New York City Family Court

Child Protective Plan

2010

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INTRODUCTION

In 2008, at the direction of then Chief Judge Judith S. Kaye, the New York City Family Court embarked upon an important new initiative know as the "Child Protective Initiative." Its purpose was to assess the process by which child protective cases were handled and its goal was to reform that process as necessary to reduce the time it took to achieve appropriate permanency for children. A large committee consisting of Family Court representatives and representatives of the many organizations involved in child protective proceedings undertook a thoughtful, focused and collaborative review of child protective case processing in New York City.

With the ongoing support of the Honorable Ann Pfau, Chief Administrative Judge, and the Honorable Fern Fisher, Deputy Chief Administrative Judge for courts within New York City, the committee developed a plan that included a rigorous case conferencing protocol designed to develop more information about the case in a shorter time and to speed the case to settlement or trial, recommendations for using enforcement techniques to achieve greater compliance with court orders, and a well-designed system for using data to evaluate the success of the plan.

The Child Protective Plan went into effect in July 2009 and I am happy to report that the Plan's recommendations have become part of our daily practice. The committee continues its work as a standing advisory committee, known as the Advisory Committee on Child Protective Matters.

We are well on our way to the achievement of many of the goals the committee identified when we started this journey over two years ago. Challenges remain, but with the leadership of the Supervising Judges and the continued cooperation and hard work of the full child welfare community, I know progress will continue to be made and goals achieved.

Edwina G. Richardson Mendelson
Administrative Judge
New York City Family Court
December, 2010

EXECUTIVE SUMMARY

The New York City Child Protective Plan (CPP) was developed by a citywide child protective committee consisting of representatives of the Family Court and all the entities involved in child protective proceedings, including the Administration for Children's Services, attorneys representing children, attorneys representing respondents, foster care agencies, and others. After first establishing a set of "shared goals and action steps" to guide their work, the committee developed more detailed recommendations that were implemented in July of 2009. The CPP has been a major undertaking of every single child protective part in each of the five boroughs.

In summary, the Plan calls for the following shared goals and action steps:

Goals:

-Earlier permanency for children
-Every appearance meaningful
-Fewer and shorter adjournments
-Everyone appearing on time and prepared to go forward
-Continuous trials
-Expanded participation of children and youth in their permanency hearings

Actions Steps:

-Efficiencies in case processing
    Times certain beginning and ending (in all NYC Family Court parts)
    Multiple conferences
-Dedicated attorneys
    Attorneys dedicated to judge/court attorney/referee parts
-Trial readiness
    Notice in advance of whether reports are ready and witnesses available
-Timely submission of reports
-Cross-disciplinary workgroups in each county

The bulk of the work was done by the members of three additional committees: one established to review case management procedures, one established to address compliance issues and one established to develop techniques for the evaluation of the Plan through data metrics.

Case Management

The citywide Case Management Committee, co-chaired by Supervising Judges Douglas Hoffman and Carol Stokinger, was formed to work on improving the timeliness of child protective court proceedings and decreasing the time to appropriate disposition in child protective cases through case conferencing by court attorneys. Toward those ends, the Case Management Committee was charged with developing standardized conferencing protocols and forms. The protocols were to be designed so that every court appearance would be meaningful, adjournments would be fewer and for shorter periods of time, and everyone would know that they were expected to appear on time and be prepared to proceed with their cases.

The committee met regularly and repeatedly reviewed and revised each of the protocols and forms, and each member took back to their constituency every version of the protocols to use and review. In the spring of 2010, the Case Management Committee completed its work with the finalization of the *Foreword to the Preliminary Conference Protocol, the Preliminary Conference Protocol, the Preliminary Conference Consent Order, the Compliance and Pre-Settlement Conference Protocol and the Final Settlement Conference Protocol,* as well as an expert witness order.

The final protocols and forms, although standardized throughout the city, provide sufficient flexibility to meet the style and needs of individual judges as well as the needs of the attorneys and litigants in all type of Article 10 cases. The final protocols call for three conferences – *a preliminary conference, a compliance and pre-settlement conference, and a final settlement conference* – yet acknowledge that some cases need fewer than three conferences, and some need more. Within general guidelines, flexibility is provided in a number of other areas such as the time frame for the scheduling of conferences, the amount of time allotted to each conference, the scheduling of fact-finding dates, and the issuance of preliminary orders.

In the summer of 2010, the finalized protocols and forms were distributed to all Family Court judges, personnel and Family Court agencies. Consistent with the Child Protective Plan, case conferencing and the conferencing protocols are now being utilized in all child protective parts in New York City Family Court.

Compliance

The Compliance Committee, co-chaired by Supervising Judges Monica Drinane and Helene Sacco, developed recommendations to guide the court in the effective use of its general powers to sanction and/or hold in contempt attorneys who engage in frivolous conduct, or who, without good cause, appear late or fail to appear at scheduled times for hearings or conferences, or to impose appropriate penalties against the Administration for Children's Services and foster care agencies if they fail to comply with court orders. The committee had citywide representation. However, a special acknowledgment must go to Judge Carol Sherman, her court attorney Mary Jane Cotter, and Bronx County practitioners for taking the leadership on this issue. The subcommittee issued a well-researched memorandum that laid out the options available to jurists to encourage compliance and a thorough review of current case law supporting them.

Court Metrics

The Court Metrics Committee, chaired by Supervising Judge Paula Hepner, was formed to recommend the best ways to measure the effectiveness of the Child Protective Plan (CPP). Since the CPP calls for both an increase in the use of time certain beginning and time ending scheduling of cases, and a decrease in the number of adjournments–these two critical areas were chosen to be studied. The study included many perspectives and was not limited to child protective cases. It included all case types and it surveyed judges, referees, court attorneys, parent's attorneys, attorneys for children, caseworkers and petitioning attorneys, and asked them to answer the following questions for each case: What was the purpose for the appearance? Was

the goal accomplished? At what time did the case start and end?

Every organization participated and over 6000 responses were received and collated by the Office of Court Administration's Office of Court Research. There were several major findings but perhaps the most significant finding is the clear picture the study offered as to the critical interdependence of the Family Court and those who practice and appear there every day.

The report noted a factor that runs through the work of all three committees and which cannot be understated: *that in addition to the Family Court's pursuit of better case processing procedures, all institutions, agencies and individual practitioners involved in child protective cases must work toward making improvements in their own operations if we are to achieve our common goal of creating real and lasting systemic improvement.*

County Workgroups

In March, 2010, each Family Court within New York City sent a team to the "Ready, Set, Go" conference held in Albany, New York. The conference, co-sponsored by the Child Welfare Court Improvement Project and the New York State Office of Children and Family Services, was an opportunity for each Family Court to start planning how its Child Protection Plan's Shared Goals and Actions Step could be implemented and expanded in the county.

Bronx County: Under the leadership of Bronx County Supervising Judge Monica Drinane, the workgroup in the Bronx is monitoring the most important milestones in the implementation of the CP Plan such as time certain calendaring and case conferencing. The workgroup has identified problems such as the shortage of services and service providers in the county and has begun developing methods for addressing the problems. They are also in the process of developing a comprehensive County Resource Guide to share information about what services are available in the Bronx, some unique to that borough. The workgroup also serves as a forum in which all members can share operational updates and their suggestions for legislative changes as well as host presentations by service providers to educate the group about their programs. The group also serves as a mechanism for the court and agencies to communicate their current initiatives such as "Courts Catalyzing Change," an initiative examining issues of disproportionate representation of minorities in child welfare cases, and ACS's One Year Home initiative.

Kings County: Following the "Ready, Set, Go" conference, the Kings County representatives set about preparing for ACS's One Year Home initiative by working collectively to try to reduce the pending inventory of cases in the county. It was an enormous task and the efforts, while noble, did not achieve the original results expected. What did result was an understanding by all involved that there is an "art" to negotiation and settlement which needed tweaking. Under the leadership of Kings County Supervising Judge Paula Hepner, three working committees were established: one to address settlement practices, a second to address trial practices (e.g. to improve trial readiness and eliminate stumbling blocks in the preparation of cases for trial), and a third to address changes by both the Court and ACS in the Intake process. Kings County will be continuing the use of the Emergency Hearing Part and has recently devised a more equitable system for distributing newly filed cases.

New York County: Under the leadership of New York County Supervising Judge Douglas Hoffman, New York County has implemented the conferencing system devised by the CPP and their county workgroup is discussing how data might be used to develop New York County-specific shared outcomes. Their "Ready, Set, Go" workgroup has also established an education-focused subcommittee whose purpose is to effect change in the educational outcomes for children in foster care and in the delinquency systems. They have expanded their participants to include additional representation by the judiciary and attorney groups and have also included the Department of Education, local education-focused non-profit agencies, the Department of Probation, alternative to detention programs, as well as parent advocates and educational advocacy experts. The group is currently planning to implement a series of courthouse training events and is developing an education-focused checklist as well as other programs such as a one-on-one mentoring/tutoring program utilizing retired education professionals or those in training. New York County is also looking at different ways to work with youth in the Foster Care Review Part and there is a proposal underway to create an Adolescent Transition Part utilizing a social worker/resource coordinator to assist with the cases of older youth. New York County is also conducting a "prepared direct examination" pilot and has established a special Trial Part. The Legal Aid Society plans to begin a clustering system for their attorneys in the child protective parts in January, 2011.

Queens County: In conjunction with the Child Protective Plan, Queens County Supervising Judge Carol Stokinger created a special Trial Part. Cases prioritized for the Trial Part are those in which at least one of the subject children has been removed from a parent. The five other CP judges in the county may transfer trial-ready cases to the trial part to be heard in a much shorter time span with little or no adjournment during the hearing. The Trial Part began on July 1, 2010, with the expectation that requests from ACS for trials within 60-days, under ACS's One Year Home initiative that began that July, would be accommodated. The initial cases referred to the trial part were settled, leading to a completion of the fact-finding within the 60 days, promoting very meaningful appearances in a much shorter time period. Queens County Family Court is also sponsoring a series of lunchtime training programs for the Queens Family Court Community. The monthly training program is underway with presentations on such varied topics as ICPC, Mental Health, and Education scheduled over the next three months.

Richmond County: With the recent creation of the Supervising Judge position for Richmond County and the appointment of Judge Helene Sacco to this position, Richmond has found creative ways to implement the CPP despite the constraints of caseload and space. Old cases have been reviewed to see if they can be resolved, monthly meetings are held with Agency heads to discuss any issues that have arisen with the Plan. They have also convened regular meetings of their local Child Protective Group under the direction of their CP Judge. Richmond County is utilizing time certain court appearances and has emphasized the importance of the newly created electronic check-in system whereby attorneys can check in on their cases from out-of-court locations. Upcoming plans include outreach to the Department of Education to commence a dialogue regarding the role of education in the lives of families involved in Child Protective cases.

The Child Protective Community: The level of cooperation and support for the Child Protective Plan from the practitioners in the child welfare community has been enormous. The various member organizations who have participated in the CPP committees are listed in the attached documents. Their work in response to the CPP includes:

Training: Each of the attorney groups as well as ACS and COFFCA have scheduled specific training sessions for their lawyers and caseworkers on the conferencing protocols, time certain beginning and ending scheduling, speeding-up the discovery process and using the new electronic check-in system for attorneys.

New Methods of Attorney Assignment: ACS now assigns attorneys to specific parts in four boroughs and clusters their attorneys in the fifth. The Legal Aid Society has, for a long time, dedicated attorneys to specific parts in one county and has plans to begin assigning attorneys to clusters in other counties shortly. The Appellate Divisions' Assigned Counsel Plans for both the First and Second Department are working on adjustments to their intake and primary day scheduling procedures.

Borough Meetings: All organizations report regular participation in each of the borough workgroups to discuss CPP as well as ACS's One Year Home initiative. There are several workgroups in each borough. Some work on trial issues while others focus on issues such as disproportionate minority representation in child welfare cases and youth aging out of care.

Data: Several participating organizations are developing internal metrics to track key markers in the progress of the case to determine if we are achieving expedited permanency. Others are conducting workflow studies to see how their staff is deployed and how well technology can make their practice more effective.

There is much work going on and much more work to be done. To quote one of the participating organizations: "The ongoing collaboration with the Family Court Child Protective Advisory Committee has been critical in overcoming the long-standing communication barriers among all Family Court stakeholders. We value this work and are committed to continue our support of the reform efforts."

It is in this spirit that we will continue to work collectively to meet our goals.

Case Management Committee

A. Preliminary Conference Form

B. Compliance and Pre-Settlement Conference Protocol

C. Final Settlement Conference Protocol

D. Expert Witness Form

E. Committee Members

A. *Preliminary Conference Form*

FOREWORD TO PRELIMINARY CONFERENCE FORM

1. The court should to the extent possible address key subjects set forth in the preliminary conference form at the initial intake and/or arraignment. For example, the court may wish to address kinship resources, visitation, and urgent medical or educational issues involving the subject children at intake. The court may wish briefly to address at intake limited discovery issues by, for example, directing ACS to provide the case record prior to or at the preliminary conference, or stating that reciprocal discovery should be completed within 30 days. In this manner, appropriate orders may be issued by the Judge as needed and the preliminary conference can serve to some extent to ensure compliance with any directives emanating from the intake/arraignment process.

2. The caption on the first page and the preliminary conference form should be preprinted by the Part Clerk prior to the Court Attorney conducting the conference. This will obviate the need for the court attorney to spend time at the preliminary conference filling out this part of the form.

3. Part A (Background Information) can be filled out by the attorneys and parties during the preliminary conference. Thus, the court attorney need not spend any time filling out the first page.

4. Part B (Placement Resources) and Part C (Visitation) were placed in the forefront to reflect their importance.

5. Part E (Educational and Medical Considerations) may be discussed as appropriate. For example, a subject child may need to change schools or have transportation arranged to a new or existing school. With respect to medical considerations, there may be medications that must follow the subject child or appointments that must be kept. The possible educational and medical considerations are vast; accordingly, this section of the form is kept open for the court attorney to insert any educational and medical considerations during the preliminary conference.

6. The court attorney needs to fill out the manner discovery is provided in section F only if that is an issue. Depending upon time, there may simply be an agreement for reciprocal discovery within 30 days and a date by which petitioner's expert report will be provided. The attached expert witness order is self-contained and may be utilized when appropriate.

7. At a minimum, the next conference with the court attorney or status conference before the Judge (if needed) should be agreed upon at the preliminary conference (see Part G). If a Judge wishes to schedule the ultimate fact-finding hearing at the preliminary conference, the court attorney may establish the trial schedule. A fact-finding date may be set at any time as a mechanism to advance resolution of the case.

8. It is preferred that an actual order emanate from the preliminary conference. If the parties cannot agree concerning an order, the court attorney, in consultation with the Judge, may establish a protocol for the case to be heard that day by the Judge, or on another day. Alternatively, the Part may require the attorney(s) seeking an order to restore the matter for determination by the Judge by motion.

B. PLACEMENT RESOURCES

RESOURCE IDENTIFIED	INVESTI-GATION DUE BY	DATE RESULTS PROVIDED TO PARTIES/COURT	ICPC SUBMITTED BY	ICPC SUBMISSION TO OCFS DUE BY
	___/___/09	___/___/09		___/___/09
	___/___/09	___/___/09		___/___/09
	___/___/09	___/___/09		___/___/09

Additional orders re: placement

C. VISITING

1. The visiting supervision level required below ☐ may be increased
   ☐ upon the consent of all parties ☐ at the discretion of ACS/Agency
2. The frequency of visiting identified below ☐ may be increased
   ☐ upon the consent of all parties ☐ at the discretion of ACS/Agency

	FREQUENCY AGREED TO OR EXISTING *(include docket #)*	DURATION	TYPE OF SUPERVISION REQUIRED
Mother			
Father			
Siblings placed apart			
Other family member *(specify)*_____			
Other family member *(specify)*_____			

Additional orders re: placement

D. SERVICES

These are services identified and agreed to as of today. The services listed are not intended to be all-inclusive; nor are they intended to substitute for the Family Service Plan required by SSL § 409-e.

SERVICE	REFERRAL BY *(e.g., ACS/Agency)*	REFERRAL COMPLETED BY
a. Identified for respondent mother		
1.		
2.		
3.		
4.		

b. Identified for respondent father		
1.		
2.		
3.		
4.		
c. For the Child *(specify child)*		
1.		
2.		
3.		
4.		
d. For the Child *(specify child)*		

E. EDUCATIONAL AND MEDICAL CONSIDERATIONS

_____

_____

_____

_____

F. DISCOVERY SCHEDULE *(ongoing and reciprocal)*

Unless otherwise specified, hard copies or electronic copies of the ACS case record, ORT, and Preventive Services records will be provided in the manner specified below and all other records will be made available for photocopy and inspection in the manner provided below.

ITEM	DUE BY	PARTY RESPONSIBLE TO OBTAIN/PROVIDE/ SUBPOENA/OTSC	DATE TO BE SUBPOENAED BY/ REQUESTED BY	MANNER PROVIDED *(only if an issue)*
a. Demand for discovery or voluntary	___/___/		___/___/	
b. ACS case records	___/___/		___/___/	
c. Preventive services records	___/___/		___/___/	
d. ORT	___/___/		___/___/	

e. Board of Ed/school records	___/___/		___/___/	
f. Clinic medical records	___/___/		___/___/	
g. Drug treatment records	___/___/		___/___/	
h. Family shelter records	___/___/		___/___/	
i. Forensic evaluations	___/___/		___/___/	
j. Hospital records (med/psych)	___/___/		___/___/	
k. Mental health (out-patient)	___/___/		___/___/	
l. Police/domestic incident report/criminal history	___/___/		___/___/	

G. SCHEDULING

	DATE(S)	TIME CERTAIN BEGINNING AND ENDING
Pretrial Compliance Conference		
Settlement Conference		
Mediation *(if agreed to)*		
Fact-finding Hearing		

H. OTHER

_____

_____

_____

_____ _____

RESPONDENT MOTHER — ATTORNEY FOR RESPONDENT MOTHER

_____ _____

RESPONDENT FATHER — ATTORNEY FOR RESPONDENT FATHER

_____ _____

ATTORNEY FOR THE CHILD — ATTORNEY FOR ACS

Dated _____/_____/09
New York, NY

ENTER:

Hon. _____
J.F.C.

B. *Compliance & Pre-Settlement Conference Protocol*

COMPLIANCE AND PRE-SETTLEMENT CONFERENCE PROTOCOL

1. A Compliance and Pre-Settlement Conference ("Conference") should be held in every Article 10 proceeding as appropriate. Depending upon the particular circumstances of a case, this conference may be combined with the Final Settlement Conference. It is expected that the Court Attorney will conduct the conference. The Court should make clear at the Preliminary Conference the scope of the Compliance and Pre-Settlement Conference, including which documents may be required at this conference.

2. Scheduling: This Conference should be scheduled at the earlier Preliminary Conference for a beginning and ending time certain, with 30-60 minutes suggested depending upon the issues to be addressed.

3. Purposes of the Conference include:

a) Reviewing and updating issues raised at the Preliminary Conference, such as status of kinship resources, visitation, services for parents and subject children, and discovery. Attorneys should be reminded of their continuing obligation to update discovery.
b) Commencing exploration of settlement of petition; and
c) Preparing for fact-finding.

4. Attendance: Parties and attorneys are required to attend unless excused by the Court. To the extent approved by the Court, a party or attorney may attend electronically or by telephone. Age appropriate children may attend in the discretion of the Court. It is essential that a party with full authority to address issues that may arise be present or readily available by telephone for the duration of the Conference.

5. Settlement: Attorneys are expected to have conferred in advance with their clients concerning settlement options and issues that must be resolved prior to settlement. At the Conference, offers of settlement concerning fact-finding and disposition will be discussed. All parties have an equal affirmative obligation to initiate settlement discussion - it is not incumbent upon any particular party to extend the first settlement offer. If a settlement is reached, the Court Attorney should notify the Judge, who may see the parties at that time, later that day or on another date in the discretion of the Court.

6. Preparation for Fact-Finding: If the proceeding is not settled, the parties may commence formal preparation for fact-finding. Judges may elect not to utilize this Conference for this purpose and may address some or all of these issues at the Final Settlement Conference. Depending upon the particular case, the Judge or Court Attorney conducting the Conference may assist the parties to:

a) Determine whether there is an intention of a party to move for an order granting leave to amend pleadings and set a date for the filing of such a motion if there is no consent;
b) Ascertain whether petitioner seeks to withdraw any cause of action or factual assertion contained in the petition. Written confirmation should be arranged.

c) Stipulate to material facts. If there is a stipulation, the Judge or Court Attorney should establish a schedule by which a written Stipulation of Facts is drafted by one party, agreed upon by the other parties and submitted to the Court by a date certain.
d) Identify divergent interpretations of relevant law and the primary arguments for and against a specified position. The Court may require the parties to submit by a date certain a memorandum of law concerning a particular issue.
e) Exchange or submit to the Court previously exchanged lists of:

1) Proposed exhibits and copies of available proposed exhibits and records intended to be offered at the hearing, which shall include specific portions of any records intended to be offered, if applicable. These documents may be provided via e-mail unless there is a compelling reason to require provision of hard copies.

2) Expert witnesses and statements pursuant to CPLR sec. 3101(d). The proponent of the expert must identify with precision the proposed area of expertise of this witness and must provide all other counsel with a copy of the expert's CV. The parties must discuss whether to stipulate to the CV in lieu of or to reduce significantly oral testimony as to qualification.

3) Other witnesses, together with a brief statement as to substance of the testimony of each witness.

f) Stipulate to the admission of any document, the testimony of any lay witness or to the qualification of any expert witness pursuant to paragraph 6e) above. At the conference, the parties will seek to resolve any outstanding disputes concerning the admissibility of all or part of an exhibit. Trial exhibits may be pre-marked after this discussion.
g) Where appropriate in the discretion of the Court, stipulate to the typewritten direct testimony of a witness, particularly that of an expert witness, and establish a time frame for the submission of that direct testimony to all parties and the Court.
h) Establish appropriate fact-finding dates. If the Presiding Judge elects, the Court Attorney shall establish at this Conference fact-finding dates and times certain (beginning and ending) sufficient to hear all testimony. The Court shall endeavor to establish continuous fact-finding dates to the extent practicable and appropriate under the circumstances of the case. If it appears that fact-finding dates, if any, previously established appear either unduly long or short, the Court shall make the necessary adjustments to the time frame. If it appears likely that the proceeding may be settled, the Court may decide to vacate or modify previously established fact-finding dates.
i) Establish a firm date and time for the Final Settlement Conference and inform the parties of the scope of the Final Settlement Conference.

7. Orders Emanating from Compliance/Pre-Settlement Conference: If the parties agree to an order and the Judge approves, the Judge may sign an appropriate order. If the parties do not agree concerning an order and an order is essential, the Court Attorney, in consultation with the Judge, may establish a protocol for the case to be heard that day by the Judge, or on another day. Alternatively, the Court may require the attorney(s) seeking an order to restore the matter for determination by the Judge by motion.

C. *Final Settlement Conference Protocol*

FINAL SETTLEMENT CONFERENCE PROTOCOL

1. A Final Settlement Conference ("Conference") should be held in every Article 10 proceeding as appropriate. Depending upon the particular circumstances of a case, this conference may be combined with the Compliance Conference. Although it is expected that the Court Attorney will conduct the conference, some Judges may elect to conduct all or part of this Conference. The Court should make clear at the Compliance and Pre-Settlement Conference the scope of the Final Settlement Conference, including which documents may be required at this conference.

2. Scheduling: This Conference should be scheduled at the earlier Compliance and Pre-Settlement Conference or at the Preliminary Conference for a beginning and ending time certain, with 30-60 minutes suggested depending upon the issues to be addressed.

3. Purposes of the Conference include:

a) Completing exploration of settlement;
b) Reviewing and updating any outstanding issues from the Compliance and Pre-Settlement Conference, such as status of kinship resources, visitation, services for parents and children, discovery;
c) Engaging in final preparation for fact-finding.

4. Attendance: Parties and attorneys are required to attend unless excused by the Court. To the extent approved by the Court, a party or attorney may attend electronically or by telephone. Age appropriate children may attend in the discretion of the Court. It is essential that a party with full authority to address settlement issues be present or readily available by telephone for the duration of the Conference.

5. Settlement: Attorneys must confer in advance with their clients and all other counsel, including the attorney for the children, concerning settlement options and issues that must be resolved prior to settlement. At the Conference, specific offers of settlement concerning fact-finding and disposition will be discussed. All parties have an equal affirmative obligation to initiate settlement discussion - it is not incumbent upon any particular party to extend the first settlement offer. If a settlement is reached, the Court Attorney should notify the Judge, who may see the parties at that time, later that day or on another date in the discretion of the Court.

6. Preparation for Fact-Finding: If the proceeding is not settled, the parties must commence formal preparation for fact-finding. The Judge or Court Attorney conducting the Conference may assist the parties to:

a) Determine whether there is an intention of a party to move for an order granting leave to amend pleadings and set a date for the filing of such a motion if there is no consent;
b) Ascertain whether petitioner seeks to withdraw any cause of action or factual assertion contained in the petition. Written confirmation should be arranged.
c) Stipulate to material facts. If there is a stipulation, the Judge or Court Attorney should establish a schedule by which a written Stipulation of Facts is drafted by one party,

agreed upon by the other parties and submitted to the Court by a date certain.
d) Identify divergent interpretations of relevant law and the primary arguments for and against a specified position. The Court may require the parties to submit by a date certain a memorandum of law concerning a particular issue.
e) Exchange or submit to the Court previously exchanged lists of:

1) Proposed exhibits and copies of available proposed exhibits and records intended to be offered at the hearing, which shall include specific portions of any records intended to be offered, if applicable. These documents may be provided via e-mail unless there is a compelling reason to require provision of hard copies.

2) Expert witnesses and statements pursuant to CPLR sec. 3101(d). The proponent of the expert must identify with precision the proposed area of expertise of this witness and must provide all other counsel with a copy of the expert's CV. The parties must discuss whether to stipulate to the CV in lieu of or to reduce significantly oral testimony as to qualification.

3) Other witnesses, together with a brief statement as to substance of the testimony of each witness.

f) Stipulate to the admission of any document, the testimony of any lay witness or to the qualification of any expert witness pursuant to paragraph 6e) above. At the conference, the parties will seek to resolve any outstanding disputes concerning the admissibility of all or part of an exhibit. Trial exhibits may be pre-marked after this discussion.
g) Where appropriate in the discretion of the Court, stipulate to the typewritten direct testimony of a witness, particularly that of an expert witness, and establish a time frame for the submission of that direct testimony to all parties and the Court.
h) Establish appropriate fact-finding dates. If not already set forth in a previous conference, the Judge or Court Attorney shall establish at this Conference fact-finding dates and times certain (beginning and ending) sufficient to hear all testimony. The Court shall endeavor to establish continuous fact-finding dates to the extent practicable and appropriate under the circumstances of the case. If it appears that fact-finding dates, if any, previously established appear either unduly long or short, the Court shall make the necessary adjustments to the time frame. If it appears likely that the proceeding may be settled, the Court may decide to vacate or modify previously established fact-finding dates.

7. Orders Emanating from Final Settlement Conference: If the parties agree to an order and the Judge approves, the Judge may sign an appropriate order. If the parties do not agree concerning an order and an order is essential, the Court Attorney, in consultation with the Judge, may establish a protocol for the case to be heard that day by the Judge, or on another day. Alternatively, the Court may require the attorney(s) seeking an order to restore the matter for determination by the Judge by motion.

D. *Expert Witness Form*

PRESIDING: Hon._____ Part No. _____

In the Matter of Docket No. _____

_____

Child/ren

_____

RESPONDENT

_____

RESPONDENT

The following schedule pertains to Expert Witnesses: Pursuant to CPLR 3101(d)(1)(i), notification must include the name(s) of the expert witness(es), reasonable detail about the subject matter upon which each expert is expected to testify, the substance of the facts and opinions upon which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion. Parties should be clear about the specific area of expertise in which the party will seek to have the expert qualified.

EXPERTS	PARTY	NOTIFICATION DUE BY	OBJECTIONS, IF KNOWN, DUE BY
	ACS	___/___/09	___/___/09
	Respondent Mother	___/___/09	___/___/09
	Respondent Father	___/___/09	___/___/09
	Other Respondent *(specify)* _____	___/___/09	___/___/09
	Attorney for the Child	___/___/09	___/___/09
	2nd Attorney for the Child *(specify)* _____	___/___/09	___/___/09
	Other _____	___/___/09	___/___/09
	Other _____	___/___/09	___/___/09

So Ordered:

_____

Date ____/____ 09

E. *Committee Members*

New York City Family Court Case Management Subcommittee

Maria Barrington, Trial Court Operations
Trista Borra, Child Welfare Court Improvement Project
Alexandra Byun, New York County Family Court
Joseph Comisi, New York County Family Court
Michele Cortese, Center for Family Representation
Kathleen DeCataldo, Permanent Judicial Commission on Justice for Children
Barbara DeMayo, New York City Family Court
Elizabeth Fassler, Center for Family Representation
Janet Fink, Office of Court Administration
Catherine Friedman, New York City Family Court
Budy Garcia, Jewish Child Care Association
Virginia Gippetti, New York City Family Court
Malaika Gutman, Jewish Child Care Association
Megan Hafner, Office of the Mayor
Douglas Hoffman, Co-chair, Supervising Judge, NY County Family Court
Shari Hyman, Office of the Mayor
Anne-Marie Jolly, Judge, Bronx County Family Court
Emma Ketteringham, Bronx Defenders
Christine Kiesel, NYS Court Improvement Program
Betsy Kramer, Lawyers for Children
Elissa Krauss, Office of Court Administration
Grace LoGrande, Little Flower
Cynthia Lopez, ACS
Emily Martinez, Bronx County Family Court
Debra McCall, Leake & Watts
Lauren Meller, ACS
Chip Mount, Office of Court Administration
Peter Passidomo, New York City Family Court
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Compliance Committee

MEMORANDUM

TO: **Advisory Committee on Child Protective Matters**

FROM: **Honorable Monica Drinane, Chair**
Compliance Committee

DATE: **May 23, 2010**

SUBJECT: **Family Court Sanction and Contempt Powers in Article 10 Proceedings**

The Compliance Committee on the Sanction and Contempt Powers of the Family Court makes the following recommendations to guide the court in the effective use of its general powers to sanction and/or hold in contempt attorneys who engage in frivolous conduct, or who, without good cause, appear late or fail to appear at scheduled times for hearings or conferences, and against the Administration for Children's Services and foster care agencies who fail to comply with court orders.

The Court's use of both sanctions and contempt should be sparing and only after other methods to enforce compliance with court directives have failed. For example, requiring the appearance of higher level and key supervisory personnel from the agencies functioning within or providing services to families in Family Court often results in appropriate action being taken and the timely production of required documents. Further, regular meetings scheduled by the supervising judges of the county with the heads of agencies appearing before the court are effective in dealing with persistent issues and problems. However, sanctions and contempt can be effective tools in dealing with repeated and/or egregious failures by agency personnel to comply with court orders.

This memorandum is not directed at remedying noncompliance with court orders by parents or other parties, adults or children, since the court can impose specific statutory remedies against such litigants, obviating the need for the court to employ its general sanction and contempt powers. It provides the current law in the area of sanctions and contempt, as well as required procedures, and recommendations for court practices.[1]

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[1] **Special thanks for their work on this memorandum to:**
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I. Attorney Sanctions

The Family Court "in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court" (22 NYCRR § 130-2.1[a]). In determining whether to impose sanctions, the court must consider the factors specified below. In considering those factors, the court may take steps to rectify the attorney's behavior prior to imposing sanctions. These may include:

- Discussion with the attorney as to the problem(s) that has occurred in relation to the attorney's failure to appear and/or tardiness.
- Discussion with supervisory staff as to the problem if the attorney is employed by an agency providing legal services to the court (FCLS, LAS, CLC, LFC, BX DEF, CFR, BLS).
- Discussion with the Appellate Division Director if an 18B attorney is involved.
- Monitoring and recording of the attorney's timeliness in all future appearances.

If these steps do not result in an acceptable resolution of the problem, the court may refer the matter to the supervising judge for further discussion with appropriate parties. The court may also consider the imposition of sanctions as outlined below.

A. Sanctions May be Imposed for Failure to Attend or Timely Attend a Scheduled Court Appearance Without Good Cause

The Rules of the Chief Administrative Judge, 22 NYCRR subpart 130-2, permit the court to impose sanctions upon an attorney for failure to attend or timely attend a scheduled hearing or conference without good cause, and delineate eight factors that the court must consider in determining whether the attorney has presented a good cause excuse for his nonappearance or lateness.

