

**NEW YORK STATE SUPREME COURT  
APPELLATE DIVISION, FOURTH DEPARTMENT**

**HONORABLE GERALD J. WHALEN  
PRESIDING JUSTICE**



**GUIDELINES FOR ATTORNEYS FOR CHILDREN  
IN THE FOURTH DEPARTMENT**

**2022**

# **GUIDELINES FOR ATTORNEYS FOR CHILDREN IN THE FOURTH DEPARTMENT**

## PREFACE

The Departmental Advisory Committee of the Fourth Department Attorneys for Children Program (Hon. Lenora B. Foote-Beavers, Chair) drafted these guidelines and they have been approved by the Appellate Division, Fourth Department. The guidelines are an update of the guidelines issued by the Departmental Advisory Committee of the Fourth Department Law Guardian Program in the 1980's and 1990's (Hon. John F. O'Donnell, Chair), subsequently updated in the 2000's and 2010's by the Departmental Advisory Committee of the Fourth Department Attorneys for Children Program (Hon. Michael F. Griffith, Chair). The guidelines have been updated to reflect current practice in light of case law, statutory changes, Court Rules and Appellate Division, Fourth Department policy, and inclusion and cultural sensitivity considerations. These guidelines contain recommended best practices for all attorneys for children and shall be used as a basis for evaluation of the overall performance of attorneys for children.

## FUNCTION OF THE ATTORNEY FOR THE CHILD

The following Rule of the Chief Judge must be followed by all attorneys for children in the Fourth Department:

Section 7.2 Function of the attorney for the child.

- A. As used in this part, "attorney for the child" means [an attorney] appointed by family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.
- B. The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness to the litigation.
- C. In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.
- D. In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.
  1. In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.

2. If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
3. When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

### DIVERSITY AND INCLUSION

It is the responsibility of the attorney for the child (hereafter attorney for the child or AFC) to provide their clients with equal and culturally sensitive legal representation without regard to:

1. Race
2. Color
3. National origin
4. Gender
5. Religion
6. Socio-economic status
7. Mental health
8. Cognitive/intellectual ability
9. Disability
10. Pregnancy
11. Gender identity or expression
12. Sexual orientation
13. Predisposing genetic characteristics
14. Domestic violence victim status
15. Familial status
16. Immigration status
17. Criminal conviction status
18. Any other relevant consideration

### TRAUMA INFORMED PRACTICE

It is the responsibility of the AFC to maintain an awareness of the prevalence of trauma amongst their clients.

In doing so, the AFC should be alert to the signs and symptoms of physical, emotional, sexual, and or medical trauma in children. Exposure to Intimate Partner Violence, physical neglect/abuse, sexual abuse, bullying, and medical trauma are common forms of trauma experienced by children.

In representing clients, the AFC should conduct themselves in a manner that promotes safety, empowerment and trust. The AFC should be sensitive to interactions that may trigger a re-experiencing of chronic, acute and/or complex trauma. Where appropriate the AFC may recommend treatment linkages.

### THE CHILD'S COMMUNICATION NEEDS AND ACCOMMODATIONS

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to hear, see, speak, read, listen, process and otherwise participate in or understand the activities and discussions pertaining to their proceeding. The AFC should ascertain whether the child is able to adequately speak and understand English, identify the child's preferred or dominant language, inquire whether the child receives English as a New Language (ENL) or bi- or multi-lingual services in school, and request interpreter services in and outside of court, as applicable, for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, the nature of the disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of education and related services that the child receives.

### SUMMARY OF RESPONSIBILITIES OF THE ATTORNEY FOR THE CHILD

The following Summary of Responsibilities of the Attorney for the Child was drafted by the Statewide Attorneys for Children Advisory Committee and approved by the Administrative Board of the Unified Court System. The Appellate Division, Fourth Department endorses this summary.

While the activities of the attorney for the child will vary with the circumstances of each client and proceeding, in general those activities will include, but not be limited to, the following:

1. Commence representation of the child promptly upon being notified of the appointment;
2. Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;
3. Consult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child;
4. Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the

child shall retain and consult with all experts necessary to assist in the representation of the child;

5. Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;
6. Appear at and participate actively in proceedings pertaining to the child;
7. Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and
8. Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal.

