trial has been conducted over a long period of time

on multiple dates. When the attorney is expected to begin cross-examination immediately after lengthy and complicated direct testimony, or when the attorney was provided with discovery of the witness's prior statements moments before the direct testimony commenced, the attorney should consider requesting a recess or a continuance before commencement of cross-examination.

D-4. Motion to Dismiss at the Conclusion of the Presentment Agency's Case. At the conclusion of the Presentment Agency's direct case, the attorney should make a motion to dismiss on the ground that the evidence is legally insufficient, and specify the grounds for the motion. When appropriate, the attorney should request a missing witness inference.

Commentary

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

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

D-5. Presentation of a Defense Case. The attorney should present witnesses and offer documentary, demonstrative and other evidence in support of the theory of defense. When necessary, the attorney should engage in subpoena practice and employ other means of compelling the testimony of witnesses and the production of evidence. The attorney should carefully prepare defense witnesses for their testimony.

Commentary

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

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

D-6. Presentation of the Child's Testimony. The attorney should discuss with the child his/her right to testify and the advantages and disadvantages of testifying, and, together with the child, determine whether the child will testify. This determination should take into account the child's need or desire to testify, any repercussions of testifying, the necessity of the child's testimony, and the child's developmental ability to testify effectively and withstand possible cross-examination. Ultimately, the attorney is bound by the child's decision concerning testifying.

Commentary

If the child will be testifying, the attorney should prepare the child by describing in detail the persons who will be in the courtroom and what the courtroom setting is like. The attorney should seek to insure that direct examination questions are phrased in a syntactically and linguistically appropriate manner. The phrasing of questions should take into consideration the

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

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

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

D-7. Make Summation. The attorney should make a summation, and, in order to preserve issues for appeal, should be specific in pointing out deficiencies in the Presentment Agency's proof.

Commentary

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

Many judges, certain that they have command of the facts and adequate knowledge of the law, do not want to hear lengthy summations during which the attorneys review the testimony in detail. Indeed, after a relatively short, one-day trial, the child's attorney might be well-advised to focus on legal argument and the crucial facts. However, when a trial has been conducted over a long period of time on multiple dates, the attorney should not assume that the court has taken adequate notes and recalls accurately what has happened previously in the proceeding. In such cases, the attorney should include more facts in the summation.

D-8. Raise Appropriate Objections to the Court's Order. When the court renders a decision at the conclusion of trial, the attorney should make appropriate objections. The attorney should obtain a copy of the court's written order and ascertain whether there are any errors.

Commentary

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

D-9. Motion for New Trial. When appropriate, the attorney should make a motion for a new trial based on a substantial change of circumstances, or the court's inherent power to vacate its order.

Commentary

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

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

E. ACTIONS TO BE TAKEN BEFORE THE DISPOSITIONAL HEARING.

E-1. Prepare a Dispositional Recommendation and Plan. Prior to any Probation investigation or mental health evaluation, the attorney should, together with the child, begin developing a dispositional recommendation and plan. In doing so, the attorney should review relevant records, including mental health, drug/alcohol treatment, medical, school, and social service agency and other service provider records, and interview potential witnesses.

Commentary

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

The attorney must respect the wishes of the child in selecting a dispositional plan, but should discuss with the child the likelihood that the judge will adopt the plan preferred by the child and the advisability of preparing and/or consenting to alternative plans.

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

E-2. Prepare the Child for Probation and Mental Health Interviews. The attorney should prepare the child and family members for interviews with Probation officers or mental health professionals during the dispositional process.

Commentary

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

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

E-3. Contacts With Probation and Mental Health Examiner. The attorney should engage in contacts with Probation, and with any mental health examiner, that are designed to influence the dispositional recommendations.

Commentary

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

While there may be certain judges who routinely bar attorneys from engaging in ex parte contacts with Probation and with mental health examiners, generally these examiners are not represented by counsel in the proceeding and thus Rule 4.2 of the Rules of Professional Conduct

does not prevent an attorney from engaging in such "lobbying." Kenneth C. v. Delonda R., 10 Misc.3d 1070(A) (Fam. Ct., Kings Co., 2006).

E-4. Prepare to Challenge Dispositional Reports and Recommendations. The attorney should review the Probation investigation report and any mental health evaluation ordered by the court, as well as notes and other documents prepared or utilized by Probation or the mental health examiner.

Commentary

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

When appropriate, the child's attorney should object to commencement of the hearing and introduction of reports when the required five-day notice has not been provided. The attorney also should seek disclosure, via subpoena if necessary, of handwritten or typed notes prepared by Probation or mental health examiner, and any records and other documents upon which they relied in formulating their recommendations.

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

E-5. Protect the Child's Right to a Speedy Dispositional Hearing. The attorney should monitor and, when appropriate, attempt to enforce, compliance with statutory speedy disposition requirements.

Commentary

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

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

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

However, the family court does have substantial discretion under Matter of Jose R., 83 N.Y.2d 388, 394 (1994), in which the Court of Appeals held that dismissal is not a statutorily

required remedy for delays in the dispositional process, but did concede that "[i]n unusual circumstances where the juvenile is not solely responsible for the delay, the Family Court retains the authority to dismiss."

F. ACTIONS TO BE TAKEN AT THE DISPOSITIONAL HEARING

F-1. Cross-Examine and Present Witnesses at the Dispositional Hearing. At the dispositional hearing, the attorney should, as appropriate, call and cross-examine witnesses.

Commentary

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

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

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

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

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

cross-examination, usually is taken by the judge to be an indication that the attorney is hiding something or lacks confidence in the parent.

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

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

F-2. Advocate for the Least Restrictive Alternative. At the dispositional hearing, the attorney should argue in support of a dispositional order that constitutes the least restrictive alternative.

Commentary

An adjudication of delinquency, which results from a finding that the respondent requires supervision, treatment or confinement (FCA § 352.1[1]), must be based on a preponderance of the evidence. FCA § 350.3(2). If the court cannot make the required finding, the petition must be dismissed. FCA § 352.1(2).

The possible orders the court can issue upon an adjudication of delinquency are conditional discharge (FCA § 353.1); probation (FCA § 353.2); placement in the respondent's own home or in the custody of a suitable relative or other private person (FCA § 353.3[1]); placement with the Commissioner of Social Services, which may include specification of a particular agency or class of agencies (FCA § 353.3[2]); and placement with the New York State Office of Children and Family Services, with the respondent to be placed in an OCFS-run facility (FCA § 353.3[3]), placed with a particular agency or class of agencies (FCA § 353.3[4]), or placed with the Commissioner of Mental Health or the Commissioner of Mental Retardation and Developmental Disabilities (FCA § 353.4). Restrictive placements in designated felony cases are governed by FCA § 353.5.

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

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

Accordingly, when challenging a placement recommendation, the attorney should cite these statutory requirements while arguing that the Presentment Agency has failed to establish that any risk to the community posed by the child cannot be adequately addressed while the child resides at home. In some cases, the least restrictive alternative is an adjournment in

contemplation of dismissal. See In re Israel M., 2008 WL 5170602 (1st Dept. 2008); In re Anthony M., 47 A.D.3d 434 1st Dept. 2008); In re Joel J., 33 A.D.3d 344 1st Dept. 2006); In re Letisha D., 14 A.D.3d 455 (1st Dept. 2005); In re Justin Charles H., 9 A.D.3d 316 (1st Dept. 2004).

In the case of a child who already is in a foster care placement pursuant to FCA Article Ten or Ten-A, the attorney should, unless there is a strategic reason not to, insist that a representative of the local Department of Social Services appear at the dispositional hearing, and, where appropriate, argue that the DSS should remain responsible for the child and that no placement order is necessary. If the child is ultimately placed with the Office of Children and Family Services, the attorney should, where appropriate, insure that the child's foster care placement is not allowed to lapse merely because the child has been placed with OCFS. In Matter of Peter R., 171 Misc.2d 278 (Fam. Ct., Kings Co., 1996), the court denied the Administration for Children's Services' application for leave to allow a foster care placement to lapse where there was a concurrent OCFS placement. The court noted that it had far more discretion to address the needs of the child under Article Ten.

F-3. Request Rehabilitative Services for the Child in Placement. If the child is placed by the court, the attorney should, as appropriate and with the consent of the child, ask the court to order that rehabilitative services, such as substance abuse or mental health treatment, be provided or arranged by the agency with which the child is placed.

Commentary

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

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

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

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

deemed to possess the required consent. FCA § 355.4(2). The parent or guardian may later make a motion objecting to services or treatment. FCA § 355.4(4).

G. ACTIONS TO BE TAKEN POST-DISPOSITION.

G-1. Discuss the Dispositional Order With the Child. The attorney should review the dispositional order to ensure that it conforms to the court's oral directives and complies with statutory requirements. The attorney should discuss the order and its consequences with the child, and assist the child in preparing to comply with conditions of behavior that are contained in the order. The attorney should discuss the end of the legal representation and determine what contacts, if any, the attorney and the child will continue to have.

Commentary

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

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

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

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

G-2. Appeal From Dispositional Order. The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If, after such consultation, the child wishes to appeal the order and the appeal would not be frivolous, the attorney should take all steps necessary to perfect the appeal and seek interim relief necessary to protect the interests of the child during the pendency of the appeal. If the attorney determines that he/she cannot or is unwilling to handle the appeal, the attorney should notify the court and seek to be discharged and replaced as soon as possible.

Commentary

When the court has issued a dispositional order, the attorney must advise the child and his/her parent or guardian in writing, of the right to appeal, the time limitations, the manner of initiating the appeal and obtaining a transcript, and the right to apply for leave to appeal as a poor person, and explain the procedures for instituting an appeal, the possible reasons upon which the appeal may be based, and the nature and possible consequences of an appeal. FCA § 354.2(1). The attorney also must ascertain whether the child wishes to appeal and, if the child does wish to do so, file the necessary notice of appeal. FCA § 354.2(2); see also FCA § 1121. If necessary, the attorney must apply for leave to appeal as a poor person, and file a certification of continued eligibility for appointment of counsel. FCA § 1121(3).