1. Factors in Determining Good Cause and the Measure of Sanctions or Costs

The court "shall consider all of the attendant circumstances" and the factors listed below in determining whether the attorney has shown good cause, and in calculating "the measure of sanctions or costs to be imposed" (22 NYCRR § 130-2.1[b]). The factors include, but are not limited to, the following:

- The explanation, if any, offered by the attorney for his or her nonappearance;
- The adequacy of the notice to the attorney of the time and date of the scheduled appearance;
- Whether the attorney notified the court and opposing counsel in advance that he or she would be unable to appear;
- Whether substitute counsel appeared in court at the time previously scheduled to proffer an explanation of the attorney's nonappearance;

- Whether an affidavit or affirmation of actual engagement was filed in the manner prescribed in Part 125 of the Uniform Rules for the Trial Courts of the Unified Court System;
- Whether the attorney on prior occasions in the same action or proceeding failed to appear at a scheduled court action or proceeding;
- Whether financial sanctions or costs have been imposed upon the attorney pursuant to this section in some other action or proceeding; and
- The extent and nature of the harm caused by the attorney's failure to appear.

See 22 NYCRR § 130-2.1(b) (1) - (8).

The Rules do not authorize the court to impose sanctions upon an attorney who timely appears for a scheduled hearing or conference but who is unprepared to go forward. *See Matter of Tanishea F.*, 44 AD3d 1043, 845 NYS2d 379 (2d Dept 2007) citing *Matter of Premo v Breslin*, 89 NY2d 995, 997, 679 NE2d 630, 657 NYS2d 391 (1997).

2. **Considerations Prior to Imposing Sanctions**

Before imposing sanctions, the court must look to the factors specified in the rules above. The court must give counsel sufficient opportunity to provide an explanation for his or her tardiness or failure to appear. Further, the court must review counsel's history as to timeliness and whether the incident is an isolated one or part of a pattern. Finally the court must consider the impact of counsel's failure to appear or lateness on the case itself and the litigants. For example, the court must look at whether the case would have gone forward if counsel had been present and/or had appeared on time, and/or if the court had to extend a remand, placement or detention of children based on its inability to go forward.

The appellate courts have vacated sanctions imposed against an attorney for failure to timely attend hearings, for "brief" periods of lateness, i.e., 23 minutes and 35 minutes, where the attorney had no history of lateness, the circumstances that delayed the attorneys were beyond his/her control, and the attorney had taken steps to notify the court about the delay. *See Matter of Walsh v People*, 206 AD2d 434, 614 NYS2d 441 (2d Dept 1994); *ACS-NY v Pizarro*, 285 AD2d 406, 727 NYS2d 430 (1st Dept 2001). However, the First Department upheld the imposition of a $50 fine imposed by the Criminal Court against an attorney who appeared two hours and 45 minutes late for a morning hearing and failed to notify the court of his engagement in another part or arrange for another attorney to advise the court of his engagement (*Matter of Gurwitch v McPherson*, 174 Misc2d 948, 668 NYS2d 866 [1st Dept 1997]). Further, the Second Department affirmed the imposition of a fine of $250 by the Family Court upon an attorney whose nonappearance disrupted a delinquency proceeding involving three juveniles. The attorney had not notified the court in advance that she no longer represented the juvenile, and had not properly executed a consent to change attorney form (*Matter of Myles,* 20 AD3d 413, 798 NYS2d 132 [2d Dept 2005]).

The actual engagement of an attorney in another matter has been considered a "good cause" excuse for counsel's nonappearance (*People v Dean*, 288 AD2d 636, 637, 732 NYS2d 696, 697 [3d Dept 2001] citing 22 NYCRR § 125.1 [e]). The Second Department affirmed Supreme Court's denial of an award of attorney's fees to defendants based on a plaintiff's attorney's nonappearance where it found the attorney's explanation for his nonappearance, that his wife required emergency dental treatment, which was documented, was a "reasonable excuse" and established good cause for his failure to appear at the

trial/settlement conference (*Zelster v Sacerdote*, 24 AD3d 541, 808 NYS2d 286 [2d Dept 2005]). A good cause basis was also found and sanctions vacated against an attorney for failure to appear in a medical malpractice trial where the case was complex, substitute counsel could not be obtained, and the attorney, who had not previously failed to appear, had informed the court and opposing counsel of his engagement in another trial court (*Guin-Nedo Hamilton ex rel. v Marshall, Cheung, & Diamond, P.C.*, 301 AD2d 728, 753 NYS2d 548 [3d Dept 2003]).

In determining whether a trial court properly has found that an attorney's nonappearance was "without good cause," the appellate courts have examined whether the court has in its written decision or order or in statements on the record provided reasons for imposing sanctions (*Krivda v Liberty Lines Express, Inc.*, 27 AD3d 260, 811 NYS2d 363 [1st Dept 2006] holding that "a sparse record, and particularly in the absence of an order describing the attendant circumstances, the imposition of a 22 NYCRR subpart 130-2 sanction cannot be justified"). In addition, appellate courts have reviewed whether the trial court has considered all the "attendant circumstances," and in particular, applied the eight factors specified in regulation. Appellate courts have also examined whether the trial court has considered the eight regulatory factors in setting the amount of the fine or award of costs, and have reduced financial sanctions in cases where the fine appears "excessive" (*Matter of G. Children*, 47 AD3d 713, 848 NYS2d 895 [2d Dept 2008]).

3. **Associated Partners, Firms and Law Offices Are Subject to Sanctions and Costs**

The court, as appropriate, may impose any such financial sanctions or award costs upon an attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office, with which the attorney is associated and that has appeared as attorney of record" (22 NYCRR § 130-2.1 [c]). However, sanctions pursuant to 22 NYCRR subpart 130-2 cannot be imposed on a party. *See Rizzuto v Rizzuto*, 5 AD3d 579, 774 NYS2d 159 (2d Dept 2004).

4. **Procedures: Written Memorandum Decision or Statement on the Record; Imposition of Sanctions or Award of Costs Shall be Entered as a Judgment**

An award of costs or imposition of financial sanctions "may be made either upon motion or upon the court's own initiative, after reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the attorney's failure to appear and the totality of the circumstances of the case" (22 NYCRR § 130-2.1[d]). The rules provide that:

> The court may impose sanctions or award costs or both only upon a written memorandum decision or statement on the record setting forth the conduct on which the award or imposition is based and the reasons why the court found the attorney's failure to appear at a scheduled court appearance to be without good cause. The imposition of sanctions or an award of costs or both shall be entered as a judgment of the court. In no event shall the total amount of sanctions exceed $2,500 for any single failure to appear at a scheduled court appearance.
>
> (22 NYCRR § 130-2.2).

"Payments of sanctions shall be deposited with the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law" (22 NYCRR § 130-2.3).

B. Costs and Sanctions for Frivolous Conduct in Civil Litigation Against Either an Attorney or a Party to the Litigation or Against Both

Various statutory provisions permit the court to impose a financial sanction against a party or attorney. Pursuant to Civil Practice Law and Rules (CPLR) § 5015(a), courts have discretion to impose a monetary sanction as a condition for vacating a default. In addition, CPLR § 8303-a permits the imposition of sanctions in connection with frivolous claims and counterclaims in personal injury, wrongful death or property damage cases.[2] Under CPLR § 3126, the court may impose sanctions against "any party or a person who at the time a deposition is taken or an examination or inspection is made . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" pursuant to CPLR Article 31.

Court rules pursuant to 22 NYCRR subpart 130-1 permit the family court, in its discretion, to award costs and impose financial sanctions on an attorney or a party, or against both, for "frivolous conduct" in civil litigation. However, the Rules specifically state that the provisions of 22 NYCRR subpart 130-1 do not apply to proceedings in the family court commenced under Article 3, 7, or 8 of the Family Court Act (22 NYCRR § 130-1.1[a]). Since the prohibited conduct most likely applies to the filing of frivolous actions or motions to "harass" a litigant or "delay" a proceeding, this section may not be applicable to most Article 10 proceedings as well. An overview of the standards and procedures required by the court rules is outlined below.

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[2] Cases which involve "requests for costs or attorneys' fees subject to the provisions of CPLR 8308-a" are excluded from the provisions of 22 NYCRR subpart 130-1. *See* 22 NYCRR § 130-1.5.

1. **Definition of Frivolous Conduct**

Court rules require that the conduct must be "frivolous" as defined in 22 NYCRR § 130-1.1 (c), as follows :

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section . . .

In addition, the court rules provide that "[e]very pleading, written motion, and other paper served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney . . . [b]y signing a paper, an attorney or party certifies that, to the best of the person's knowledge, information and belief, formed after an inquiry reasonable . . ." that the information presented is not frivolous as defined in the court rules or not obtained through illegal conduct or unauthorized practice of law (22 NYCRR §§ 130-1.1a [a] and [b)[1]).

2. **Factors in the Determination of Frivolous Conduct**

The court rules outline factors that the court "shall consider" in determining whether conduct in civil litigation was frivolous, as follows:

> . . .(1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.
>
> (22 NYCRR § 130-1.1 [c] [3]).

Courts have considered the following factors to be critical in determining whether to impose sanctions for "frivolous conduct": the overall pattern of conduct; whether the pattern of conduct was pursued in good faith, without intent to delay, harass or maliciously injure; whether fairness and equity would permit the award of costs or the imposition of financial sanctions as punishment for past conduct; whether the imposition of sanctions or the award of costs would deter future frivolous conduct, and the experience level of the attorney.[3]

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[3] Supreme Court, New York County, addressed two incidents of alleged frivolous conduct in *Principe v Assay Partners*, 154 Misc2d 702, 710, 586 NYS2d 182, 188 (Sup Ct, New York County 1992), and held that the use of abusive language and sexist remarks made by a plaintiff's attorney toward defendant's counsel, at a deposition, constituted sanctionable frivolous conduct. However, the court declined to impose sanctions against the same attorney pursuant to 22 NYCRR subpart 130-1 for a second incident where there was an underlying factual dispute, concluding that a hearing to determine whether the misconduct took place would lead to protracted litigation, defeating the purpose of the court rules, which are intended to prevent waste of judicial resources and deter dilatory litigation. As an alternate remedy, the court found it appropriate to refer the incident to the Departmental Disciplinary Committee. Case law also holds that making persistent arguments before the court is not a basis for the imposition of costs and sanctions for "frivolous conduct" but may be grounds for a contempt proceeding (*Grier v. Grier*, 266 AD 2d 345, 698 NYS2d 324 [2d Dept 1999]).

3. **Persons Subject to Award of Costs or Imposition of Sanctions** (22 NYCRR § 130-1.1[b]).

The rules provide that, "The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both" (22 NYCRR § 130-1.1[b]). The award of costs or imposition of financial sanctions against an attorney "may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office, with which the attorney is associated and that has appeared as attorney of record" (*id.*).

4. **Sanctions for Failure of Timely Provision of Discovery - CPLR § 3126**

Timely and comprehensive discovery is essential to the effective and appropriate disposition of cases within a reasonable time frame. Pre-trial motion practice would result in the early and efficient resolution of discovery issues. For example, the filing of discovery motions early in a case, motions to compel when discovery has not been turned over, motions to preclude hearsay in hospital and/or case records well in advance of the court date, and the monitoring of compliance with subpoenas are likely to lead to a reduction in the number of cases adjourned because of failure to provide full discovery and disclosure.

Pursuant to CPLR § 3126, the court "may make such orders . . . as are just" and impose sanctions upon parties, or persons under a party's control, for disobedience to an order for disclosure or a willful failure to disclose information, "which the court finds ought to

have been disclosed pursuant to this article."[4] Appellate courts are reluctant to endorse sanctions that would result in the preclusion of evidence and dismissal of a proceeding when children are at risk. *See Matter of the F. B .Children*, 161 AD2d 459, 556 NYS2d 32, 34 (1st Dept 1990) reversing the court's preclusion of witness lists and offers of proof in FCA Article 10 proceeding for failure to comply with a discovery demand as an inappropriate sanction. Moreover, sanctions for discovery violations are "only justified where the moving party shows conclusively that the failure to disclose was willful, contumacious and due to bad faith . . . The willful failure to comply with a discovery order assumes 'an ability to comply and a decision not to comply'" (*Dauria v City of New York,* 127 AD2d 459, 460, 511 NYS2d 271 [1st Dept 1987] quoting 3A Weinstein-Korn-Miller, *NY Civ Prac* para.3126.04 [internal citations omitted]). In addition, the party's application for sanctions pursuant to CPLR § 3126 must "detail the good faith effort to resolve the discovery disputes" (*Reyes v Riverside Park Community (Stage I), Inc.* 47 AD3d 599, 850 NYS2d 414 [1st Dept 2008] citing 22 NYCRR 202.7[a][2]). Therefore, in family court proceedings, the award of costs and counsel's fees is a more effective remedy for "willful failure" to provide discovery than a preclusion order.

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[4] Sanctions enumerated in CPLR § 3126 are:

> 1. an order that the issues to which information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The Third Department has upheld the family court's authority to impose a "monetary sanction including costs and counsel fees," holding that the terms of CPLR § 3126 authorize "any order that the court finds 'just'" (*Matter of John H.*, 60 AD3d 1168, 1169, 876 NYS2d 169, 171 [3d Dept 2009] quoting CPLR § 3126). The court held further that, "It was entirely reasonable for the court to impose sanctions when petitioner thereafter refused to comply with the law guardian's demands that were specifically court ordered," to wit, disclosure of documents and production of a caseworker for oral deposition (*id.*). The family court ordered the petitioner, the Greene County Commissioner of Social Services, to pay the law guardian double the amount of his counsel fees and disbursements as a sanction for discovery violations pursuant to CPLR § 3126. The appellate court reduced the amount of the sanction but sustained the award of counsel fees and disbursements.

5. **Award of Costs or Sanctions: Written Memorandum Decision Required** (22 NYCRR §§ 130-1.1 [a], 130-1.2, 130-1.3).

Court rules provide that "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from the frivolous conduct as defined in this Part" may be awarded (22 NYCRR § 130-1.1 [a]). In addition, the court may award costs or impose financial sanctions or both for frivolous conduct in an amount not to "exceed $10,000 for any single occurrence of frivolous conduct" (22 NYCRR § 130-1.2). Payments of sanctions by an attorney "shall be deposited with the Lawyers' Fund for Client Protection" (22 NYCRR § 130-1.3). Payments of sanctions by a party who is not an attorney "shall be deposited with the clerk of the court for transmittal to the Commissioner of Taxation and Finance" (*id.*). "The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based,

the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. An award of costs or the imposition of financial sanctions or both shall be entered as a judgment of the court" (22 NYCRR § 130-1.2).

6. **Procedures**

An award of costs or the imposition of financial sanctions for frivolous conduct may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after reasonable opportunity to be heard" (22 NYCRR § 130-1.1 [d]). However, "[t]he form of the hearing shall depend upon the nature of the conduct and the circumstances of the case." A formal evidentiary hearing may not be necessary where the offending party has an opportunity to review the application for relief, and has an opportunity to be heard on the motion.

II. Contempt Powers

Family Court Act (FCA) § 156 governs the contempt powers of the family court and provides, pursuant to the Judiciary Law, Article 19, that the family court has the power to punish for both criminal and civil contempt, either separately or combined. *See* Judiciary Law §§ 750, 753. The statute "'makes explicit that the court's power extends to any person properly before the court, rather than merely a formal party to the proceeding . . .'" (*Matter of Murray,* 98 AD2d 93, 96, 469 NYS2d 747, 750 [1st Dept 1983] quoting the memorandum of the Office of Court Administration in support of the 1975 amendments of FCA § 156 [NY Legis Ann, 1975, p.18]). However, FCA § 156 expressly limits the court from exercising its contempt powers if "a specific punishment or other remedy for such violation is provided in this act or any other law."

Certain family court proceedings, child and spousal support (Article 4) and family offenses (Article 8), have specific procedures and specialized remedies, which must be applied to the adjudication of willful violations of court orders. However, the task of discerning whether the court has authority to apply Judiciary Law contempt powers in proceedings that have limited or no remedy or specific punishment for violations of court orders -- Persons in Need of Supervision (PINS) proceedings (Article 7), termination of parental rights, adoption, custody, and guardianship proceedings (Article 6), and child protective proceedings (Article 10) -- is less clear. The discussion that follows examines case decisions that provide guidance on Judiciary Law, Article 19, contempt powers in family court proceedings, in light of the restrictions imposed by FCA § 156.

Article 7 Case Law

The appellate courts have underscored the importance of analyzing the remedies and punishment established by the PINS statute in determining whether and when the family court can employ its contempt powers and have reversed the efforts of the family courts to hold juveniles in contempt in Article 7 proceedings. In the *Matter of Jennifer G.*, 196 Misc2d 692, 764 NYS2d 503 (Fam Ct, Queens County 2003), the family court had issued 10 warrants for the arrest of a 12 year old child who was remanded to the custody of New York City's Commissioner of Social Services pursuant to a PINS petition. Thereafter the Commissioner filed a motion requesting that the child be charged with the crime of criminal contempt, Penal Law § 215.50 (3), and detained in secure detention pursuant to Article 3 juvenile delinquency proceedings. The family court dismissed the PINS petition, granted the Commissioner's motion and found that the youth required a secure placement. The Second Department, in reversing the family court's order, stated generally that, "the Family Court Act, as presently structured, prohibits the commitment of PINS to a secure detention facility and the issuance of a criminal contempt order" (*Matter of Jennifer G.*, 26 AD3d 437, 438, 811 NYS2d 85, 87 [2d Dept 2006] [internal citations omitted]).

In a case of first impression, *Matter of Naquan J.*, 284 AD2d 1, 5, 727 NYS2d 124, 126 (2d Dept 2001), the Second Department directly addressed the issue whether the family court, pursuant to FCA § 156, and Judiciary Law § 750, criminal contempt, may hold a PINS-adjudicated youth, who persistently violated court orders, in contempt and commit him to a secure detention facility. In this case, the family court issued a dispositional order directing ACS to place the 15 year old youth in a residential treatment facility. The youth ran away from various facilities, and the court issued more than 30 warrants for his arrest. Finally, on its own motion, the family court held the

youth in criminal contempt pursuant to Judiciary Law § 750, and ordered him committed to a secure detention facility. On appeal, the Second Department found that the family court was without authority to hold the youth in contempt or commit him to secure detention, stating that: "article 7 provides the Family Court with specific remedies (see, Family Ct Act §§ 777, 778 and 779) [all of which essentially state that the court may, upon competent proof that the respondent has violated the order, revoke its original order and make any order that might have been made at the time the original order was made]" (*id.*). Notwithstanding the inadequacies of Article 7 remedies, the appellate court stated that pursuant to FCA § 156 the provision of a remedy "supersedes" the court's Judiciary Law contempt powers and the court "did not have the statutory authority to issue the subject contempt orders and commit Naquan to secure detention facilities" (*Id.* at 4, 6).

In contrast, the family court is empowered to use contempt sanctions against officials charged with the supervision of PINS juveniles who abscond from court-ordered foster care placements. In the *Matter of Darren H.,* 179 Misc2d 130, 132, 684 NYS2d 126, 128 (Fam Ct, Kings County 1998), the family court remanded a 14 year old to the care and custody of the Administration of Children's Services (ACS) pursuant to a PINS petition seeking the child's placement in a "diagnostic treatment program." In its remand order, the court directed ACS "to take all lawful steps which are reasonably necessary to assure that [the respondent] does not abscond from the custody of ACS, and returns to Court" (*id.*). The family court found that the officials responsible for the care and custody of the child did not take reasonable and necessary steps to provide the child with proper supervision, and, in view of the potential harm to which the child was exposed, the court held ACS in civil contempt.

Article 6 Case Law

In custody/visitation proceedings, the family court has held litigants in contempt of court pursuant to Judiciary Law, Article 19, for failure to comply with its orders. *See* FCA § 651, which pertains to family court's "jurisdiction over habeas corpus proceedings and petitions for custody and visitation of minors," and contains no remedy or punishment for the violation of such orders. The Third Department upheld family court's contempt finding against a respondent for denying the petitioner two days of visitation in violation of the court's order, finding that "the order was clear and explicit and respondent offered no credible excuse for her non-compliance" *(Matter of Wright v Wright,* 205 AD2d 889, 613 NYS2d 949 [1994]). In a matter that involved the family court's application of Judiciary Law contempt sanctions and the imposition of a sentence of weekend incarceration against a respondent for impeding the petitioner's visitation rights, the Fourth Department held that the "Family Court has the responsibility of enforcing its orders and it is in a superior position to determine the extent of the punishment necessary to compel future compliance" (*Kruszcznski v Charlap,* 124 AD2d 1073, 1074, 508 NYS2d 861 [4th Dept 1986]). And the appellate court found that FCA § 156 empowers the family court to impose contempt sanctions for violation of its visitation orders *(Glenn v Glenn,* 262 AD2d 885, 886, 692 NYS2d 520, 522 [4th Dept 1999], *lv dismissed, lv denied* 94 NY2d 782, 700 NYS2d 418 [1999]).

However, in cases in which the family court has issued orders pursuant to FCA § 652, the statute which applies to family court's "jurisdiction over applications to fix custody in matrimonial actions on referral from supreme court," it would be error for the family court "to resort to the contempt statute as the Family Court Act contains a specific remedy" with respect to such visitation orders (*Matter of Michael N.G. v Elsa R.*, 233 AD2d 264, 265-266, 650 NYS2d 140, 141

[1st Dept 1996] citing FCA § 652[b] [ii]). The appellate court, in this case, also delineated procedural requirements that govern contempt applications. "Pursuant to Judiciary Law § 756, such application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court and, the return date shall be no less than ten and no more than thirty days before the time at which the application is noticed to be heard, unless otherwise noticed by the court" (*id.*). The court found that the petitioner in this case, the violator of the court's visitation order, was not properly served with notice of the contempt proceeding and the court did not have jurisdiction to hold him in contempt. The court held further that its "conclusion would be the same even were we to find this to have been a criminal contempt proceeding" (*id.* citing *Matter of Murray,* 98 AD2d 93, 469 NYS2d 747 [1st Dept 1983]).

A. <u>Contempt in FCA Article 10 Proceedings</u>

In Article 10 proceedings, the family court has the authority to impose sanctions against the Commissioner of Social Services pursuant to Judiciary Law, Article 19, for violation of orders of visitation and for support services. The Third Department upheld the family court's decision to punish the Commissioner of Social Services, Delaware County, in civil contempt pursuant to Judiciary Law § 753 for violating an order that directed the continuation of support services and visitation between a respondent mother and her children, who were in foster care (*Matter of Bonnie H.*, 145 AD2d 830, 535 NYS2d 816 [3d Dept 1988] *appeal dismissed* 74 NY2d 650, 542 NYS2d 520 [1989]). The appellate court held that the family court had issued the dispositional order pursuant its jurisdictional authority set forth in FCA § 115 (a) (1) and §1013 (a), and the Commissioner was required to comply with the order. The fact that the Commissioner did not intend to disobey the order

and "chose to act through his subordinates will not permit respondent to escape the consequences of his action. It is not necessary that the disobedience be deliberate; the mere act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes, or prejudices the rights of a party" (*Id.* at 832 citing *Matter of McCormick v Axelrod,* 59 NY2d 574, 587, 466 NYS2d 279 [1983]; *Yalkowsky v Yalkowsky*, 93 AD2d 834, 835, 461 NYS2d 54 [2d Dept 1983]). *See* FCA § 1015-a, which explicitly empowers the family court to "order a social services official to provide or arrange for services or assistance to the child and his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care . . . Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law."

In addition, the family court has held the Commissioner of New York City's ACS in civil contempt for failure to comply with a temporary visitation order issued at the conclusion of a FCA § 1028 hearing. The order mandated ACS to arrange weekly visits at its office between the respondent and his children, both of whom were placed in foster care (*Matter of M Children,* NYLJ 10/31/96, p. 31, col. 1 [Fam Ct, Kings County]). ACS staff failed to arrange visits on a weekly basis. The Commissioner argued that he should not be held in contempt since the violation was "unintentional." The family court found that it was not necessary to show that the violation was willful for a finding of civil contempt. The court stated that, "Here, the violation of the temporary visitation order and resulting prejudice to respondent's rights are not disputed" and determined that the Commissioner was in civil contempt of the court (*id.*).

Most recently, the family court in Kings County held the Commissioner in contempt for refusal to follow its order to place an infant with a relative in kinship foster care in accordance with the statutory preferences set forth in FCA § 1017 (*Matter of Lanaya B.*, 25 Misc3d 981, 886 NYS2d 319 [Fam Ct, Kings County 2009]). ACS failed to certify the child's uncle as a foster parent, did not provide a reasonable or legal basis for its failure to do so, and placed the infant in a non-kinship foster home, contravening the court's order. The attorney for the respondent mother filed a motion for civil contempt against ACS and the foster agency. ACS asserted that the contempt motion should be denied on the grounds that the harm to the mother and infant was "speculative, not measurable or specific" and did not rise to the level of compensable harm required to sustain a finding of civil contempt pursuant to Judiciary Law § 753 (*Id.* at 990). The court found that the evidence supported a finding of civil contempt against the Commissioner for the nine day period the infant was in non-kinship foster care. After the infant was placed with the uncle, the respondent mother had "liberal visitation," which extended up to eight hours per day. The mother also brought the infant's siblings to the visits at the uncle's home, which promoted their interaction with and attachment to the baby. The court found clear evidence that "this mother was not able to hold, feed, parent, and bond with Lanaya" and "suffered daily compensable harm" while the infant was placed in non-kinship foster care (*Id.* at 994).

In contrast, relying on the availability of a statutory remedy, the First Department in the *Matterof Murray,* 98 AD2d 93, 97, 469 NYS2d 747, 751 [1st Dept 1983] reversed the family court and found that the court was barred from holding New York City's Commissioner of Social Services in contempt for failure to timely initiate proceedings to legally free two

children for adoption because the controlling statute, Social Services Law § 392[b][7] [c], provided an "express statutory remedy," which authorized foster parents to initiate such proceedings. *See also Matter of Wilson,* 98 AD2d 666, 469 NYS2d 735 (1st Dept 1983) stating "Family Court lacks the power to treat a violation of one its orders as a contempt when another statutory remedy is available for the violation" citing FCA § 156. However, in a case in which a foster child was placed with the State's Office of Mental Retardation and Developmental Disabilities, the family court found that New York City's Commissioner of Social Services failed to timely file a court-ordered termination of parental rights proceeding, and held the Commissioner in contempt for violation of the order, noting that in this case FCA § 156 placed no limitation on the use of the court's contempt powers since the child did not have foster parents and there was no other statutory remedy available. *See Matter of Martina Terry*, 151 Misc2d 48, 571 NYS2d 881 (Fam Ct, New York County 1991).

Finally, Judiciary Law contempt powers cannot be employed by the family court to punish a respondent for violation of Article 10 dispositional orders pursuant to FCA § 1054 and § 1057. FCA § 1054 permits the release of the child to the custody of parent or other person responsible for care under supervision of ACS or an agency, and FCA § 1057 governs orders placing the respondent under the supervision of ACS or an agency. Such orders are enforceable pursuant to the provisions of FCA § 1072, which provides a specific remedy and punishment – "(a) revoke the order of supervision or of protection and enter any order that might have been made at the time the order of supervision or of protection was made or (b) commit the parent or other person who willfully and without just cause violated the order to

jail for a term not to exceed six months."[5] Accordingly, the court must apply the remedy or punishment set forth in FCA § 1072 as to violations of orders made pursuant to FCA § 1054 and § 1057, and is barred from employing Article 19, Judiciary Law, contempt sanctions to enforce such orders. *See Matter of Marquis EE,* 257 AD2d 699, 683 NYS2d 637 (3d Dept 1999) citing the requirements of FCA § 156.

1. Procedures for Contempt Sanctions in Article 10 Proceedings

Family Court Article 10 orders which direct an attorney, party, ACS, or a contract agency to do, or refrain from doing, an act must be in writing and express a clear, lawful, and unequivocal mandate. Effective use of contempt sanctions in Article 10 proceedings requires knowledge of the controlling statute(s) on which the court order is based, distinctions between the nature of civil and criminal contempt, and adherence to their respective procedural requirements, as follows:

- The court must determine whether the controlling statute sets forth a specific punishment or remedy for the violation of the order. If so, the statutory provisions must be applied, and the court cannot employ Judiciary Law contempt powers and procedures.
- Although the same act may be punished as a civil contempt or a criminal contempt, or as both civil and criminal contempts, the court must distinguish the nature of the contempt and apply Judiciary Law, Article 19 procedural requirements, as outlined below.

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[5] Until 2006, FCA § 1072 also provided a remedy or punishment for violations of orders of protection issued pursuant to FCA § 1027 and § 1056. However, as part of technical revisions to the Permanency Bill (L 2005, ch 437), the legislature deleted these sections from the opening paragraph of FCA § 1072 (L 2006, ch 437). *See* New York Bill Jacket, 2006 Senate Bill 8435.

- In civil contempt, the purpose is the protection of the private rights of a party, which have been prejudiced or impeded by the offender's misconduct. Civil contempt penalties of fine or imprisonment, or both, are remedial in nature, designed to compensate the aggrieved party and/or coerce compliance by the offender. In contrast, criminal contempt is an offense against public justice. Its purpose is to uphold the authority of the court, and punish the offending party for a willful, deliberate violation of the court's mandate.
- The court may request an injured party to file a motion for contempt, or the court, by its own motion, may file for contempt.
- Because contempt proceedings lead to fines and imprisonment, due process requirements of notice and a reasonable opportunity to prepare a defense must be met, except when the contempt occurs in the immediate view and presence of the court, and a summary criminal contempt adjudication is warranted (Judiciary Law § 755).
- Summary criminal contempt powers may be exercised only in exceptional and necessary circumstances in which the offensive conduct disrupts or threatens to disrupt proceedings in progress, or destroys or undermines or tends to destroy or undermine the dignity and authority of the court to conduct business and an immediate summary action is required to restore or maintain order (22 NYCRR § 604.2; 22 NYCRR § 701.2).

2. Statutory Authority

- Two general provisions of the Family Court Act authorize the court to order the delivery or performance of medical services or the cooperation of officials and organizations.
  - *FCA § 233. Medical Services* - "Whenever a child within the jurisdiction of the court appears to the court to be in need of medical, surgical, therapeutic, or hospital care or treatment, a suitable order may be made therefor."
  - *FCA § 255. Cooperation of officials and organizations* -- "It is hereby made the duty of, and the family court or a judge thereof may order, any state, county, municipal and school district officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required, to further the objects of this act [with certain limitations as to duties imposed on school districts] . . . It 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. The court is authorized to seek the cooperation of, and may use within its authorized appropriation therefor, the services of all societies or organizations, public or private, having for their object the protection or aid of children or families, including family counselling services, to that end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction

such care, protection and assurance as will best enhance their welfare."

- Article 10 specifically authorizes the family court to order the delivery or performance of services pursuant to the following provisions:

  - *FCA § 1015-a. Court-ordered Services* – "In any proceeding under this article, the court may order a social services official to provide or arrange for the provision of services or assistance to the child or his or her family to facilitate the protection of the child, the rehabilitation of the family and, as appropriate, the discharge of the child from foster care. Such order shall not include the provision of any service or assistance to the child and his or her family which is not authorized or required to be made available pursuant to the comprehensive annual services program plan then in effect. In any order issued pursuant to this section the court may require a social services official to make periodic progress reports to the court on the implementation of the order . . . Violation of such order shall be subject to punishment pursuant to section seven hundred fifty-three of the judiciary law [civil contempt]."

  - *FCA §§ 1051-1059, Dispositional Orders.*

  - *FCA §§ 1071-1075, Compliance with Orders.*

  - *FCA § 1089, Permanency Hearings.*

B. Procedural Requirements for Contempt Pursuant to Judiciary Law, Article 19

- Article 10 scheduling orders should include a notice that the ACS caseworker and/or foster care agency caseworker assigned to the case is required to be present at each court hearing and conference. If the assigned caseworker is unavailable, ACS shall ensure the presence of a caseworker and/or a supervisor who is knowledgeable about the case and able to provide a report to the court as to the facts, issues, and services affecting the child and his or her family. The caseworker(s) may appear by telephone only with notification to all parties well in advance of the hearing and/or conference and only with prior authorization of the court.
- Short orders, which contain a pre-printed notice pursuant to FCA § 156 Contempts, that "the provisions of the judiciary law relating to civil and criminal contempts shall apply to the family court in any proceeding in which it has jurisdiction under this act or any other law, and a violation of an order of the family court in any such proceeding which directs a party, person, association, agency, institution, partnership or corporation to do an act or refrain from doing an act shall be punishable under such provisions of the judiciary law, unless a specific punishment or other remedy for such violation is provided in this act or any other law," shall be made available to the court. These pre-printed orders may be used at the discretion of the court.
- In order to resolve any issues of service, the court may direct that Article 10 Part Clerks to hand deliver court orders to the Office of the ACS Family Court Legal Services Unit located in the court building on the next business day of the order's issuance. It will then

be the obligation of the ACS Family Court Legal Services Unit to provide the order to the assigned ACS and/or contract agency caseworker(s)/supervisor(s).

1. Civil Contempt, Judiciary Law § 753

a. ***Initiation of a Civil Contempt Proceeding***- If the offender is a party to the litigation, the contempt proceeding is initiated by notice of motion within the action, or by an order of the court requiring the offender to show cause before it why he or she should not be punished for the alleged offense (Judiciary Law § 756). If the offender is a nonparty, a special proceeding is required.