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**ABUSE AND NEGLECT PROCEEDINGS**  
**Article 10, Family Court Act**

A. The Function of the Attorney for the Child

The AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation...the AFC must zealously advocate the child's position.

1. In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a trauma informed manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
2. If the child is capable of knowing, voluntary and considered judgment, the AFC should be directed by the wishes of the child, even if the AFC believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's wishes and interests.
3. When the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the AFC would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so, the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients, the AFC seeks to establish their clients' sense of safety through acts of transparency, trustworthiness, collaboration, choice and empowerment. The Trauma Informed Practice

Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

D. Client-Directed Representation and Responsibilities

The AFC is required to engage in client-directed representation, adhering to the child's expressed interests and wishes, unless the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child. The AFC should assist the child to identify their interests and litigation goals and to evaluate alternative case strategies and outcomes. The AFC should keep the child fully informed and provide them with ongoing consultation and advice. The AFC should explain the practical effects of taking a position and may express an opinion on the likelihood of the court adopting that position. Where the AFC believes that the child's directions will not achieve an outcome consistent with the child's interests, the AFC should discuss these concerns with the child, provide the child with additional information as needed, and present alternatives. Communication with the child should be conducted in terms the child can understand and be informed by current adolescent brain science, effective child and adolescent interviewing techniques and trauma informed strategies.

E. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

F. Upon Appointment and Prior to the Initial Appearance of the AFC, if feasible, or as soon as practically possible thereafter

1. The AFC must obtain and examine all pleadings and supporting documents.
2. In order to determine the current address and phone number of the child, the AFC should, if permitted by the agency's attorney, contact the child



protective worker named as petitioner in the action or if the worker is unavailable, the supervisor of such worker.

3. The AFC should obtain information from the child protective worker regarding the present welfare of the child and services the child may need.
4. Absent extraordinary circumstances, the AFC must do the following:
  - a. If the child is in foster care or not with a named respondent, arrange through the foster care worker, foster parent or relative to visit and interview the child in a trauma informed manner and environment appropriate to the child's age and maturity to ascertain more particular facts concerning the alleged abuse or neglect and to determine the child's wishes and needs regarding temporary access and placement.
  - b. If the child is in the care and custody of a named respondent, the AFC may request permission from the attorney for the respondent to arrange an interview with the child out of the presence of the respondent and in a trauma informed manner and environment appropriate to the child's age and maturity. If permission is refused, the AFC should request the help of the court in arranging an interview with the child. During the interview, the AFC should ascertain more particular facts concerning the alleged abuse or neglect and determine the child's wishes and needs regarding temporary access and placement.
5. Absent extraordinary circumstances, the AFC should do the following:
  - a. If the child is in foster care or not with the named respondent,
    - 1) Obtain from the child's caretaker information regarding the level and quality of care and services the child is currently receiving and services the child may need and;
    - 2) Visit the child in the caretaker's home and make observations of the child and the child's interactions.
  - b. If the child is in the care and custody of the named respondent, the AFC may consider requesting permission from the respondent's attorney to:
    - 1) Meet with the respondent to obtain necessary background and relevant history and information regarding the child's care and need for services and;
    - 2) In certain circumstances the AFC may visit the child in the child's home and make observations of the child and the child's relationships being mindful of avoiding situations and conversations that would make the AFC a potential witness in the proceedings and disqualify the AFC from the case.
6. The AFC should obtain from caseworkers and caretakers names and addresses of hospital personnel, physicians, teachers, and other persons who have had significant contact with the child and may have pertinent

information regarding the child. When representing an older child, the AFC should attempt to obtain information directly from the child, if possible. If the older child does not have the information, then secondary sources should be contacted.

7. The AFC should advise all other attorneys in the proceeding that the child may not be interviewed without the permission of the AFC.