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

However, the risk may be illusory, or at least insufficiently consequential to deter an appeal. For instance, the attorney should consider, and discuss with the child, the likelihood that the Presentment Agency will, in fact, want to and be able to re-prosecute the case. Also, given the potential double jeopardy implications and the fact that the court is barred from ordering a more restrictive disposition as "punishment" for the child's decision to appeal [North Carolina v. Pearce (395 U.S. 711 (1969)], the attorney should consider, and discuss with the child, the likelihood that the court would, upon a fact-finding at a new trial, impose additional restrictions after the child already has served out a dispositional order.

G-3. Conclusion of Appeal. When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

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

G-4. Sealing, Destruction and Expungement of Records. The child's attorney should seek to ensure compliance with statutory provisions requiring sealing or destruction of records, and consider moving for post-adjudication sealing or expungement.

Commentary

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

Probation may maintain records and papers for the purpose of complying with statutory provisions governing adjustment. FCA § 375.1[3].

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

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

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

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

G-5. Motion for New Dispositional Hearing or Termination of Placement. When appropriate, the attorney should make a motion for a new dispositional hearing, or for a change in or termination of placement, based on a substantial change of circumstances or the court's inherent power to vacate its order.

Commentary

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

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

G-6. Protect Child's Right to Permanency Planning Prior to Release From Placement. The child's attorney should ensure that the placement agency prepares, prior to the child's release from placement, the report required by FCA § 353.3(7).

Commentary

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

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

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

G-7. Advocate for the Child at Violation Proceedings. When a petition is filed alleging that the child violated a dispositional order, the attorney should determine whether the filing and the petition satisfy statutory requirements, attempt to negotiate a resolution, and, if there is a hearing, zealously advocate the child's position.

Commentary

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

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

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

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

G-8. Advocate for the Child at Extension/Permanency Proceedings. When a petition is filed requesting an extension of placement, the attorney should determine whether the filing and the petition satisfy statutory requirements, attempt to negotiate a resolution, and, if there is a hearing, zealously advocate the child's position. The attorney also should zealously advocate the child's position at a permanency hearing.

Commentary

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

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

The attorney should utilize statutory requirements, and any information provided pursuant thereto, when asking the court to issue orders directing the agency to take action to expedite release of the child from placement or the achievement of some other permanency goal. For instance, a release (or conditional release) plan report required by FCA § 353.3(7) (see Commentary to F-5 ante) must be submitted not later than sixty days prior to the date on which a permanency hearing must be held and shall be annexed to the petition for a permanency hearing and extension of placement. FCA § 353.3(7). At a permanency proceeding, the court must consider and determine, inter alia, whether and when the respondent will be returned home, placed for adoption, referred for legal guardianship, placed permanently with a relative, or placed in another permanent living arrangement, and specify "the steps that must be taken by the agency with which the respondent is placed to implement the plan for release or conditional release . . . the adequacy of such plan and any modifications that should be made to such plan." In the case of a respondent who has attained the age of sixteen, the court also must determine the services needed, if any, to assist the respondent to make the transition from foster care to independent living. FCA § 355.5(7). See also Fostering Connections to Success and Increasing Adoptions Act of 2008 (Public Law 110-351) (conditions state receipt of federal Title IV-E funding on, inter alia, imposition of requirement that aging-out youth's caseworker, and other representative as appropriate, help youth develop personal transition plan during ninety-day period immediately before youth exits care).

When a client approaches the age of eighteen, the attorney should discuss with the child the advantages and disadvantages of remaining in placement and, if the client decides to remain in care past his/her eighteenth birthday, have the client sign a written consent to remain in care (except where there has been a designated felony finding and placement may be extended without consent until the child is twenty-one).

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

NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

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

June 2008

Approved by the Executive Committee of the New York State Bar Association on June 19, 2008.

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

(June 2008)

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN PERSON IN NEED OF SUPERVISION PROCEEDINGS (2008)

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN PERSON IN NEED OF SUPERVISION PROCEEDINGS (2008)

PREFACE

Standards for Attorneys Representing Children in Person in Need of Supervision Proceedings (2008) is a revised edition of the Standards that were issued in 1996.

These Standards apply to all attorneys representing children in Person in Need of Supervision (PINs) proceedings. The term "law guardian" has not been used because the October 17, 2007 Administrative Order of the Chief Judge of the State of New York indicates that "attorney for the child" means a law guardian and because the term "attorney" reflects the current understanding of the function of the child's representative. Although the efforts of the NYSBA to have the term "law guardian" deleted from the Family Court Act have not yet been successful, perpetuating the use of "law guardian" in this new edition of the Standards seems inappropriate.

Attorneys and judges who are familiar with the 1996 edition of the Standards will find a number of changes in the 2008 edition. PINs law now requires that diligent efforts be made to divert the child from being the subject of a PINs petition. The child's attorney is not appointed until a petition has been filed, which would be after these diversion efforts have been made. Diversion has resulted in a substantial decrease in the number of PINs petitions being filed; in some counties almost all potential PINs cases are diverted. An additional difference is that the 2008 edition is shorter and does not provide separate standards for each stage in the proceeding. All Departments now provide training for attorneys representing children in PINs proceedings, and hence the extensive, substantive commentary for each stage in a proceeding is no longer needed.

The **Standards for Attorneys Representing Children in Person in Need of Supervision Proceedings (2008)** are intended to define generally what constitutes effective representation.

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

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN PERSON IN NEED OF SUPERVISION PROCEEDINGS (2008)

A. THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship. Whether retained or assigned, and whether called "counsel" or "law guardian," the child's attorney shall maintain a traditional attorney-client relationship with the child and zealously defend the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences and secrets, and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with the child and advise the child in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. Pursuant to Canon 7 of the Lawyers Code of Professional Responsibility and Ethical Consideration 7-8, there is a presumption that the attorney will adhere to the direction of a competent *adult* client. The same presumption should apply in representation of a child client.

Commentary

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

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

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

Case law makes plain that children are entitled to more than the mere presence of an attorney; they deserve effective representation and the failure to provide effective representation constitutes reversible error. In re Chad H, 278 A.D.2d 601, 717 N.Y.S.2d 725 (3d Dep't 2000).

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

The child's attorney is not among the mandated reporters listed in Soc. Ser. L. § 413, and the attorney has no obligation under that statute to reveal abuse or neglect allegations made by the child. Licensed social workers are covered by § 413, but, because statements made to a social worker employed by the child's attorney ordinarily are covered by the attorney-client privilege, there is substantial controversy with respect to whether § 413 requires a social worker-employee to make disclosure.[1] *Accordingly, to best protect client confidentiality, the*

[1] See Kansas Attorney General Opinion No. 2001-28 (licensed social worker should comply with reporting law, and attorney should inform client of conflicting duties of attorney and social worker and allow client to decide whether

social worker employed by an attorney should explain to a child that if the child has any doubt about whether he or she wishes a statement regarding abuse or neglect allegations to be disclosed to a third party, the child should first discuss the situation with the attorney. The social worker and the child's attorney should arrive at a joint decision concerning a social worker's § 413 disclosure obligations before the social worker interviews any child.

A-2. Counseling and Advising the Child. The attorney has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child understand the proceedings, make decisions, and otherwise provide the attorney with meaningful input and guidance. A child may be more susceptible to intimidation and manipulation than an adult client, and therefore the attorney should ensure that the child's decisions reflect his/her actual position. The attorney has a duty not to overbear the will of the child.

The attorney's duties as counselor and advisor include:

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

Commentary

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

The child's attorney, like any attorney, must perform the vital role of being an advisor and counselor. In that role, the attorney may attempt to persuade the child to adopt a course of action that, in the attorney's view, will promote the child's legal interests, even when this course of action differs from the client's initial position. To do so effectively, the attorney needs to determine what factors have been most influential in the child's thinking, what the child does not

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to proceed with use of social worker); District of Columbia Bar Opinion 282 (1998) (provision in ethics rules that permits attorney to reveal confidences when "required by law" does not authorize social worker to reveal confidences and secrets under law that does not apply to attorney; however, while attorney should inform social worker of duty to protect client confidences and secrets and should not provide legal advice to social worker regarding reporting obligations, attorneys' ethics rules cannot insulate social worker from legal obligation to report, and, as a result, attorney should not request that social worker ignore reporting law and must inform client that social worker may be obligated to report).

know, and what may be confusing to the child, and then work diligently to help the child understand the attorney's perspective and thinking.

While explaining why the attorney believes a different outcome, or route to the outcome, may be preferable, the attorney must take care not to overwhelm the client's will, and thus override the child's actual wishes. The attorney must remain aware of the dynamics of power inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests. Ultimately, the child must understand that the attorney will represent the child's position to the court, even if the attorney does not personally agree with that position.

B. GENERAL AUTHORITY AND DUTIES

B-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet with the child as soon as possible and on a continuing basis, prior to court hearings and when apprised of emergencies or significant events impacting on the child. Additionally, if appropriate, the attorney should maintain telephone contact. The attorney should undertake training to be reasonably culturally competent regarding the child's ethnicity and culture.

Commentary

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

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

B-2. Basic Obligations. The attorney should ensure that facts in support of the child's position which may be relevant to any stage of the proceeding are presented to the court. To this end, the attorney should:

(1) Review the pre-petition diversion efforts to determine if the diligent efforts required by F.C.A. § 735 have been made to divert the child from being the subject of a PINs petition;
(2) Review the petition to determine if it meets the requirements of F.C.A. § 732 and § 735;
(3) Determine if additional diversion efforts should be made post-petition, pursuant to F.C.A. § 742.

(4) Determine if a conflict of interest exists and observe ethical rules related to conflicts, such as those prohibitions related to co-respondents (including siblings);

(5) Obtain copies of all pleadings and relevant notices and conduct ongoing discovery;

(6) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g. judge, parties and their advocates, intervenors, caseworkers, child's attorney), and what to expect in the legal process;

(7) Develop a theory and strategy of the case, including ultimate outcomes and goals to implement at fact-finding and dispositional hearings and including factual and legal issues;

(8) Consider whether a neglect petition or child protective investigation under F.C.A. § 1034 should be undertaken, and if appropriate and the client consents, make the necessary motions, unless the court proceeds on its own motion under F.C.A. § 716;

(9) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, child interviews, and any changes of circumstances affecting the child and the child's family;

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

(11) Identify (upon consultation with the child) appropriate family and professional resources for the child;

(12) Obtain and review all court and agency records concerning the child's placement history and consult with all attorneys who had previously represented the child;

(13) Obtain evaluations and retain expert services if deemed necessary to zealously defend the client; and

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

Commentary

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

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

C. <u>ACTIONS TO BE TAKEN</u>

C-1. Investigate. To advocate for the client's position, the attorney must conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

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

Commentary

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

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

Commentary

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

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

Commentary

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

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

Commentary

The attorney "has the right to interview any petitioner or witness who may possess information bearing on the issues before the court." Rapoport v. Berman, 49 A.D. 2d 930, 373 N.Y.S. 2d 652 (2d Dep't 1975). The attorney should keep in mind, however, that if the petitioner is represented by counsel, the attorney shall not: "communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." DR 7-104 (A) (1) of the New York State Code of Professional Responsibility; 22 NYCRR § 1200.35. Where the petitioner, parents or other parties are not represented, the attorney should not give them advice, "other than the advice to secure counsel." Id. DR 7-104 (A)(2).