1) ***Required Contempt Warning*** - It is a jurisdictional requirement that the following statement appear on the face of the notice of motion or order to show cause in eight-point boldface type in capital letters, as follows: **"WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT"** (Judiciary Law § 756), (Form 1--Body of Order to Show Cause in Civil Contempt Proceeding, a copy of which is attached at Appendix 2).

2) ***Affidavit in Support of Motion or Order to Show Cause*** --The affidavit in support of the motion or order to show cause must state the specific facts of the alleged disobedience to the court's mandate. If the moving party seeks adjudication of a monetary loss in the determination of the fine, the affidavit must include the amount of loss and the necessary facts to establish it. If disobedience to a judgment or order is alleged, a certified copy of the order or judgment, and proof that it was served, must be annexed to the affidavit.

See Judiciary Law § 756, Form 2 -- Affidavit in Support of Application to Show Cause in Civil Contempt Proceeding, attached at Appendix 2.

3) ***Timing of Notice*** – "The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred fifty of the civil practice law and rules[6] or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard" (Judiciary Law § 756; *see Matter of Michael N.G. v Elsa R.*, 233 AD2d 264, 266, 650 NYS2d 140, 141 [1st Dept 1996]).

4) ***Personal Service*** – The moving papers must be personally served upon the alleged offender, unless the court directs that service be made upon the alleged offender's attorney. *See* Judiciary Law § 761.

5) ***Right to Counsel*** – " . . . the court shall inform the offender that he or she has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him or her" (Judiciary Law § 770).

[6] CPLR 5250 applies to the arrest of judgment debtors.

b. *Adjudication of Civil Contempt*

1) ***Standard of Evidence*** – the standard of proof is *clear and convincing evidence. See Rienzi v Rienzi,* 23 AD3d 447, 449, 808 NYS2d 113 (2d Dept 2005)*; Chambers v Old Stone Hill Road Associates*, 66 AD3d 944, 889 NYS2d 598 (2d Dept 2009).

2) ***Hearing Required if Facts in Dispute*** – The offender must be afforded an opportunity to present material, relevant facts. *See Matter of Mosso v Mosso,* 2004 NY Slip Op 02626, 6 AD3d 827 (3d Dept 2004) "due process requires that, in contempt proceedings, the contemnor be afforded 'an opportunity to be heard at a meaningful time and in a meaningful manner'" (internal citations omitted). However, a hearing is required only if a factual dispute exists. A finding of civil contempt requires evidence of the following:

- The offender violated a lawful order of the court, that expressed a clear, unequivocal mandate. *See Matter of Commissioner of Social Services of Erie County v Honan,* 67 AD2d 815, 413 NYS2d 532 (4th Dept 1979) holding that "there must be a showing of the specific terms of the order violated and the particular facts of the violation."
- The offender had actual knowledge of the existence and contents of the court's order. *See James W.D. v Sandra C.,* 44 AD3d 423, 843 NYS2d 73 (1st Dept 2007) holding that, "It is sufficient if, as here, the charged party is shown to have

been actually aware of, and disobeyed a clear and unequivocal court directive" citing *Matter of McCormick v Axelrod,* 59 NY2d 574, 583 466 NYS2d 279 (1983). Proof of personal service of the order upon the offender is not necessary.

- Evidence that the offender's violation or other misconduct was calculated to or actually did defeat, impair, impede, or prejudice the right or remedy of a party to the litigation *See* Judiciary Law §753 (A). It is not necessary to find that the violation was willful.
- Evidence of the offender's act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt. The good faith of the contemnor is not a defense. *See Matter of Bonnie H.,* 145 AD2d 830, 535 NYS2d 816 (3d Dept 1988).

c. ***Final Order and Warrant of Commitment*** must be in writing and state a:

1) ***Description*** of the acts that constituted the contempt;
2) ***Finding*** that the acts prejudiced the rights of a party to the action;
3) ***Determination*** whether the contemnor should have an opportunity to purge himself or herself from contempt;
4) ***Punishment*** - the fine and/or duration of imprisonment.

d. ***Civil Contempt Punishment*** – A civil contempt is punishable by fine and imprisonment, or either, in the discretion of the court. The court's determination regarding punishment, must be based on the interests of justice and a consideration of all facts regarding the nature, extent and willfulness of the misconduct. The burden of proof is on the offender to make a factual showing as to the grounds by which the disobedience to the court's order may be excused.

1) ***Fines*** - Civil contempt fines are remedial in nature and are paid over to the aggrieved party. Damages due to the contemnor's misconduct must be proved by the aggrieved party. *See* Judiciary Law § 756, Form 2 -- Affidavit in Support of Application to Show Cause in Civil Contempt Proceeding, a copy of which is attached in Appendix 2. For example, damages may be measured based on the cost to remedy the harm caused. The court cannot compensate for punitive damages in a contempt proceeding. The compensated party is barred from pursuing a subsequent personal injury action to recover the same damages or losses (it is unclear if the compensated party is also barred from pursuing a section 1983 civil rights action in federal court for the same damages or losses. *See* 42 USC § 1983. If actual loss or injury is not proved by the aggrieved party, Judiciary Law § 773 provides that the court may impose a fine "not exceeding the amount of the complainant's costs

and expenses" incurred in pursuing the contempt motion and $250 "in addition thereto." If no costs or expenses are claimed, the court may impose only the single sum of $250 as a fine for the contempt. If the contempt involves multiple contemnors, the fine of $250 is shared jointly and severally by the contemnors.

2) ***Imprisonment*** The court has the power to imprison the offender for an indefinite jail term if the court's mandate called for performing an act or required the offender to refrain from acting, or to undo an act that is still within the power of the offender to perform. The purpose is to coerce compliance with the court's mandate. Where the court imposes a jail term for an act no longer in the power of the offender to perform or undue, and imposes a fine, the offender may be jailed for no more than three months where the fine is less than $500, and no more than six months for a fine of $500 or more. In all cases involving an act no longer in the power of the offender to perform, imprisonment is not to exceed six months (Judiciary Law § 774 [1]). Pursuant to Judiciary Law § 774(2) a person jailed for contempt is entitled to an automatic review of his or her status at intervals of not more than 90 days. The court has discretion to release the contemnor from jail upon a demonstration of hardship. *See* Judiciary Law § 775.

2. Criminal Contempt, Judiciary Law § 750

a. *Summary Criminal Contempt Adjudication*

1) ***"Immediate View and Presence" Summary Contempt Adjudication-***

Rules of the Appellate Divisions, First and Second Departments, which govern the exercise of judicial contempt powers, provide that as a pre-requisite to exercising summary contempt powers, not only must the act(s) of contempt occur in the immediate view and presence of the court, but the court must adjudicate summarily during the trial or hearing.[1] If the judge adjudicates the contempt following the trial or hearing, then "the contempt shall be adjudicated at a plenary hearing with due process of law including notice, written charges, assistance of counsel, compulsory process for production of evidence and an opportunity of the offender to confront witnesses against him" (22 NYCRR § 604.3[b]; 22 NYCRR § 701.3). An adjudication of summary contempt that takes during a trial or hearing, requires the following:

- The court must give the required contempt warnings that the proceedings may result in the accused's immediate arrest

[1] The family court is empowered to: "hold a juvenile in contempt of court for acts committed in its presence (Family Ct Act, § 156). The court has and should have some disciplinary power in order to ensure proper conduct and respect for its proceedings" (*People of the State of New York ex rel. Wayburn v Schupf*, 47 AD2d 79, 83, 365 NYS2d 235, 238 [2d Dept 1975] finding that the court had authority to impose contempt sanctions, but the behavior at issue, the youth's "backing away from a court officer, shaking him off and then pushing the door on his way out of the courtroom, all at the conclusion of the hearing" was "impetuous"and did not warrant a contempt finding). The appellate court stressed that the family court's contempt "power should be sparingly exercised in any case and particularly with respect to the juvenile respondent himself, since he or she generally lacks the mental and emotional maturity of an adult,"and, further, that contempt sanctions cannot be used "as a subterfuge to extend the time a juvenile might otherwise be detained prior to the fact-finding or dispositional hearing" (*id.*).

and imprisonment.

- The court must provide the offender with a reasonable opportunity to make a statement explaining the circumstances of the contempt, and to desist from the contumacious behavior. If the offender fails to desist and/or provides no explanation or an insufficient explanation, a finding of contempt can be made.
- The court may give the offender a chance to purge the contempt, by apology or performance.
- If the court determines that the apology or performance is not sufficient, punishment must be immediately determined and imposed.
- The court must make a full and complete record. In the final order and warrant of commitment, the court must set forth the particular circumstances of the offense and the type of punishment prescribed. *See* Judiciary Law § 752.
- A challenge to a summary contempt adjudication is made by an Article 78 proceeding. *See* Judiciary Law § 752.

2) ***Punishment for Summary Criminal Contempt*** - Criminal contempt, whether summary or plenary, is punishable by a fine, not exceeding $1,000, or by jail, not exceeding 30 days, or by both, in the discretion of the court (Judiciary Law § 751 [1]).

b. *Non-Summary Criminal Contempt*

1) ***Initiation of Non-Summary Criminal Contempt*** - Judiciary Law does not specify notice and/or procedural requirements for the initiation of a non-summary criminal contempt proceeding. However, case law and the Rules of the Appellate Divisions, First and Second Departments require the following:

a) ***Notice of Charges and Required Contempt Warning*** - A notice must issue stating the charges against the offender. The following statement must appear on the face of the notice in eight-point boldface type in capital letters: **"WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT."**

b) ***Right to Counsel*** – " . . . the court shall inform the offender that he or she has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him or her" (Judiciary Law § 770).

c) ***Personal Service*** - the offender must be personally served.

d) ***Compulsory process*** must issue for the production of evidence.

e) ***A plenary hearing*** must be afforded to the offender that provides an opportunity to confront and examine witnesses. *See Matter of Figueroa v Figueroa,* 160 AD2d 390, 553 NYS2d 753 (1st Dept 1990).

2) ***Adjudication of Non-Summary Criminal Contempt***

a) ***Standard of Evidence*** – the standard of proof is *beyond a reasonable doubt.* See *Matter of Rubackin v Rubackin,* 62 AD3d 11, 875 NYS2d 90 (2d Dept 2009).[1]

b) ***"Willfulness"*** of the violation must be proven. *See Matter of Murray,* 98 AD2d 93, 97, 469 NYS2d 747, 751 (1st Dept 1983) "it must be shown that the accused violated the underlying order with a higher degree of willfulness and contumaciousness than is required in a civil contempt proceeding."

c) Proof that the other side has been prejudiced by the misconduct is not required.

[1] In the *Matter of Rubackin v Rubackin,* the Second Department ruled that "[w]hen the purpose of committing an individual to jail is in the nature of vindicating the authority of the court, protecting the integrity of the judicial process, or compelling respect for the court's mandates, the contempt is a criminal contempt. In order to sustain a finding of criminal contempt, there must be proof beyond a reasonable doubt that the contemnor willfully failed to obey an order of the court." The critical question in determining whether the contempt is criminal or civil is whether the contemnor "holds the keys to the jail cell in his hand." In a civil case he does. In a criminal case he does not. See *Pamela R. V James N.,* 25 Misc3d 670, 884 NYS2d 323 (Fam Ct, Albany County 2009).

c. ***Punishment for criminal contempt*** - Criminal contempt, whether summary or plenary, is punishable by a fine, not exceeding $1,000, payable to the County Clerk, or by jail, not exceeding 30 days, or by both, in the discretion of the court (Judiciary Law § 751 [1]).

III. APPENDICES

APPENDIX 1

1 (a) - Form used by the Family Court pursuant to 22 NYCRR subpart130-2.

1 (b) - Form used by the Supreme Court pursuant to 22 NYCRR subpart 130-2.

1 (c) - Operational procedures pursuant to the Rules of the Chief Judge, 22 NYCRR Part 37, *Costs and Sanctions;* and Rules of the Chief Administrative Judge, 22 NYCRR Part 130, *Awards of Costs and Imposition of Financial Sanctions for Frivolous Conduct in Civil Litigation,* established by the Civil Court of the City of New York, effective August 21, 1989.

APPENDIX 2

2 (a) - Forms appended to Judiciary Law § 756.

- Form 1– Body of Order to Show Cause in Civil Contempt Proceeding.
- Form 2 -- Affidavit in Support of Application to Show Cause in Civil Contempt Proceeding.

2(b) - Sample civil contempt motion forms from the Juvenile Rights Practice, Legal Aid Society.

- Order to Show Cause for Contempt and Enforcement.
- Affirmation in Support of Motion for Civil Contempt and Enforcement.

Appendix 1

APPENDIX 1(a)

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF
----------X
In the Matter of

DECISION
Child(ren) Under Eighteen Years of Age Alleged to be Neglected by — Docket No.

Respondent(s).
----------X

RICHARDSON-MENDELSON, J.

This matter was scheduled for an appearance on , 2007 for a continued dispositional hearing. , Esq., the attorney for the children, did not appear on time as scheduled, causing the court and all counsel to await her appearance.

This Court is authorized under Subpart 130-2 of Part 130 of the Rules of the Chief Administrator of the Courts to impose a financial sanction up to $2,500.00 upon an attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding.

The court, on it's own motion, ordered the above-named attorney to submit an affirmation stating why she should not be sanctioned pursuant to Subpart 130-2 of Part 130 of the Rules of the Chief Administrator of the Courts. The above-named attorney submitted an affirmation as ordered.

After due consideration of the circumstances, the court has decided not to impose a financial sanction, but cautions Ms. to use her best efforts to appear on time for court appearances.

This is the decision and order of the court.

ENTER:

_____
EDWINA G. RICHARDSON-MENDELSON
Judge of the Family Court

Dated: Jamaica, New York

March 6, 2007

Order: Pursuant to Subpart 130-2:1 of Part 130 of the Rules of the Chief Administrator of the Courts, attorney is ordered to show cause via affirmation due to this Court by 5:00 p.m. on , 2007 as to why s/he should not be financially sanctioned for his/her failure to appear in court on time at for today's court appearance.

APPENDIX 1(b)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF_____
----------X

Plaintiff,

Index No.:_____

-against-

ORDER IMPOSING SANCTIONS

Defendant.
----------X

J.:

This Court having issued its Order dated _____, directing _____

_____,

and this Court having found that *plaintiff / defendant* having failed without good cause to comply with this court's order; and this Court having considered all of the attendant circumstances, including but not limited to those set forth in 22 NYCRR §130-2.1(b), and 22 NYCRR §130-2.2; and the Court having set forth on the record the conduct on which imposition of the following sanction is based and the reasons why the Court found the failure to comply to be without good cause;

NOW, upon the Court's own initiative and after providing *plaintiff / defendant* a reasonable opportunity to be heard, it is

ORDERED, that *plaintiff / defendant* be sanctioned in the amount of _____ for ~~his / her failure to~~ _____, ~~and it 's further~~

ORDERED, that *plaintiff / defendant* shall pay to _____, Esq., counsel fees in the amount of _____ within thirty (30) days from the date of this Order; and it is further

ORDERED, that _____, Esq. shall make payment of the sanction by depositing said sum with the Lawyers' Fund for Client Protection established pursuant to §97-t of the State Finance Law. Payment to be made to the Clerk of this Court within thirty (30) days from the date of this Order, with proof of the same furnished to the Court within seven (7) days thereafter.

Dated: _____

_____
Justice Supreme Court

APPENDIX 1(c)

CIVIL COURT OF THE CITY OF NEW YORK

Civil Court Directive	Class:	DRP-104
Subject: Costs and Sanctions	Category:	GP-20, LT-20
	Eff. Date:	Aug. 21, 1989

BACKGROUND

Effective January 1, 1989, an addition to the Rules of the Chief Judge (22 NYCRR Part 37; Costs and Sanctions) authorized and an addition to the Rules of the Chief Administrator of the Courts (22 NYCRR Part 130; Awards of Costs and Imposition of Financial Sanctions for Frivolous Conduct in Civil Litigation) implemented what have come to be known as the "Sanction Rules."

These new Rules, which specifically exclude Small Claims, but specifically include "Judges of the Housing Part," allow for the award of costs or the imposition of financial sanctions, or both, in an amount not to exceed $10,000 per proceeding on "any party or attorney" who engages in "frivolous conduct" as defined by the Rules.

Rule 22 NYCRR 130.2 requires that the award of costs or the imposition of sanctions shall be entered as a Judgment of the Court against the litigant or attorney.

Rule 22 NYCRR 130.3 sates that payments of sanctions by an attorney "shall be deposited with the Clients' Security Fund," while payments of sanctions by a party who is not an attorney "shall be deposited with the Clerk of the Court for transmittal to the State Commissioner of Taxation and Finance."

Although the Judiciary Law requires that all Court revenues shall be transmitted to the Commissioner of Taxation and Finance, the new Rule states that sanctions shall be "deposited with the Clients' Security Fund." In order to resolve what appears to be a conflict, the Director of Budget and Finance of the Office of Court Administration has provided specific procedures. Budget Bulletin Number 127 clarifies that while all payments are to be transmitted to the Commissioner of Taxation and Finance, special coding will be utilized to allow such Commissioner to segregate the receipts into either the General State Revenues Fund or the Clients' Security Fund.

In further clarification, the Deputy Chief Administrator has issued an administrative memorandum, dated July 7, 1989, in which he provides operational (non-fiscal) procedures by adding that:

- all individuals upon whom a sanction has been imposed should be directed to make their payment to the Clerk of the Court and not directly to the Clients' Security Fund;
- the clerk must issue a Satisfaction of Judgment whenever a sanction has been paid;
- where payment of a sanction has been inadvertently made directly to the Clients' Security Fund, this transaction should be treated as if it had been made directly to the clerk and a Satisfaction of Judgment should also be issued.

DIRECTIVE

Accordingly, it is the Directive of the Administrative Judge of the Civil Court that:

All payments for Judgments entered based upon sanctions imposed as a result of 22 NYCRR Part 130 are to be paid to the Clerk of the Court in the respective division in which the Judgment was entered.

Any Judge ordering such Judgment for sanctions is to direct the Judgment Debtor to pay the Judgment to the Clerk of the Court, even when the sanction is imposed against an attorney.

Upon payment of the sanction, the Clerk is to issue both a receipt and also a Satisfaction of Judgment.

All such payments are to be regarded as revenue and will be submitted to the Commissioner of Taxation and Finance along with the rest of the revenue. In accordance with the procedures specified by the OCA Budget and Finance Office, special revenue coding will be utilized by the Citywide Administration Office of Civil Court in reporting money's received, in order to ensure that any sanction revenues which are to go to the Clients' Security Fund are properly credited to that fund.

Dated: August 21, 1989

Jacqueline W. Silbermann
Administrative Judge

APPENDIX 1(c)

CIVIL COURT OF THE CITY OF NEW YORK

Civil Court Directive	Class:	DRP-104
Subject: Costs and Sanctions	Category:	GP-20, LT-20
	Eff. Date:	Aug. 21, 1989

It is the determination of the Chief Clerk of the Civil Court that this Directive be implemented as follows:

Following the addition of 22 NYCRR Parts 37 and 130, and based upon the Directive of the Administrative Judge of the Civil Court, the Clerk shall accept payment of financial sanctions imposed pursuant to those rules utilizing the following procedures:

CLERK'S PROCEDURES

Provide Advice to Judgment Debtors.

All individuals upon whom a sanction has been imposed should be directed to make their payments to the Clerk of the Court (payable at either the L&T Cashier or the Civil Court Cashier, as appropriate) and not make such payment directly to the Clients' Security Fund. No sanctions are permitted in Small Claims cases.

Acceptable Payments.

The Clerk may accept payments for sanctions in cash, by certified check, bank check, money order and, if from an attorney, by attorney's check. The payment is to cover the total amount of the judgment, and may not be accepted without having the Judgment on hand for

1) verification of the amount and
2) entry of the Satisfaction

General Revenue.

The payment of sanctions is to be treated as general revenue, entered into the Cash Receipts Journal, and deposited in the revenue account for transfer to the Commissioner of Taxation and Finance along with the rest of the revenue.

Notification to Client Security Fund (CSF).

Where a financial sanction has been imposed on an attorney, necessitating the transmittal of funds to the credit of the Clients' Security Fund, the Clerk of the County should submit a copy of the Court's Order or Judgment to:

Client Security Fund
55 Elk Street
Albany, NY 12201

and a copy to the Civil Court's Budge, Finance and Statistics Office attached to the Monthly Report of Money's Received.

Entries.

The entry on the Cash Receipts Journal is to be made in one of the blank columns.

- If the money is paid as a result of sanctions levied upon an attorney, it is to go to the Client's Security Fund. The column is to be labeled CSF.
- If the money is paid as a result of sanctions levied upon anyone other than an attorney, it is to go to the General State Fund, and the column is to be labeled Miscellaneous.

This procedure is similar to the procedure for accepting payments ordered upon a finding of Contempt.

Receipt.

Upon receipt of the payment the Clerk is to issue a receipt ([either the current 43-4010 or the new CIV-RB-70] by making an entry under "Other" indicating the reason and the amount.

Satisfaction of Judgment.

In addition to a receipt, the Clerk will also issue a "Satisfaction of Judgment Entered Pursuant to 22 NYCRR Part 130" (CIV-GP-80.1). The Satisfaction of Judgment form is to be issued free of charge, and an entry is to be made on the Judgment itself indicating:

1) the date of satisfaction,
2) the amount, and
3) the name of the person receiving the payment.

Payment made directly to the CSF.

In the rare instance where an attorney has made payment for sanctions directly to the Clients' Security Fund, and the fund has notified the Clerk of such payment, the issuance of a Satisfaction of Judgment regarding the transaction should be treated as if it had been made directly to the Court.

Upon receipt of such notification from the Fund, the Clerk is to note on the Judgment:

1) the date of satisfaction,
2) the amount,
3) a brief statement as to the notification, and
4) the name of the person entering the Satisfaction and then attach the notification from the Clients' Security Fund to the Judgment, and issue a "Satisfaction of Judgment pursuant to 22 NYCRR Part 130" (CIV-GP-80.1).

If the attorney who satisfied the Judgment is not present in court at the time that the notification from the Clients' Security Fund is received, the Satisfaction of Judgment (CIV-GP-80.1) is to be mailed by regular mail to the attorney at the address given in the papers

Cash Disbursement and Reporting.

The Budge, Finance and Statistics Section of Civil Court Citywide Administration will account for payments on sanctions received by the Civil Court in accordance with OCA Budge and Finance Office procedures.

The distribution of each payment will differ depending on whether the sanction was imposed upon an attorney or a litigant.

If it was imposed on an attorney, it will be credited to the Clients' Security Fund.

If it was imposed on anyone other than an attorney, it will be credited to General Revenue.

Dated: August 21, 1989

Jack Baer
Chief Clerk

Appendix 2

APPENDIX 2(b)
CIVIL CONTEMPT MOTION FORM
JUVENILE RIGHTS PRACTICE, LEGAL AID SOCIETY

WARNING:YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF *

In the Matter of

*

ORDER TO SHOW CAUSE
FOR CONTEMPT AND
ENFORCEMENT

Docket number *

GREETINGS:

PLEASE TAKE NOTICE that one of the purposes of the hearing upon the following application is to punish the New York City Commissioner of *** ("the Commissioner") in his official capacity for civil contempt of court and that the punishment for this contempt may consist of fine or imprisonment, or both, according to law.

Upon the annexed attorney's affirmation of _____, dated _____, 2000, and the annexed exhibits, and upon all the prior proceedings related to this matter, LET the respondent SHOW CAUSE at Part __ of this Court, at the Courthouse located at _____, _____, New York, on the _____ day of _____, 2000, at _____ in the _____noon, or as soon thereafter as counsel may be heard, why an order should not be issued:

(1) FINDING the Commissioner of ***[Juvenile Justice, Neil Hernandez, or Children's Services, John Mattingly], in his official capacity, to be in civil contempt of this court pursuant to

APPENDIX 2(a)

JUDICIARY LAW §756, FORM 1

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

In the Matter of

Petitioner,
- against -
ORDER TO SHOW CAUSE
CIVIL CONTEMPT PROCEEDING

Respondent.

----------x

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

On reading and filing the annexed affidavit of_____, sworn to the, day of _____, 20_____and upon all the proceedings heretofore had herein,

Let_____ show cause before this court at a Special Term, Part _____ thereof, to be held in and for the County of_____ at the County Courthouse at _____ on the _____ day of_____, 20_____, at _____o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why an Order should not be made adjudging the said _____ guilty of, and punishing him for contempt of this court for his alleged misconduct in failing to obey the _____ [Order] of this court dated the _____ day of _____, 20_____, [or, the subpoena, or otherwise], commanding him_____ specify briefly], as alleged in said affidavit, such punishment to consist of a fine or imprisonment, or both, according to law, and why _____[movant] should not be granted such other and further relief as may be just and proper.

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

Service of a copy of this Order and the accompany papers upon _____, the attorney for said _____ [or personally upon the said _____] on or before the _____day of _____, 20_____, shall be deemed good and sufficient service thereof.

_____

Sworn to before me this day of 2010.

_____

Notary Public

Section 753 of the Judiciary Law for failing to comply with those portions of this Court's Order of _____, 200_ which [fill in what order requires];

(2) IMPOSING civil contempt sanctions for this violation, including awarding the statutory penalty set forth in Judiciary Law §773 of $250 per day, along with movant's costs and fees associated with bringing this motion;

(3) ENJOINING the Commissioner of ***, to [do what the order requires] immediately; and

(4) GRANTING such other and further relief as this Court deems just and proper.

SUFFICIENT CAUSE THEREFOR APPEARING, let service of this Order and the papers upon which it is based on or before the ___ day of _____, 2000 by 5:00 p.m. be deemed good and sufficient service.

ENTER:

_____
The Hon. _____
Family Court Judge

Yours,

***

_____, NY ____
(718) _____

By:
_____
Attorney for Respondent

TO: [Neil Hernandez, Commissioner
New York City Department of Juvenile Justice
110 William Street, 20th floor
New York, New York 10038;
or
John Mattingly, Commissioner
New York City Administration for Children's Services
150 William Street
New York, NY 10038]

APPENDIX 2(b)

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF ***

In the Matter of *

[fill in caption]

AFFIRMATION IN SUPPORT
OF MOTION FOR
CIVIL CONTEMPT
AND ENFORCEMENT

Docket No.

_____, an attorney authorized to practice law in the Courts of the State of New York, affirms, subject to the penalties of perjury, the truth of the following:

1. I am ***, the attorney of record for _____ (referred to in this motion as Respondent). I am fully familiar with the papers and proceedings related to this court case.

2. I make this affirmation in support of the Respondent's motion to hold the New York City Commissioner of *** , ("the Commissioner"), in his official capacity, in civil contempt of this Court.

BACKGROUND

3. This proceeding began with the filing of a petition on _____ alleging _____. [fill in factual background including the order.] *See* Order, attached hereto.

THE COMMISSIONER HAS KNOWLEDGE OF A VALID COURT ORDER

4. The Commissioner, through his agent, had knowledge of the order. When the order was issued, he appeared in Court through his agent, _____. The fact that the Commissioner did not appear personally is not a defense to disobedience of this Court's order where the Commissioner appeared through his agent.

[*Alternatively] The Commissioner was served with a certified copy of this court's order at ___ William Street, New York, New York 10038, on _____, 200_. Therefore the Commissioner had knowledge of the order.

THE RESPONDENT HAS BEEN HARMED BY THE COMMISSIONER'S NONCOMPLIANCE

6. The Commissioner's failure to obey the Court's lawful order has defeated, impaired, impeded, or prejudiced

the rights and remedies of the Respondent.

7. [*Fill in here how client was harmed by the Commissioner's failure to comply with the order]

THE NEED FOR CONTEMPT SANCTIONS

11. Section 753(A) of the Judiciary Law provides:

> A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: . . .
>
> 3. A party to the action or special proceeding . . . for any other disobedience to a lawful mandate of the court.

Judiciary Law § 753(A).

12. The Court of Appeals has set forth four predicates for establishing civil contempt under Section 753:

> In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed . . . . Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party . . . . Finally, prejudice to the right of a party to the litigation must be demonstrated.

McCormick v. Axelrod, 59 N.Y.2d 574, 583 (1983) (citations omitted); McCain v. Giuliani, 84 N.Y.2d 216, 225-27 (1994); see also Dep't of Envtl. Protection v. Dep't of Envtl. Conservation, 70 N.Y.2d 233, 239-40 (1987) (per curiam). For a finding of civil contempt, a court need not find that disobedience to the order was willful.

13. Contempt sanctions are necessary to ensure that the Commissioner does not continue to disobey this Court. The Commissioner must be held accountable for his actions and inactions and for the failures of his agents.

14. The Order of this Court is clear. It plainly states that ***. The Commissioner's disobedience is equally clear. If the Commissioner had a legitimate objection to the Court's directive, the Commissioner could have sought vacatur or modification without delay. It is no defense to contempt for one charged with carrying out an order to simply wait for enforcement efforts before raising claims that the order should be vacated. Thus a claim of lack of available beds in non-secure detention facilities is no defense to civil contempt. Good faith is also not a defense. McCain, 84 N.Y. 2d at 226-27; Matter of Bonnie H. (Rose H.), 145 A.D.2d 830 (3rd Dep't 1988), leave dismissed 74 N.Y. 2d 650 (1989).

15. No prior request has been made for the relief sought in this motion (except that _____).

FOR ALL OF THESE REASONS, I respectfully ask that this Court enter an order granting the following relief:

(a) Finding the Commissioner in his official capacity to be in civil contempt of this court for failing to comply with the Court's Order of _____, 200_ which ***;

(b) Awarding Respondent, in accordance with Judiciary Law §773, the statutory fine of $250 per day the Commissioner was in violation of the Order, attorney's fees, and the movant's costs and expenses against the Commissioner in his official capacity for his failure to comply with the order referred to in paragraph(a) above;

(c) Directing the Commissioner to *** immediately; and

(d) Granting such other relief as this Court deems just and proper.

Dated:_____, 200_
_____, NY
***_

____, NY ____
(718) _____

By:
_____

Attorney for Respondent

Attachments:

Court order
Certification (of order)
Affidavit of service

Data Committee

Time Certain Appearances in NYC Family Court: Summary Report

Data Committee, Child Protective Plan, Hon. Paula J. Hepner, Chair

October 20, 2010

Data were collected describing practices in the New York City Family Courts with respect to time-certain appearances during the latter part of 2009. This report compares practices across specialties and identifies and quantifies factors impacting delay and attainment of goals.

This study was conducted to inform the ongoing work of The Child Protective Plan, chaired by Hon. Edwina Richardson Mendelson, Administrative Judge, New York City Family Court

Table of Contents

Members of the Data Committee

Hon. Paula J. Hepner, Chair, Kings County Family Court

Mike Ciluffo, New York City Family Court Administration

Joseph Comisi, New York City Family Court Administration

Terrell Evans, Administration for Children's Services

Karen Freedman, Lawyers for Children

Courtney Hougham, Court Research, OCA

Shari Hyman, Criminal Justice Coordinator's Office

Virginia Gippetti, New York City Family Court Administration

Sue Jacobs, Center for Family Representation

Elissa Krauss, Court Research, OCA

Toni Lang, Permanent Judicial Commission on Justice for Children

Hon. Joseph Lauria, Center for Court Innovation

Amelia Lepore, Trial Court Operations, OCA

Bobette Masson-Churin, The Legal-Aid Society, Juvenile Rights Practice

Glenn Metsch-Ampel, Lawyers for Children

Lee Pardee, SCO Family Services

Meredith Patten, Court Research, OCA

Nancy Thomson, Administration for Children's Services

Katherine Vera, Criminal Justice Coordinator's Office

Frank Woods, Office of Alternative Dispute Resolution and Court Improvement Programs

Research assistance for this study was supported by the Federal Court Improvement Project Grant from the U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.

In early 2009, the Office of Court Administration together with the New York City Family Court convened members of the Family Court community to discuss shared goals and action steps to improve child protective proceedings. A Court Metrics subcommittee was formed to recommend how best to measure the effectiveness of the new Child Protective Plan (CPP.)

The CPP calls for both an increase in the use of time certain / time ending scheduling of cases, and a decrease in the number of adjournments. These two critical areas were chosen to survey. The study which follows is a seminal look at court scheduling practices at that time and reasons why cases are adjourned.

The study included many perspectives. It surveyed judges, referees, court attorneys, parent's attorneys, attorneys for the children, caseworkers and petitioning attorneys, and asked them to answer the following questions for each case: What was the purpose for the appearance? Was the goal accomplished? At what time did the case start and end?

The study notes differences between what the court reported and what the practitioners reported. It found surprising agreement on the subject of goals accomplished.

Some of the major findings:

- A little more than two thirds of all appearances accomplish their goals.
- Time certain scheduling is now routine in the Child Protective Specialty and to a somewhat lesser extent in the other specialties.
- Appearances are most frequently allotted one half hour.
- Some commonly held beliefs about causes of delay are not necessarily true.

Perhaps the most significant finding is the clear picture the study offers of the critical interdependence of the Family Court and those who practice and appear there every day. The importance of this cannot be understated, for it means that every institution, agency and individual practitioner must work together for there to be real and lasting improvement.

This report is a clarion call to raise our expectations in defining what the terms "meaningful appearance" and "goals met" really mean. The finding that a little more than two thirds of all appearances accomplish their objectives, while about one third do not - a 68% pass rate for getting something done - is just not good enough.