#### G. Preparation for the Fact-Finding Hearing

1. The AFC must:
  - a. Review the files and all relevant information.
  - b. Advise an older child, in terms the child can understand, of the nature of the proceeding, the child's rights, the role and responsibilities of the AFC, the attorney-client privilege, the fact-finding process, and the possible consequences of a finding. The strengths and weaknesses of the petitioner's case should be evaluated from the point of view of fact-finding and disposition. The AFC's strategy should be developed with full consultation, in terms the child can understand, with the child. If the child is capable of knowing, voluntary and considered judgment, the AFC must, after consultation with the child, advocate for the child's position, goals and strategies, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
  - c. Actively participate in any pre-trial settlement discussion regarding any aspect of the case with the child protective agency and respondent's attorney, with or without the judge or the judge's law clerk present.
2. The AFC should:
  - a. Contact persons who have had significant contact with the child and may have pertinent information regarding the child.
  - b. Obtain, by subpoena, if necessary, all the foster care child protective records from the agency (judicial subpoena duces tecum) and necessary and relevant medical, psychological, school, etc., records.
  - c. Consult with any attorney who previously represented the child.
  - d. In certain circumstances seek approval from the respondent's attorney to interview the respondent regarding the allegations of the petitioner. After permission is granted, interview the respondent, being mindful of avoiding situations and conversations that would make the AFC a potential witness in the proceedings and disqualify the AFC from the case.

- e. If any existing reports are insufficient or for any other valid reason, request services such as an independent mental health evaluation under § 722-c of the County Law.
  - f. Request any temporary orders that may be in the child's interests, including preventive and rehabilitative services under the Families First Prevention Services Act (P.L. 115-123), temporary foster care or temporary placement with a relative. If the child is in foster care, the AFC must consider the possibility of placement with a relative or friend as well as possible alternative foster care placement, and in consultation with the child, the AFC should advocate for appropriate parental access and sibling visitation, if appropriate.
3. If the child has been removed from the child's residence prior to a court order, the AFC must participate actively at the §1027 hearing or §1028 hearing (requesting such hearing be held, if necessary) and present evidence and a position concerning the need for removal; the AFC must not merely endorse the position of another party. If necessary and advisable, the AFC should appeal an adverse finding.

#### H. The Fact-Finding Hearing

1. The AFC must take an active role during the fact-finding hearing as the child's advocate. The AFC must not merely endorse the position of another party.
2. The AFC must be familiar with the relevant records, reports and evidence and ensure that necessary witnesses testify, and relevant material is introduced into evidence.
3. Whenever appropriate, the AFC must present independent evidence and witnesses, cross-examine witnesses, make opening and closing statements, and make necessary motions.
4. The AFC must be fully involved in any discussion regarding the proposed testimony of the child and, if it is determined that the child should testify, must strongly advocate for that testimony to be taken in a legally acceptable and emotionally neutral setting.
  - a. Following the filing of the petition, the AFC must arrange to be present whenever the child is interviewed by an attorney and must advise all attorneys that interviews with the child must be scheduled, if at all, through the AFC.
  - b. The AFC should prepare the child for testifying by:
    - 1) Bringing the child to the courtroom shortly before the trial, showing the child the setting, introducing the child to the judge and available attorneys of record, and advising the child in simple terms as to the nature of an oath and the purpose and mechanics of testifying.

- 2) When appropriate, scheduling an appointment with the child and the attorney who has subpoenaed the child to advise the child (in the presence of the AFC) of questions that may be asked at trial.

#### I. Preparation for the Dispositional Hearing

1. The AFC should request the court to order reports that may be helpful, including mental health studies or other evaluations.
2. The child should be interviewed again to determine the child's wishes, the possible dispositional evidence and, if relevant, the status and appropriateness of the foster home. Consultation with social workers or other professionals should occur if determined necessary.
3. The AFC should consider re-visiting the child's prior residence and, if relevant, the foster home; the respondent should be interviewed again with the consent of respondent's attorney being mindful of avoiding situations and conversations that would make the AFC a potential witness in the proceedings and disqualifying the AFC from the case. Parental access and sibling visitation should be evaluated and, if possible, observed.
4. Every relevant report and record should be obtained or subpoenaed, including school records, court-ordered evaluations, and the records of any supportive or rehabilitative program.
5. When necessary, the AFC should develop independently a complete dispositional plan to present to the court. If a full dispositional hearing is needed, potential witnesses and other evidence should be subpoenaed to support the specific dispositional plan.
6. The child should be consulted and apprised, in terms the child can understand, of the specific dispositional plan and possible alternatives proposed by the AFC or child protective agency. When the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes with regard to the specific disposition that the AFC intends to present and argue, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
7. Child protective officials and other appropriate persons should be consulted regarding the dispositional plan; if possible, the AFC and the attorney for the agency should reach agreement or consent concerning the disposition.