(6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records;

(7) Interviewing individuals involved with the child who may be relevant to the case, including school personnel, child welfare caseworkers, non-respondent parents, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary

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

(8) Conducting all necessary discovery;

(9) Reviewing relevant statements, photographs, video or audio tapes and other evidence;

(10) Considering whether the child should be examined by a physician, a mental health professional, or a social worker;

(11) Retaining any necessary expert services;

Commentary

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

limit if appropriate. For example, a psychological examination may be less harmful than a physical or complete psychiatric examination.

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

Commentary

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

(13) Ensure that the required efforts to avoid removal of the child from the home have been made.

Commentary

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

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

C-2. File Pleadings. The attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

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

Commentary

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

C-3. Request Services. Consistent with the child's legal interests, the attorney should seek appropriate services (by court order, if necessary) to access entitlements, to protect the child's interests and to implement a service plan through a referral back for diversion or for a continuing case. These services may include services for the child or for the parent(s), as long as the request for services is made in order to advance the child's legal interests. Such services may include, but are not limited to:

(1) Family preservation-related prevention or reunification services;
(2) Sibling and family visits;
(3) Child support;
(4) Domestic violence prevention, intervention, and treatment;
(5) Medical and mental health care;
(6) Drug and alcohol treatment;
(7) Parenting education;
(8) Semi-independent and independent living services;
(9) Foster care placement;
(10) Education;
(11) Recreational or social services; and
(12) Housing.

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

Commentary

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

C-4. Client Competency. In some cases the attorney may feel that the client needs a competency evaluation, which can be ordered by the court or can be arranged by the attorney. The attorney should explain to the client why such an evaluation is needed.

C-5. Adolescent Clients. The attorney who represents a young person, age 14 or older, should be familiar with, among other things, both the federal and state law governing services and discharge resources available to youth aging out of placement.

Commentary

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

When clients approach the age of 18, the attorney should be prepared to discuss the advantages and disadvantages of remaining in placement and, if the client decides to remain in care past their 18th birthday, have the client sign a written consent to remain in care.

C-6. Undocumented Children. The attorney for the child should determine at the outset of the case whether the child is an undocumented immigrant and what impact this might have on the development of the case. Undocumented children who are initially placed on a PINS petition, but continue to remain in care due to abuse, neglect, or abandonment may be eligible for Special Immigrant Juvenile Status (SIJS) under the Federal Immigration and Naturalization Act. The attorney for the child should be familiar with this statute in order to determine whether the young person is eligible for SIJS. If the young person may be SIJS eligible, the attorney should obtain the family court orders required in order to adjust the young person's immigration status and connect the child with appropriate immigration resources so that the child can obtain a green card.

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

Commentary

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

(1) The young person is under 21 years of age;
(2) is unmarried;
(3) has been declared dependent upon a juvenile court;
(4) has been deemed eligible by the court for long-term foster care due to abuse, neglect or abandonment;

(5) continues to be dependent upon the juvenile court and eligible for long-term foster care in that family reunification is no longer an option; and that

(6) it would not be in the young person's best interest to be returned to the country of nationality or last residence.

See, Immigration and Naturalization Act §101(a) (27) (J), 8 U.S.C. §1101(a) (27) (J).

C-7. Negotiate Settlements. The attorney should participate in settlement negotiations to seek expeditious resolution of the case, balancing the effect of continuances and delays on the child. The attorney should use suitable mediation resources and, where appropriate, ask the court to authorize the use of conferencing or mediation.

D. HEARINGS

D-1. Court Appearances. The attorney should attend and fully participate in all hearings, telephone communications, or other conferences with the court.

Commentary

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

D-2. Explanation to Client. The attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during, and after each hearing. Post-court appearance updates should be provided to the child as soon as possible.

D-3. Motions and Objections. The attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at or after trial. If necessary, the attorney should file briefs in support of evidentiary issues. Further, during all hearings, the attorney should preserve legal issues for appeal, as appropriate.

Commentary

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

(a) Only evidence that is competent, material and relevant may be admitted in a fact-finding hearing.

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

D-4. Presentation of Evidence. The attorney should make an opening statement, present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary to support the child's legal position.

D-5. Whether Child Should Testify. The attorney should decide, in consultation with his or her client, whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the attorney is bound by the child's direction concerning testifying.

Commentary

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

D-6. Questioning the Child. The attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

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

D-7. Conclusion of Hearing. If appropriate, the attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The attorney should ensure that a written order is entered and make any necessary post-trial motions.

Commentary

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

D-8. Dispositional Hearing. The attorney should, in consultation with the child, develop a dispositional plan and should request a hearing if necessary to advocate for that plan.

Commentary

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

D-9. Permanency Hearings and Obligations after Disposition. The attorney's representation continues throughout the period of placement, supervision or adjournment in contemplation of dismissal. The attorney must monitor the case, receive relevant reports, and initiate appropriate modification, enforcement or other action in the interests of the child.

Commentary

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

D-10. Expanded Scope of Representation. The attorney should evaluate, in consultation with the child, the pursuit of other issues on behalf of the child, administratively or judicially, even if those issues do not appear to arise from the court appointment. For example:

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

Commentary

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

E. <u>POST-HEARING</u>

E-1. Review of Court's Order. The attorney should review all written orders to ensure that they conform to the court's verbal orders and statutorily required findings and notices. The attorney should file a sealing motion if appropriate.

E-2. Communicate Order to Child. The attorney should discuss each order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children

may assume that orders are final and not subject to change. Therefore, the attorney should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished.

E-3. Implementation. The attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

Commentary

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

E-4. Protecting the Child's Rights. Whenever appropriate, after consulting with the child, the attorney should assist in the filing of a notice of claim, obtain counsel for clients who were abused or injured in foster care, and for clients who were removed in violation of their constitutional rights, and investigate bringing suit for damages for the client. The attorney for the child is obligated to protect all of the child's legal rights even if the attorney is not able to represent the child in another forum.

F. APPEAL

F-1. Decision to Appeal. The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If, after such consultation, the child wishes to appeal the order and the appeal would not be frivolous, the attorney should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

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

F-2. Withdrawal. If the attorney determines that he or she cannot or is unwilling to handle the appeal, the attorney should notify the court and seek to be discharged or replaced as soon as possible.

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

Commentary

If the child's interests are affected by the issues raised in the appeal, the attorney should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal.

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

F-4. Conclusion of Appeal. When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

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

F-5. Cessation of Representation. The attorney should discuss the end of the legal representation and determine what contacts, if any, the attorney and the child will continue to have.

Commentary

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

NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings

(June 2007)

Approved by the Executive Committee of the New York State Bar Association on June 28, 2007.

Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings

(June 2007)

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007)

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007)

PREFACE

Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (2007) is a revised compilation of Parts III. Child Protective Proceedings; IV. Termination of Parental Rights Proceedings; and V. Foster Care Placement & Review Proceedings of the 1996 edition of Standards. The 1996 Standards on Juvenile Delinquency Proceedings and Person in Need of Supervision Proceedings will be revised at a later date.

These Standards apply to all attorneys representing children in the proceedings referenced above. The term "law guardian" has not been used, because the label is outdated and confusing to attorneys and parties alike. Although the efforts of the NYSBA to have the term deleted from the Family Court Act have not yet been successful, perpetuating the use of "law guardian" in this new edition of the Standards seems inappropriate. In addition, despite some ongoing confusion regarding the party status of the child in the context of child welfare proceedings, the child will be considered a party and referenced as such throughout these Standards.

Attorneys and judges who are familiar with the 1996 edition of the Standards will find many similarities with the 2007 edition. A major difference is that the 2007 edition is shorter and does not provide separate standards for each stage in the proceeding. Because all Departments now provide training for attorneys representing children in protective proceedings, the Committee felt that extensive, substantive commentary for each stage in a proceeding was no longer needed. The format and some language come from the American Bar Association's Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, which were approved by the ABA House of Delegates in February, 1996; although there are substantial differences between the NYSBA standards and the ABA standards, we appreciate the assistance received from the ABA standards.

The **Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (2007)** are intended to define what constitutes effective representation.

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

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007)

A. THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship. Whether retained or assigned, and whether called "counsel" or "law guardian," the child's attorney shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. There is a presumption that the attorney will adhere to the direction of a young client in the same manner that the attorney would follow the direction of a competent adult pursuant to Canon 7 of the Lawyers Code of Professional Responsibility and Ethical Consideration 7-8, even if the attorney for the child believes that what the child wants is not in the child's best interests. Unless a child is not capable of expressing a preference, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, the attorney must not "substitute judgment" in determining and advocating the child's position.

A-2. Counseling and Advising the Child. The lawyer has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the lawyer with meaningful input and guidance. Because a child may be more susceptible to intimidation and manipulation than an adult client, the lawyer should ensure that the child's decisions reflect his/her actual position. The lawyer has a duty not to overbear the will of the child.

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

Commentary

The attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when, at the end of the day, the lawyer

and the child disagree. However, representation is also "lawyer-directed" in the sense that, particularly when representing a young child, a lawyer has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.

The child's lawyer, like any lawyer, must perform the vital role of being an advisor and counselor. In that role, the lawyer may attempt to persuade the child to adopt a course of action that, in the lawyer's view, will promote the child's legal interests, even when this course of action differs from the client's initial position. To do so effectively, the lawyer needs to determine what factors have been most influential in the child's thinking, what the child does not know, and what may be confusing to the child, and then work diligently to help the child understand the lawyer's perspective and thinking.