When we learn 25% of appearances start more than 16 minutes late, and half of *those* start more than 30 minutes late, we have to ask: what does it mean for the other cases on the calendar? What does it mean for attorneys who have cases in other parts? What does it mean

for caseworkers for whom a court appearance is only part of their job? What does it mean for the parents who must take off from work? What does it mean for the children whose cases seem to last forever? And what does it mean for other jurists whose calendars are disrupted waiting for attorneys to come from parts which are running late?

It is time to face the reality that lateness of attorneys is all too often a function of court delay in other parts. Conversely, court delay is a function of attorneys not showing up on time because they are being held in other parts, or who have over-booked their time due to the pressing needs of the court and the litigants. These latenesses are two sides of the same coin.

Historically, the Family Court has operated in a culture of lateness and unpreparedness where goals are not accomplished in 1 out of 3 cases. This is unacceptable.

Each jurist must not only schedule an achievable goal within a time certain appearance, but must release those appearing on the case at the conclusion of the time certain so that other parts may achieve their scheduled goals. Attorneys must ensure that they, as well as their witnesses, are on time and prepared for each appearance. This is the real path to reducing adjournments in Family Court.

Although interdependent, everyone in the Family Court community must address that which is under their respective control in order to achieve the scheduled goals. It is the court that can re-design how cases are calendared and heard. It is the attorneys who can set parameters for interviewing clients and preparing their cases. It is the caseworkers and their agencies that can make the required referrals, interview their clients and prepare court ordered reports. And it is the institutional agencies that can assist their attorneys with trial readiness.

If each group attends to its own business, then we will have truly taken the first step toward changing the culture of Family Court.

The Child Protective Plan Court Metrics Committee

Introduction and Acknowledgements

On behalf of the Data Committee of the Child Protection Plan, the Office of Court Research studied time-certain appearances of all types in all specialties in the New York City Family Court. This study was conducted in Kings County in September 2009 and in the other four boroughs in December 2009. Judges, court attorneys, and referees were asked to complete a survey card for each time-certain appearance during a two-week data collection period. In addition, institutional and court appointed attorneys were invited to participate as were ACS and provider agency case workers. This is a report of data collected in the study. The data are reported without stating opinions about the reasons or causes for the results found. The study results reveal some successes in the courts while helping to highlight some factors that may contribute to inefficiency in family court case processing.

During studies such as these, participants may bend over backwards to be on time. There have been anecdotal reports that delays increased when no study was in progress. The data show more on-time appearances than would be expected based on anecdotal accounts; they also show that more than one-quarter of appearances were substantially delayed. Thus, the data reflect a minimum or baseline of what court participants can accomplish when it comes to timeliness – with clear room for improvement. If in the future, data such as start and end times and timeliness are captured in UCMS these analyses can be performed in the blind without asking individuals to complete cards by hand.

This study was made possible by the willing assistance of scores of judges, court attorneys, referees, and attorneys and caseworkers practicing in Family Court who included completing data collection cards in their already busy schedules. In particular, court attorneys in the supervising judges' offices collected and scanned thousands of completed forms to the Office of Court Research; personnel at various agencies who participated made a similar contribution.

Most important, the 18 members of the Data Committee truly worked long and hard to make this project a success. At our 12 meetings over two years time, committee members always came prepared to participate, gave thoughtful suggestions, and raised important and valuable questions about how to collect data and approach analysis. This committee was unique in its constructive and collaborative approach to its work.

Executive Summary – Major Findings[1]

This study identifies both strengths and weaknesses in the court's case processing practices. The strengths can be applauded at the same time as the court seeks solutions for the weaknesses. Critically examining the areas of weakness the court arrives at a decision crossroads: when it comes to accomplishing goals, what is the level of success in meeting goals that the court wants to achieve as its operating standard?

- **Goals are met in 68% of appearances and not met in 32% of appearances.**

- **Key participant delay, lateness, and absence are the most common reasons goals are not met.**
  - Either the court was delayed or an attorney was late or absent in more than half the appearances.
  - In 35% of appearances study participant said court was delayed.[2]
    - "Prior matter ran over" was the most frequently mentioned reason for court delay.
  - In 33% of appearances an attorney was reported absent and/or late.
  - In 23% of appearances a party was reported late/absent.
  - In 46% of the 273 appearances requiring an interpreter, the interpreter was reported late/absent.
  - In one out of five (21%) of appearances where a caseworker was required, the caseworker was reported late/absent.
  - In 33% of appearances where reports were required they were not timely.

- **Significant progress has been made in reducing general-call scheduling.**
  - Time-certain appearances are scheduled throughout the day.
  - Nearly two thirds of appearances included beginning and ending times.

- **A majority of appearances start on time.**
  - 52% of appearances start within five minutes of scheduled start time.
  - 22% of appearances start between six and 15 minutes late.
  - 26% are more than 15 minutes delayed.

---

[1] Study participants included court personnel (judges, court attorney referees and court attorneys) and non-court personnel (attorneys and case workers) who reported on more than 6,000 appearances: 47% from court personnel, 41% by non-court personnel and 11% could not be identified. Responses to most questions by court and non-court personnel demonstrated general agreement between them.

[2] "Court" referred to whoever was conducting the appearance: judge, court attorney or referee.

- **Regardless of specialty or purpose, appearances are most frequently allotted thirty (30) minutes.**[3]
  - Actual appearance duration is nearly always shorter than scheduled duration.
  - Average scheduled duration – 43 minutes; average actual duration – 23 minutes.
  - Median scheduled duration – 30 minutes; median actual duration – 16 minutes.[4]

- **Some common assumptions about causes of delay are misplaced.**
  - Emergency hearings rarely cause delays in other parts.
  - Attorneys are sometimes absent or late – but no particular attorney group is substantially more likely than others to be absent or late.
  - Settlement conferences, bench conferences, and court conferences (judge conferring with court attorney or referee) rarely cause court delays.
  - Probation officers are rarely late or absent; out of 126 reported appearances where a probation officer was expected to appear, 10 were reported late or absent.
  - Building issues (such as elevator delays and lines at the magnetometers) are problematic when they occur but were reported as the cause of delay in only 2% of instances where the court was reported delayed.

[3] 30 minutes is the "mode" – the most common amount of time allotted. Median is the mid-point; the number at which half the sample is above that number and half is below.

Executive Summary – Recommendations

Judicial Officers

- **Improve calendar and time management to minimize the probability of delay and to anticipate unavoidable delay.**
  - Allot the amount of time needed to accomplish the expected appearance goals; taking into account issues expected to be covered at the appearance, whether there will be reports for review, witnesses and how long their testimony will last, argument, etc.
  - Honor time certain beginnings and endings.
  - Consider the use of telephone appearances to improve caseworker participation.
  - Calendar "catch up time" for completing matters that run over.

- **Minimize practices that assume that delay is inevitable or that build in delay.**
  - Avoid using "default" time slots. Though 30 minutes is the most commonly used appearance time slot, appearances rarely use 30 minutes.
  - Avoid overbooking and double-booking and asking attorneys to do so.
  - Respect attorneys' need to have time to consult with clients and to get from one appearance to another by not expecting them to schedule immediate consecutive appearances.
  - Schedule time-certain appearances throughout the day without overemphasizing the 9:00 AM – 11:00 time slot.
  - Reduce reliance on court officer/clerk communication concerning delays.
    - Make direct contact with colleagues when key participants are delayed.
    - Use Electronic Check-in Part Report as a tool for locating attorneys.
    - Direct contact between judicial officers sends a message about the importance of honoring other parts' schedules.

Family Court Administration

Some examples of administrative changes aimed at facilitating these recommendations include:

- Improve interpreter assignment and scheduling practices to eliminate frequent interpreter absence and delay.
- Provide judicial officers with resources and training for improving time management skills.
- Consider adopting a court wide policy of scheduling "catch up time" in judges' daily calendars, to handle appearances that run over allotted time.

- Make mandatory the use of Electronic Attorney Check-In including use by parts and part staff of the available daily reports summarizing attorneys' schedules.
- Expand use of UCMS as a management tool
  - Capture in UCMS beginning and end times for all on-the-record appearances (FTR) thereby facilitating future case processing analysis.
  - UCMS next-available scheduling feature can allow more efficient scheduling.
  - Include details about attendance and availability of reports that will improve data analysis for future timing study reports.

Attorneys

- **Attorneys can minimize their contribution to court delays by:**
  - Using electronic check-in
    - Making it easier for the court to locate an attorney who is absent or late and to identify reasons for absence or lateness.
    - Avoiding wasting time "showing up" at each part
    - Enabling 9:00 AM and 9:30 AM appearances to begin on time.
  - Taking into account the need to consult with clients when scheduling appearances.
  - Building time into their schedules to get from one court room to another.
  - Avoiding over-booking, double booking, or booking immediate consecutive appearances.
  - Realistically assessing the time needed to complete an appearance and requesting an appropriate amount of time for the appearance.
  - Assuring that clients and witnesses are reminded about appearances and the need to arrive at the court 30 minutes early in order to be in the part on time.

ACS and Provider Agencies

- Improve caseworker scheduling and reporting practices.
- Assure that caseworkers are present for appearances at the time those appearances are scheduled.
- Assure that reports are timely provided to the court and to counsel for the parties.

Study Methodology and Sample

Each study participant completed one survey card per time-certain appearance. The card is reproduced in Appendix A. It covers the following issues:

- **Who conducted the appearance:** purpose and scheduled and actual start and end times
- **Whether the court was delayed:** if so, causes of the delay
- **Whether required reports were submitted on time**
- **Absence/lateness of key participants** including attorneys, case workers, parties, interpreters, probation officers, or other witnesses
- **Whether appearance goals were met** and if not, why not

The study started in Kings in September, 2009 and completed in the other four boroughs in December, 2009. After data were collected in Kings, there was some minor re-design of the data collection card to improve comprehension and clarity.

- **6,083 cards were completed: 47% by court personnel and 41% by non-court personnel.[5] Each card describes a time-certain Family Court appearance.**
    - 18b, Family Court Legal Services, and Legal Aid attorneys were the major non-court personnel contributing (Bronx Defenders, Children's Law Center, Lawyers for Children, Center for Family Representation, and caseworkers also participated).
    - Study participants reporting on CP appearances were equally divided between court and non-court personnel. Court personnel were the clear majority among those reporting on CVO and JD appearances.

Study Participants			
Specialty	**CP**	**CVO**	**JD**
Sample Size	4,975	710	358
Court	**46%**	**63%**	**75%**
Non-court	43%	21%	18%
***Totals do not equal 100 due to missing data.**			

[5] Because of inconsistencies in the ways in which study participants reported docket numbers it is impossible to ascertain exactly how many unique appearances are in the sample. However, comparison of court and non-court personnel responses (discussed below) reflect substantial agreement between the two groups.

- The sample well represents all counties, all appearance purposes and all specialties.
- The sample size for each specialty is large enough to reach conclusions about that specialty and to make comparisons across specialties.
- The distribution of who conducted appearances in each specialty is consistent with what would be expected.

Who conducted appearances included in the study?			
Specialty	CP	CVO	JD
Judge	34%	44%	92%
Court Attorney	20%	22%	7%
Referee	45%	35%	<1%

- **Court and non-court personnel agree on most issues studied.**
  - Court personnel are more likely to report attorneys are late (difference of 4%).
  - Non-court personnel are more likely to report court was delayed (difference 8%).
  - There is agreement between court and non-court personnel on other issues.

Compare Court and Non-Court Responses		
	Court	Non-Court
Court Delayed	31%	39%
Attorney Absent /Late	35%	31%
Appearance Goals		
Met	69%	69%
Not Met	31%	31%

Discussion – Meeting Appearance Goals

- **Appearance goals are met in 68% of appearances and not met in 32%.**
  - Emergency Hearings are most likely to meet goals (79%); Fact Findings least likely to meet goals (63%).
  - Longer lasting appearances are more likely to meet goals.
    - In 78% of appearances lasting more than 20 minutes goals were met.
    - In appearances lasting up to 20 minutes, 64% met goals.

- **Appearance goals are less likely met when a key participant is delayed, absent or late.**
  - When court is delayed 42% do not meet goals.
  - When an attorney is absent or late 46% do not meet goals.
  - When a caseworker is reported late/absent >50% do not meet goals.

- **Goals were not met in 1,768 appearances.**
  - In 44% of appearances where goals were not met – 811 of the 1,768 – a key participant was not present. When a key participant was not present:
    - An attorney was absent or late in 51%
    - A party was late/absent in 40%
  - In 18% of appearances where goals were not met paperwork was not timely.
  - In 8% of appearances where goals were not met a party was not ready or compliant.

- **Delay between scheduled and actual start time has no effect on meeting goals.**
  - Only in fact findings and hearings did some delay seem to contribute to meeting goals.
  - Where fact-finding or hearing start time was delayed 16 – 30 minutes, goals were more likely to be met.

Discussion – Appearance Timing

Participants indicated scheduled and actual start and end times on the data collection card.

Scheduling and Duration of Appearances

- **Time-certain appearances are scheduled throughout the day, across counties and across specialties.**
  - 43% of appearances are scheduled between 9:00 AM and 11:00 AM, 29% between 11:00 AM and 1:00 PM and 25% between 2:00 PM and 4:00 PM.

- **Start and end times were included on the cards for 61% of appearances.**
  - Start and end times were more commonly reported in CP and JD than in CVO.

- **Scheduling continuous trials continues to be unusual.**
  - Most CP fact findings are scheduled for less than two hours;
  - CVO fact findings were more frequently scheduled for more than two hours.

- **30 minutes is the most common scheduled appearance duration.**

- **Actual time spent on appearances is consistently less than amount of time scheduled.**

Scheduled and Actual Appearance Duration: In Minutes by Specialty				
	Average		Median	
	Scheduled	Actual	Schedule	Actual
Total	**43**	**23**	**43**	**30**
CP	41	22	30	17
CVO	**62**	**28**	**30**	**15**
JD	45	24	30	15

Delay Between Scheduled and Actual Start Times

- The majority of appearances start on time.

Reported Delay Between Scheduled and Actual Appearance Start Time	
Starts within	
5 minutes of scheduled time	52%
6 – 15 minutes of scheduled time	22%
16 – 30 minutes of scheduled time	12%
>30 minutes after scheduled time	14%

- The most common delay between scheduled and actual start time is 0.[6] Average delay between scheduled and actual start time is 15 minutes; median delay is 5 minutes.

- Referee appearances and permanency planning hearings had the shortest delays between scheduled and actual start times: average 9 minutes, median 3 minutes.

- In 37% of the appearances, the court was not delayed and no attorney was reported late/absent. In 19% of appearances, both the court was reported delayed and attorney was reported later or absent.

Court Delayed		No	Yes	Total
Attorney Late/Absent	No	37%	30%	67%
	Yes	14%	19%	33%
Total		51%	49%	100%

[6] 0 is the "mode" for delay between scheduled and actual – i.e., the most common number.

Delays in Start Time and Delayed End Times

- Scheduled and actual end times were supplied for 3,373 appearances. Of those, 54% ended early (before scheduled end time) and 25% ended more than 15 minutes after scheduled end time.

- To see the impact of start time delays, it's necessary to look at appearances where all four times were reported: scheduled and actual, start and end times. The sample included 1,086 appearances meeting these criteria.

    - Two thirds of appearances that start early or on time, end early.
    - Nearly two thirds of appearances that start more than an hour later than the scheduled start time, end more than thirty minutes later than scheduled end time.
    - Overall patterns:
        - amount of time used for the appearance is the same whether it starts early or on time or it starts late.
        - the more delayed the start time, the more delayed the end time.

Appearances Scheduled for 30 Minutes Where Data Includes Scheduled and Actual Start and End Times					
Start Time Delay	**Up to 5 minutes**	**6 - 15 minutes**	**16 - 30 minutes**	**> 30 minutes**	**Total**
Number of Appearances	338	416	205	127	1086
End Time					
Up to 15 minutes early	66%	47%	18%		42%
On time or up to 5 minutes late	27%	34%	40%	1%	29%
6 - 30 minutes late	6%	17%	38%	39%	19%
>30 minutes late	1%	1%	5%	61%	10%
	100%	100%	100%	100%	100%

Factors Affecting Delay: Compare less than 30 minutes with 30 minutes or more

- **There is little difference in the incidence of factors that might affect delay when comparing these appearances that start within 30 minutes of scheduled start time and those that start 30 minutes or later than scheduled start time.**

The table below compares appearances that started within 30 minutes of scheduled start time with appearances that started at least 30 minutes after scheduled start time and shows the percentage of each group for each factor affecting delay. Thus, for example an attorney was reported absent or late in 33% of appearances that started within 30 minutes of scheduled start time and in 35% of appearances that started 30 minutes or more after scheduled start time.

The factors affecting delay showing the most notable difference between these two groups is "court delayed," where 72% of the appearances starting 30 minutes or more late also reported that the court was delayed, and only 30% reported court was delayed where start time was less than 30 minutes delayed.

Factors Affecting Delay Between Scheduled and Actual Start Time Percent of Entire Sample		
	Amount of Delay	
	< 30 Minutes	30 Minutes or more
Court Delayed	**30%**	**72%**
Attorney Absent and/or Late	33%	35%
ACS CW Late/Absent	**9%**	**6%**
Agcy CW Late/Absent	12%	9%
Reports Late	**13%**	**7%**
Party Late/Absent	23%	22%
Other Witness Late/Absent	**2%**	**2%**
Interpreter Late/Absent	2%	2%
Probation Late/Absent	**<1%**	**<1%**

Discussion - Delay, Absence, Lateness

The Court: Judge, Court Attorney, or Referee

The data collection card asked whether the court was delayed. Study participants were instructed that "court" referred to the judicial officer conducting the appearance. If the court was delayed, three choices were offered for reasons that might explain the delay; in addition there was an "other" category.

- **In 35% of appearances, participants reported that the court was delayed.**[7] Court participants reported court delay in 31% of appearances; non-court participants reported court delay in 39% of appearances.[8]

- **Analysis of reasons for court delay was divided between those things that the court can control and those that are not within the court's control.**[9]

  - **Delays within the court's control:**
    - 37% Prior matter ran over[10]
    - 13% Double booking or calendar confusion
    - 3% Off-the-record or settlement conferences. In only 39 instances was the judge conferring with a court attorney or referee
    - 10% Court late, not available, or in a meeting

  - **Delays outside the court's control:**
    - 25% Key participant was in another part. Only 35 delays were attributed to an emergency hearing: 31 in CP parts; 24 in Kings County.
    - 5% Lateness or absence of a party, caseworker, or other witness
    - 2% Building issues - elevator delays, court house lines, fire drills, etc.

[7] Court delay was reported in 2,116 of the 6,083 appearances. This question was not answered on 308 cards.
[8] These differences were not statistically significant.
[9] Total does not equal 100% because 5% were other, miscellaneous or illegible.
[10] Of the 2,116 reports that the court was delayed, 716 indicated that the prior matter ran over.

Attorney Absence and/or Lateness

Participants were asked to indicate if an attorney was absent and, if so, to indicate the attorney's affiliation. This was followed by questions concerning whether an attorney was late and, if so, the attorney's affiliation.

- One or more attorneys were reported absent and/or late in one-third of appearances overall, slightly less (27%) in JD appearances.

- Court and non-court personnel report similar levels of attorney absence/lateness.

Attorney Lateness and/or Absence			
	Total	Court	Non-Court
Absent	**14%**	**17%**	**14%**
Late	**22%**	**29%**	**24%**
Absent and/or Late	**33%**	**35%**	**31%**

- Distribution of attorney absence and/or lateness is the same as distribution of attorneys by agency or institution and by county.
    - No particular provider group is any more likely than others to be absent or late.
    - Attorney lateness is slightly more frequent in New York County (36%) and slightly less frequent in Richmond (24%).
    - Combined absence and/or lateness is almost the same in CVO parts (33%) as it is in CP parts (31%); and slightly less frequent in JD parts (27%).

- When an attorney is absent or late, the percentage of appearances where goals are not met increases from 32% overall to 41%.

- Attorneys are slightly more likely to be late for court attorney appearances (26%) and referee appearances (23%) than for judge appearances (20%).

Combined Impact of Court Delay and Attorney Lateness/Absence

- Neither the court nor an attorney was reported delayed/late/absent in 41% of appearances; 80% of these appearances started on time.
- Both the court and attorney were reported delayed/late/absent in 12% of appearances.
    - 11% of these appearances started on time.
    - 66% start more than 30 minutes later than scheduled appearance time.

Caseworker Lateness/Absence

For caseworkers, the card made no distinction between absence and lateness. Participants could choose late/absent or on time. The data reported below are based on the total number of appearances (cards) where one or the other response was checked (assuming that where neither was checked, no caseworker was expected to appear).

- ACS caseworker was reported late/absent in 20% of 2,172 appearances where attendance was noted.
- Agency caseworker was reported late/absent in 24% of 2,522 appearances where attendance was noted.
- When a caseworker was reported late/absent the percentage of appearances where goals were not met was greater than 50%.

Timeliness of Reports

Participants were asked to indicate whether reports were required for the appearance and if so, whether they were submitted on time.

- Reports were required in 2,402 appearances in Bronx, NY, Queens and Richmond.[11]
- For 2,108, timeliness was reported: 67% were on time, 33% were not on time.
- 1,941 were required in CP cases: 68% were on time, 32% were not on time.
- Untimely paperwork was a reason goals were not met in 17% (296) of the 1,768 appearances where goals were not met.

Parties, Interpreters, Probation Officers, Other Witnesses

- Party was reported late/absent in 48% of the 2,837 appearances where a party's presence/absence was reported.
- In nearly half (46%) of the 273 appearances where an interpreter was expected to appear the interpreter was reported late/absent.
- Probation officers were only rarely reported late/absent: 10 of the 126 appearances where they were expected to appear.
- Other witnesses were reported late/absent in 30% of the appearances where they were expected.

Timeliness of Other Participants				
	Timeliness Reported	Late/Absent	% Late/Absent	% of total
Party	2,837	1,378	49%	23%
Interpreters	273	126	46%	2%
Probation Officers	126	10	8%	0%
Other Witness	328	98	30%	2%

[11] These data were not collected for Kings County.

CVO Specialty

- Attorney absence /lateness are almost the same in CVO parts (33%) as in CP parts (31%). [12] Attorney absence was slightly more likely in CVO than other specialties.

Attorney Absence/Lateness by Specialty			
Attorney Reported...	**CP**	**CVO**	**JD**
Absent	15%	23%	16%
Late	**27%**	**30%**	**20%**
Absent and/or Late	33%	31%	27%

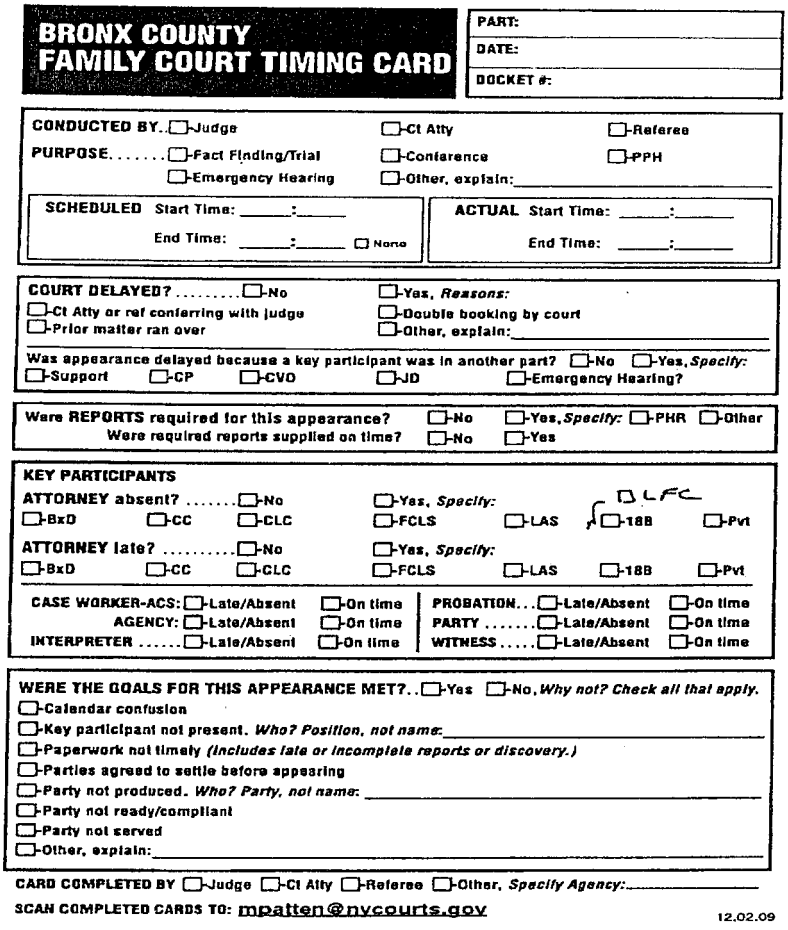
- **18b attorneys are no more likely to be absent or late for CVO appearances than for other appearances.**
  - An 18b attorney was reported late in 77 CVO appearances (11%) and 453 CP appearances (9%).
  - CVO appearances make up 13% of the total sample and 12% of the appearances where 18b attorneys were reported absent or late.

- **A clear majority (63%) of CVO appearances were reported on by court personnel.**
  - In 38% of CVO appearances goals were not met as compared to 32% for CP and 33% for JD.
  - The court was reported delayed in 45% of the CVO appearances as compared to 33% in CP and 35% in JD; 46% of court personnel and 50% of non-court personnel reported that the court was delayed.
    - A scheduling or time conflict with another part was reported in 10% (68) of the appearances where court delay was reported.
    - Among the 68 where a key participant was reported to be in another part 41 identified the specialty where the missing participant was and of those 21 were in CP parts.

- **Party lateness/absence is more often reported in CVO than in other specialties.** **When a party's timeliness was reported**, 56% were reported as late/absent; that is 27% of CVO appearances in this study as contrasted with 21% of CP appearances where a party was reported late/absent.

[12] Attorney absence/lateness is lowest in JD parts (27%). There were only 260 JD appearances in which attorney attendance was reported.

Appendix A: Sample Data Collection Card



BRONX COUNTY FAMILY COURT TIMING CARD

PART:
DATE:
DOCKET #:

CONDUCTED BY: ☐-Judge ☐-Ct Atty ☐-Referee

PURPOSE: ☐-Fact Finding/Trial ☐-Conference ☐-PPH ☐-Emergency Hearing ☐-Other, explain:_____

SCHEDULED Start Time: ____:____ End Time: ____:____ ☐ None

ACTUAL Start Time: ____:____ End Time: ____:____

COURT DELAYED? ☐-No ☐-Yes, *Reasons:*
☐-Ct Atty or ref conferring with judge ☐-Double booking by court
☐-Prior matter ran over ☐-Other, explain:_____

Was appearance delayed because a key participant was in another part? ☐-No ☐-Yes, *Specify:*
☐-Support ☐-CP ☐-CVO ☐-JD ☐-Emergency Hearing?

Were REPORTS required for this appearance? ☐-No ☐-Yes, *Specify:* ☐-PHR ☐-Other
Were required reports supplied on time? ☐-No ☐-Yes

KEY PARTICIPANTS

ATTORNEY absent? ☐-No ☐-Yes, *Specify:* DLFC
☐-BxD ☐-CC ☐-CLC ☐-FCLS ☐-LAS ☐-18B ☐-Pvt

ATTORNEY late? ☐-No ☐-Yes, *Specify:*
☐-BxD ☐-CC ☐-CLC ☐-FCLS ☐-LAS ☐-18B ☐-Pvt

CASE WORKER-ACS: ☐-Late/Absent ☐-On time
AGENCY: ☐-Late/Absent ☐-On time
INTERPRETER ☐-Late/Absent ☐-On time
PROBATION... ☐-Late/Absent ☐-On time
PARTY ☐-Late/Absent ☐-On time
WITNESS ☐-Late/Absent ☐-On time

WERE THE GOALS FOR THIS APPEARANCE MET? ☐-Yes ☐-No, *Why not? Check all that apply.*
☐-Calendar confusion
☐-Key participant not present. *Who? Position, not name:*_____
☐-Paperwork not timely *(includes late or incomplete reports or discovery.)*
☐-Parties agreed to settle before appearing
☐-Party not produced. *Who? Party, not name:* _____
☐-Party not ready/compliant
☐-Party not served
☐-Other, explain:_____

CARD COMPLETED BY ☐-Judge ☐-Ct Atty ☐-Referee ☐-Other, *Specify Agency:*_____

SCAN COMPLETED CARDS TO: mpatten@nycourts.gov

12.02.09

Time Certain Appearances in New York City Family Court

A Study of
All Counties - All Specialties

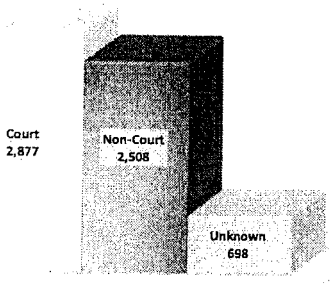
By the Office of Court Research for the
Data Committee, Child Protective Plan
Hon. Paula J. Hepner, Chair

Methodology

- **Who completed data collection cards?**
  - Judges, court attorneys, and referees
  - Institutional attorneys, 18b's and case workers
- **For how long was the study conducted?**
  - Two weeks in each county
- **When were cards completed?**
  - Kings – September 8 – 18, 2009
  - All other counties – December 7 – 22, 2009

Description of the Sample

Each Card Describes an Appearance
6,083 Appearances



2,877 Court Personnel Completing Cards

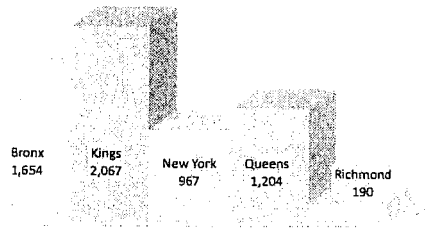
	Number	Percent of 6,083
Judge	1,089	18%
Court Attorney	564	9%
Referee	1,222	20%
Court Social Worker	2	<1%

2,508 Non-Court Personnel Completing Cards

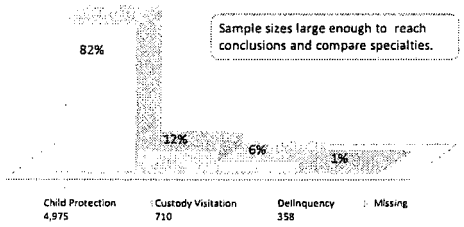
Affiliation	Number	% of 6,083
18b	371	6%
Bronx Defender	89	1%
ACS/ FCLS*	936	15%
Legal Aid	888	15%
Corp Counsel	32	1%
CLC	42	<1%
LFC	68	<1%
Law Guardian	48	1%
Case worker*	137	2%

*May include ACS caseworkers

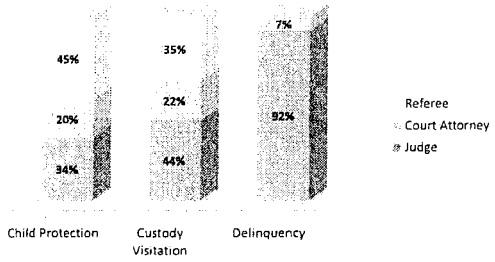
Counties are Well Represented



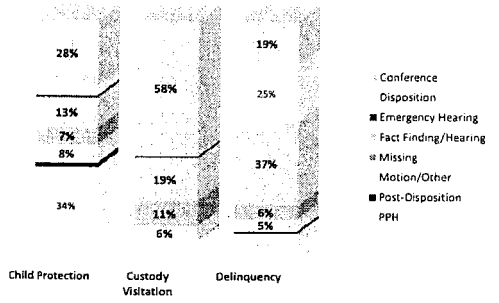
Distribution By Specialty
CP Over-Represented



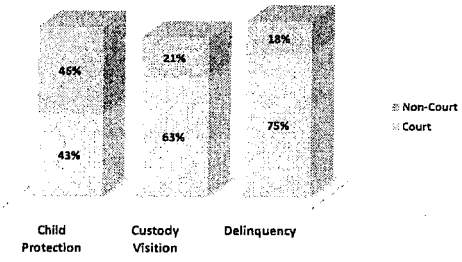
Who conducts appearances by specialty?



Appearance Purpose by Specialty



Court/Non-Court Responses by Specialty



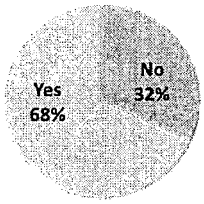
Totals do not equal 100% due to missing data describing person submitting card.

Compare Court and Non-Court Responses

	Court	Non-Court
Court Delayed	31%	39%
Attorney Absent /Late	35%	31%
Appearance Goals		
Met	69%	69%
Not Met	31%	31%
Reports Were Required	54%	56%

Meeting Appearance Goals

Were Appearance Goals Met?