#### J. The Dispositional Hearing

1. The AFC should present and advocate a specific dispositional plan to the court and apprise the court of the child's wishes.

2. The AFC should ensure that every relevant report and witness supportive of the AFC's dispositional plan are presented to the court.
3. When relevant, witnesses should be cross-examined; if appropriate, such as when the AFC disagrees with the agency's plan, the AFC should present evidence to support the alternate plan.
4. If the court intends to interview the child in chambers, the AFC must be present; all questions should be posed only by the court and the AFC, and attorneys may submit written questions to the court prior to the interview. The AFC must prepare the child for the meeting with the court and should question the child in an age appropriate manner. The AFC should inform the court of any disabilities, developmental delays or other impediments that may impact the ability of the court to interact with the child.

#### K. Post Disposition

1. The AFC should explain to the child, in terms the child can understand, the disposition and its consequences, the child's rights, and possibilities of post-hearing motions or hearings, and the responsibilities of each of the parties, including the child protective agency and the respondent(s).
2. If the AFC believes that the court's determination is contrary to the child's wishes or interests and grounds exist upon which to base an appeal, after considering the wishes of the child, a notice of appeal should be filed. If there is an appeal, the AFC must comply with the appeals section of these guidelines. If the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes with regard to the filing of an appeal, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
3. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (*see Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.
4. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.
5. The AFC must examine the dispositional order to ensure that the order conforms with the finding and disposition. The AFC should ensure that

statutorily required findings and notices, such as the possibility of future termination of parental rights (if there was an abuse finding) and contempt warnings for violations of orders of protection, are included in the order.

6. To effectuate post-disposition review and to ensure that court-ordered reports reach the AFC, the AFC should request that the order of disposition contain the provision that the AFC remain the child's attorney for the duration of the order.
  - a. The AFC should ensure that the dispositional order contains provisions that direct the child protective agency and other service providers named in the order to provide periodic reports to the AFC on the actual provision of services, the compliance of the respondent with the court order, and the current welfare of the child.
  - b. In appropriate cases, the AFC, in monitoring the provisions of the dispositional services, should return the matter to the court if necessary, to protect the interests of the child. (The AFC is empowered by the Family Court Act to seek new hearings and reconsiderations of orders [see Family Court Act §1061] on behalf of the child).
  - c. The AFC must provide the child, or an appropriate caretaker/guardian, with a phone number or other method of contacting the AFC in the event that problems arise with regard to the disposition.

**FOSTER CARE APPROVAL PROCEEDINGS**  
**Social Services Law § 358-a**

A. The Function of the AFC

The AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation...the AFC must zealously advocate the child's position.

1. In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a trauma informed manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances.
2. If the child is capable of knowing, voluntary and considered judgment, the AFC should be directed by the wishes of the child, even if the AFC believes that what the child wants is not in the child's best interests. The AFC should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's wishes and interests.
3. When the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the AFC would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients the attorney for the child seeks to establish their clients' sense of safety through acts of transparency,

trustworthiness, collaboration, and choice and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

D. Client-Directed Representation and Responsibilities

The AFC is required to engage in client-directed representation, adhering to the child's expressed interests and wishes, unless the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child. The AFC should assist the child to identify their interests and litigation goals and to evaluate alternative case strategies and outcomes. The AFC should keep the child fully informed and provide them with ongoing consultation and advice. The AFC should explain the practical effects of taking a position and may express an opinion on the likelihood of the court adopting that position. Where the AFC believes that the child's directions will not achieve an outcome consistent with the child's interests, the AFC should discuss these concerns with the child, provide the child with additional information as needed, and present alternatives. Communication with the child should be conducted in terms the child can understand and be informed by current adolescent brain science, effective child and adolescent interviewing techniques and trauma informed strategies.

E. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

F. Preparation for the Initial Appearance of the AFC

1. The AFC should obtain and examine all pleadings and supporting documents. The transfer of custody instrument executed by the parent or transfer of care instrument signed by a non-parent also should be examined.