While explaining why the lawyer believes a different outcome, or route to the outcome may be preferable, the lawyer must take care not to overwhelm the client's will, and thus override the child's actual wishes. The lawyer must remain aware of the power dynamics inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests. Ultimately, the child must understand that unless the attorney has factual grounds to believe that the child's articulated position will place the child at imminent danger of grave physical harm, the attorney will represent the child's position to the court, even if the attorney does not personally agree with that position.

A-3. Overcoming the Presumption of Adherence to the Client's Directions An attorney must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences, except in the following circumstances:

1. The attorney has concluded that the court's adoption of the child's expressed preference would expose the child to imminent danger of grave physical harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision; or

2. The attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions.

In these circumstances, the attorney for the child must inform the court of the child's articulated wishes, unless the child has expressly instructed the attorney not to do so.

Commentary

When considering whether the child has "capacity to perceive and comprehend the consequences of his or her decisions," the lawyer should not make judgments that turn on the level of maturity, sophistication, or "good judgment" reflected in the child's decision-making. All that is required is that the child have a basic understanding of issues and consequences. The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, most children ages seven and above, and sometimes even younger, will have the capacity to make decisions that bind the lawyer with

respect to fundamental issues such as where the child should live. In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child's developmental status and capability (see A-5).

The use of the language, "imminent danger of grave physical harm" in sub-section 1. above, is intended to include sexual abuse and to recognize the extraordinary circumstances that should be present before overriding a child's expressed position. See, Merril Sobie, Representing Child Clients: Role of Counsel or Law Guardian, NYLJ, 10/6/92, p. 1, col. 1 (while opining that a law guardian may refuse to argue for a result that would place child in "imminent danger," author notes that those words "connote a grave immediate danger"). See also, American Bar Association Standard B-4(3).

A-4. The Use of Substituted Judgment. In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences, the attorney must inform the court that this is the basis upon which the attorney will be advocating the legal interests of the child. The attorney should be prepared to introduce evidence to support the attorney's position. The attorney also is required to inform the court of the child's articulated position, unless the child has expressly instructed the attorney not to do so. In formulating substituted judgment, the attorney:

(1) Must conduct a thorough investigation, including interviewing the child, reviewing the evidence and applying it against the legal standard applicable to the particular stage of the proceeding; and

(2) Should consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child's articulated position.

Commentary

In those cases in which the lawyer has properly decided to make decisions for the child, the lawyer should be guided by his/her objective analysis of the legal issues governing the proceeding. The lawyer has no right to make "best interests" determinations and act upon them when the law clearly states that a different standard applies. The lawyer properly advances the client's interests only by ensuring that the child's legal interests are protected and that the legal position advanced by the child's attorney conforms to the applicable legal standard governing each stage of the proceeding. For example, at the pre-fact-finding stage of a child protective proceeding, removal of the child is lawful only if there is an "imminent risk to the child's life or health" (FCA §§ 1022, 1024, 1027) as those terms are defined by the New York State Court of Appeals in Nicholson v. Scopetta, 3 N.Y.3d 357 (2004). Thus, pre-fact-finding, an attorney using substituted judgment under the standard set forth in section A-3 (above) would look to the specific facts of the case and take a position for or against removal based on the legal guidelines set forth in Nicholson.

In contrast, some controversies do require the court, and thus the child's lawyer (when using substituted judgment), to consider the child's best interests. These include controversies related to, for example, parental and sibling visitation, or agency supervision, or treatment and services, or, when a return to a parent is not feasible, the choice of a custodian,. In those instances, the lawyer's formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney. The lawyer should take into account the full context in which the client lives, including the importance of the child's family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law.

It is important to note that if a child affirmatively chooses not to take a position in the litigation, this is not automatically cause for the use of substituted judgment. In such circumstance, the attorney should present this position to the court and represent the child's legal interests in this context. Substituted judgment should only be used if the attorney has objective factual evidence to support the conclusion that a failure to substitute judgment would expose the child to imminent danger of grave physical harm.

A-5. Confidentiality of the Attorney Client Relationship. The attorney-client privilege attaches to communications between the child and his or her attorney, including advice given by the attorney. Statements made by the child to a social worker, an investigator, a paralegal, or another person employed by the attorney also are protected by the privilege. Information protected by the attorney-client privilege may only be disclosed by the child's lawyer in the following circumstances:

(1) The child consents to disclosure;

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

(3) The attorney has determined pursuant to Standard A-3 that the use of substituted judgment is required, and that disclosure advances the child's legal interests; or

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

Commentary

Because attorney-client communications which take place in the presence of a third person are ordinarily not covered by the privilege, an attorney who represents multiple clients in a proceeding should conduct separate interviews of the children. Unless the child testifies and discloses confidential communications, the child's attorney cannot be compelled to turn over his or her notes of interviews with the child for use by other counsel on cross-examination. People v. Lynch, 23 N.Y. 2d 262 (1968). However, the testimony of a social worker regarding the child's out-of-court statements would result in a waiver of the privilege. Matter of Lenny McN., 183 A.D. 2d 627, 584 N.Y.S.2d 17 (1st Dept. 1992).

The attorney also should protect a child's right to confidentiality--for instance, during the course of in camera discussions or negotiations or during casual contacts with attorneys and

other persons. The child's permission to communicate discrete items of information to other parties or the judge can often be obtained by explaining to the child the importance or relevance of the disclosure to the child's legal interests.

The exceptions to confidentiality find support in City Bar Ethics Opinion1997-2, which concluded that the child's lawyer may disclose confidential information concerning abuse or mistreatment if the lawyer is required by law to do so, or disclosure is necessary to keep the client from being maimed or killed, or the client lacks capacity and the lawyer believes disclosure is in the client's best interest. See also State Bar Ethics Opinion 486 (1978) (attorney must balance protection of human life against professional standards when deciding whether to reveal client's contemplation of suicide). In determining whether to make disclosure, the attorney should take the child's desires into account and consider the effect disclosure would have on the attorney-client relationship.

The child's attorney is not among the mandated reporters listed in SSL §413, and the attorney has no obligation under that statute to reveal new abuse or neglect allegations made by the child. Licensed social workers are covered by §413, but, because statements made to a social worker employed by the child's attorney ordinarily are covered by the attorney-client privilege, there is substantial controversy with respect to whether §413 requires a social worker-employee to make disclosure.[1] *Accordingly, to best protect client confidentiality, the social worker employed by an attorney should explain to a child that if the child has any doubt about whether he or she wishes a statement regarding new abuse or neglect allegations to be disclosed to a third party, the child should first discuss the situation with the attorney. The social worker and the child's attorney should arrive at a joint decision concerning a social worker's §413 disclosure obligations before the social worker interviews any child.*

B. <u>GENERAL AUTHORITY AND DUTIES</u>

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

(1) Obtain copies of all pleadings and relevant notices and demand ongoing discovery;

(2) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g. judge, parties

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

and their advocates, intervenors, case workers, child's lawyer), and what to expect in the legal process;

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

(4) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, child interviews, and any changes of circumstances affecting the child and the child's family;

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

(6) Identify (upon consultation with the child) appropriate family and professional resources for the child.

(7) The attorney should obtain and review all court and agency records concerning the child's placement history and should consult with all law guardians who had previously represented the child.

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

Commentary

The attorney should not be merely a fact-finder, but rather should zealously advocate a position on behalf of the child. Delay is endemic to the Family Court process, but delay is especially harmful to children. The attorney for the child should take the initiative and not wait for child protective services, the foster care agency, or the parents to take action. The attorney for the child should make all appropriate motions and seek any necessary orders in furtherance of the child's position.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position. The attorney for the child should actively seek the child's participation and input throughout the legal process and should not undermine the position of the child by volunteering to the court information that contradicts that position. If the client is dissatisfied with the representation provided by his or her attorney, the attorney should inform the child of all of the options available to resolve the child's grievances.

The attorney for the child is not an arm of the court and should not engage in ex parte communications with the court.

B-2. Conflict Situations.

If a lawyer is appointed to represent siblings, there may be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Commentary

An attorney should not accept assignment for siblings if the exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by the attorney's representation of the other or if so doing would be likely to involve the lawyer in representing differing interests. If such a conflict arises during the course of representation, the attorney may not continue to represent all siblings. The attorney may accept assignment or continue his/her assignment when a conflict arises only "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." Code of Professional Conduct § 1200.24.

C. <u>ACTIONS TO BE TAKEN</u>

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child, and additionally, if appropriate, should maintain telephone contact. The attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child's ethnicity and culture.

Commentary

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

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

In preparation for a termination of parental rights proceeding, the attorney should ascertain the detailed facts concerning the placement, the foster parents, the birth parents and the child's wishes concerning placement and adoption. It is crucial to explore the relationship between the child and the foster parent or prospective adoptive parents. Of equal significance is the relationship between the child and the birth parents as well as the child's relationship with siblings. Termination can result in a total severance of the parent-child relationship so the attorney must carefully discuss these issues with the child.

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

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

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

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. The attorney may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those records which pertain to the other parties. Unless overriding client-directed advocacy, the attorney should obtain the child's permission before obtaining and/or reviewing the child's records (e.g. mental health, law enforcement, and education) or contacting the child's school, counselor, therapist, and other similar persons and institutions.

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

Commentary

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

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

Commentary

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

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

Commentary

Such contact generally should include visiting the child's place of residence, which can give the attorney additional information about the child's custodial circumstances.

In a termination of parental rights proceeding, the parents' attorney should be solicited for approval to interview the birth parents; if possible, the respondents should be interviewed and, if they oppose termination, their plan concerning the child's future should be evaluated.

(6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records;

Commentary

F.C.A. § 1038(a) provides that "each hospital and any other private or public agency having custody of any records, photographs or other evidence relating to abuse or neglect" shall be required to send such material to the court upon subpoena of any of the parties, including "counsel for the child."

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

Commentary

In some jurisdictions the attorney is permitted free access to agency case workers. In others, contact with the case worker must be arranged through the agency's lawyer.

(8) Reviewing relevant photographs, video or audio tapes and other evidence;

Commentary

It is essential that the lawyer review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence. F.C.A. § 1038(b) provides that the attorney may "pursuant to a demand pursuant to Section 3120 of the Civil Practice Law and Rules, obtain any record, photograph or other relevant evidence from the petitioner or a Social Services official for inspection and photocopying."