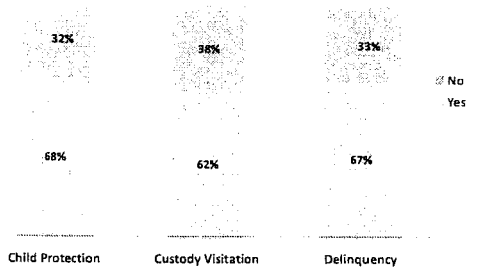


What is the level of success at meeting goals
that the court wants to achieve as its operating standard?

Goals *Least Likely Met* in Fact Findings
Most Likely Met in Emergency Hearings

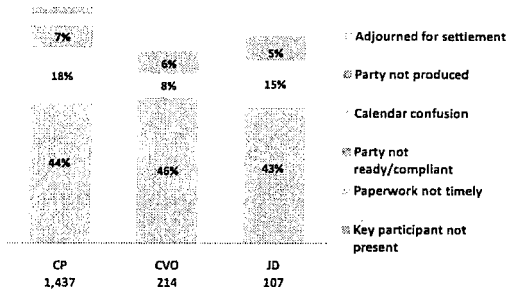
Appearance Purpose	Number	% Where Goals were Met
Fact Finding/Hearing	843	63%
Disposition	273	66%
PPH	1,584	66%
Return of Process	91	68%
Conference	1,677	68%
Motion	157	69%
Post-Disposition	107	73%
Emergency Hearing	52	79%

Were Goals Met: by Specialty



	CP	CVO	JD
Court	31%	38%	30%
Non-court	31%	32%	38%

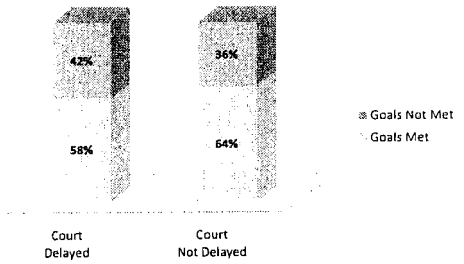
Reasons Goals Not Met – By Specialty



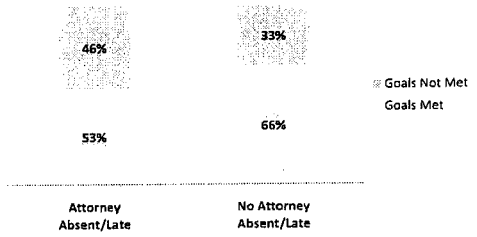
Key Participant Not Present

Among the 1,768 cards reporting that goals were not met 881 reported that a key participant was not present. These responses were compared to responses concerning lateness/absence. Total here is greater than 881 because in some cases more than one key participant was not present.

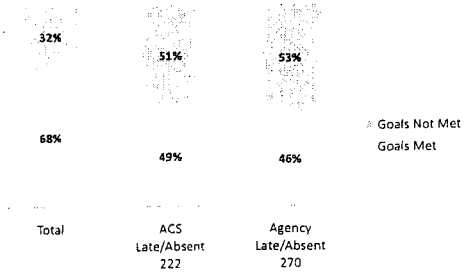
When Court is Delayed Goals Less Likely to be Met



When Attorney is Absent/Late Goals Less Likely to be Met



When Caseworker Late/Absent Goals Less Likely to be Met



Findings: Meeting Appearance Goals

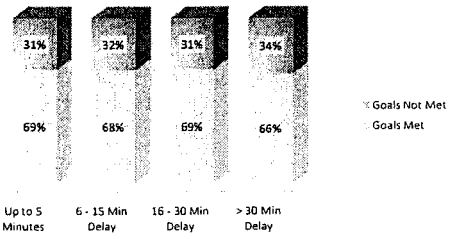
- Appearance goals are not met in one-third of appearances
  - Pattern is the same across county, specialty, and appearance purpose.
- Most common reason goals are not met – key participant not present (881 appearances):
  - Attorney (433 absent, late, or both)
  - Party (353 late or absent)

Timing & Meeting Goals

Appearances That Meet Goals Last Longer

	Average	Median
Overall	23	17
Goals Met	24	20
Goals Not Met	18	15
Key Participant Not Present (746)	15	10
CP (595)	15	12
CVO (98)	17	9
JD (49)	11	10

Delay Between Scheduled and Actual Start Time Has No Effect on Meeting Goals



Except....

Fact Findings: 16 – 30 min delay Increased Likelihood of Meeting Goals

Delay between scheduled and actual start time	CP	CVO	JD
Up to 15 minutes	67%	71%	68%
16-30 minutes	71%	74%	84%
>30 Minutes	57%	50%	71%

Findings: Timing and Meeting Goals

- Delay in start time has no effect on meeting goals
- Presents a Dilemma:

  Should judicial officers delay start times to avoid adjournments?

  OR

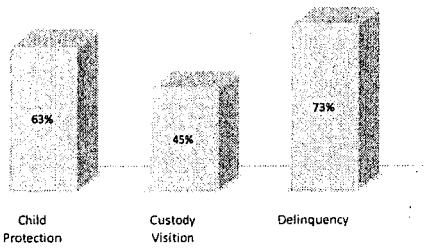
  reduce expectation that delay is part of doing business? and increase expectations that goals can be met?

Appearance Timing
Scheduling, Duration, and Delay

Scheduling

Appearances are Scheduled Throughout the Day
Slight Over Scheduling 9 – 11 AM

Start and End Times are Widely Reported



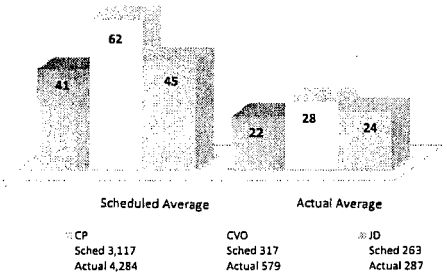
Findings: Appearance Scheduling

- 61% included scheduled start and end times.
- Time certain appearances are scheduled throughout the day in all specialties.
- Tendency to over-schedule in the 9:00 – 11:00 time slot builds in delay later in the day.
- General calls in morning time slots, not included here, probably add to delay later in the day.

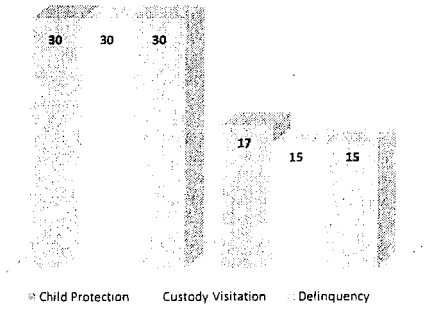
Appearance Duration

- Actual time spent on appearances is consistently less than amount of time scheduled.
- Thirty minutes is the most frequently scheduled amount of time.

Average Appearance Duration in Minutes
Scheduled - 43 Actual - 23



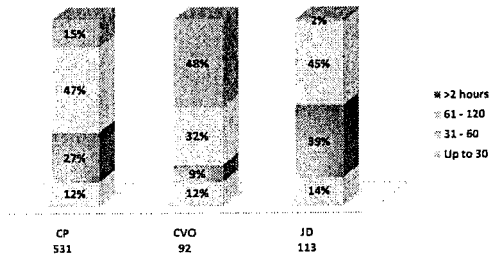
Median Appearance Duration in Minutes
Scheduled - 30 Actual - 16



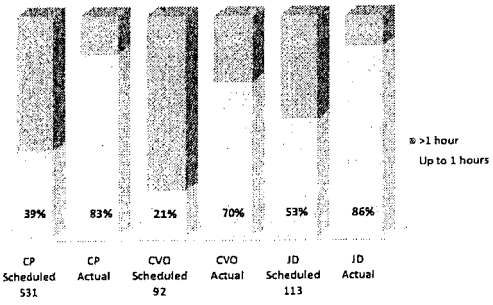
Fact Findings - Continuous Trials Are Rare

- Fact findings are most often scheduled for 1 – 2 hours and rarely last more than 1 hour.
- CVO more likely to schedule for 2 hours or more.

Fact Findings - Scheduled Duration
CVO Schedules Longer Fact Findings



Fact Findings Only
Scheduled >1 Hour Actual <1 Hour



Findings: Appearance Durations

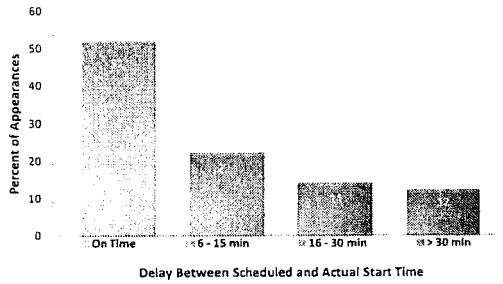
- Average and median scheduled and actual appearance durations are the same in all specialties.
- Actual appearance duration is about one-half the scheduled duration.
- CVO schedules longer time-certain appearances than other specialties
- Fact Findings and Emergency Hearings scheduled for > one hour rarely last > one hour
  - CVO most often scheduled for > two hours;
  - CP and JD most often scheduled for one – two hours.

Delay Between Scheduled and Actual Start Time

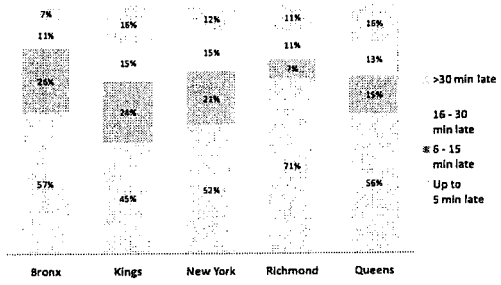
Scheduled vs. Actual Start Time
Court and Non Court Personnel Agree
Majority of Appearances Start on Time

Start Time	Court	Non-Court
Early up to 5 min late	52%	54%
6 – 15 minutes late	23%	21%
16 – 30 minutes late	13%	14%
>30 minutes late	12%	12%

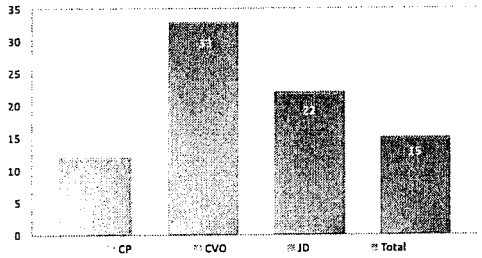
74% of Appearances Start Within 15 Minutes of Scheduled Start Time



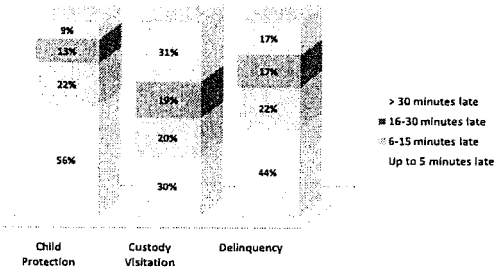
Delay Between Scheduled and Start Time by County
Kings has the most delay – Richmond has the least



Average Delay – Scheduled to Actual Start Time In Minutes by Specialty



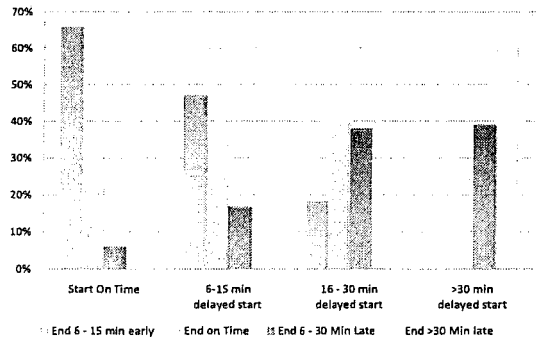
Distribution of Delay Between Scheduled and Actual Start Time by Specialty



Delay Between Scheduled and Actual Start Time Does Not Effect Appearance Duration

Delay	Average Duration (minutes)	Median Duration (minutes)
Up to 5 Minutes (On Time)	24	20
Up to 15 Minutes	21	15
Up to 30 Minutes	21	15
More than 30 minutes	23	15
Total	23	16

Appearances That Start on Time End Early

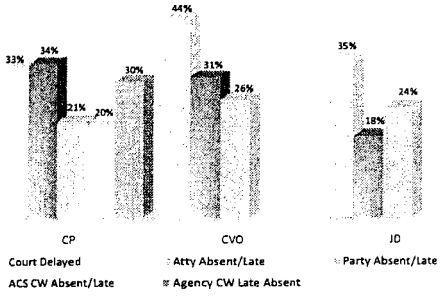


Findings: Delay Between Scheduled and Start Time

- Many appearances start on time
  - 74% start within 15 minutes of scheduled start
  - 52% start within 5 minutes of scheduled start
- Delayed start is not related to duration.
- Appearances that start early, end early.
- Appearances that start late, end late.

Key Participant: Delay, Absence, Lateness

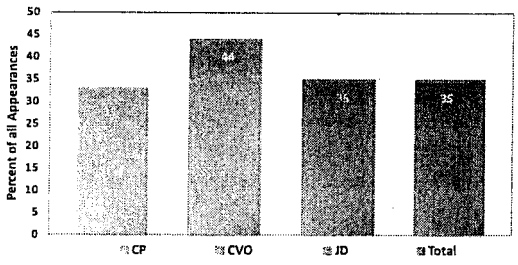
Participant Absence/Lateness: Overview



Totals do not equal 100% due to overlap and/or missing data.

Court Delayed?

Court Reported Delayed By Specialty



Reasons for Court Delay (N=2,116)

Prior Matter Ran Over	37%
Key Participant in Another Part (1% are emergency hearings)	25%
Double booking/Calendar Confusion	13%
Other Court (court late, not available, in meeting, etc.)	10%
Party, caseworker, other witness late/absent	5%
Off the record or settlement conference	3%
Building Issues (elevators, lines, fire drills, etc.)	2%
Other	5%

Key Participant In Another Part Not Reported as Frequently as Expected

		CP	CVO	JD
Number reporting delay because key participant was in another part		419	68	14
Participant Was In	CP	200	21	5
	CVO	31	15	1
	JD	29	1	7
	Emergency Hearing	31	3	1
	No Answer	128	28	

Findings: Reasons for Court Delay

Prior matter ran over and key participant in another part most frequently mentioned.

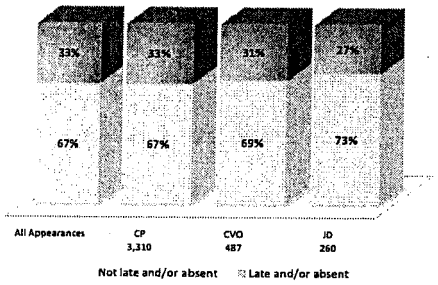
- Settlement conferences and absence of witnesses are infrequent causes of delay.
- Delays because key participant in another part less frequent than expected. Delay due to Emergency Hearings very rare.
- Building issues rarely reported as reason for delay (2%). Court late, unavailable, or in meeting reported in 10%.

Attorney Lateness/Absence

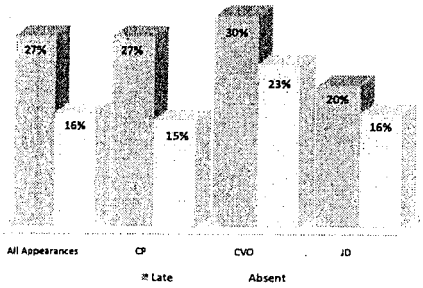
Reported Attorney Absence/Lateness

	Total	Court	Non-Court
Absent	14%	17%	14%
Late	22%	29%	24%
Absent and/or Late	33%	35%	31%

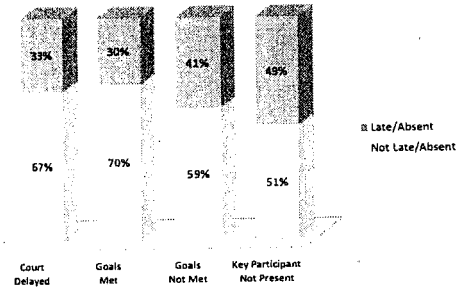
Attorney Absence/Lateness Overview



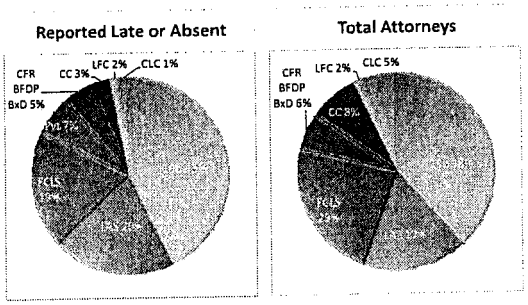
Attorney Absence (but not Lateness) Slightly More Frequent in CVO than in CP or JD



Attorney Lateness/Absence – More Common Where Goals Not Met or Key Participant Not Present



Attorney Absence/Lateness Proportional to Overall Percentage by Attorney Type



Compare Distribution - Total Sample and 18b late/absent		
	Total Sample	18b late/absent
Kings	34%	26%
Queens	20%	26%
CP	82%	81%
CVO	13%	12%
JD	6%	6%
Conducted by		
Judge	39%	34%
Court Attorney	20%	26%
Referee	40%	42%
Conferences	28%	35%
Fact Findings	15%	15%
PPH	25%	25%

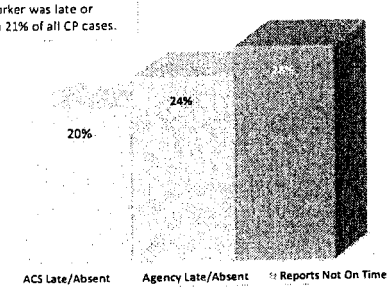
Findings: Attorney Lateness/Absence

- In one third of appearances an attorney was reported absent, late or both.
- Similar pattern for CVO and CP; slightly lower in JD.
- Distribution of attorney lateness/absence is consistent with distribution of attorneys by institutional affiliation (and by borough).
- 18b attorneys most often reported late/absent – however, there are also more 18b attorneys – 18b's are 38% of all attorneys and 43% of reported attorney lateness.
- No specialty is disproportionately affected by 18b lateness/absence.

Caseworker Absence/Lateness Reports Missing

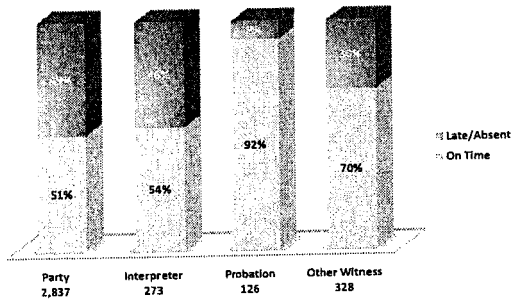
Child Protection Cases Only

A caseworker was late or absent in 21% of all CP cases.



Other Lateness/Absence

Other Participants' Attendance



Numbers of cases in which this participant's presence or absence/lateness was noted.

Recommendations

Recommendations to Judicial Officers

- **Improve calendar and time management**
  - Minimize probability of delay
  - Anticipate unavoidable delays
- **Honor time certain beginnings and endings.**
  - Avoid over-booking and double booking
  - Respect attorneys' need to get from one part to another and to consult with clients
- **Schedule time-certain appearances throughout the day** without overemphasizing the 9 AM to 11 AM time slot.
- **Make contact with colleagues when key participants are delayed.**
  - Reduce reliance on court-officer communication
  - Use tools provided by Electronic Check-in
- **Calendar "catch-up time" for completing matters that run over.**

Recommendations to Family Court

- Provide judicial officers with resources and training for improving time management skills
- Consider adopting a court-wide policy of including "catch up time" in judicial calendars.
- Expand use of UCMS as a management tool
- Encourage court-wide use of electronic check-in
- Improve interpreter assignment and scheduling practices.
- Make use of electronic check-in mandatory.

Recommendations to Attorneys

- **Remind clients and witnesses to arrive at court 30 minutes early in order to be at the part on time.**
- **Realistically assess time needed to complete an appearance and request the appropriate amount of time.**
  - Take into account the need to consult with clients when scheduling appearances.
  - Build time into schedule to get from courtroom to courtroom.
- **Avoid over-booking, double booking, or booking immediate consecutive appearances.**
- **Use electronic check-in to minimize running from part to part in the morning.**
  - Makes it easier to locate attorneys
  - Enables 9:00 AM and 9:30 AM appearances to begin on time.

Recommendations to ACS and Provider Agencies

- Assure that reports are timely provided to the court and to counsel for the parties.
- Improve caseworker scheduling and reporting practices.
- Assure that caseworkers are present for appearances at the time those appearances are scheduled.

Time Certain Appearances in NYC Family Court: Summary Report

Includes comprehensive and more detailed discussion of the data

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FAMILY COURT CASE CONFERENCING AND POST-DISPOSITIONAL TRACKING: TOOLS FOR ACHIEVING JUSTICE FOR PARENTS IN THE CHILD WELFARE SYSTEM

*Sara P. Schechter**

INTRODUCTION

Parents who participated in the two-day Conference on Achieving Justice: Parents and the Child Welfare System, held at Fordham University School of Law in the spring of 2001, consistently voiced a litany of complaints about their experiences in Family Court. As panelists and members of working groups, parents who had been respondents in Family Court reported a number of problems in the course of having their cases reviewed: they did not understand what was going on during the court proceedings; their lawyers never talked to them or explained the nature of the proceedings; they were never given an opportunity to talk in court or tell their side of the "story"; they were never consulted with respect to the formulation of the service plans for their families; and they had to spend inordinate amounts of time waiting for their cases to be called into court and had to return to court many times after repeated adjournments. Few parents perceived the court process as having contributed to the reunification of their families. At best, the court was seen as a rubber stamp for the child welfare agencies and, at worst, as an independent obstacle and source of delay.

The Conference produced numerous recommendations from all the working groups that seek to address the issues listed above, along with other defects in the New York child welfare system. In particular, the Working Group on the Judiciary and the Courts made certain recommendations about the use of case conferencing and post-dispositional tracking of cases that merit further elaboration. Case conferencing and post-dispositional tracking have been successfully tested in an experimental project instituted in the Family Court in Manhattan (i.e., New York County) and are now being implemented in the other boroughs of New York City.

* Judge, Family Court of the State of New York.

I. THE MODEL COURT

The pilot, officially called the "Special Expedited Permanency Part," was commonly known as the Model Court because it was the first major innovation to the Family Court of New York City, which was designated in 1998 as a model court by the National Council of Juvenile and Family Court Judges.[1] As a demonstration project, the Special Expedited Permanency Part functioned for two calendar years, 1999 and 2000, and the data discussed herein were collected during that period.[2] I was privileged to preside over the demonstration part, and although we are now known as Part 9 of the New York County Family Court, we continue to use the methodology and techniques we developed as the Model Court.[3]

The overriding goal of the Special Expedited Permanency Part, as its name implies, was to achieve faster permanency for children in the child welfare system. To make sure that the court process was not itself an agent of delay, we set standards for the Model Court to complete the fact-finding on child protective cases within sixty days of the filing of the abuse/neglect petitions and move forward to disposition within ninety days of such filing.[4] Everyone loves the axiom "justice delayed is justice denied," and that has never been more accurate than in Family Court. At the same time, however, New York has been justly proud of its tradition of providing due process for respondents in Family Court. Our challenge, therefore, was to devise a process that would be both fast and fair. In addition, we

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1. Funding for the pilot was provided by the federal government through the State Court Improvement Project, which directs funds to the highest court in each state for the improvement of child welfare proceedings. The New York Court of Appeals designated the Permanent Judicial Commission on Justice for Children to implement New York's projects in connection with these funds, which include the Model Court. Technical assistance with regard to the Model Court was provided by the National Council of Juvenile and Family Court Judges.

2. The Model Court handled 1509 child protective and permanency cases, including those for neglect, abuse, extension of placement, termination of parental rights, adoption surrenders, adoptions, status review of freed children pursuant to section 1055-a of the New York Family Court Act, and related cases such as those concerning paternity, guardianship, and custody/visitation. *See* N.Y. Fam. Ct. Act § 1055-a (McKinney 2001) (outlining the court's procedure in ensuring that adoptions proceed expeditiously).

3. Intake to the Model Court closed at the end of 2000, except for cases related to those already pending in the Model Court such as new neglect/abuse cases for after-born children and termination of parental rights cases stemming from the abuse/neglect cases that began in the Model Court. All cases that began in the Model Court remain within the jurisdiction of that court, however, and data on the progress to permanency of the children involved in those cases is still being collected.

4. In the Model Court, 63.5% of the neglect/abuse cases met the goal of disposition within the ninety-day period, as compared with 16.2% of such cases in the New York City Family Court in 1999, the most recent year for which data is available. By the end of the sixth month, 92.7% of the Model Court cases had reached disposition within the targeted time limit, as opposed to only 38.4% in the New York City Family Court.

wanted to restore to the Family Court a human element that had been drowned out as caseloads have risen and court proceedings have become more formal in the post-*Gault*[5] era. Finally, our invention had to work in the Manhattan Family Court, where child protective/permanency judges typically handle upwards of thirty cases per day.

The solution was to create a conferencing process that parallels the court process up to the point of disposition and then takes over the case upon disposition until permanency is achieved. This process entailed using quasi-judicial personnel such as court attorneys, referees, and court-employed social workers as conference facilitators and reviewers, intensively tracking cases from the day the petition is filed until the court's involvement is no longer required. In the Model Court we tracked not only children in foster care, but also those who were paroled or released to their parents under supervision.[6] Each court appearance was preceded by a conference, and at least two post-dispositional reviews were held before the permanency hearing in the fourteenth month after the child's removal from the home. Conferences up to the point of disposition were considered "off the record," as they often involved settlement discussions, whereas post-dispositional reviews (commonly called "back-end tracking") were tape-recorded. Tracking ended only when a child was discharged outright to the custody of a parent or relative, or when the child was adopted.

Initial reaction to the announcement of the Model Court was cautious optimism.[7] While everyone recognized the deficiencies of the old system (and no one said, "Don't fix it if it ain't broke"), our plan nevertheless met a degree of skepticism, as some practitioners seemed to hear "permanency" as a code word for "adoption." As the results of the plan started to materialize (and they were more dramatic than

5. *In re Gault*, 387 U.S. 1 (1967), was the seminal decision incorporating constitutional due process protections into Family Court. It was followed by numerous cases of similar ilk and statutory amendments codifying or anticipating *Gault* jurisprudence. For example, as a result of *Gault*, the child protective article of the New York Family Court Act, now article 10, was rewritten in 1970 "[t]o provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met." N.Y. Fam. Ct. Act § 1011 (McKinney 1999).

6. Our decision to track children released to their parents under supervision proved crucial to our success in preventing placement and achieving early reunification of those children, who had to be temporarily removed, with their parents, as agencies and law guardians were more willing to agree to let the children remain at home when they were assured of the court's close scrutiny.

7. Our potential had already grown in Manhattan based on the positive precedent set by the Family Treatment Court, a specialized part of the court that handles neglect cases where parental drug or alcohol abuse is alleged. The success of the Family Treatment Court, which began operations in 1998, demonstrated that change was indeed possible and that sometimes change was for the better.

even we had expected), everyone "put their shoulders to the wheel" and helped us shift the old paradigm.

Less than half of the children in the Model Court were subjected to placement,[8] more than a quarter were released to their parents or other family members,[9] and almost twice as many cases as those in the rest of New York County were either adjourned in contemplation of dismissal, withdrawn, or dismissed.[10] In the cases where foster care was required to avert imminent danger to the child, the median length of stay in foster care by a child subject to the Model Court was only 4.6 months, a sharp contrast to the twenty-seven-month median length of stay that was calculated for the rest of New York City in 1998.

Significantly, these results were achieved despite the Model Court's intake of exactly the same types of neglect/abuse cases as the other child protective parts—cases involving the mildest to the most severe allegations and those involving the most compliant to the most intractable of respondents.[11] In fact, our intake was random (i.e., without pre-screening), and the consent of the parties was not sought or required for a case to be assigned to the Model Court.

II. INTAKE

The Model Court methodology applies from the very beginning of the legal process; that is, from the day a child protective petition is filed. Before the case is called into the courtroom, respondents eligible for assigned counsel are introduced to the attorneys who will be representing them. A "resources" form is distributed to each respondent and law guardian, requesting a list of *all* relatives who might be considered as caretakers, as well as their addresses and telephone numbers, which will be consulted in the event the court grants a remand of the child.

When the case is called, the judge formally assigns counsel and checks the petition to see whether both parents' names, addresses, and birth dates have been correctly stated. If some of that information is listed as "unknown," the court will inquire of the respondents or other family members, who may be present, as to

8. More specifically, only forty-six percent of the children in child protective proceedings held in the Model Court, compared to fifty-eight percent in the Manhattan Family Court, were subjected to placement in 1999.

9. More specifically, twenty-seven percent of the children in child protective proceedings held in the Model Court, compared to twenty-five percent in the Manhattan Family Court, were released to their parents or other family members.

10. More specifically, twenty-four percent of the child protective cases brought in the Model Court, compared to thirteen percent in the Manhattan Family Court, were either dismissed, withdrawn, or adjourned.

11. The Model Court case mix was typical for a child protection and permanency part in New York City, where Family Court judges are assigned to one of three specialties: (1) delinquency and PINS ("persons in need of supervision"), (2) custody and domestic violence and (3) child protection and permanency.

whether they can supply the missing information. If a non-respondent parent's whereabouts are known, the court will order that the notice of pendency be sent to the absent parent immediately. If the name, but not the whereabouts, of the absent parent is known, a diligent search to find the parent is ordered. The early identification and involvement of non-respondent parents have proven to be an important key in preventing foster care placement. Even if the non-respondent parent is unable to take custody of his or her child for a reason such as incarceration, for example, that parent nevertheless may have extended family members who can come forward to care for the child. The caseworker is directed to explore *each* of the individuals listed on the "resources" form thoroughly until an acceptable caretaker for the child is located.

If a child is remanded to foster care at intake, the court inquires as to whether the respondents are requesting a hearing to challenge the remand of the child. If a respondent or law guardian requests such a hearing, the temporary custody hearing is calendared for a date within three court days, with a preliminary conference scheduled slightly earlier in the day to attempt to resolve some or all of the interim issues prior to the hearing.[12] As a radical departure from practice in the other family courts of New York, however, a preliminary conference is scheduled in the Model Court even if a respondent does not request a 1028 hearing.[13] In many other jurisdictions, courts routinely conduct temporary custody hearings (sometimes called "show cause hearings" or "shelter hearings") even absent a party's specific request.

In designing the Model Court, we debated whether, in our already overburdened court, it was wise to incorporate automatic preliminary hearings. The idea of a preliminary conference instead of a preliminary court hearing seemed to be a reasonable compromise between judicial expediency and parents' rights to be heard. To our surprise, the preliminary conference turned out to be the cornerstone of the Model Court process. In the few cases where circumstances prevented our conducting a preliminary conference, we found that the subsequent steps of the legal process were less effective.

III. PRELIMINARY CONFERENCE

The Model Court preliminary conference is a hybrid of legal and service planning aspects. The conference facilitator, a court attorney or the Model Court's social worker, conducts the conference following

12. Such hearings are colloquially called "1028 hearings" after the statutory section that authorizes them. N.Y. Fam. Ct. Act § 1028 (McKinney 2001) (requiring petitioner to establish that the child would be in "imminent danger" if they are returned to the respondent).

13. Where a 1028 hearing is not requested, the preliminary hearing will be scheduled within ten days of intake.

a checklist of topics. Although our conference rooms are tiny, we manage to squeeze anyone involved with the case who wishes to participate into the room. This routinely includes the attorney and the caseworker from the Administration for Children's Services ("ACS"), the caseworker of the agency providing foster care or preventive services, the respondents, the respondents' attorneys, and the law guardian for the child. Often other family members wish to sit in, and respondents sometimes bring their clergy or lay advocates. At the law guardian's recommendation, a child of appropriate maturity is also allowed to participate in a portion of the conference. However rarely, sometimes the attorney for the respondent advises the client to remain in the waiting room during the conference. Most respondents participate at least in the service planning aspects of the conference. A respondent's acceptance of services offered at the conference is not treated as an admission to the allegations contained in the petition, and although there is no promise of confidentiality, no reference to the conference will be included in the presentment agency's case at the fact-finding stage.

The preliminary conference agenda includes updates on efforts to locate and notify missing parents and to serve process on any respondent who has not yet appeared, as well as the distribution of open file discovery. With the legal issues out of the way, the conference then turns to service planning. Parents are encouraged to agree to begin services, although the court cannot order services without a respondent's consent until after a fact-finding inquiry (called an "adjudication" in many jurisdictions) has been conducted. The vast majority of respondent-parents agree to start services at this stage upon hearing that their compliance will help them get their children home sooner. When the respondents agree, a preliminary services order is prepared. These orders are extremely detailed, specifying precisely which caseworker should make each referral, to which facility the referral should be made, the type of service to be provided, and the anticipated starting date of the service. We learned to avoid using general terms such as "counseling," when we really meant to state "individual psychotherapy with a qualified mental health professional." Visitation orders are also prepared, and they are similarly specific as to the time and place of visits and what sort of supervision, if any, is required.

At the Fordham Conference, many parents complained that the rules seemed to change in the midst of the permanency planning process. After completing the services that the parents had thought were required, the parents found that a new caseworker had been assigned and additional requirements had been appended to their service plan. Careful court monitoring of service planning from the inception of the case decreases the likelihood of such misunderstandings. While further services may certainly be required

when new problems are revealed or when the parent has not benefited from the services originally offered, the continuity of the court process ensures that additional requirements will not be heaped on arbitrarily.