(9) The attorney should consider whether the child should be examined by a physician, a psychologist, or a social worker.

Commentary

When considering a request for the child to be examined by a physician, psychologist or social worker pursuant to F.C.A. § 1038, the attorney must consider not just the usefulness of the examination as a fact finding tool, but must also consider the effect of the examination on the child. In determining whether to support a motion made by another party for an examination, or whether to make a motion seeking an examination, the attorney must balance the need for the information against the effect that the examination would have upon the child. The attorney should consider whether the scope of the examination sought can be limited, and move for such a limit if appropriate. For example, a psychological examination may be less harmful than a physical or complete psychiatric examination.

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

Commentary

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

(11) If the child is removed from the home, the attorney should investigate the possibility of placement in the home of a non-respondent parent, other suitable relative, or other adult with whom the child has a relationship, and with the child's siblings. Unless so directed by a competent client, in a child protective proceeding, the attorney should not agree or fail to object to a removal or remand without the court conducting a hearing under FCA §1027.

Commentary

If the court determines it is necessary to remove the child from his home, it must inquire, during the course of a F.C.A. §1027 hearing and a S.S.L. § 358-a hearing, if the child is older than five, whether he or she has identified a relative or other suitable person who plays or has played a significant positive role in his or her life. It is crucial that the attorney explores such resources and/or helps the client, regardless of the age of the client, identify possible caretakers. It is also important to identify which potential resources the child does not wish to live with.

C-3. File Pleadings. The attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;
(2) A protective order to prevent successive mental health or other evaluations of the child;
(3) A parenting, custody or visitation evaluation;
(4) An increase, decrease, or termination of contact or visiting;
(5) Restraining or enjoining a change of placement;
(6) Contempt for non-compliance with a court order;
(7) Termination of the parent-child relationship;
(8) Child support;
(9) A protective order concerning the child's privileged communications or tangible or intangible property;
(10) A request for services for child or family; and
(11) Dismissal of petitions or motions.

Commentary

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

C-4. Request Services. Consistent with the child's legal interests, the attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include services for the child or for the parent(s), as long as the request for services is made in order to advance the child's legal interests. Such services may include, but are not limited to:

(1) Family preservation-related prevention or reunification services;
(2) Sibling and family visits;
(3) Child support;
(4) Domestic violence prevention, intervention, and treatment;
(5) Medical and mental health care;
(6) Drug and alcohol treatment;
(7) Parenting education;
(8) Semi-independent and independent living services;
(9) Foster care placement;
(10) Termination of parental rights action;
(11) Adoption services;
(12) Education;
(13) Recreational or social services; and
(14) Housing.

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

Commentary

The attorney has full standing to request a hearing pursuant to F.C.A. § 1027 to determine whether the child's interests require protection pending a final order of disposition. For example, the court may remove the child from the home, place him with a non-respondent parent, relative or a foster parent, or may order any supportive measures that would protect the child in the home (such as homemaking services, day care services and counseling).

If the child has been temporarily removed from the home in a child protective proceeding, the attorney should arrive at a position, consistent with the child's wishes, as to whether the child should be returned to the home and, if so, apply for an order returning the child pursuant to F.C.A. § 1028.

In Nicholson v. Scopetta, 3 N.Y.3d 357 (2004), the Court of Appeals held that when a request is made to remove a child from a home, the court must consider whether the risk of harm that is posed by remaining in the home can be eliminated by putting services in place. Whenever it is consistent with the child's legal interests, the attorney should develop and present a service plan on behalf of the child.

In a voluntary foster care placement, the attorney should, consistent with the child's position, determine whether there were alternatives to placement, including preventive services,

and whether the parents were made aware of alternatives to placement. In addition, because many S.S.L. § 358-a proceedings involve elements of abuse or neglect, the attorney should consider whether a child protective proceeding would be appropriate. If so, the attorney should request that a petition be filed, because child protective proceedings may afford better protection for the child.

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

C-5. Child With Special Needs. Consistent with the child's wishes, the attorney should assure that a child with special needs receives appropriate services to address any physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;
(2) Supplemental security income (SSI) to help support needed services;
(3) Therapeutic foster or group home care; and
(4) Residential/in-patient and out-patient psychiatric treatment.

Commentary

The attorney should ensure that the court is aware of the child's needs, so that the court can take those needs into consideration in making decisions regarding placement and services. In particular, the child's emotional needs and attachments must be considered in any decision to remove a child from his/her home. Nicholson v. Scopetta 3 N.Y.3d at 379.

There are many services available from extra-judicial, as well as judicial, sources for children with special needs. The attorney should be familiar with these other services and how to assure their availability for the client.

C-6. Adolescent Clients. The attorney who represents a young person age fourteen or older should be familiar with, among other things, both the federal and state law governing services and discharge resources available to youth aging out of foster care.

Commentary

An enormous number of young people age out of the system each year without the resources they need and to which they are legally entitled. The attorney must advocate for effective planning for adolescent clients as early in a case as possible. See 42 U.S.C. §§ 675(1)(D), 677(a); F.C.A. §§ 1052(b)(i)(A)(6)(iv), 1089(c)(v), 1089(d)(2)(i); S.S.L. § 358-a(3); N.Y.C.R.R. § 430.12(f).

When clients approach the age of 18, the attorney should be prepared to discuss the advantages and disadvantages of remaining in foster care and, if the client decides to remain in care past their 18th birthday, have the client sign a written consent to remain in care.

C-7. Undocumented Children. The attorney for the child should determine at the outset of the case whether the child is an undocumented immigrant. Undocumented children have a unique opportunity to regularize their immigration status under the Special Immigrant Juvenile Status section of the federal Immigration and Naturalization Act. The attorney for the child should be familiar with this statute in order to determine whether the young person is eligible for Special Immigrant Juvenile Status (SIJS). If the young person is SIJS eligible, the attorney should obtain the family court orders required in order to adjust the young person's immigration status and connect them with appropriate immigration resources so that the child can obtain a green card.

Commentary

It is estimated that well over one thousand children who enter foster care in New York State each year do not have legal immigration status. This poses a major obstacle to permanency planning for these young people, who are at risk of deportation, not authorized to work, and ineligible for college financial aid and other government benefits. Relief for these children is available in the form of SIJS, a type of visa designated for undocumented children who are the subject of abuse, neglect, voluntary foster care placement, guardianship, adoption, and PINS or delinquency proceedings. While the SIJS application itself is made to the United States Citizenship and Immigration Services, a prerequisite for the application is an order from the Family Court making specific factual findings that:

- *The young person is under 21 years of age;*
- *is unmarried;*
- *has been declared dependent upon a juvenile court;*
- *has been deemed eligible by the court for long-term foster care due to abuse, neglect or abandonment;*
- *continues to be dependent upon the juvenile court and eligible for long-term foster care in that family reunification is no longer an option; and that*
- *it would not be in the young person's best interest to be returned to the country of nationality or last residence.*

See, Immigration and Naturalization Act §101(a)(27)(J), 8 U.S.C.§1101(a)(27)(J)

C-8. Negotiate Settlements. The attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The attorney should use suitable mediation resources and, where appropriate, ask the court to authorize the use of conferencing or mediation to "further a plan for the child that fosters the child's health, safety, and wellbeing." F.C.A. § 1018.

Commentary

Particularly in contentious cases, the attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the attorney to negotiate with a parent directly without the consent of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the attorney for the child is in a pivotal position in negotiation.

Settlement frequently obtains at least short-term relief for all parties involved and is often the best resolution of a case. The attorney, however, should not become merely a facilitator to

the parties reaching a negotiated settlement. As developmentally appropriate, the attorney should consult the child prior to any settlement becoming binding. The attorney's consent is required as a condition precedent to acceptance of an admission (F.C.A. § 1051(a)) or an adjournment in contemplation of dismissal (F.C.A. § 1036). Thus, the legislature clearly intended that the settlement protect the child's legal interests and wishes.

D. HEARINGS

D-1. Court Appearances. The attorney should attend and fully participate in all hearings and in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

Commentary

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

D-2. Client Explanation. The attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during, and after each hearing. Post-court appearance updates should be provided to the child as soon as possible.

D-3. Motions and Objections. The attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the attorney should file briefs in support of evidentiary issues. Further, during all hearings, the attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The attorney should present and cross-examine witnesses, offer exhibits, and provide independent evidence as necessary to support the child's legal position.

Commentary

The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-6), and not a mere endorsement of another party's position. Caselaw makes plain that children are entitled to more than the mere presence of a lawyer; they deserve effective representation and the failure to provide effective representation constitutes reversible error. See Matter of Jamie TT, 191 A.D.2d 132. 599 N.Y.S.2d 892 (3rd Dept. 1993).

D-5. Child at Hearing. The attorney shall determine whether the child wishes to be, or in the case of a child who lacks capacity, whether the child should be present during courtroom proceedings. When the attorney determines that the child wishes to or should be present, the attorney shall make necessary applications to the court and otherwise attempt to enforce the child's right to be present.

Commentary

New York State has not yet enacted legislation nor recognized a constitutional right for children to be present during court proceedings. However, the ABA has opined that a child has the right to meaningful participation in the proceeding, which right includes the opportunity to be present at significant court hearings. Moreover, recent federal legislation mandates that states receiving federal funding require the court to "consult" with the child regarding the permanency plan. Children and Families Services Improvement Act of 2006 (Public Law 109-248). Arguably, the federal law requires an in-court appearance by the child.

When the attorney has determined pursuant to Standard A-3 that the child has the capacity to decide whether to appear in court, the attorney may first provide counseling and advice to the child, but, in the end, must assert the child's right to appear in court insofar as the child directs. The attorney should raise and discuss with the child the emotional impact of the child's presence in court or exposure to inflammatory facts, and, with the child's consent, waive the child's appearance for discrete portions of the proceeding.

When the attorney has determined pursuant to Standard A-3 that the child lacks capacity, the attorney, after taking into account the child's expressed wishes, may decide whether to assert the child's right to be present in court. In making such determinations, the attorney should, with due regard to rules governing disclosure of confidential information, consult with mental health professionals, caretakers, and any other persons who are knowledgeable about the child's emotional condition and possible reaction to the court proceedings. The attorney should keep in mind that even a child who is too young to sit through the hearing, or too developmentally delayed to direct the attorney with regard to the outcome of the case, may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making decisions.

The lawyer should attempt to ensure that the child's experience in court is as comfortable and stress-free as possible. To that end, the attorney should press the state custodian to meet its obligation to transport the child to and from the hearing; arrange for the child to wait in an appropriate setting in the courthouse; and explain to the child, before and after the hearing, what is likely to occur and what has occurred.

D-6. Whether Child Should Testify. The attorney should decide, in consultation with his or her client, whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the attorney is bound by the child's direction concerning testifying.

Commentary

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision to have the child testify should be made individually, based on the circumstances of the individual child and the individual case. In the absence of compelling reasons, a child who has a

strong desire to testify should be called to do so. If the child does not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parent(s), and requesting sufficient hearing time in order for the child's testimony to be limited to one appearance. The child should know whether the in-chambers testimony will be shared with others, such as parents who might be excluded from chambers, before agreeing to this forum. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes.

If the child's testimony is requested or required, the attorney must thoroughly prepare the child, and advise the child of the nature of the testimony and the reasons the testimony is necessary. If the child's testimony is requested and the child does not wish to testify, the attorney should consider whether testifying may be avoided through either the introduction of other evidence or by stipulation to the facts to which the child would attest. The attorney should also consider requesting that the testimony be taken in the judge's chambers, rather than the more formal courtroom (which may be intimidating to the client), with the attorney present. The attorney should request that the in camera interview be structured in a way that would be least harmful to the child. The attorney should also consider consulting with a social worker or other mental health professional to help the child prepare for the psychological, and emotional experience of testifying before the court.

D-7. Child Witness. The attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Commentary

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The lawyer should seek any necessary assistance from the court, including location of the testimony (in chambers, at a small table etc.), determination of who will be present, restrictions on the manner and phrasing of questions posed to the child, and the possibility of a prior visit to the court room.

The accuracy of children's testimony is enhanced when they feel comfortable. Courts have permitted support persons to be present in the courtroom, sometimes even with the child sitting on the person's lap to testify. Because child abuse and neglect cases are often closed to the public, special permission may be necessary to enable such persons to be present during hearings. Further, where the rule sequestering witnesses has been invoked, the order of witnesses may need to be changed or an exemption granted where the support person also will be a witness. The child should be asked whether he or she would like someone to be present and, if so, whom the child prefers. Typical support persons include parents, relatives, therapists, Court Appointed Special Advocates (CASAs), social workers, victim-witness advocates, and members of the clergy. For some, presence of the attorney provides sufficient support.

D-8. Questioning the Child. The attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

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

The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

D-9. Challenges to Child's Testimony or Statements. The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary

If necessary, the attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

D-10. Conclusion of Hearing. At the conclusion of the fact finding, disposition or permanency hearing, if appropriate, the attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The attorney should ensure that a written order is entered.

Commentary

One of the values of having a trained attorney is that such a lawyer can often present creative alternative solutions to the court. Further, the attorney is able to argue the child's legal position from the child's perspective, keeping the case focused on the child's wishes, needs and the effect of various dispositions on the child.

D-11. Dispositional Hearing. The attorney should, in consultation with the child, develop a dispositional plan to present to the court, and should request a hearing if necessary to advocate for the expressed wishes and legal interests of his/her client.

Commentary

Only the child's attorney is charged with expressing the child's wishes. Any disposition should be the product of extensive evaluation and review, should comprehensively address the family's problems, and should be consistent with the child's legal interests and, to the greatest extent possible, his or her wishes. All disposition alternatives should be explored with the client and any resources that the child might identify including: foster care placement, placement for

adoption, custody, guardianship and, (as of April 1, 2011) kinship guardianship with financial assistance, pursuant to Social Services Law § 458-b.

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

In a termination of parental rights proceeding, a separate dispositional hearing is not required when the court has determined, at the fact-finding stage, that the parent has abandoned the child, or that parental rights should be terminated because of "permanent" mental illness or retardation. However, disposition, whether adoption, continued foster care, or family reunification, determines the child's future life. The need for specific services, the appropriateness of potential permanent placements and even the proof necessary to sustain a finding, may all flow from the dispositional goal. Therefore, the attorney should formulate an opinion as to the dispositional plan to be presented by the petitioning agency and if, after consultation with the child, the attorney disagrees with the agency's plan, a comprehensive alternative plan should be prepared and presented to the Court.

A denial of a request for a dispositional hearing in a termination of parental rights proceeding could constitute an abuse of discretion, and, in such situations, the attorney may initiate an appeal.

D-11. Permanency Hearings. The attorney must appear at all permanency hearings scheduled by the court and advocate for the child's position regarding each of the issues to be addressed, including: the permanency planning goal, efforts to be made to achieve the goal, visitation plans, the appropriateness of the child's current placement, and the child's service needs.

Commentary

The Family Court retains continuing court jurisdiction and calendaring for all children who have been placed or freed for adoption "until the child is discharged from placement and all orders regarding supervision, protection or services have expired." F.C.A. § 1088. Within eight months after the child was first removed and placed in foster care, and every six months thereafter, a permanency hearing must be held. The attorney should make best efforts to obtain the mandated permanency hearing report, which is due at least fourteen days before the date set for the permanency hearing F.C.A. § 1089. Although the hearing must be completed within 30 days, the attorney should consider asking the court for a continuance if the report has not been provided prior to the hearing so that the attorney can do an independent assessment and, if necessary, prepare for a full evidentiary hearing on behalf of his or her client. The legislative intent of the permanency legislation was to ensure that children who have been placed in foster care or freed for adoption do not languish and that the court oversees the progress of every child on a frequent basis. It is incumbent upon the attorney to make best efforts to ensure that every child achieves his or her permanency goal as soon as possible.

D-12. Expanded Scope of Representation. The attorney should evaluate, in consultation with the child, the pursuit of other issues on behalf of the child, administratively or judicially, even if those issues do not appear to arise from the court appointment. For example:

(1) Child support;
(2) Delinquency or status offender matters;
(3) SSI and other public benefits;
(4) Custody;
(5) Guardianship;
(6) Paternity;
(7) Personal injury;
(8) School/education issues, especially for a child with disabilities;
(9) Mental health proceedings;
(10) Termination of parental rights;
(11) Adoption; and
(12) Immigration status.

Commentary

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

If a termination of parental rights petition is pending on behalf of the child, the attorney should consider whether or not an adoption petition should be filed forthwith. D.R.L. § 12(8).

As a result of legislation enacted in 2006, where a child is under the jurisdiction of the Family Court as a result of a Family Court child protective, foster care, surrender or termination of parental rights proceeding, there is a preference for filing an adoption proceeding in the same court and a procedure for ensuring that the case will be heard, to the extent practicable, before the same judge presiding over the pending proceeding.

D-13. Obligations after Disposition. The attorney's representation continues throughout the period of placement, supervision or adjournment in contemplation of dismissal. Throughout this time, the attorney must monitor the case, receive relevant reports, and initiate appropriate modification, enforcement or other action in the interests of the child. The attorney should file an appropriate petition if a client over the age of 14, who has been freed for adoption but not adopted, notifies the attorney that he or she wishes to have parental rights restored pursuant to F.C.A. § 635. Similarly, in certain circumstances the attorney should file appropriate motion papers on behalf of a client who is over 18 and has consented to discharge from foster care, but wishes to return to care.

Commentary

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the attorney's work often comes after the initial hearing, including ongoing

permanency hearings, service plan reviews, issues of termination, and so forth. Often a child's case workers, therapists, other service providers or even placements change while the case is still pending. The attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for the agency and court. The attorney should stay in touch with the child, third party caretakers, case workers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

Pursuant to legislation passed in 2010, the attorney's obligations toward the client who is over the age of 18 may extend past the client's discharge from foster care. Family Court Act Article 10-B provides that youth under the age of 21 may return to foster care if they have been discharged after age 18 due to their decision to decline to consent to the continuation of foster care, and find themselves with no reasonable alternative to placement, consent to participation in an educational/vocational program, and it is in their best interest to return. If, within 2 years of discharge, the client notifies his/her attorney that each of these criteria are met and that he or she desires to return to care, the attorney should move the court for an order approving the client's return to foster care. Similarly, F.C.A. § 635 has created a mechanism for parental rights to be restored, post disposition if a child over the age of 14 has been freed for adoption for 2 years or more but has not been adopted. It is incumbent upon the child's attorney, to consult with the client to determine if a petition to restore parental rights meets the criteria for filing and if the child wishes to return to the parent's care.

E. <u>POST-HEARING</u>

E-1. Review of Court's Order. The attorney should review all written orders to ensure that they conform to the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The attorney should discuss each order and its consequences with the child.

Commentary

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

E-3. Implementation. The attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

Commentary

The lawyer should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with

implementation, the lawyer should stay in touch with the child, case worker, third party caretakers, and service providers between review hearings. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation. The attorney for the child is mandated by F.C.A. § 1075 ("special duties of law guardian") to review progress reports to determine whether there is reasonable cause to suspect that the child is at risk of further abuse or neglect or that there has been a substantive violation of a court order. Where the attorney makes such a determination, the attorney must apply to the court for appropriate relief pursuant to F.C.A. § 1061. That section provides that the attorney may move the court to stay, set aside, modify or vacate any order issued in the course of an Article 10 proceeding. It should be noted that the attorney may seek relief pursuant to F.C.A. § 1061 at any time s/he receives information that would render such a motion appropriate.

E-4. Protecting the Child's Rights. Whenever appropriate, after consulting with the child, the attorney should assist in the filing of a notice of claim, obtain counsel for clients who were abused or injured in foster care, and for clients who were removed in violation of their constitutional rights, and investigate bringing suit for damages for the client. The attorney for the child is obligated to protect all of the child's legal rights even if the attorney is not able to represent the child in another forum.

F. APPEAL

F-1. Decision to Appeal. The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal would not be frivolous, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

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

F-2. Withdrawal. If the attorney determines he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

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

Commentary

The attorney should take a position in any appeal filed by the parent, agency, or other party. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal

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

F-4. Conclusion of Appeal. When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

F-5. Cessation of Representation. The attorney should discuss the end of the legal representation and determine what contacts, if any, the attorney and the child will continue to have.

Commentary

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.

NEW YORK STATE BAR ASSOCIATION

NYSBA

Committee on Children and the Law

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

June 2008

Approved by the Executive Committee of the New York State Bar Association on June 19, 2008.