If the children cannot be returned immediately to the parents, even with the services agreed upon, every effort is made by the Model Court to identify an appropriate relative or friend who is able to care for the child. Usually the caseworker finds an acceptable caretaker from the "resources" form prepared by the respondents at intake. Sometimes further investigation is required, or the "resource" needs a few more days to prepare the home for the child (e.g., acquire additional furniture or install smoke alarms). In such cases, a follow-up conference is scheduled within a few days. Although it may seem contrary to the goal of family reunification, the Model Court considers, at this early stage, whether the proposed "resource" would be willing and able to care for the child in the long-term if the parents do not succeed in rehabilitating themselves. The preliminary conference provides an opportunity for the court to discuss these questions frankly with the proposed caretakers in the presence of the respondents. This concurrent planning not only benefits the child, but also serves as a way of putting the respondents on notice of just how much is at stake. A few fortunate children have numerous acceptable relatives vying for the privilege of caring for them. In those situations, the preliminary conference functions more as a family group conference where the family members, including the parents, are able to talk among themselves with gentle guidance from the facilitator to reach a consensus as to which relative is best suited to become the caretaker.

The final business of the preliminary conference is that of scheduling the settlement conference and fact-finding hearing. The parties are given adjournment slips for both dates, which also state the specific time when the case will be called. The case then goes before the judge for a brief period, which gives the respondents an opportunity to note on the record their agreement to the preliminary service order and allows the court to make any agreed upon changes to the status of the child, such as a parolee to a parent or relative. When a 1028 hearing has been requested, the preliminary conference usually resolves the issues that prompted the respondent to request a 1028 hearing. If the conference fails to achieve this effectively, however, the court conducts the 1028 hearing, since respondents in the Model Court are not required to give up any of their rights to have hearings.

The preliminary conference is more than the sum of its parts. Although no element of the conference is novel, and each of its tasks could probably be accomplished in some other setting, we have found that the preliminary conference had an almost magical, synergistic potency. It is an opportunity for the people who will be working

together to start getting acquainted with each other, express their points of view on the child protective matters at hand, and offer their suggestions.

At the Fordham Conference, participants from all backgrounds recalled experiences of communication breakdowns and a pervasive, almost paranoid, reluctance to share information within the child welfare system. The sheer size of New York City's child welfare system is largely to blame. Although telephonic and e-mail communications are indispensable in today's world, they are poor vehicles for discussion of the complex and emotion-laden issues involved in a child protective proceeding. Face to face contact is required.

At the Model Court preliminary conference, the participants sit down together to share ideas and information in a safe and neutral setting. While the respondents and their attorneys spend time together, ACS and foster care agency caseworkers meet and put a face on what might otherwise have been just another voice over the telephone. It is easier for parties whose professional relationships have begun on these open and collaborative terms to continue to work together effectively throughout the process.

At the Fordham Conference, several parents also mentioned that they had felt uncomfortable in court, that the course of the proceedings was hard to follow, and that somehow they never seemed to get their turn to talk. In this regard also, the Model Court preliminary conference adds a dimension to the legal proceeding. The atmosphere of the conference is serious and businesslike, but not as adversarial, formal, and intimidating as that inside the courtroom. Respondents and family members are able to speak freely and ask questions. Within this focused, but accommodating environment, the course that the child protective case will follow is charted. Each person's role is explained, and each participant leaves the conference with marching orders in hand.

IV. SETTLEMENT CONFERENCE

The parties' next contact with the court is a settlement conference, which is conducted by an experienced court attorney approximately forty-five days after the intake day. One characteristic of the legal culture of the Manhattan Family Court has always been a low settlement rate. In this difficult environment, our project aspired not only to negotiate settlements and avoid fact-finding hearings in the majority of cases, but also to learn in advance of the hearing date which cases would settle and which would go to trial. While we made definite progress,[14] this aspect of our project inflicted the most wear

14. The trial rate in the Model Court was thirty-nine percent. The Office of Court Administration does not keep trial rate statistics, but in a small sample counted by

and tear on us. With experience and acceptance, the other components of the Model Court have become "plug-and-play," but each settlement conference has to be hand-cranked like an old Victrola. Nevertheless, we continue to work hard to arrive at settlements for three reasons: (1) court time is precious and is not to be squandered on matters that are unprovable or indefensible; (2) the purpose of a child protective proceeding is to protect the child and not to stigmatize and humiliate the respondents; and (3) abusive and neglectful parents need to acknowledge their problems in order to successfully overcome them. When the parents have wholeheartedly participated in the services ordered in the preliminary conference, the chances of settlement improve dramatically. As part of a settlement negotiation, ACS might offer an adjournment in contemplation of dismissal, or the respondents might be prepared to admit to some of the allegations. Often, it is possible to parole the child at this time or to fix a future date for parole contingent upon the respondents' completion of certain services that are already in progress.

If a case is settled, it goes before the judge that day for the settlement to be placed on the court record. The fact-finding date that had been scheduled at the preliminary conference is then vacated, and the time is "recycled" for 1028 and other emergency hearings. Even if the case cannot be settled, however, the settlement conference is not wasted because it provides an opportunity for the court attorney conducting the conference to check whether the service plan is on track. If the respondents have not yet begun to utilize the services as required in the preliminary services order, the Model Court's social worker is available to assist them with difficulties that may have developed concerning funding or snags in the referral process.

If the settlement process fails, it becomes necessary to double-check the trial-readiness of the case. At the Fordham Conference, parents who had been respondents in Family Court told of how they deplored the days wasted waiting for their cases to be called, only to find that the matter was adjourned due to the presentment agency's lack of readiness. Recommendations for better calendar control were issued by several working groups. Successful time-certain scheduling, however, requires much more than writing the name of the case in the relevant part's diary. The court must have an accurate idea of which cases will go forward and how much court time each case will require. In the Model Court, this is the responsibility of the person conducting the settlement conference.[15] That person makes sure that the

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hand in October 1997 to provide baseline data for the Model Court, the trial rate in the Manhattan Family Court child protective/permanency planning parts was sixty-five percent.

15. In fact, the Office of Court Administration recently created a new job title, Case Coordinator, which will be filled by persons who will assume these duties of managing the time requirements and scheduling of cases as they proceed through

witnesses are available, subpoenaed documentary evidence has arrived, any discovery materials that became available subsequent to the preliminary conference have been shared, orders to produce incarcerated respondents have been submitted to the appropriate correctional facilities, and the amount of time set aside on the court calendar for the trial is sufficient. If more or less time will be required than was estimated at the preliminary conference, the schedule is adjusted immediately.

V. DISPOSITIONAL CONFERENCE

After the fact-finding has been conducted, whether through admission or after trial, the case proceeds to disposition. Again, at the conclusion of the fact-finding, the parties are given two adjournment slips, both establishing times certain for the dispositional conference and a court date for disposition of the case. In child protective/permanency parts that have not yet adopted the Model Court methodology, the disposition is the first point when the court can take a serious look at the service plan. In the Model Court, of course, the case has already been following a court-ordered service plan for several weeks.

In preparation for disposition, judges generally order an Investigation and Report ("I&R"). When an I&R is ordered, the ACS case is transferred to a specialized unit within the ACS field office in charge of the case. The caseworker who prepares the I&R assembles post-filing information from a variety of sources, particularly from the worker assigned to the family in the foster care agency under contract with ACS. After considerable experimentation, we found that in the Model Court we rarely need an I&R. This step is unnecessary in the Model Court because the foster care worker attends the conferences in person and relays information directly to the court. Since the preparation of the I&R is often the cause of delay, eliminating this step aids us significantly in meeting our goal of having cases reach disposition within ninety days after the petition is filed. We require only that the caseworker already assigned to the case obtain updated reports from all the service providers.

The purpose of the dispositional conference, which is conducted by the Model Court's social worker, is to make sure all the necessary reports are obtained, discuss any amendments to the service plan that might be appropriate, and agree upon the actual language of the dispositional order. If the disposition is agreed upon, the case comes before the court to allow for the disposition to be stated on the record. Usually, however, some information is missing on the conference day, and the parties must return on the previously scheduled court date. Contested dispositions are extremely rare in the Model Court,

court in all child protective/permanency parts.

although the court is always available to conduct a hearing if the parties cannot agree. All court orders from the Model Court are distributed to the respondents and the caseworkers right outside the courtroom immediately following each court appearance.

VI. POST-DISPOSITIONAL REVIEWS

Service plans require constant attention and oversight. When we were designing the Model Court, we imagined that the primary business of the post-dispositional reviews would merely be to mark off the service plan those services that had been completed. Thus, we only required two post-dispositional reviews: the first, approximately ninety days after disposition of the case and, the second, about sixty days before the expiration of the supervision or placement order, giving the referee discretion to schedule more reviews as needed. In practice, however, reviews have taken place much more frequently, and this phase of the Model Court, which everyone calls "back-end tracking," is its most popular feature.

The lesson we learned from back-end tracking is that things do indeed fall apart. We realize in retrospect that it was naive to expect that the service plans we put so much effort into creating would simply proceed on their own, free of problems or setbacks. On the contrary, we found that the possible causes of derailment are infinite: some of the programs that comprised vital parts of the service plans might have closed; a program might have discovered, after four sessions, that it does not accept the parents' health insurance; a parent might have lost his or her job, and with it his or her health insurance; parents might have moved to another borough and requested a referral closer to the new home; parents might have been discharged from the program for noncompliance, but may wish to try again in a new program; and the therapist might have completed his or her internship or residency, and the parent might have been put on a wait list for a new therapist. Sorting out the various imperfections of the service delivery system as exposed by the back-end tracking process will require initiatives that stretch beyond any individual case, and, using the experience of the Model Court, we are working with other child welfare system stakeholders to take the required steps in achieving that end.[16]

On a case-by-case basis, however, back-end tracking is instrumental in holding the case on course. The value added to permanency planning by the post-dispositional review process is in the court's ability to project an overview of the course each case takes (or "see

16. With the technical assistance of the National Council of Juvenile and Family Court Judges, the New York Family Court was able to establish improved methods of communication and collaboration with other child welfare system stakeholders, such as ACS and law guardians, over the past three years.

the forest," if you will). For a variety of reasons, including high caseworker turnover and vacancy rates, agencies tend to lose sight of the time constraints built into the permanency planning process.[17] When a permanency hearing is held after a child's first year in care,[18] parents should not be told, "Time's up," if throughout that previous year, everyone had behaved as if they had all the time in the world. The back-end tracking process, therefore, is relentlessly goal-oriented.

Because so much information is shared during the post-dispositional reviews, permanency hearings, which are conducted by judges in the Model Court, are thorough and substantive. Often, the children are already home on trial discharge at the time of the permanency hearing, or a date is set for the trial discharge process to commence. The decision to begin a trial discharge is a point at which a "push" from the court is often required to overcome bureaucratic paralysis. The simple act of setting a target date for the trial discharge to begin is usually a sufficient catalyst. Occasionally, the referee conducting the post-dispositional review will find that the permanency goal needs to be changed before the child's fourteenth month in care. In such a case, the referee will direct the agency to file a petition for a permanency hearing immediately, and the matter will then come back before the judge.

Since we first implemented the Model Court, ACS institutionalized its own conferencing system and also reinforced the service plan reviews held at the child care agencies. We found that the two conferencing processes were complimentary and that the agency conferencing did not obviate the need for court conferencing and back-end tracking. When the court was told that an ACS conference was about to occur, the court conference or review was usually scheduled to follow the conference. When a productive ACS conference had taken place, the court's preliminary conference was shorter, richer, and more productive, and fewer follow-up court conferences were required.

Court conferences differ from agency conferences, however, in ways that matter to parents. At court, the performance of both the agency and the respondents is placed under scrutiny. Respondents in court are usually represented by counsel, contrary to their experiences during service plan reviews, where they are rarely able to bring an attorney. The court is mindful of the legal rights of absent parents and is able to order the production of prisoners. The court is also able to subpoena the production of records and reports from recalcitrant

17. Where a child has been in foster care for fifteen of the most recent twenty-two months, a proceeding to terminate parental rights must be filed by the foster care agency unless compelling reasons dictate otherwise. *See* N.Y. Soc. Serv. Law § 384-b(3)(l) (McKinney Supp. 2001).

18. N.Y. Fam. Ct. Act § 1055(b)(ii) (McKinney 2001) (stating that placement cannot be extended or continued until the court holds a permanency hearing).

service providers. Finally, the court is viewed as a more level playing field, and its power as the final arbiter is recognized.[19]

Conferences and post-dispositional reviews help parents receive justice in Family Court. They increase parents' understanding of the court process and enhance parents' ability to state their case. They tie the service planning process to court proceedings so that the court proceedings become more relevant and the service planning process more equitable. Because conferencing and post-dispositional reviews improve communication and clarify expectations among the participants in the legal process, they are tools that help keep families together.

19. At the permanency hearing, the court must either approve or modify both the permanency goal and the service plan. *Id.* § 1055(b)(iv)(B)(1) (addressing the court's role in considering whether placement extension is consistent with the permanency goals established in the child services plan).

GIVING THE CHILDREN A MEANINGFUL VOICE: THE ROLE OF THE CHILD'S LAWYER IN CHILD PROTECTIVE, PERMANENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS[1]

This article on the role of lawyers of the Juvenile Rights Practice of The Legal Aid Society represents policy guidelines of the Juvenile Rights Practice. These guidelines are the culmination of a process during which the JRP reexamined the proper role of Juvenile Rights attorneys, particularly in light of Chief Judge Judith S. Kaye's new Rules of the Chief Judge and recent New York State Bar Association standards that require lawyers for children like our Juvenile Rights lawyers to provide client-directed representation and not simply substitute the lawyer's judgment for the wishes of a child client.

Part One: Introduction

Abuse and neglect (child protective) and termination of parental rights proceedings in family court fit the traditional model for adversarial proceedings. A petition is filed by the child protective or foster care agency which is prosecuting the case. The agency is represented by counsel, who will marshal evidence and make arguments supporting the agency's position and otherwise attempt to achieve the agency's litigation goals. The agency's goal is to protect the child's interests as the agency perceives them, and thus the agency's lawyer will provide a mature perspective on the child's interests. Named as respondents in the proceeding are the child's parents, or, in a child protective proceeding, other persons legally responsible for the care of the child who are charged with acts constituting neglect and/or abuse. Typically, each respondent is assigned a different lawyer, who acts as loyal "defense counsel" and marshals evidence and makes arguments in support of the respondent's position, but also may advocate for the child's interests as the respondent perceives them. Often, the respondents have conflicting legal interests and perspectives, which are reflected in their lawyers' distinctive advocacy. In addition, it is not uncommon for non-respondent parents, and/or other relatives such as grandparents, to intervene in the proceeding to seek custody of the children. In many instances, these parties are represented by counsel as well.

The judge, of course, is charged with responsibility for making legal determinations regarding, *inter alia*, the sufficiency of the evidence supporting the allegations in the petition, and the appropriate disposition. Because these proceedings involve the safety and welfare of children, appellate courts have made it clear that judges have a duty to gather as much evidence as possible so that well-informed determinations can be made.

To ensure that another key perspective is considered by the judge, the subject child also is assigned a lawyer, who, in the vast majority of cases filed in New York City, is employed by The Legal Aid Society. Against this backdrop of competing parties and lawyers, the role of the child's lawyer seems clear. If, as they are bound collectively to do, the judge, and the lawyers

[1] The initial draft of this article was prepared by Gary Solomon, the Director of Legal Support for The Legal Aid Society's Juvenile Rights Practice, and was revised during a collaborative process involving other Society staff. This final version represents the official policy of The Legal Aid Society.

representing the agency, the respondents and any intervening relatives marshal all relevant evidence and also invoke the child's interests, the child's lawyer should be free to focus on the one missing ingredient in this adversarial process: presentation and advocacy of the child's expressed position, as developed and refined through the lawyer-client counseling process.

Despite all this, the role of a child's lawyer in Family Court proceedings has long been a controversial subject for academics and court practitioners. Academia has produced a surfeit of thought-provoking literature, staking out a number of highly nuanced positions, and the subject is addressed in ethics codes and opinions and in court decisions. While everyone agrees that the lawyer's counseling role is crucial when the client is a child, and that the lawyer and the child should develop primary litigation goals, and positions on other matters, in a collaborative process orchestrated by the lawyer, there are several schools of thought with respect to whether the lawyer, or the child, is entitled to make those litigation decisions that an adult client would be entitled to make. Among the "camps" that have been identified are: 1) those favoring a traditional attorney's role (representing what the child client wants, or the child's expressed interests); 2) those favoring a guardian *ad litem* role (representing what the lawyer determines to be in the child's best interest); 3) those who advocate lawyers' assuming one form or another of hybrid role -- somehow representing both positions to the court, or representing what the child wants unless the child's preference fails to meet some standard of reasonableness, or asking the court to appoint a separate GAL or attorney where client wishes and perceived interests divide; and 4) those who call for the child's lawyer to serve as a neutral fact finder presenting all relevant information to the court to ensure a full and comprehensive consideration of the child's actual circumstances. "For most attorneys, the age of the child (and, for some, the issues at stake) will affect which role is assumed. Those advocating the traditional attorney approach necessarily exclude children too young to speak, and most require that the children be old enough to engage in a rational decision-making process about the particular issue in question. Those advocating the guardian *ad litem* role for most children, generally still concede that at some age -- at least in the late teenage years -- children should be able to direct their counsel, on some, if not all, issues."[2]

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[2] Emily Buss, "*You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1700-1705 (1996); *see also* Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1002 (2006) ("Most of the controversy . . . has focused on how to determine when the child has reached [the age at which she is entitled to client-directed representation], how to represent the impaired child, and the relationship between the role of guardians ad litem and the role of lawyers for children"); Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 33-34 (2000) ("In sum, the discussion often boils down to the questions of when is a child capable of directing the objectives of the representation, and what role the attorney should play for the child who lacks this capacity").

For additional discussions of the various models of representation, *see* Jean Koh Peters, *Representing Children in Child Protective Proceedings* (Lexis Law Publishing, 3rd Ed. 2001); Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001); Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 32 LOY. U. CHI. L.J.; Robert E. Shepherd, Jr., "*I Know the Child is My Client, But Who Am I?*," 64 FORDHAM L. REV. 1917 (1996).

With respect to representation of children in New York, *compare* Angela D. Lurie, *Representing the Child-Client: Kids are People Too*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 238-239 (1993) (author recognizes hybrid role of lawyer assigned as "law guardian," who should abide by wishes of children who are capable of making "considered

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The Legal Aid Society's Juvenile Rights Practice is committed to the zealous representation of its clients, and to granting clients the opportunity to participate in decision-making to the greatest extent possible. We believe that every client who can communicate his or her desires is capable of assisting her lawyer in important ways. With the respondents' and petitioner's lawyers, and any intervening parties' lawyers, focused on their clients' interests, and the judge focused on reaching a legally sound result, only the child's lawyer can provide the child with meaningful representation, and provide the court with factual information and legal arguments that enable the court to fully consider the child's unique perspective and thus make a truly well-informed decision.

Since the "children" involved in these proceedings can be as old as twenty, no one doubts that some of them are entitled to make litigation decisions that an adult client would make in similar circumstances. Before those decisions are made, however, there must be a dynamic lawyer-client counseling process, in which the lawyer, among other things, describes the nature of the proceeding, sets out and discusses the various options, educates the child about the advantages and risks involved in different courses of action, and works together with the child in developing her litigation goals and the steps designed to achieve them. Needless to say, when representing very young children, the lawyer must engage the child in a particularly far-reaching process. Viewed in this way, the representation is controlled neither by the lawyer nor the child: it is a collaboration between the two that is designed to assist the child in making well-informed and sound decisions. Thus, when we refer in this article to "client-directed" advocacy, we mean that the lawyer must take full account of the child's wishes, and when, at the end of the counseling process, there remains a conflict between what the child wants and what the lawyer believes is in the child's legal interest, the lawyer will sometimes be bound by the child's decision.

When does a child have the capacity to make decisions? At one end of the spectrum are infants, toddlers and verbal children who are unable to fully comprehend the nature of the proceeding and the issues raised, and communicate a preference and comprehensible reasons for it. The lawyer usually makes decisions for those children. At the other extreme are teenagers, who, it is generally agreed, do have the capacity to make decisions. In addition, for many years there has been a consensus among child advocates that a child usually has acquired this capacity by age ten. We go one step further, and agree with those who have argued that many children have this capacity by the age of seven, eight or nine. Indeed, seven-year-old children in New York can be charged with juvenile delinquency and, in such a proceeding, are entitled to constitutionally effective, client-directed representation regardless of what risks may be present in the child's home environment.

This model of representation clearly falls within the range of practices permitted under New York law, and is true to the prevailing view among academics and child advocates. This is made clear in the practice guide/discussion that follows, in which we have referenced New York's statutes, case law and court and professional responsibility rules, as well as academic and

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judgment" and make decisions on behalf of children who are not) *with* Diane Somberg, *Defining the Role of Law Guardians in New York By Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 566 (2003) (author prefers "best interests" model for law guardians in child protective proceedings).

other non-binding authorities, in an effort to synthesize the best ideas.

Part Two: Legal Background

New York Statutes and Court Rule

In child protective, permanency and termination of parental rights proceedings, the child has a statutory right to counsel. N.Y. Fam. Ct. Act §§ 249(a), 1016, 1090(a) (West, Westlaw, through 2007 legislation).[3] According to N.Y. Fam. Ct. Act ("FCA") § 241:

> [The family court] act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court.

FCA §§ 242, 249(a), and 1016 also state that the "law guardian" is assigned to "represent" the

[3] A respondent parent has no automatic right to assigned counsel under the Federal Constitution. *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 32 (1981) (Constitution does not require appointment of counsel in every parental termination proceeding; but, when parent's interests are at their strongest, State's interests are at their weakest, and risks of error are at their peak, presumption against right to appointed counsel might be overcome). Thus, it could be that the subject child has no such right. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 133-34 (1984).

However, it appears that the child has a right to counsel under the New York State Constitution. *Matter of Jamie TT.*, 191 A.D.2d 132, 136-137 (3d Dep't 1993). In *Jamie TT.*, the Third Department noted that "Jamie had a strong interest in obtaining State intervention to protect her from further [sexual] abuse and to provide social and psychological services for the eventual rehabilitation of the family unit in an environment safe for her," *id.* at 136, but there is no reason to think the State constitutional right to counsel exists only in abuse cases. This State constitutional right includes the right to the *effective* assistance of counsel. *Matter of Jamie TT.*, 191 A.D.2d at 136-137; *Matter of Erin G.*, 139 A.D.2d 737, 739 (2d Dep't 1988); *see also Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1360-1361 (N.D. Ga. 2005) (employing three-part federal test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), court concludes that children have due process right to counsel under Georgia State Constitution).

The process by which the lawyer's effectiveness is evaluated depends upon the lawyer's advocacy role. When the lawyer is providing client-directed representation, the lawyer's effectiveness under constitutional and tort law is tested as it would be in a case involving an adult client. In contrast, when the lawyer makes decisions on behalf of a child who lacks capacity to direct the representation, the evaluation also takes into account the lawyer's effectiveness in making decisions on behalf of the client. *Marquez v. The Presbyterian Hospital In The City Of New York*, 159 Misc.2d 617, 624-625 (Sup. Ct., Bronx County, 1994) (law guardian should ascertain and consider all relevant facts, and then exercise discretion in good faith and to the best of the lawyer's ability).

child.[4]

Because FCA § 241 provides the child with a primary right to "counsel of [her] own choosing," it appears that the hybrid term "law guardian," which has generated much of the confusion in New York,[5] merely substitutes for the term "counsel" when the lawyer has been assigned rather than chosen. Thus, a law guardian is *counsel for the child*, not a guardian *ad litem*, and has a traditional attorney-client relationship with the child. This is the view recently adopted in Section 7.2 of the Rules of the Chief Judge, which is entitled "Function of *the attorney for the child*" (emphasis supplied).[6]

Moreover, counsel chosen by the child certainly is obligated to advocate in a manner consistent with the child's stated position: indeed, if the lawyer did otherwise, the child would be entitled to dismiss the lawyer and choose another one.[7] Since the Legislature cannot have contemplated that children represented by an assigned "law guardian" have inferior rights, it follows that an assigned lawyer cannot substitute her own judgment for that of the child merely because the child is not in a position to choose counsel. And, because §241 defines *all* lawyers for the child -- the Family Court Act does not contain separate definitions applicable in each type of proceeding -- there is no reason to believe that lawyers for similarly situated children in different types of proceedings should assume different roles.

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[4] For comprehensive information regarding the approaches taken by other states, *see* Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. at 1074-1081.

[5] Andrew Schepard, *The Law Guardian: A Need For Statutory Clarification*, N.Y.L.J., Sept. 14, 2000, at 3 ("The unique New York term 'law guardian' mixes the contradictory role of guardian and attorney in its title and a single person. It thus sends an ambiguous message. . ."); Douglas J. Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241 ("The convoluted wording of this section reflects: (1) the underlying ambivalence of its drafters about the role of Law Guardians, and (2) the problems inherent in establishing guidelines for the representation of young people of varying degrees of maturity").

This ambiguity and ambivalence were clearly on display in *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113 (2d Dep't 1990), where the Second Department noted that "in disputed custody/visitation litigation, the appointment of a law guardian has been recognized as appropriate and helpful to the court. The attorney may act as champion of the child's best interests, as advocate for the child's preferences, as investigator seeking the truth on controverted issues, or may serve to recommend alternatives for the court's consideration (citations omitted)." *Id.* at 117.

[6] *See also Cervera v. Bressler*, 50 A.D.3d 837 (2d Dep't 2008) (court notes that at time of trial proceeding, attorney for child was "then known as the law guardian"); *New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, Preface* (2007) (term "law guardian" is not used "because the label is outdated and confusing to attorneys and parties alike"); *State Bar Ethics Opinion 656*, N.Y.L.J., Jan. 21, 1994, at 2 ("Several commentators have noted that the [Family Court] Act's drafters apparently envisioned law guardians to be 'the equivalent to legal counsel,' even if the term 'guardian' assigns to these lawyers some of the additional investigative and parental functions of the guardian ad litem"). Accordingly, for purposes of the rule in DR 7-104(A)(1), a child represented by a law guardian is considered a "party," and, therefore, neither the respondent's lawyer nor the petitioner's lawyer may communicate with the child without the consent of the law guardian. *Id.* The child also enjoys the protection of the attorney-client privilege. *Matter of Angelina AA.*, 211 A.D.2d 951, 953 (3d Dep't 1995) (law guardian could not testify where child had not waived privilege, since child had attorney-client relationship with law guardian).

[7] *Matter of Elianne M.*, 196 A.D.2d 439, 440 (2d Dep't 1993).

Again, this is the view adopted in §7.2 of the Rules of the Chief Judge, which states that in juvenile delinquency and person in need of supervision proceedings, "the attorney for the child must zealously defend the child," and that in other proceedings, the child's attorney "should be directed by the wishes of the child" if "the child is capable of knowing, voluntary and considered judgment," even if the attorney "believes that what the child wants is not in the child's best interests." The attorney "would be justified in advocating a position that is contrary to the child's wishes" when the attorney "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...." Consistent with FCA § 241, Rule 7.2 also states that "[w]hen the attorney overrides the child's wishes, the attorney must inform the court of the child's expressed preference "if the child wants the attorney to do so." Rule 7.2 was promulgated shortly after, and is consistent with, the New York State Bar Association's Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (*see* below).

New York Professional Responsibility Rules and Standards

Courts do take State professional responsibility rules into account when deciding related matters,[8] which brings us to the New York State *Code of Professional Responsibility*. The Code's Disciplinary Rules do not specifically cover these issues, but they are addressed in the Code's Ethical Considerations.

The general rule is that the client makes fundamental litigation decisions. "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions," but "otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."[9] Disputes concerning what is best for the client must ordinarily be resolved in the client's favor. The lawyer need not personally approve of the client's position.[10] While appearing in court, a lawyer should refrain from expressing a personal opinion concerning the matter at hand.[11]

However, in discharging his or her duties, a lawyer may take into account a client's disabilities. "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition *or age* of a client. . ." (emphasis added).[12] "Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts

[8] *See, e.g., People v. DePallo*, 96 N.Y.2d 437, 441 (2001).

[9] N.Y. Code of Prof'l Responsibility, *EC 7-7*.

[10] *Id., EC 7-17*.

[11] *Id., EC 7-24*.

[12] *Id., EC 7-11*.

additional responsibilities upon the lawyer."[13] "If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client."[14]

Accordingly, while the lawyer must "obtain all possible aid" from the child, and thus should take her cue from the child to the greatest extent possible, the State Code does open the door to decision-making by lawyers when, after the lawyer-client counseling process has played out, the child and the lawyer cannot agree. However, the State Code provides no guidance to the lawyer who wonders *when* age should be considered a "disability" that permits the lawyer "to make decisions on behalf of the client."[15]

The New York State Bar Association's ("NYSBA") Committee on Children and the Law issued, in 1996, its *Law Guardian Representation Standards*, which have guided courts and practitioners.[16] The Standards admonished law guardians not to advocate for their own view of a child's best interests: "By requiring the law guardian to protect the child's 'interests' (rather than promote the 'best interests' of the child), the Legislature clearly intended law guardians to perform a function distinct from the judicial assessment of the best interest of the child."[17] The law guardian was instructed to determine the child's "interests," involve the child in decision-making to the greatest extent possible, and weigh the child's wishes while taking into account the child's level of maturity.[18] The child's "interests" were not defined, and the 1996 Standards "punted" on the issue of age guidelines. The NYSBA Committee on Children and the Law's *Law*

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[13] *Id., EC 7-12*.

[14] *Id. See* Subha Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. 619, 637 (2003) (EC 7-12 "actually grants overt authority for the lawyer to Amake decisions on behalf of the client").

[15] *See* Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. at 637 ("Although both Ethical Considerations 7-11 and 7-12 seem rather detailed, they provide little direction for the lawyer of the child").

[16] *See, e.g., Matter of Dominique A. W.*, 17 A.D.3d 1038, 1039-1040 (4th Dep't, 2005), *lv denied* 5 N.Y.3d 706 (while criticizing law guardian who acknowledged that he had never met the child, court cites client contact requirements in *Guidelines for Law Guardians in the Fourth Department* and *State Bar Law Guardian Representation Standards*); *Matter of Jamie TT.*, 191 A.D.2d at 137 (State Bar standards encourage law guardian to be familiar with possible evidentiary material and to question and cross-examine witnesses for a full presentation).

[17] *New York State Bar Association Law Guardian Representation Standards, Introductory Commentary to Child Protective Proceedings Standards* (1996).

[18] *See supra* note 17, *Child Protective Proceedings Standards* A-2, C-1, C-2, C-4, D-7, D-8, E-2, E-3, F-1, F-3.

Guardian Representation Standards, Volume II: Custody Cases (3d Ed., 2005) avoided the age issue as well.

In June 2007, the Committee on Children and the Law replaced the 1996 standards with new *Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings*. Unlike the 1996 version, these standards do take sides in the longstanding controversy, and stake out definitive positions, regarding the role and responsibilities of the child's lawyer.

"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."[19]

Other Authorities

The traditional advocacy approach "appears to represent the majority approach among legal academics" in the United States.[20]

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[19] *New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, Standard A-1* (2007); *see also Standard A-3* (attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he 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 "[t]he 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").

Like § 7.2 of the Rules of the Chief Judge, the State Bar Standards recognize that even when the attorney determines that the child lacks capacity, the attorney must communicate the child's expressed wishes to the court "unless the child has expressly instructed the attorney not to do so." *Standard A-3*. One writer, discussing § 7.2, wonders how the child's attorney, having determined that "the child lacks the capacity for knowing, voluntary and considered judgment," can nonetheless deem the child capable of "mak[ing] a knowing, voluntary and considered judgment as to whether the attorney should inform the judge of his or her articulated preference." Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3. This is a fair point, yet it is likely that Rule 7.2 and Standard B-3 have in mind only cases in which a child with decision-making capacity has advised the attorney to take a position adversarial to the child's parents, but, for personal reasons, prefers that the attorney refrain from disclosing the child's expressed preferences.

[20] *See, e.g.*, Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84

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For example, standards issued by the American Bar Association ("ABA") take the view that when the lawyer is assigned under State law as *counsel for the child,* the lawyer cannot properly perform the functions of a guardian *ad litem*. If the child is capable of communicating a preference, the lawyer must provide client-directed representation. "These Standards do not accept the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation."[21] Because "the child is a separate individual with potentially discrete and independent views," "the child's attorney must advocate the child's articulated position * * * [i]n all but the exceptional case, such as with a preverbal child."[22] In an effort to preserve the role and functions of a lawyer, the ABA also asserts that when the child is unable to express a position or is incapable of understanding the legal or factual issues, the lawyer "should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem."[23]

The National Association of Counsel for Children ("NACC") has responded to the ABA with standards that provide additional flexibility for lawyers representing very young clients. "While the default position for attorneys representing children under [NACC] standards is a client directed model, there will be occasions when the client directed model cannot serve the client and exceptions must be made. In such cases, the attorney may rely upon a substituted judgment process (similar to the role played by an attorney guardian ad litem), or call for the appointment of a guardian ad litem, depending upon the particular circumstances, as provided herein. To the extent that a child cannot meaningfully participate in the formulation of the client's position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child's and formulate and present a position which serves the child's interests."[24]

Requesting assignment of a GAL does not appear to be an option available to the child's lawyer in New York; the Legislature has provided for assignment of a lawyer who either advocates for what the child wants or substitutes judgment, and has not authorized assignment of

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CORNELL L.REV. 895, n.4 (1999).