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

(June 2008)

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN AND THE LAW

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

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN AND THE LAW

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

PREFACE

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

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

The term "law guardian" has not been used because the October 17, 2007 Administrative Order of the Chief Judge of the State of New York indicates that "attorney for the child" means a law guardian and because the term "attorney" reflects the current understanding of the function of the child's representative. Although the efforts of the NYSBA to have the term deleted from the Family Court Act have not yet been successful, perpetuating the use of "law guardian" in this new edition of the Standards seems inappropriate.

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

The **Standards for Attorneys Representing Children in New York Custody, Visitation and Guardianship Proceedings (2008)** are intended to define what constitutes effective representation.

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

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

A. THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship. Whether retained or assigned, and whether called "counsel" or "law guardian," the child's attorney shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences and secrets, and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances. Pursuant to Canon 7 of the Lawyer's Code of Professional Responsibility and Ethical Consideration 7-8, there is a presumption that the attorney will adhere to the direction of a competent client. This presumption should apply in representation of a child client, even if the attorney for the child believes that what the child wants is not in the child's best interests. Unless a child is not capable of expressing a preference, or one of the conditions set forth in §A-3 (below) has been met, the attorney must not "substitute judgment" in determining and advocating the child's position.

Commentary

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

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

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

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

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

(3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

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

A-2. Counseling and Advising the Child. The attorney has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the attorney with meaningful input and guidance. Because a child may be more susceptible to intimidation and manipulation than an adult client, the attorney should ensure that the child's decisions reflect his/her actual position. The attorney has a duty not to overbear the will of the child.

The attorney's duties as counselor and advisor include:

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

(2) Informing the child of the relevant facts and applicable laws;

(3) Explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings;

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

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

(6) Counseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position.

Commentary

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

However, representation is also "attorney-directed" in the sense that, particularly when representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.

The child's attorney, like any attorney, must perform the vital role of being an advisor and counselor. In that role, the attorney may attempt to persuade the child to adopt a course of action that, in the attorney's view, will promote the child's legal interests, even when this course of action differs from the client's initial position. To do so effectively, the attorney needs to determine what factors have been most influential in the child's thinking, what the child does not know, and what may be confusing to the child, and then work diligently to help the child understand the attorney's perspective and thinking.

While explaining why the attorney believes a different outcome, or route to the outcome, may be preferable, the attorney must take care not to overwhelm the child's will, and thus override the child's actual wishes. The attorney must remain aware of the power dynamics inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests. Ultimately, the child must understand that unless the attorney has factual grounds to believe that the child's articulated position will place the child at substantial risk of imminent, serious harm, the attorney will represent the child's position to the court, even if the attorney does not personally agree with that position.

A-3. Overcoming the Presumption of Adherence to the Client's Directions. An attorney must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences, except in the following circumstances:

(1) The attorney has concluded that the Court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision; or

(2) The attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions.

In these circumstances, the child's attorney must inform the court of the child's articulated wishes, unless the child has expressly instructed the attorney not to do so.

Commentary

When considering whether the child has "capacity to perceive and comprehend the consequences of his or her decisions," the attorney should not make judgments that turn on the level of maturity, sophistication, or "good judgment" reflected in the child's decision-making. All that is required is that the child has a basic understanding of the issues in the case and their

consequences. The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, most children ages seven and above, and sometimes even younger, will have the capacity to make decisions that bind the attorney with respect to fundamental issues such as where the child should live. In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child's developmental status and capability. (See A-5.)

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

A-4. The Use of Substituted Judgment. In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences or when the child is not capable of expressing a preference, the attorney must inform the court and the child that substituted judgment is the basis upon which the attorney will be advocating the legal interests of the child. The attorney should be prepared to introduce evidence to support the attorney's position. The attorney also is required to inform the court of the child's articulated position, unless the child has expressly instructed the attorney not to do so. In formulating substituted judgment, the attorney:

(1) Must conduct a thorough investigation, which includes interviewing the child, reviewing the evidence, and applying it against the applicable legal standard; and

(2) Should consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child's articulated position and/or to assist the attorney in formulating a legal position on behalf of a child who is not competent (see A-3).

Commentary

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

legal interests are protected and that the legal position advanced by the child's attorney conforms to the applicable legal standard governing the proceeding.

Some controversies related to parenting time[1] or the choice of a custodian will require the court, and thus the attorney who is using substituted judgment, to consider the child's best interests. In those instances, the attorney's formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney. The attorney should take into account the full context in which the client lives, including the importance of the child's family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law. When using substituted judgment and formulating a best interests position, the attorney may wish to consult a social worker or other mental health professional for assistance.

It is important to note that if a child affirmatively chooses not to take a position in the litigation, this is not automatically cause for the use of substituted judgment. In such circumstance, the attorney should represent this position to the court and represent the child's legal interests in this context. Substituted judgment should only be used when the child clearly lacks capacity pursuant to the criteria set forth in section A-3 (see above), or if the attorney has objective factual evidence to support the conclusion that a failure to substitute judgment would expose the child to substantial risk of imminent, serious harm.

A-5. Confidentiality of the Attorney Client Relationship. The attorney-client privilege attaches to communications between the child and his or her attorney, including advice given by the attorney. Statements made by the child to a social worker, an investigator, a paralegal, or another person employed by the attorney also are protected by the privilege. The child's attorney may only disclose information protected by the attorney-client privilege under the following circumstances:

(1) The child consents to disclosure;

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

(3) The attorney has determined pursuant to Standard A-3 that the use of substituted judgment is required, and that disclosure advances the child's legal interests; or

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

Commentary

Because attorney-client communications that take place in the presence of a third person are ordinarily not covered by the privilege, an attorney who represents multiple clients in a proceeding should conduct separate interviews of the children. Unless the child testifies and

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

discloses confidential communications, the child's attorney cannot be compelled to turn over his or her notes of interviews with the child for use by other counsel on cross-examination. People v. Lynch, 23 NY2d 262 (1968). However, the testimony of a social worker regarding the child's out-of-court statements would result in a waiver of the privilege. Matter of Lenny McN., 183 A.D.2d 627, 584 N.Y.S.2d 17 (1st Dept. 1992).

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

The exceptions to confidentiality find support in City Bar Ethics Opinion 1997-2, which concluded that the child's attorney may disclose confidential information concerning abuse or mistreatment if the attorney is required by law to do so, or disclosure is necessary to keep the client from being maimed or killed, or the client lacks capacity and the attorney believes disclosure is in the client's best interest. See also State Bar Ethics Opinion 486 (1978) (attorney must balance protection of human life against professional standards when deciding whether to reveal client's contemplation of suicide). In determining whether to make a disclosure, the attorney should take the child's desires into account and consider the effect disclosure would have on the attorney-client relationship.

The child's attorney is not among the mandated reporters listed in S.S.L. §413, and the attorney has no obligation under that statute to reveal new abuse or neglect allegations made by the child. Licensed social workers are covered by §413, but, because statements made to a social worker employed by the child's attorney ordinarily are covered by the attorney-client privilege, there is substantial controversy with respect to whether §413 requires a social worker-employee to make a disclosure.[2] *Accordingly, to best protect client confidentiality, the social worker employed by an attorney should explain to a child that if the child has any doubt about whether he or she wishes a statement regarding new abuse or neglect allegations to be disclosed to a third party, the child should first discuss the situation with the attorney. The social worker and the child's attorney should arrive at a joint decision concerning a social worker's §413 disclosure obligations, before the social worker interviews any child.*

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

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

B. GENERAL AUTHORITY AND DUTIES

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

(1) Obtain copies of all pleadings and relevant notices and demand ongoing discovery;

(2) Counsel the child concerning the subject matter of the litigation, the child's rights; the court system, the proceedings, the role of all participants (e.g. judge, parties and their advocates, case workers performing court-ordered investigations, child's lawyer), and what to expect in the legal process;

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

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

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

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

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

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

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

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

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

Commentary

The attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. Delay is endemic to the Family Court process, but delay is especially harmful to children. The attorney for the child should take the initiative and not wait for the other parties to take action. The attorney for the child should make all appropriate motions and seek any necessary orders, including interim or temporary orders, in furtherance of the child's position.

Although the child's position may overlap with the position of one or both parents, or a third-party, the attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position. The attorney for the child should actively seek the child's participation and input throughout the legal process and should not undermine the position of the child by volunteering to the court information that contradicts that position.

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

The attorney for the child is not an arm of the court and should not engage in ex parte *communications with the court.*

B-2. Conflict Situations. If a lawyer is appointed to represent siblings, the attorney should determine if there is a conflict of interest, which could require that the lawyer decline representation or withdraw from representing some or all of the children.

Commentary

An attorney should not accept assignment for siblings if the exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by the attorney's representation of the other OR if so doing would be likely to involve the lawyer in representing differing interests. Depending on the circumstances and the stage of the proceeding, if such a conflict arises the attorney may not be able to continue to represent any or all of the siblings. The attorney may accept assignment or continue his/her assignment when a conflict arises only "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." Lawyer's Code of Professional Responsibility, D.R. 5-105.

C. <u>ACTIONS TO BE TAKEN</u>

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet

with the child prior to court hearings and when apprised of emergencies or significant events impacting the child, and additionally, if appropriate, should maintain telephone contact. The attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child's ethnicity and culture.

Commentary

The attorney should recognize that the child's situation and position may be fluid. As a result, the attorney should remain in close communication with the child throughout the proceedings and apply to the court for further review, monitoring or modification of any preliminary orders, as necessary. The attorney should make reasonable efforts to visit the child in his or her current living situation whenever such a visit would facilitate communication with the child or enhance the attorney's ability to represent the child's legal interests. When representing a very young client who cannot be interviewed, the attorney can observe the child in order to evaluate the child's demeanor, physical condition, reaction to the environment in which the child lives, and interaction with the parties.

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

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

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

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

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

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

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

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

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

(6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, child protective and social services records, and medical records pertaining to the child, as well as relevant criminal records, medical records, and mental health records pertaining to the parties;

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

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

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

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

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. The attorney may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially records pertaining to the other parties. Unless the attorney is using substituted judgment pursuant to §§A-3 and A-4 above, the attorney should obtain the child's permission before obtaining and/or reviewing the child's records (e.g. mental health, law enforcement, and education) or contacting the child's school, counselor, therapist, etc.