[21] *A.B.A. Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Commentary to Standard B-3* (1999).

[22] *See supra* note 21, C*ommentary to Standard A-1*; *see also Standard A-1* ("The term 'child's attorney' means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client"); *Standard B-4* ("The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation").

[23] *See supra* note 21, *Commentary to Standard B-4(1)*.

[24] *Nat'l Assoc. of Counsel for Children, A.B.A./N.A.C.C. Revised Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Standard B-4(1)* (1999).

a guardian *ad litem* as well.[25] However, in other respects, the NACC 's approach, which permits the lawyer to "substitute judgment," is more suitable for New York lawyers than the ABA's approach, which, on its face at least, requires lawyers to advocate for the expressed wishes of toddlers.

The Questions Left Unanswered

Although it is now clear that the default position for children's lawyers in New York is to advocate for the child's wishes, important issues remain unsettled. When does a child "lack[] the capacity for knowing, voluntary and considered judgment" within the meaning of § 7.2 of the Rules of the Chief Judge. What is "a substantial risk of imminent, serious harm to the child" within the meaning of § 7.2? Is there an approximate age at which a child is deemed competent to make decisions that bind the lawyer? Family Court Act § 241 requires the lawyer to protect the child's interests, not "best" interests, so when the lawyer makes decisions on behalf of the child, what are the "interests" the lawyer should protect? Does the child's lawyer protect the child's "legal" interests under the applicable statutes, and consider the child's "best" interests only when they are relevant to a determination of the child's "legal" interests?

Part Three: JRP'S Representation Model

Counseling the Client and Developing a Litigation Strategy

Lawyers are better able than clients to recognize when goals are unrealistic or may not actually advance the client's broader interests. Needless to say, this is especially true of lawyers who represent children. Thus, it is vitally important for the child's lawyer to work hard to help the child understand the lawyer's perspective and thinking. Also, because there are limits to a young child's ability to comprehend the lawyer-client relationship and to accurately communicate her wishes and goals, the lawyer needs to "educate the client about the lawyer-client relationship," and, when "confusion derives from developmentally imposed obstacles, the lawyer's attempt at clarification must engage that developmental process."[26]

"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

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[25] *See Fargnoli v. Faber*, 105 A.D.2d 523, 524 (3rd Dep't 1984) (law guardians, not guardians *ad litem*, should be appointed when minors are subject of proceedings in Family Court); *Anonymous v. Anonymous*, 70 Misc.2d 584, 585 (Fam. Ct., Rockland County, 1972) ("It would therefore clearly appear that the intention of the Legislature in enacting sections 241 and 249 of the Family Court Act was to provide for representation of a minor in a Family Court proceeding by a Law Guardian or counsel of his own choosing and not by a guardian ad litem pursuant to CPLR"). Moreover, by requesting appointment of a guardian *ad litem*, the lawyer, supposedly a loyal advocate, invites introduction of a new "player" into the proceeding who may well undermine the client's chances of achieving his or her stated goals. *Cf. A.B.A. Model Rules of Prof'l Conduct, Commentary to Rule 1.14* ("Disclosure of the client's diminished capacity could adversely affect the client's interests").

[26] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 956.

otherwise provide the lawyer with meaningful input and guidance."[27] The lawyer's duties as counselor and advisor include: "[d]eveloping a thorough knowledge of the child's circumstances and needs,"[28] [i]nforming the child of the relevant facts and applicable laws,"[29] "[e]xplaining 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,"[30] "[e]xpressing an opinion concerning the likelihood that the court will accept particular arguments,"[31] "[p]roviding an assessment of the case and the best position for the child to take, and the reasons for such assessment,"[32] and "[c]ounseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position."[33]

Thus, in the end, "[t]he 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

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[27] *N.Y.S.B.A. Standards, Standard A-2*.

[28] *Id. Standard A-2(1)*.

[29] *Id. Standard A-2(2)*.

[30] *Id. Standard A-2(3)*.

[31] *Id. Standard A-2(4)*.

[32] *Id. Standard A-2(5)*.

[33] *Id. Standard A-2(6)*. *See also Standard-EC 7-8* (lawyer should "bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint," should "exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations," should "advise the client of the possible effect of each legal alternative," and may "emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions"); *EC 7-3* (lawyer may assist client "in determining the course of future conduct and relationships"); *supra* note 21, *Commentary to Standard B-4* (lawyer may express opinion concerning likelihood of court or other parties accepting particular positions, and inform child of expert's recommendations, and, since child "may agree with the lawyer for inappropriate reasons," lawyer "needs to understand what the child knows and what factors are influencing the child's decision," and "should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case"); *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 684-685 (2006) (lawyer should "let the child talk" and "listen to the child," begin with the child's agenda, gather information from collateral sources, explain the attorney-client relationship, encourage the child to speak with others, explain the court process, help child understand that she has right to have wishes advocated for without attribution, and help child understand the different pressures operating on her); Robert D. Fleischner and Dara L. Schur, *Representing Clients Who Have or May Have "Diminished Capacity": Ethics Issues*, 41 CLEARINGHOUSE REV. J. OF POVERTY LAW AND POLICY 346, 356 (September/October 2007) ("Clients often direct their attorneys to take positions that may undermine their long-term goals. When getting the client's input on a strategic decision in a case, ask the client more than once and in different ways. For example, perhaps your client was experiencing disability-related difficulties when you first asked about a particular issue. Asking again at a different time may yield a more informed decision. Trying to get to know the client and gaining an understanding of the client's long-term goals will help you in counseling the client about how to proceed in the short term").

day, the lawyer and the child disagree," and "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."[34] In many instances, the child will follow the lawyer's sound advice.[35]

However, although the lawyer may attempt to persuade the child to select intermediate and long-term goals that are more realistic and appropriate than the goals identified by the child, the lawyer "must take care not to overwhelm the client's will, and thus override the child's actual wishes" and "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."[36] The counseling role should be undertaken to enlighten and guide the client, not to remove the client as an obstacle to the achievement of what the lawyer wants. This is particularly important given that the lawyer "has an inordinate influence on the proceedings."

Determining the Child's Capacity to Make Decisions

Generally

The lawyer's determination of the child's capacity to make decisions "should be made at the outset of the representation in accordance with a principled analytic framework."[37] Among the criteria that should be used in assessing capacity are: the child's developmental stage (cognitive ability, socialization, emotional development); the child's expression of a relevant position (ability to communicate with lawyer, ability to articulate reasons); the child's individual decision-making process (influence - coercion - exploitation, conformity, variability and consistency); and the child's ability to understand consequences (risk of harm, finality of decision).[38]

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[34] *See supra* note 19, *Commentary to Standard A-2.*

[35] Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 821 (2006) ("a ten year old child may wish to remain home with her drug addicted mother, but may understand and accept her counsel's private statements that the court will never agree, and that the better course is to advocate for the help her mother needs, with the goal of minimizing the placement duration while maximizing visitation; as soon as mom is ready, counsel will advocate reunification").

[36] *See supra* note 19, *Commentary to Standard A-2.*

[37] *City Bar Ethics Opinion 1997-2*, 1997 WL 1724482.

[38] *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1313 (1996); *see also supra* note 19, *Standard A-3* (child's attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he 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"); *supra* note 19, *Commentary to Standard A-3* ("[a]ll that is required is that the child have a basic understanding of issues and consequences"); *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. at 685.

A lawyer should not "bootstrap" during this process by treating what appears to the lawyer to be a bad decision by the child as conclusive evidence of a lack of capacity.[39] And, when the determination of capacity is a close call, the lawyer should seek the assistance of a qualified mental health professional, preferably one who is already involved with the child.[40]

A determination regarding capacity is not an "all or nothing," or immutable conclusion. A child may be capable of deciding some issues but not others. A child's disability "is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others."[41] Also, "[i]t is possible for the child client to develop from a child incapable of meaningful participation in the litigation. . . to a child capable of such participation during the course of the attorney client relationship. In such cases, the attorney shall move from the substituted judgment exception. . . to the default position of client directed representation. . . ."[42]

The Child's Age

In Appellate Division and trial court decisions, there is strong support for the view that the child's lawyer ordinarily should provide traditional advocacy for teenagers. In *Matter of Albanese v. Lee*,[43] the First Department held that the Society for the Prevention of Cruelty to Children was properly relieved as guardian *ad litem* where the agency did not advocate the

[39] *See supra* note 19, *Commentary to Standard A-3* ("[w]hen 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," and "may not use substituted judgment merely because the attorney believes that another course of action would be 'better' for the child"); *City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 (lawyer "should not conclude merely from the fact that a decision appears to be a bad one that the client is not making a reasoned decision"); Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3 ("Must it not at least be considered that the child's attorney, without any objective measure of the child's capacity for considered judgment, will measure it by the extent to which the child's wishes correspond with the attorney's view of what is best for the child?"); Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 FORDHAM L. REV. 1473, 1485 (1996) (there is an "outcome test" under which the decision-maker is deemed competent "if the decision was substantively sound, from the vantage point of the judge, doctor, or other arbiter," but "[m]odern trends have frowned on the invidious biases of the status test and the paternalistic and tautological character of the outcome test").

[40] *See supra* note 19, *Commentary to Standard A-3* ("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").

[41] *See supra* note 21, *Commentary to Standard B-3.*

[42] *See supra* note 24, *Standard B-4(3).*

[43] 272 A.D.2d 81 (1st Dep't 2000).

wishes of its fifteen-year-old client. In *Matter of Elianne M.*,[44] the Second Department held that "[w]here, as here, both the Law Guardian and the teenage child have explicitly expressed their failure to communicate, the child has indicated her lack of trust in her appointed representative, her fear that this representative will not effectively communicate her wishes to the court and her belief that the Law Guardian has been influenced by her adoptive mother, the proper course was to relieve the Law Guardian and permit substitution of counsel of the child's choosing."[45] In *Suzanne T. v. Arthur L. T.*,[46] where the law guardian, while reciting the fourteen-year-old child's preference for the mother, recommended that custody remain with the father, the court recognized that the law guardian may assert a position which, in the law guardian's independent judgment, would best promote the child's interest even if that position is contrary to the wishes of the child, but impliedly criticized the law guardian by noting that *this* child was a very mature, strong-willed and articulate fourteen-year-old.[47] In *Marquez v. Presbyterian Hosp. in the City of New York*,[48] the court noted that "[t]he adversarial role for Law Guardians has, quite properly, predominated. . . . Recent cases, without any discussion of the issue, routinely treat Law Guardians as though they were counsel in a criminal case. (citations omitted)."[49]

In the context of juvenile delinquency and persons in need of supervision proceedings as well, courts have recognized that an adolescent has presumptive authority to make fundamental litigation decisions.[50]

Support for traditional representation of younger children can be found in *Matter of Scott L. v. Bruce N.*,[51] where the court posited a hybrid lawyer/GAL role in which the child does not *control* the representation, but also recognized that children often should have controlling influence over the lawyer's advocacy. The court observed that "[t]he extent to which the child's wishes should influence the formulation of the position must vary according to the maturity, intelligence and emotional stability of the child in question. Where the child is a teen-ager of reasonably sound judgment, either a Law Guardian or a guardian ad litem would be very likely

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[44] 196 A.D.2d 439.

[45] 196 A.D.2d at 440.

[46] 12 Misc.3d 691 (Fam. Ct., Monroe County, 2005).

[47] 12 Misc.3d at 694.

[48] 159 Misc.2d 617 (Sup. Ct., N.Y. County, 1994).

[49] 159 Misc.2d at 622. *See also Matter of Delaney v. Galeano*, 50 A.D.3d 1035 (2d Dep't 2008) (where attorney for fourteen-year-old child appealed from order which denied his motion to hold respondent mother in contempt in visitation proceeding, Second Department, while citing 22 NYCRR §7.2(d)(2), dismissed appeal because child did not want appeal to proceed).

[50] *See, e.g., Matter of Sandra XX.*, 169 A.D.2d 992, 994 (3d Dep't 1991); *see also City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 (children above age of twelve generally will be capable of making considered judgments concerning the representation).

[51] 134 Misc.2d 240 (Fam. Ct., N.Y. County, 1986).

to advocate for the outcome the child prefers, and properly so, since the wishes of a mature youngster also carry greater weight with the court than those of a younger child [citation omitted]." With respect to the seven and nine-year-old subject children, the court noted that "the Law Guardian might arguably feel obligated to assert the position in the case which the child desires, and asserting a position in a litigation involves much more than merely expressing the child's wishes to the court."[52]

In *K.T. v. C.S.*,[53] the court found that where the ten-year-old child "was of sufficient age and maturity to express her own desires in an intelligent and compelling fashion," there was "no indication that her testimony was coached or was not the product of her true desires," and there was no indication "that [her] ability to express her views was compromised or that her desires were incompatible with the advancement of her best interests, the law guardian had an obligation to advocate those wishes."

There are cases in which the lawyer's decision to advocate a position contrary to the expressed wishes of the child has been approved. In *Carballeira v. Shumway*,[54] where the child's lawyer advocated a position contrary to the expressed wishes of his eleven-year-old client, the Third Department noted that the law guardian "has the statutorily directed responsibility to represent the child's wishes as well as to advocate the child's best interest. Because the result desired by the child and the result that is in the child's best interest may diverge, Law Guardians sometimes face a conflict in such advocacy (citations omitted)." When such a conflict exists, "[d]epending on the circumstances, 'a Law Guardian may properly attempt to persuade the court to adopt a position which, in the Law Guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child' (citations omitted)."[55] Similar rulings have been issued in other custody proceedings.[56]

However, it must be borne in mind that *Shumway* involved a custody dispute between biological parents, and so the child's liberty interests were not nearly as compelling as they are when the State attempts to remove a child from the parents' home.[57] Also, among the reasons

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[52] 134 Misc.2d at 243-244.

[53] N.Y.L.J., July 6, 2000, at 26 (Sup. Ct., Suffolk County).

[54] 273 A.D.2d 753 (3d Dep't 2000), *lv denied*, 95 N.Y.2d 764.

[55] 273 A.D.2d at 755.

[56] *See, e.g., Matter of James MM. v. June OO.*, 294 A.D.2d 630, 633 (3d Dep't 2002) (law guardian did not violate duty to eleven and twelve-year-old clients when he filed neglect petition against mother, and recommended that father get custody, even though children preferred to stay with mother); *Armenio v. Armenio*, N.Y.L.J., Aug. 3, 1999, at 25 (Sup. Ct., Suffolk County) (law guardian properly made recommendation that was contrary to desires of children, ages eleven and nearly seven, where law guardian made "cogent legal and common sense arguments" as to why children's expressed preferences were not consistent with their best interests); *Reed v. Reed*, 189 Misc.2d 734, 737 (Sup. Ct., Richmond County, 2001) (even if law guardian was not acting in accordance with wishes of six-year-old child, law guardian's own position was relevant).

[57] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, n.15 (in child protection proceedings, "children. . . face the risks of either returning to a dangerous home or severing their relationship with their entire immediate family"); Martin Guggenheim, *A Paradigm for Determining*

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underlying the *Shumway* ruling was the child's severely impaired condition. The court noted that the child suffered from several neurological disorders including Tourettes Syndrome, Obsessive-Compulsive Disorder and Attention Deficit Hyperactivity Disorder; that a psychologist had opined that the child was intelligent, but somewhat less mature than average, and could be easily manipulated by adults; that the child may have been blinded by his love for the mother, who exerted influence on his thoughts concerning custody; and that the child "did not articulate objective reasons for his preference" other than his dislike of discipline at the father's home and the lack of rules and discipline at the mother's home.[58]

Moreover, in *Shumway*, the Third Department merely concluded that, in appropriate circumstances, a child's lawyer "may" adopt a position that is contrary to the wishes of the child, but did not suggest that a law guardian abuses her discretion when she chooses to assign dispositive weight to the child's position.[59]

Viewed as a whole, then, these court decisions suggest that the child's lawyer ordinarily should give controlling weight to the desires of a teenage client, and, with respect to younger children, leave the lawyer with considerable discretion to assign appropriate, and, if the lawyer chooses, *controlling* weight to the child's wishes.

While "[a]ny specific [age-related line] will be an arbitrary choice to some extent,"[60] we believe that age-related guidelines are useful. Children as young as two or three, while capable of communicating wishes, cannot be granted decision-making authority under any rational representation model. As already noted, a consensus among child advocates has been reached regarding children age ten or older, who usually are deemed entitled to client-directed representation,[61] and children under the age of seven, who usually are not. The advocacy model

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the Role of Counsel for Children, 64 FORDHAM L. REV. 1399, 1426 (1996) (child's right in custody proceeding is to have the judge determine which caregiver will best serve child's interests).

[58] 273 A.D.2d at 755-756; *see also Matter of Amkia P.*, 179 Misc.2d 387, 389-390 (Fam. Ct., Bronx County, 1999) (law guardian for ten-year-old child in child protective proceeding properly advocated position at odds with child's expressed wishes where child was afflicted with chronic, debilitating and life-threatening illness, appeared to have little comprehension of severity and complexity of her disease or of precariousness of her situation if she was not provided with proper medical care, and was intelligent and poised but was "still a young child, and as such she lack[ed] the sophistication, experience and maturity to decide for herself what is in her best interest in the complicated medical predicament in which she [found] herself").

[59] *See* Schepard, *The Law Guardian: A Need For Statutory Clarification*, N.Y.L.J., Sept. 9, 2000, at 3 ("Carballeira seems to leave the decision about whether to serve as a guardian or as an attorney to the individual judgment of the appointee in a particular case. The court does not tell us if it would have been reversible error for the child's lawyer to advocate for the seemingly impaired child's preference, only that the lawyer properly exercised discretion not to do so").

[60] *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. 623, 625 (2006); *see also City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 ("The lawyer should not conclude that minors below a particular age are invariably unable to make reasoned judgments or that all verbal minors are invariably able to do so").

[61] *See, e.g.*, Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 820 ("Children above the age of ten usually comprehend the issues and are capable of formulating a position

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for children falling in that three-year gap has remained less certain. After revisiting these issues, we believe that many children between the ages of seven and ten are entitled to make decisions that an adult client would make. (We reiterate that when we refer in these pages to "client-directed representation," we mean that the child has authority to make certain decisions at the conclusion of a complex process in which the lawyer, acting as counselor and adviser, works together with the child in developing the child's goals and positions.)

There is ample support for viewing children as young as seven as being capable of making decisions. The *Commentary to NYSBA Standard A-3* states that "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." A similar conclusion was reached by a well-known authority in 1984.[62] And, at the 2006 University of Nevada, Las Vegas *Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, a working group recommended adoption of a statutory presumption that lawyers should function as client-directed advocates for children age seven and above, and, with respect to children younger than seven, should "[g]ive due consideration to the view of the child in determining what position to advocate, and present to the court the views of the child."[63]

Moreover, New York has made seven the minimum age at which a child may be deemed competent to stand trial on a charge of juvenile delinquency,[64] and a "[b]road consensus now

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with the assistance of counsel even if, on occasion, the assistance should be more structured than with an adult," but, with clients between the ages of five and ten, "counsel faces or should face, the tricky task of maximizing the child's input and participation without necessarily granting her a veto over her attorney's position"); Douglas J. Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act, § 241 ("Often, the child's ability to reach a 'considered judgment,' and hence the Law Guardian's role, is clear," such as when "an adolescent alleged to be abused or neglected may have a clear and rational opinion about whether his father's occasional violence warrants his removal from the home").

[62] Guggenheim, *The Right To Be Represented But Not Heard: Reflections On Legal Representation For Children*, 59 N.Y.U. L. REV. at 91.

[63] *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. 623; *see also Model Rules of Prof'l Conduct, Commentary to Rule 1.14* (2006) (client with diminished capacity "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody"); Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 173 (2008) ("Studies have shown that children as young as 6 years of age have the capability to reason and understand. Certainly from age 6, and at ages even younger than that, children are capable of having and sharing their view of what happened in the past and what they would like to see happen in the future. This is especially true for foster children, who, by necessity, have had to grow up more quickly than their peers"); Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) (author endorses "a bright line test, say at seven").

[64] N.Y. Fam. Ct. Act § 301.2(1). Indeed, the law of competency should be consulted when a lawyer is attempting to determine a child's capacity to make decisions in this context. *See, e.g., People v Picozzi*, 106 A.D.2d 413, 414 (2d Dep't 1984) (court should consider: (1) whether defendant is oriented to time and place; (2) whether defendant is able to perceive, recall and relate; (3) whether defendant has an understanding of the process of the trial and the roles of the judge, jury, prosecutor and defense attorney; (4) whether defendant can establish a working

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exists within both the delinquency bar and the judiciary that lawyers for minors charged with crimes should take direction from their clients just as they would if their clients were adults."[65] No exception has been carved out for cases in which the lawyer believes that the delinquency client is a neglected child.[66] Even assuming, *arguendo*, that the Legislature envisioned a slightly modified role for the lawyer when the defining purpose of the proceeding is to protect, rather than prosecute and obtain a finding of delinquency *against* the child -- indeed, that role *must* be modified when an infant is involved -- the fact remains that in child protective and permanency proceedings, the child faces a Fourth Amendment seizure,[67] removal/exclusion from the home, and involuntary confinement in a foster home or facility selected by the court or by governmental officials.[68] Thus, there is no reason why the "broad consensus" regarding the role of the lawyer in a delinquency proceeding should not guide the child's lawyer in a child protective, permanency or termination of parental rights proceeding, particularly given the fact that the Family Court Act contains only one, generic description of the child's lawyer.

Also, we know that by age seven a child's social, language and cognitive abilities have become more complex and sophisticated:

> "During the school-age years, children become increasingly sophisticated in understanding the perspectives of others. The preschool child tends to see the situations of others egocentrically

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relationship with his attorney; (5) whether defendant has sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate (without necessarily adopting) the fact that one course of conduct may be more beneficial to him than another; (6) whether defendant is sufficiently stable to enable him to withstand the stresses of the trial without suffering a serious prolonged or permanent breakdown).

It is also worth noting that while a child is not presumed to possess the capacity to comprehend the special nature of a testimonial oath, and give sworn testimony in a juvenile delinquency or criminal proceeding, until age *nine*, appellate courts have found that children as young as seven were properly sworn. *See, e.g., Matter of Joseph C.*, 185 A.D.2d 883, 884 (2d Dep't 1992); *People v. Hendy*, 159 A.D.2d 250 (1st Dep't 1990), *lv denied*, 76 N.Y.2d 893.

[65] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L.Rev. 895, n.14. We note that the lawyer's lack of control over the client's decision-making in a juvenile delinquency (or N.Y. Fam. Ct. Act Article Seven persons in need of supervision proceeding) is intrinsic rather than exclusively a matter of role definition, since the child's denial of guilt and/or refusal to plead guilty cannot be overridden.

[66] Guggenheim, *The Right to be Represented But not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. at 92.

[67] *Tenenbaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999).

[68] Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 766 ("the child has an obvious cognizable interest in the outcome - it is her life and her interests that are at issue"); *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children* (2007), at 7 ("In abuse and neglect hearings, the person with the most to gain or lose is the child. Consistent with traditional notions of a hearing, every party should have a right to be heard and children cannot be meaningfully heard without an advocate. There are crucial constitutional issues at stake in dependency proceedings for children: their liberty (are they going to be wards of the state or returned home?), their safety, and their statutory rights").

> and tries to assimilate another person's viewpoint into her own viewpoint. Beginning at age 6, the child becomes more able to see and acknowledge another person's different point of view. Over the next several years the child gradually realizes that there can be multiple ways of viewing a situation and can imagine how her own ideas appear to another person.
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> As perspective taking improves, so does the child's ability to see below the surface of behavior and to attribute psychological qualities and motives to others. Up to age 8, children tend to describe others in terms of their behavior and physical characteristics. After 8, because of improving ability to analyze and synthesize information, they begin to describe others in terms of internal, psychological characteristics (citation omitted). . . . Children become more able to assess other people's intentions and the psychological resonances of communication.[69]
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> By age 7 the child has a basic grasp of the syntactical and grammatical structures of her native language. . . . Although there is a range of language ability across individual children, school age children generally possess sufficient facility with language to express what they are thinking and to tell coherent narratives having a beginning, middle, and end.[70]
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> By age 7, the child is moving away from egocentric thinking and is using logic. The child becomes aware that intuition based on an awareness of surface appearances is not always correct (citation omitted).[71]

Thus, we agree with those who "argue that children exhibit the ability to think rationally by the age of seven and sometimes even younger. They point out that the typical seven-year-old

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[69] Douglas Davies, *Child Development: A Practitioner's Guide 346-347* (2d ed. Guilford Press 2004).

[70] Davies, *Child Development: A Practitioner's Guide*, at 353.

[71] Davies, *Child Development: A Practitioner's Guide*, at 359.

can comprehend information, make causal connections between events, and use these skills to assess the relative attractiveness of various options."[72] While "GAL advocates. . . argue that children's ability to engage in abstract thinking--in particular their ability to think through a range of merely hypothetical solutions--is highly compromised until adolescence,"[73] we do not believe that a child needs to arrive at that level of development in order to exert substantial influence over the lawyer's decision making.[74]

The Child's Proper Role in the Search for Truth and the "Right" Result

Giving children a voice in the process "empowers children, the disempowered victims of the circumstances (whether abuse, neglect, or parental separation) leading to the court's involvement. Lawyers who practice under the traditional attorney model are inspired by the considerable wisdom of children, whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment. They also acknowledge children's power, as the subjects of the decisions being made, to prevent decisions the children oppose from being effectively implemented."[75] Denying the child a voice in the lawyer's advocacy "reinforces. . . the lesson, learned most thoroughly by abused and neglected children,

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[72] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L.REV. at 903-904. *See also supra* note 19, *Standard A-3* ("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"); *Matter of Pedro M.*, 2008 WL 4379608 (Fam. Ct., Albany Co., 2008) (while addressing requirement that court consult child during permanency proceeding, court establishes guidelines that presume child age seven or over should be produced in court; court notes that age of seven is generally considered the "age of reason" and is when children acquire a sufficient facility with spoken language to be able to communicate with adults, and it is the age at which juveniles can be charged in juvenile delinquency and persons in need of supervision proceedings).

[73] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 903-904; *see also* Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. at 1702-1703.

[74] *See supra* note 19, *Standard A-3* ("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," and "[a]ll that is required is that the child have a basic understanding of issues and consequences"); Linda Elrod, *Client-Directed Lawyers For Children: It Is The "Right" Thing To Do*, 27 PACE L. REV. 869, 912 (2007) (although some children arguably have capacity but lack judgment, "just because the child lacks the maturity to consider all the implications of a custody determination does not mean that their voice should be silenced").

Given the inherent difficulty in determining a child's capacity, one writer has opined that "[i]f the legal system is going to countenance the spectacle of an attorney actively arguing against the client's stated objectives simply because the client is a child, then the issue of the child's capacity or lack thereof must, at the very least, be subject to judicial scrutiny brought to bear in the face of record evidence supporting a finding with respect to the capacity question. The stakes are too high to allow otherwise." Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3.

[75] Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. at 1704-1705.

that he should not expect to have any control over his fate."[76] It is also worth remembering that, given the psychological harm often caused by removal, and the physical and emotional health risks to which children are exposed while in foster care, a particular child's desire to return home to neglectful parents may be far from irrational.[77]

It is true that under New York law, the child's lawyer is bound by FCA §241 to help the child express her wishes to the court, and thus the child will be heard. But the mere expression of a child's wishes, by a lawyer who immediately turns around and undermines the child's stated position by arguing for, or presenting evidence supporting, the opposite result, hardly provides the child with a *meaningful* voice.[78] "To place the burden of advocating the child's 'best interests' on the lawyer for the child rather than merely advocating the child's wishes is to deny the child an effective voice in the proceedings. Of course most abused or neglected children wish to go back to the abusive home, but who will articulate the child's desires or wishes, however irrational it may seem to adults, if the lawyer for the minor will not do so?"[79] Again, it must be remembered that FCA §241 refers to the child's "interests," not the child's "best interests."

Admittedly, these determinations of a child's capacity carry some potential for arbitrariness,[80] but they are likely to be far less values-driven than a lawyer's decision to take a particular position on behalf of the client. This practice model limits the population of children for whom lawyers make decisions, and thus fosters consistency and reduces arbitrariness in child advocacy. Left to their own devices, many lawyers "are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own. Not only is there a significant chance

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[76] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 960.

[77] *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 382 (2004) ("particularized evidence must exist to justify [removal] determination, including, where appropriate, evidence of . . . the impact of removal on the child"); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805, 822 (2006) (judges and lawyers should recognize that "risk is an inherent feature of all child custody decisions and that children are placed at risk whether they are removed from their parents' custody or permitted to remain there").

[78] Merril Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 ("How can an attorney seriously state one position based on the child's wishes and then, without further ado, take a different and conflicting position based on his perception of the child's best interests?"). Of course, when the lawyer properly determines that the child lacks capacity -- and it must be remembered that children as young as three or four are capable of articulating a preference -- the awkwardness described by Sobie either does not exist, or is tolerable.

[79] Shepherd, "*I Know the Child is My Client, But Who Am I?*," 64 FORDHAM L. REV. at 1942.

[80] Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 46 ("A lawyer predisposed to depart from the normal client-lawyer relationship in the representation of children will conclude that the differences in children's developmental and life experience make such a relationship impossible. A lawyer predisposed, on the other hand, to maintain the normal client-lawyer relationship in her representation of children will conclude that, despite some differences in children's development and experience, the relationship can nevertheless reasonably be maintained").

that these decisions and ensuing positions may be against the best interest of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative, but it also leads to a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child."[81]

While some people prefer that the child's lawyer always advocate in a manner consistent with her own, presumably mature perspective, rather than the wishes of the child,[82] we believe that the role we have adopted for the child's lawyer enhances the court's search for the truth and for the right result. The respondents' lawyers are duty-bound to seek family reunification, and dismissal of the charges, if that is what their clients desire. Often, these goals are consistent with the child's interests. The petitioning agency's lawyer will prosecute the case and otherwise protect the agency's interests, which, too, may be consistent with the child's.[83] When the child is residing in foster care, the child's lawyer is duty-bound to advance the client's health and safety interests by, among other things, advocating for appropriate court-ordered services, treatment, and agency supervision. When the child is residing at home, a lawyer who is making decisions on behalf of the child will advocate for services, treatment, or supervision designed to render the home environment safe, while a lawyer providing client-directed representation for a child who wants to remain home will do the same as long as the court orders enhance the child's chances of remaining at home.[84] The judge, having no client, must focus on the law, and, when appropriate,

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[81] Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 36; *see also* Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, n.204 ("Absent any expertise about either what is best for children generally or what will best meet a particular child's idiosyncratic needs, it is my sense that lawyers making best interest judgments tend to focus disproportionate attention on avoiding the risk of physical harm and underestimate the importance of maintaining emotional attachments").

[82] *See* Martin Guggenheim, *A Law Guardian By Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 809-810 (2007) ("Trial and appellate judges recognize that getting at the true facts in many cases can be difficult. Understandably, courts want any help they can get. For many judges deciding complex custody cases, the neutral child's lawyer is just what they are looking for to help them determine the best interests of the child. * * * A very large part of the value of children's lawyers, whether to the Court of Appeals or to trial judges, is the 'reassuring' quality that the result the law guardian chose to advocate comports with the result the court chose to reach").

[83] The New York City Administration for Children's Services website indicates that it employs more than 200 lawyers to handle child welfare matters in New York City Family Court. ACS's lawyers have child protective caseworkers and the agency's other considerable resources at their disposal, while, due to limited staffing, our lawyers are assisted by social workers only in a limited number of cases. *See also* Shepherd, "*I Know the Child is My Client, But Who Am I?*," 64 FORDHAM L. REV. at 1941 ("Given the likely continuation of forces that militate against ideal representation -- poor compensation, large caseloads, occasional recalcitrant judges, little in the way of investigative and other resources -- a role that is familiar to the lawyer is more apt to be performed competently").

[84] "The extent and form of protection which the child desires may vary. Child "A" may want to be placed outside her home, perhaps with a relative, while in the same situation Child "B" may want to remain home with the parent supervised or with home based services." Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 783.

the child's best interests.[85] The judge also has broad discretion to solicit evidence the parties have not produced.[86] Thus, in the end, "the child's direction will merely give instructions to the lawyer. The child's views do not necessarily prevail. The process should be looked upon as a whole."[87] If the other lawyers and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape the role and ethical responsibilities of the child's lawyer.[88] Indeed, "[i]f the strength of the adversary process lies in the full presentation and consideration of different points of view, then giving a greater voice to the child should not impair either fact-finding or decision-making."[89]

Allocation of Decision-Making Authority

Of course, the child's lawyer must differentiate between those decisions a competent client is entitled to make, and those decisions -- involving litigation strategy -- that a lawyer is entitled to make. While the client usually makes decisions regarding matters "affecting the merits

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[85] Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. at 1703-1704 ("Those who advocate assuming the traditional attorney role. . . point out that it is the judge, and not the child's lawyer, who is responsible for determining the child's best interests. The judge bases her decision on the evidence elicited through an adversarial process. . ."); Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. at 640 ("Expressed interests advocates contend that the judge bears responsibility for determining what course of action is in the best interest of the child, and that the process for determining the best interest of the child is a product of the conventional adversarial model of lawyering").