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

Another key aspect of representing children is the review of all prior court proceedings regarding the family. Other relevant documents that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and education. These records can provide a more complete context for the current

problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate custodial arrangements.

When considering a request for the child to be examined by a physician, psychologist or social worker, the attorney must consider not just the usefulness of the examination as a fact-finding tool, but must also consider the effect of the examination on the child. In determining whether to support or oppose a motion made by another party for an examination, or whether to make a motion seeking an examination, the attorney must balance the need for the information against the effect that the examination would have upon the child. The attorney should consider whether the scope of the examination could be limited, and move for such a limit, if appropriate. For example, a psychological examination may be less distressing for a child than a physical or complete psychiatric examination. The child's attorney should always conduct proper discovery to obtain the names, qualifications, and summaries of expected testimony of any expert witnesses.

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

C-3. File Pleadings. The attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;

(2) A protective order to prevent successive mental health or other evaluations of the child;

(3) A parenting, custody or visitation evaluation;

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

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

(6) Child support;

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

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

(9) A dismissal of petitions or motions.

Commentary

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

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

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

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

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

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

Commentary:

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

C-5. Child With Special Needs. Consistent with the child's wishes, the attorney should ensure that a child with special needs receives appropriate services to address any physical, mental, or developmental disabilities. These services may include, but should not be limited to:

(1) Special education and related services;

(2) Supplemental security income (SSI) to help support needed services; and

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

Commentary

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

C-6. Negotiate Settlements. The attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The attorney should use suitable mediation resources and, where appropriate, ask the Court to authorize the use of conferencing or mediation to assist in reaching a resolution.

Commentary

Particularly in contentious cases, the attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the child's attorney to negotiate with a parent directly without the consent (preferably written) of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the attorney for the child is in a pivotal position in negotiation.

Settlement frequently obtains at least short-term relief for all parties involved and is often the best resolution of a case. The attorney, however, should not become merely a facilitator to the parties' reaching a negotiated settlement. As developmentally appropriate, the attorney should consult the child prior to any settlement becoming binding.

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

Commentary

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

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

C-8. Undocumented Children In Guardianship Proceedings. The attorney for the child should determine at the outset of the case whether the child is an undocumented immigrant. Undocumented children have a unique opportunity to regularize their immigration status under the Special Immigrant Juvenile Status section of the Federal Immigration and Naturalization Act. The attorney for the child should be familiar with this statute in order to determine whether the

young person is eligible for Special Immigrant Juvenile Status (SIJS). If the young person is SIJS eligible, the attorney should obtain the family court orders required in order to adjust the young person's immigration status and connect him or her with appropriate immigration resources so that the child can obtain a green card.

Commentary

Without legal immigration status, a young person risks deportation, cannot receive working papers, and is ineligible for college financial aid and other government benefits. In some guardianship cases, relief for these children is available in the form of SIJS, a type of visa designated for undocumented children who have been abused, neglected, and/or abandoned. SIJS is available to children who are the subject of abuse, neglect, voluntary foster care placement, guardianship, adoption, and PINS or delinquency proceedings. While the SIJS application itself is made to the United States Citizenship and Immigration Services, a prerequisite for the application is an order from the Family Court making specific factual findings that:

- *The young person is under 21 years of age;*
- *is unmarried;*
- *has been declared dependent upon a juvenile court;*
- *has been deemed eligible by the court for long-term foster care due to abuse, neglect or abandonment;*
- *continues to be dependent upon the juvenile court and eligible for long-term foster care in that family reunification is no longer an option; and that*
- *it would not be in the young person's best interest to be returned to the country of nationality or last residence.*

See, Immigration and Naturalization Act §101(a)(27)(J), 8 U.S.C.§1101(a)(27)(J); 8 C.F.R. § 204.11. The federal regulations clarify that children placed in guardianships can qualify for SIJS and define "eligible for longer term foster care" as a determination by the Family Court that family reunification, i.e. reunification with biological parents, is no longer an option. 8 C.F.R. § 204.11(a). Although the majority of lower courts that have addressed the issue have granted SIJS orders in guardianship cases, a few courts have declined to issue the orders based on jurisdictional questions. Appeals of two lower court decisions that declined to grant SIJS orders in guardianships are currently pending in the Appellate Division, First and Second Departments. See Matter of Antowa M., __ A.D.3d __ (1st Dept. __) No.2006-12426; Matter of Vanessa D., __A.D.3d _ (2d Dept. __) No.2007-03365.

D. <u>HEARINGS</u>

D-1. Court Appearances. The attorney should attend and fully participate in all hearings and in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. Client Explanation. The attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing. Post-court appearance updates should be provided to the child as soon as possible.

D-3. Motions and Objections. The attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the attorney should file briefs in support of evidentiary issues. Further, during all hearings, the attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The attorney should be prepared to present opening and closing statements, cross-examine witnesses, offer exhibits, and provide independent evidence as necessary to support the child's legal position.

Commentary

The child's position may overlap with the positions of one or both parents or a third-party caretaker. Nevertheless, the attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-1), and not a mere endorsement of another party's position. Caselaw makes plain that children are entitled to effective representation and the failure to provide effective representation constitutes reversible error. See Matter of Jamie TT, 191 A.D.2d 132. 599 N.Y.S.2d 892 (3rd Dept. 1993).

D-5. Child's Participation at Hearing. The child's participation at a hearing can take a variety of forms. Participation can be accomplished indirectly, through the attorney's representation of the child's position, or directly, through the child's presence in the courtroom or *in camera*. When the attorney determines that the child wishes to be present in the courtroom, the attorney shall make necessary applications to the court and otherwise attempt to further the child's desire to participate in the proceedings.

Commentary

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

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

that the child's presence is essential to the furtherance of the child's legal position, and after consulting with mental health professionals, caretakers, and any other persons who are knowledgeable about the child's emotional condition and possible harmful reaction to the court proceedings. The attorney should keep in mind that any child, even one who is too young to sit through the hearing, or too developmentally delayed to direct the attorney with regard to the outcome of the case, may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making decisions.

When an attorney's application to have a child present in court is granted by the judge, the lawyer should always attempt to ensure that the child's experience in court is as comfortable and stress-free as possible. To that end, the attorney should try to arrange for the child to wait in an appropriate setting in the courthouse and explain to the child, before and after the hearing, what is likely to occur and what has occurred.

D-6. Whether Child Should Testify. The attorney should decide, in consultation with his or her client whether to call the child as a witness in open court or whether the child should testify *in camera*. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, unless the child clearly lacks capacity pursuant to the criteria set forth in section A-3 (above), the attorney is bound by the child's direction concerning testifying.

Commentary

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision to have the child testify should be made individually, based on the circumstances of the individual child and the individual case. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so. If the child does not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parent(s), or the parents' attorneys, and requesting sufficient hearing time in order for the child's testimony to be limited to one appearance. Before agreeing to this forum, the child should always be made aware of the rare circumstances where judges have determined that in-chambers testimony can be shared with others, such as parents, who might be excluded from chambers. At the conclusion of the in camera *interview, the attorney should reiterate the confidential nature of the proceeding, and make every effort to ensure that the transcript will not be released to any unauthorized person. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes.*

If the child's testimony is requested or required, the attorney must thoroughly prepare the child and advise the child of the nature of the testimony and the reasons the testimony is necessary. If the child's testimony is requested and the child does not wish to testify, the

attorney should consider whether testifying may be avoided either through the introduction of other evidence or by stipulation to the facts to which the child would attest or, when appropriate, by filing a protective order to prevent the compelled testimony of the child. If the child's testimony is required, the attorney should consider requesting that the testimony be taken in the judge's chambers with the attorney present, rather than in the more formal courtroom (which may be intimidating to the child). The attorney should request that the in camera *interview be structured in a way that would be least harmful to the child. The attorney should also consider consulting with a social worker or other mental health professional to help the child prepare for the psychological, and emotional experience of testifying before the court.*

D-7. Child Witness. The attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimal harm to the child.

Commentary

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The accuracy of children's testimony is enhanced when they feel comfortable. The lawyer should seek any necessary assistance from the court in order to maximize the child's level of comfort, including location of the testimony (in chambers, at a small table, etc.), determination of who will be present, restrictions on the manner and phrasing of questions posed to the child, and the possibility of a prior visit to the courtroom.

D-8. Questioning the Child. The attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility. The attorney must become skilled at recognizing the child's developmental limitations and in asking developmentally appropriate questions. If the child is testifying in camera*, the attorney should request permission to ask questions that the judge may not have asked, whenever it is in the client's interest to have the judge hear that information.*

D-9. Challenges to Child's Testimony or Statements. The child's competency to testify, or the reliability of the child's testimony or out-of-court statements, may be called into question. The attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary

If necessary, the attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

D-10. Conclusion of Hearing. If appropriate, the attorney should make a closing argument and provide proposed findings of fact and conclusions of law. The attorney should ensure that a written order is entered.

Commentary

One of the values of having a trained attorney is that such a lawyer can often present creative alternative solutions to the court. Further, the attorney is able to argue the child's legal position from the child's perspective, keeping the case focused on the child's wishes, needs and the effect on the child of various options for custody, parenting time, and parental decision-making.

E. POST-HEARING

E-1. Review of Court's Order. The attorney should review all written orders to ensure that they conform to the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The attorney should discuss each order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children may assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. It is of particular importance that the child understands his or her continuing relationship with each parent (or the non-parent party) and each parent's continuing responsibilities to the child.

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

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

Commentary

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

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

Commentary

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

F. APPEAL

F-1. Decision to Appeal. The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal would not be frivolous, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

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

F-2. Withdrawal. If the attorney determines that he or she lacks the necessary experience or expertise to handle the appeal or is otherwise unable to proceed on the appeal, the lawyer should notify the court and seek to be relieved. The attorney should always cooperate with the new appellate attorney by sharing all relevant information on the case.

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

Commentary

The attorney should take a position in any appeal filed by the parent, agency, or other party. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal.

F-4. Conclusion of Appeal. When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision, as well as pursue any appropriate post-decision remedies.

F-5. Cessation of Representation. The attorney should discuss the end of the legal representation and determine what contacts, if any, the attorney and the child will continue to have.

Commentary

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important that there be closure between the child and the lawyer.

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