[86] *See* N.Y. Fam. Ct. Act § 153 ("[t]he family court may issue a subpoena or in a proper case a warrant or other process to secure the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary, and to admit to, fix or accept bail, or parole him pending the completion of the hearing or proceeding"). Indeed, appellate courts have trumpeted the Family Court's responsibility to ensure that all relevant and material evidence is presented. *See, e.g.*, *Matter of J.*, 274 A.D.2d 482 (2d Dep't 2000) (where doctor testified that he based diagnosis of sexual abuse on hospital records, family court should have determined whether records existed).

[87] Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. at 1247.

[88] "And finally, the argument goes, the child protective system and the court process are so underfunded and poorly conducted that, unless the child's attorney ensures that all relevant information is presented to the judge (regardless of whether it serves the child's expressed interests), the judge will be in no position to make an appropriate best interest determination." Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. at 1703.

[89] Ann M. Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. 2013, 2017 (1996); *see also* Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. at 170 ("Having the youth in the courtroom, or bringing in the child's actual words, reinforces to the judge the idea that the child is a person, not simply a file. This changes the whole focus of the discussion taking place in the courtroom and forces the judge to see things through the gaze of the child"); *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children*, at 7 ("Client-directed representation empowers the court to make the most prudent and wise decision as to the best interests of the child").

of the cause or substantially prejudicing the rights of the client,"[90] and thus "the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters," and need not "consult with the child on matters which would not require consultation with an adult client."[91]

In criminal proceedings, "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 [citations omitted]."[92] In a child protective, permanency, or termination of parental rights proceeding, the accused respondent should decide whether to go to trial or make an admission, whether to voluntarily take the stand and testify, and whether to agree to a proposed disposition. For the subject child in such a proceeding, who is not on trial, the principal concern is the child's liberty interest in residing where he/she wants to and being safe in that environment, and in having visits with those individuals the child wishes to see. Accordingly, the child's lawyer usually should be bound by a competent child's wishes regarding those issues. If the child wants to return home, the lawyer would argue at a post-removal FCA §1028 hearing for the immediate return of the child, and/or argue at a fact-finding hearing for dismissal of the charges.

However, let us assume that the parents have agreed to waive a prompt §1028 hearing because their lawyers think it is best to wait until the timing is more advantageous, and that the child's lawyer believes that a premature return to the home would place the child at undue risk and possibly sabotage the child's long-term goal of family reunification. The child's lawyer also may be concerned that a request for a §1028 hearing in such a case would be seen by the judge as frivolous, or at least odd given the parent's failure to request a hearing. In this scenario, is the child's continued desire for an immediate return to the parents a litigation goal over which the child has control? Or is ultimate reunification the litigation goal, and the lawyer has control over the pathway to that goal? While removal involves compelling liberty interests, and the lawyer must give considerable weight to the client's desires, perhaps the lawyer should retain a measure of control and refrain from taking any ill-considered steps that the lawyer believes would reduce the chances of achieving the client's long-term goal of family reunification.

Similarly, while dismissal of the petition upon a fact-finding hearing is a pathway to a child's goal of reunification, perhaps the child's lawyer, having determined that dismissal is an unrealistic goal, has discretion to contact the respondents' lawyers and suggest that their clients

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[90] *N.Y. Code of Prof'l Responsibility EC 7-7*.

[91] *See supra* note 21, *Commentary to Standard B-4*; *see also Haziel v. United States*, 404 F.2d 1275, 1278 (D.C. Cir. 1968) ("The law allows counsel to speak for his client on many occasions. In an adversarial criminal proceeding, the client may be bound by his counsel's calculated decision when trial tactics are involved. (citation omitted.) Such circumstances arise for the most part when the assertion of a claimed right may backfire if incorrect. Since these decisions must often be made in the heat of trial, and frequently involve nice calculations of procedural complexities and jurors' likely reactions, the attorney must sometimes make the choice without consulting his client").

[92] *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

make judicial admissions, or, at a hearing, maneuver towards a finding on the least serious charge and/or elicit mitigation evidence.

Moreover, there are numerous decisions, *not* directly related to custody or fact-finding, that may be of interest to the child but properly lie within the lawyer's domain. For instance, a lawyer bound by a client's wishes to seek reunification certainly should not be bound by the child's opinion regarding treatment and services the parent should be required to accept, the frequency and nature of agency supervision, or other matters that may affect the child's chances of returning home.[93] In fact, it may be appropriate for the lawyer to request or agree to the provision of crucial mental health services *for the child* even though the child objects, when those services undoubtedly would serve the child's long-term litigation goals.

In sum, it is important to recognize that, even when the lawyer concludes that a child has the capacity to make decisions, some of the child's wishes may be put aside, or at least placed on a back burner, because the child's authority runs only to certain primary litigation goals, and not to the strategies designed to achieve them.

Decision-Making By the Lawyer: What is Substituted Judgment, Anyway?

Criteria For Lawyer's Decisions

In those cases in which the lawyer has properly decided to make decisions for the child, an important question remains: what criteria should the lawyer use? To answer this question, a distinction must be made between the lawyer's decisions regarding what the law requires, and decisions regarding what is best for the child. The often heard reference to "best interests" advocacy is an unfortunate one, since the statutes providing for assignment of counsel to the child do not use that terminology, and the child's best interests are often not part of the required analysis.

When the child's lawyer appears at a post-filing removal hearing, or at a hearing held upon a parent's application for the return of the child, the issue is whether there is an imminent risk to the child's life or health, not whether it would be better for the child to be residing outside the home.[94] At the Article Ten fact finding hearing, the issue is whether the parent's acts amount to abuse and/or neglect, and/or whether State intervention is necessary, not the child's best interests.[95] Even at a dispositional hearing, or a permanency hearing held prior to termination of

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[93] Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 786 ("It may well be in the child's interests to advocate court-ordered services for his parent, thereby improving the home environment when the child is not removed or enhancing the possibility of reunification when the child has been placed").

[94] N.Y. Fam. Ct. Act §§ 1027(b)(i), 1028(b).

[95] *See* N.Y. Fam. Ct. Act § 1012; Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 806 (the "best interests" of the child are "largely irrelevant unless and until parental malfeasance has been proven"); Douglas Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. FAM. L. 217, 220-234 (1981) (child's counsel should seek dismissal when there is no persuasive evidence of abuse or neglect; when the child, although abused or neglected in the past, faces no such danger in the future; when the child is protected by virtue of parents'

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parental rights, a critical factor in the court's custodial determination is whether a return of the child to the parent would present a risk of neglect or abuse.[96]

In contrast, controversies in child protective proceedings that relate to 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, do require the court, and thus the child's lawyer, to consider the child's best interests.[97] Of course, these "best interests" determinations often implicate the child's "legal interest in preserving her family's integrity and continuing her relationship with her family. . . ."[98]

Other than the law, there is no proper basis for the lawyer's exercise of discretion when the child is not making decisions. Accordingly, while a lawyer engaged in client-directed advocacy will argue the child's position even if the lawyer believes the law mandates a different result -- for instance, a lawyer representing a seventeen-year-old child who wants to return home would argue for that result despite the lawyer's opinion that there may be some risk of harm -- a lawyer making decisions on behalf of the child "[m]ust 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, through this objective analysis, determine the child's "legal" interests. The lawyer has no right to make "best interests" determinations and act upon them when the law clearly states that a different standard applies.[99] Indeed, "[a] lawyer can bring a particularly valuable form of attention to a case by insisting upon statutory fidelity to the standards established through the democratic process to serve the needs of children and families."[100]

Thus, if the child's lawyer does not believe that removal of the child is justified by an "imminent risk to life or health,"as that risk was defined by the Court of Appeals in *Nicholson v. Scoppetta*,[101] the lawyer should argue for a return of the child. If there is insufficient evidence of neglect at the fact-finding hearing, the lawyer should argue for dismissal. If the parents pose no threat to the child at the time of disposition and are legally entitled to custody, the lawyer should

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voluntary acceptance of social services; and when harmful effects of state intervention outweigh danger child faces from parents); N.Y. Fam. Ct. Act § 1051(c) (even where there is sufficient evidence of neglect, court may dismiss petition if it "concludes that its aid is not required on the record before it").

[96] N.Y. Fam. Ct. Act § 1089(d); *Matter of Kenneth G.*, 39 A.D.2d 709 (2d Dept. 1972) (burden is on agency to establish parent's present inability to provide adequate care).

[97] *See supra* note 19, *Commentary to Standard A-4.*

[98] Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 784-785. *See also Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. at 685 (lawyer should "[a]dopt a position requiring the least intrusive state intervention").

[99] *See supra* note 19, *Standard A-4*; *Commentary to Standard A-4.*

[100] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at 959.

[101] 3 N.Y.3d 357 (2004).

not argue for placement. Of course, because courts often focus on "best interests" rather than the governing legal standard, the lawyer "must become adept at translating her proposals to the court into the language of 'best interests.'"[102]

It has been suggested that lawyers are not qualified to make "best interests" determinations.[103] Certainly that will be true in some instances, and so, when making decisions that do have a "best interests" element, the child's lawyer should employ a decision-making process that takes full account of the child's wishes and life circumstances. The mistake made by many lawyers is to view client-directed advocacy and lawyer-directed advocacy as two distinct processes; having made a determination that the child lacks capacity to direct the representation, the lawyer proceeds to make decisions while pushing the child and her concerns to the periphery. But young children, even if not entitled to direct the lawyer, can make a substantial contribution to the lawyer's decision-making process.

It could be said that the lawyer's goal is to determine what position the child would take if he/she had the capacity to direct the representation.[104] Thus, effective representation "requires attorneys to be self-aware and respectful of the full context in which the client lives."[105] Using a multi-disciplinary approach, the lawyer should formulate a position "through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria shall include but not be limited to: Determine the child's circumstances through a full and efficient investigation; Assess the child at the moment of the determination; Examine each option in light of the two child welfare paradigms; psychological parent and family network; and Utilize medical, mental health, educational, social work and other experts."[106]

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[102] Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1515 (1996).

[103] *See, e.g.*, Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1525 ("The total discretion model . . . gives a lawyer a job for which he is neither trained nor qualified, prevents the lawyer from doing the job that he is qualified to do, and creates an unjust system where similar clients are not represented similarly").

[104] *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. at 685.

[105] *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 593 (2006).

[106] *See supra* note 24, *Standard B-4(1). See also supra* note 19, *Standard A-4* (in formulating substituted judgment, attorney "[s]hould 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"); Marty Beyer, *Developmentally-Sound Practice in Family and Juvenile Court*, 6 NEV. L.J. 1215 (2006) ("Developmentally-sound practice in Family and Juvenile Court means seeing the complex and unique combination of trauma, disabilities and childish thinking behind the behavior of each child or adolescent"); *Marquez v. The Presbyterian Hosp. in the City of New York*, 159 Misc.2d 617, 625 (in order to provide effective assistance, lawyer should ascertain and consider all relevant facts, and then exercise discretion in good faith and to the best of the lawyer's ability).

"Contextualized representation is particularly important because there are often vast socioeconomic or racial gaps between the attorneys and the clients they serve. As a result of these disparities, attorneys may not appreciate all of the particular legal and social dimensions of the presenting problem that is the initial or primary subject of the representation; the importance of the child's family, race, ethnicity, language, culture, gender, sexuality, schooling, and home; and the child's developmental status, physical and mental health, and other client-related matters outside the discipline of law."[107]

In connection with her conception of the "child in context,"[108] Professor Koh Peters poses seven questions "to keep lawyers for children honest":

> (1) In making decisions about the representation, am I seeing the case, as much as I can, from my client's point of view, rather than from an adult's point of view?
> (2) Does the child understand as much as I can explain about what is happening in his case?
> (3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?
> (4) If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?

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[107] *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. at 593-594; *see also supra* note 19, *Standard C-1* ("The attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child's ethnicity and culture"); *supra* note 19, *Commentary to Standard A-4* (when considering child's best interests, "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," and "[t]he 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"); *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. at 666.

[108] "[Professor Koh Peters's] model of representation posits three defaults, three umbrella principles, and seven questions to keep us honest. The defaults, principles, and questions restrict the attorney's subjective discretion and require that the attorney develop a 'thickly detailed' understanding of 'the child-in-context.' The representation is, therefore, more objective and principled. First, the relationship default requires the attorney to meet and get to know the child, unless there is 'weighty independent evidence that the meeting would serve the client no purpose or would yield such a minimal benefit to the client that it is outweighed by the costs to the client of planning such a visit.' Second, the competency default views the child's competency along a spectrum within which the child can contribute as much as possible to the representation. Finally, the advocacy default requires the attorney to represent the child's expressed preference about issues unless the client cannot do so adequately in his or her own interest. An alternative to the advocacy default exists when addressing the situation where the attorney must represent the child's best interests. Under the alternate default, the child's voice, not the lawyer's, continues to be a major focus. These defaults represent the starting place from which the attorney must individualize the representation to allow maximum participation of the child, reflecting that child's uniqueness." Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLINE J. PUB. L. & POL'Y 177, 184-185 (2006).

> (5) Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?
> (6) Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
> (7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?"[109]

In the end, "if the child's lawyer has spent the time necessary to understand the child's needs from the child's perspective and to establish rapport with the child, the range of what constitutes the child's best available legal interests will be acceptably narrowed."[110]

It is true that when the lawyer makes decisions on behalf of the child, the lawyer's advocacy can overlap with the judge's function. Moreover, one lawyer may have a different view of the law than another.[111] And, even lawyers who employ an individualized, *client-focused* analysis are not immune to the taint of subjectivity.[112] For these reasons, it has been suggested that the lawyer for an infant, with no client and guided only by the law and the lawyer's potentially biased opinions, has no legitimate role to play and should not participate in the fact finding hearing.[113] In reality, however, this option is not open at any stage of the proceeding to a

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[109] Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1511; *see also Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 70-77; Annette R. Appell, *Decontectualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955 (1996).

[110] Ann M. Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. at 2017.

[111] Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 53 (attorney for young child "who seeks to enforce [statutory] mandates will be forced to use substantial discretion in interpreting . . . which legal interests are present, and what will be required to satisfy those interests in a given proceeding").

[112] Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, 81 ST. JOHN'S L. REV. 601, 618 (2007) ("In the child welfare setting. . . hindsight bias magnifies the perception that measures taken by government can readily prevent tragedies such as the deaths of young children due to abuse. In reality, preventing such tragedies requires dealing with a large number of variables, and incurring substantial opportunity costs, such as taking children away from a substantial number of parents who may be fit"); Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1526 (it is "inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children's needs, in assessing a client's best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming"); Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. at n. 202 (lawyer must be careful, for "[t]he distinction between advocating statutory fidelity, on the one hand, and advocating the lawyer's own objectives, on the other, sometimes will prove elusive").

[113] Guggenheim, *The Right To Be Represented But Not Heard: Reflections On Legal Representation For Children*, 59 N.Y.U. L. REV. at 138.

lawyer who has been assigned by the court and is expected to participate, or to a law firm that is under State contract to provide representation to children in these proceedings.

More importantly, it is not true that the lawyer has no role to play. There are a number of important matters to be addressed during the often lengthy delays between the filing of the petition and the fact finding hearing. Moreover, unlike the judge, the child's lawyer is in a position to conduct a full investigation outside of court and supply the child with an advocate who is in possession of all the facts and takes full account of the child's wishes.[114]

"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."[115] The lawyer should state the basis for disagreeing with the child's stated position.[116] The lawyer also must ensure that the child's wishes are communicated to the court.[117]

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[114] Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 817 ("The younger child would be effectively unrepresented and, at least in the absence of a guardian ad litem, would have no representative to argue for his interests"); Duquette, *Two Distinct Roles/Bright Line Test*, 6 Nev. L.J. at 1246 ("The better view is that children indeed need advocates in this complex and often-chaotic process"); Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241 ("No one can disagree that determining where a child's interest lies is a subjective and dangerous task (although, of course, judges do so every day). . . . Nevertheless, adopting a 'neutral' posture about the need to dismiss a case leaves unprotected the child for whom court intervention may be harmful"); *cf. Matter of Ray A.M.*, 37 N.Y.2d 619, 624 (1975) (since child could not speak for herself in termination proceeding, her lawyer's "highly competent neutral submission is reassuring").

[115] *See supra* note 19, *Standard A-4*.

[116] *See K.C. Clark v. Alexander*, 953 P.2d 145, 153-154 (Wyoming 1998); *Marriage of Rolfe*, 699 P.2d 79, 87 (Montana 1985).

[117] N.Y. Fam. Ct. Act § 241; *Matter of Derick Shea D.*, 22 A.D.3d 753, 754 (2d Dep't 2005) (orders terminating parental rights reversed, and matter remitted for new dispositional hearing, where law guardian expressed opinion that best interests of children, ages ten and fourteen, called for termination of parental rights, and set forth his reasoning, but failed to state that children had expressed desire to be returned to mother); *see supra* note 19, *Standard A-3* ("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").

We will not in this article address the separate question of whether, and, if so, under what circumstances, a child has the right or should be permitted to appear in court during the proceedings. *See supra* note 19, *Standard D-5* does state that "[t]he 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." We also note that under Social Services Law §409-e(2), a family service plan "shall be prepared in consultation. . . with the child if the child is ten years of age or older, and, where appropriate, with the child's siblings. Such consultation shall be done in person, unless such a meeting is impracticable or would be harmful to the child." Also, the Federal Children and Families Services Improvement Act of 2006 [Public Law 109-288; S. 3525] has amended §475(5)(C) of the Social Security Act to make Title IV-E foster care eligibility contingent upon the existence of procedural safeguards that "assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court. . . consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child." This Federal legislation resulted in a State requirement that the court conduct "age-appropriate consultation with the child who is the subject of [a] permanency hearing. . . ." FCA §1089(d); *see Matter of Pedro M.*, 2008 WL 4379608 (Fam. Ct., Albany Co., 2008) (court establishes guidelines

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Taking No Position

Nowhere is it written that, when making decisions on behalf of a child, the lawyer *has to take a position*. It is inconceivable that a lawyer with a large caseload will not sometimes encounter legal issues, or "best interests" determinations, that are such close calls that the lawyer cannot in good conscience make a definitive pronouncement in court that may well sway the judge. For instance, when the statutory "*res ipsa loquitur*" presumption comes into play because the child has suffered serious injuries,[118] but the respondent parents are among many adults who cared for the child during the period when the injuries were sustained and/or the parents have offered a plausible explanation for the injuries or credible denials of guilt, should a lawyer who is genuinely torn take a position just for the sake of it?

And what about the lawyer who is assigned at a removal hearing to represent an infant? Since it is clear that the lawyer will not be providing client-directed representation, the lawyer could seek to elicit as much relevant evidence as possible, and consider taking a preliminary position if she has a good faith basis for determining whether the requisite imminent risk exists. But with only the petition, and, perhaps, a child protective caseworker to guide her, the lawyer will sometimes find it appropriate to refrain from making such a judgment because of insufficient facts in a cold record.

Of course, the lawyer for an older child, for whom the lawyer is likely to provide client-directed representation, ordinarily should not take a position before speaking to the client or obtaining, through other means, clear-cut information regarding the child's position.[119]

The "Grave Physical Harm" (or "Seriously Injurious") Exception

Section 7.2 of the Rules of the Chief Judge states that the child's attorney "would be justified in advocating a position that is contrary to the child's wishes" when "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child…." *N.Y.S.B.A. Standard A-3* states that the child's attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he attorney has concluded that the court's adoption of the child's expressed preference would expose the child to

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that presume child age seven or over should be produced in court and that child under seven should not, and provide that if attorney for child under age seven wishes to have child appear in court, attorney need only communicate that to court and agency with good faith basis for request).

[118] *See* N.Y. Fam. Ct. Act § 1046(a)(ii).

[119] *Utah State Bar Opinion 04-01A*, 2004 WL 2803335 (lawyer cannot represent individual unless the two have communicated and established attorney-client relationship); *Dunkley v. Shoemate*, 515 S.E.2d 442, 445 (N.C., 1999) (person may not appear as attorney without grant of authority by person for whom attorney is appearing); *cf. In re Joshua K.*, 272 A.D.2d 160, 161 (1st Dep't 2000) (no error where court conducted TPR inquest in absence of counsel for respondent after original attorney was disqualified; even if new counsel had been appointed, there was no showing that respondent would have cooperated or been available for consultation).

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."[120] A similar, "seriously injurious" exception has been adopted by the American Bar Association and the National Association of Counsel for Children.[121]

Further support for this exception may be found in *City Bar Ethics Opinion 1997-2*,[122] where it was held that a lawyer may disclose confidential information concerning abuse or maltreatment in "extreme" and "rare" cases in which "the lawyer honestly concludes, after full consideration," that disclosure is necessary to prevent the client from being killed or maimed" by another person or from killing or maiming himself or another. Similarly, in *State Bar Ethics Opinion 486*,[123] it was held that a lawyer may disclose a client's expressed intention to commit suicide.

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[120] *See also supra* note 19, *Commentary to Standard A-3* ("use of the language, 'imminent danger of grave physical harm' . . . is intended to include sexual abuse and to recognize the extraordinary circumstances that should be present before overriding a child's expressed position"); *supra* note 19, *Commentary to Standard A-4* ("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").

[121] *See supra* note 21, *Standard B-4(3); supra* note 24, *Standard B-4(4)*. While the exception in § 7.2 of the Rules of the Chief Judge arguably includes serious *emotional* harm, the Rule merely permits lawyers to make decisions on behalf of children in certain cases, but does not require them to do so. Thus, children's lawyers in New York remain free to adhere to the stricter standards. *See also Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. at 609 (client-directed representation not mandated when "the child's expressed preferences would be seriously injurious"; seriously injurious "does not mean merely contrary to the lawyer's opinion of what would be in child's interests"); Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 (law guardian may refuse to argue for result that would place child in "imminent danger," which "connote[s] a grave immediate danger"); Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. at 2017 (for some children, "a certain degree of physical maltreatment or neglect may be far outweighed by the importance of other benefits of life with the family: affiliation, continuity of environment, proximity to friends, activities, and school, availability of pets, and other needs that the family meets"). Section 7.2 of the Rules of the Chief Judge states that the child's attorney "would be justified in advocating a position that is contrary to the child's wishes" when "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child…." While the harm contemplated in Rule 7.2 appears to be of a lesser degree than that contemplated in the other standards, the Rule merely permits lawyers to make decisions on behalf of children more often; it does not require them to do so. Thus, children's lawyers in New York remain free to adhere to the stricter standards.

[122] 1997 WL 1724482. *See also A.B.A. Model Rules of Prof'l Conduct, Rule 1.14* ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian," and, when taking such protective action, "the lawyer is impliedly authorized . . . to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests").

[123] 1978 WL 14149.

Moreover, in some cases the lawyer will be unable to advocate for the child's desires because the argument would be frivolous.[124]

Before invoking the "grave physical injury" exception, the child's lawyer should first consider whether there is a safety plan that would adequately address the danger, and begin by advocating for imposition of such a plan.[125] And, when employing the exception, the lawyer "should advocate a remedy which is as close as possible to the child's wishes as possible, but does not result in imminent danger" of serious harm.[126]

The Lawyer's Role in Presenting Evidence

Ordinarily, a lawyer attempts to present evidence that advances the client's position, and to prevent the introduction of evidence that undercuts the client's position. However, in *Matter of Scott L. v. Bruce N.*,[127] a custody proceeding, the court opined that a child's lawyer, rather than "suppress or withhold information which could be relevant to the court's determination of the child's best interests, when such evidence runs contrary to the result the child desires," should uncover and offer evidence of abuse or neglect, and other evidence that has been withheld by the other parties. "Zealous advocacy should never be permitted to interfere with this crucial function." The court noted that "[t]here is nothing in the statutes nor in case law. . . which says that a Law Guardian in a custody proceeding should advocate for the child's wishes at the expense of his over-all interests or at the expense of a full presentation of the facts."[128] Since the court had already held that the child's lawyer in a custody proceeding does *not* act in the traditional advocate's role and is not compelled to advocate for what the child wants, the court's imposition of a superseding duty to present relevant evidence was not surprising.[129]

In contrast, when a lawyer is providing client-directed representation in a child protective proceeding, in which the child's liberty interests are more compelling than in a custody

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[124] *See supra* note 21, *Standard B-4(3)* (lawyer may not advocate position that is prohibited by law or without any factual foundation); Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 ("Further, advocating the child's wishes when a court has found imminent danger may be deemed to be a frivolous position as defined in the Rules of Professional Responsibility, and attorneys are admonished to refrain from advocating a frivolous position"); *cf. Matter of Peter "VV"*, 169 A.D.2d 995, 997 (3d Dep't 1991) (PINS respondent not denied effective assistance of counsel where law guardian acknowledged need for placement despite respondent's contrary desire, but "[t]here simply was no evidence in the record that would have supported a less restrictive alternative disposition").

[125] *See supra* note 19, *Standard A-3*.

[126] Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1.

[127] 134 Misc.2d 240.

[128] 134 Misc.2d at 245-246.

[129] *See also* Guggenheim, *Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. at 1432-1433 (in custody cases, lawyer should "uncover relevant facts that place the judge in the best position to decide the case and to protect the child from harm that may result from the litigation itself").

proceeding, there is no sound justification for this approach if the lawyer's decision to advocate for the result the child desires is to have any meaning.

A limited obligation to bring evidence of abuse or neglect to light is imposed upon the child's lawyer by FCA §1075, which states that when, upon receipt of a post-dispositional report from a child protective agency, the law guardian determines that "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," the law guardian "shall apply to the court for appropriate relief pursuant to [FCA §1061]." While one expert has opined that "[s]ince there is no mention of the child's wishes or desires, the Law Guardian seems to have been transformed into an auxiliary child protective worker,"[130] that is not the case. First of all, an application for relief cannot be based on information protected by the attorney-client privilege. In addition, because the relief sought by the child's lawyer must be "appropriate," and §1061 requires "good cause" for any application to stay execution of, set aside, modify or vacate a dispositional order, the lawyer cannot apply for relief unless the facts warrant a new dispositional order. Finally, from a client-directed lawyer's perspective, relief is not "appropriate" when the child does not want it. While New York appellate courts have recognized that the lawyer has an obligation to ensure that the evidence supporting the client's position is fully presented, they have never suggested that the lawyer should present evidence that would *undermine* the client's position. On the contrary, in *Matter of Colleen CC.*,[131] the court found a violation of the right to effective assistance of counsel where a lawyer, while thoroughly questioning a fourteen-year-old client, "made a point of breaking down [the child's] direct testimony, raising the possibility that he had been "coached" by his mother during a recess and effectively impeaching him by exploring prior inconsistent statements, all for the obvious purpose of discrediting his allegations of abuse."[132]

When the lawyer is not providing client-directed representation, and plans to take a position at the hearing that is consistent with a properly formulated view of the child's legal interests, it does not seem prudent for the lawyer to challenge the introduction of relevant evidence or eschew opportunities to examine witnesses in an effort to ascertain more facts. It may "seem[] unwise, as well as naive, to expect a Law Guardian to withhold judgment--if he or she has performed a full investigation prior to the hearing."[133] However, the lawyer cannot be dead certain of her position until after a full hearing.[134]

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[130] Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241.

[131] 232 A.D.2d 787 (3d Dep't 1996).

[132] 232 A.D.2d at 788.

[133] Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241; *see also Cervera v. Bressler*, 50 A.D.3d 837 (2d Dep't 2008) (child's attorney, upon appropriate inquiry, may form opinion about merits of case); *Carbeillera v. Shumway*, *supra*, 273 A.D.2d 753 (although law guardian should not have stated that he was "biased," he only "intended to communicate that after being exposed to the evidence, he had formed a professional opinion concerning the proper disposition of custody and thus had a preference for respondent"); *Matter of TM*, 19 Misc.3d 1113(A) (Fam. Ct., Kings Co., 2008) (although child's attorney should not have position in mind at outset of case, it is appropriate for attorney to form opinion later and attempt to persuade court to adopt that position; child's attorney "cannot be required to satisfy standards of performance laid down for her by other counsel in the case, whose motives are dictated by the obligation to represent another party, with his or her own interests, which may not

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On the other hand, courts have made it clear that the "a law guardian is the attorney for the children," and not "an investigative arm of the court. While law guardians, as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices (citations omitted). Consequently, courts should not direct law guardians to make such reports."[135]

Whatever role the child's lawyer is playing, the lawyer should prepare trial strategy in close coordination with counsel for any party whose litigation goals are aligned with the child's. "The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child's 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 . . . and not a mere endorsement of another party's position."[136]

Conclusion

No model of representation is perfect, and so debater's points can be scored against each one. But the perfect should not become the enemy of the good. We are compelled to choose this

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coincide with the interests of the child").

[134] *See Matter of Williams v. Williams*, 35 A.D.3d 1098, 1100 (3d Dep't 2006) (law guardian improperly acquiesced in truncated custody hearing and formulated position in absence of complete record); *Matter of Apel*, 96 Misc.2d 839, 842 (Fam. Ct., Ulster County, 1978) ("For the law guardian to undertake such an assessment, make a judgment on the basis of that assessment as to which of his client's interests should receive paramount consideration, and then tailor his trial strategy accordingly, is a self-servicing exercise in which the lawyer judges the ultimate issues in the case and then sets out to implement his own judgment"); Besharov, *1998 Practice Commentaries*, N.Y. Fam. Ct. Act § 241 ("Therefore, even when Law Guardians are not sure that their young clients are of sufficient maturity to make a reasoned decision about the course of the proceeding, they should . . . seek the fullest presentation of the facts concerning the allegations of the petition and the family's present situation").

[135] *Weiglhofer v. Weiglhofer*, 1 A.D.3d 786, 789, n.* (3d Dep't 2003); *see also Cervera v. Bressler*, 50 A.D.3d 837, 840-841 (2d Dept. 2008) (child's attorney disqualified where he disclosed facts which were not part of record and constituted hearsay gleaned from mother, and made repeated ad hominum attacks on father's character, which effectively made attorney witness against father); *Naomi C. v. Russell A.*, 48 A.D.3d 203 (1st Dept. 2008) (court improperly asked law guardian to discuss position of ten-year-old child regarding how well custody arrangement was working, but acted properly in disallowing "cross-examination" of law guardian by petitioner's counsel; court should not consider hearsay opinion of child in determining legal sufficiency of pleading, and such colloquy makes law guardian an unsworn witness, "a position in which no attorney should be placed"); *Graham v. Graham*, 24 A.D.3d 1051, 1054 (3d Dep't 2005), *lv denied*, 6 N.Y.3d 711 ("We have not given the Law Guardian's summation greater weight than the arguments and positions of the attorneys for the parents and have treated the 'recommendations' of the Law Guardian more properly as the position of the attorney representing the child").

[136] *See supra* note 21, *Commentary to Standard D-4. See also* Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1275 (2006) ("Children's lawyers should proactively pursue any position of parents that would serve children's interests").

model because it is the best one.[137] Minimizing use of the guardian *ad litem* model reduces the number of instances in which representation becomes skewed by the preferences, and idiosyncratic biases and personal philosophies of individual lawyers. The age parameters we have set also make sense. Allowing lawyers to focus on maturity in determining when to provide client-directed representation leads to arbitrary determinations as to who is and is not "mature"--many older teenagers and adult clients would fail that test -- and permits a lawyer to discount the child's position whenever the lawyer thinks it reflects a lack of sound judgment. When the focus is on the child's baseline capacity to communicate a position and the reasons for it, rather than on the child's ability to make well-reasoned judgments, there will be more consistency in child advocacy. As long as the child's lawyer also concentrates on protecting the child in the home or institution in which the child is residing, the safety and best interests of the child will be promoted.

The model we have adopted does not remove entirely the risk of bias or arbitrariness, but the only solution would be to adopt a model requiring the lawyer to merely assist the court in gathering evidence, without taking positions and making arguments. That would relegate the lawyer to duty as an adjunct to the court, and turn the lawyer into something other than *the child's* lawyer.

Given the lawyer's counseling function, her authority to develop a litigation strategy, her discretion to invoke the "seriously injurious" exception to client-directed advocacy, and the ethical proscription against frivolous arguments, cases in which the child's lawyer is advocating for a result that would place a child at risk of substantial harm should not occur. More importantly, the law guardian's representation should never undermine, and usually will enhance, the judge's ability to ascertain the facts and make well-informed decisions. When the choice is between a lawyer who merely assists the judge in arriving at a decision the judge is fully qualified to make on her own, and a lawyer who provides the judge with a window into the child's unique perspective, the choice is a simple one. These are proceedings that can change the course of the child's life, and thus the child must be heard.

[137] In *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children*, New York received an overall grade of "A" for its system of representation in abuse/neglect proceedings because, "[u]nder New York's statute, a lawyer must represent the child's wishes and interests." *Id.* at 78.