2. The AFC must obtain the current address and phone number of the child and should, if permitted by the agency's attorney, obtain from the foster care worker information regarding the present welfare of the child and services the child needs.
3. Absent extraordinary circumstances, the AFC must arrange through the foster care worker, foster parent or relative to visit and interview the child in a trauma informed manner and environment appropriate to the child's age and maturity to ascertain more particular facts concerning the child's and family's situation and to determine the child's wishes and needs regarding access services and placement.
4. Absent extraordinary circumstances, if the child is too young to provide meaningful information, the AFC must obtain from the child's caretaker information regarding the level and quality of care and services the child is currently receiving and services the child may need and visit the child in the caretaker's home and make observations of the child and the child's interactions.
5. The AFC should obtain from caretakers and caseworkers names and addresses of hospital personnel, physicians, teachers and other persons who have had significant contact with the child and may have pertinent information regarding the child. When representing an older child, the AFC should attempt to obtain this information directly from the child, if possible. If the older child does not have the information, then secondary sources should be contacted.
6. If the record and documents show a prior foster care placement, the relevant court records should be reviewed and any AFC who previously represented the child should be consulted.

#### G. Preparation for the Hearing

1. The AFC should review the documents from the family's case file that are required to be filed with the court 10 days before the hearing. If more information is needed, the F.A.S.P. (Family Assessment and Service Plan) and any necessary and relevant medical, psychological, and school records should be obtained (by subpoena if necessary). These records should be reviewed in detail to determine issues such as the agency's assessment of the legal custodian, caretaker, or parent substitute and the specific problems that require foster care placement, the services which were offered to prevent placement, the parental response, the estimated time necessary to ameliorate the conditions that resulted in foster care placement, the identification and availability of services required for the child and the family, whether an investigation was done regarding alternatives to foster care placement through placement with fit and willing relatives or natural supports, and the access plan.

2. The AFC should determine whether all necessary parties have been served with notice of the proceeding, such as the other parent who has the right to receive notice and to be heard at the time of the proceeding, and shall notify appropriate parties of the same as long as doing so does not conflict with the child's stated wishes or desired outcome.
3. The AFC should determine, if possible, whether the parents executed the transfer instrument voluntarily or whether there was possible coercion (patent or latent); it also should be ascertained whether the parents waived a § 358-a hearing and consented to a court review on the papers only, and whether the parents were aware of and were offered alternatives to placement, including preventative services.
4. After a review of the relevant documents, and with consent from the agency's attorney, if necessary, the caseworker should be interviewed and asked about agency efforts to prevent or eliminate the need for removal of the child from the home and the reasons why such efforts were not made. The AFC may consider requesting permission from the parents' attorneys to interview the parents for purposes of obtaining information pertaining to medical, educational, psychological and social history. When permission is granted, the AFC should interview the parents. If the parents oppose continued placement, the plan concerning the child should be considered by the AFC. The parents also should be asked about the nature of the agency's efforts to prevent or eliminate the need for removal of the child from the home.
5. If the existing reports are inadequate or for any other valid reason, the AFC should request services such as an independent mental health evaluation under § 722-c of the County Law.
6. If the child has siblings in foster care, the siblings' caseworker should be interviewed regarding the family situation and the case plan for the siblings and parents. The AFC should make an inquiry into the possibility and appropriateness of placing siblings together in consultation with siblings' attorneys.
7. Absent extraordinary circumstances, the AFC must meet with the child and, if the child is capable of providing meaningful information, must interview the child to ascertain the child's desires concerning placement and services. The child should also be questioned concerning possible neglect or abuse. The child must be advised, in terms the child can understand and in a trauma informed manner, of the nature of the proceeding, the child's rights, the role and responsibilities of the attorney for the child, the agency, the court, and the parents, the attorney-client privilege, and the possible dispositional alternatives available to the court.
8. In consultation with the child, the AFC should determine the child's position relative to the continuation, duration and necessity of the placement. The AFC should form an opinion whether placement at this

time is an appropriate plan for the child, giving due consideration to the child's wishes. The AFC's strategy should be developed with full consultation, in terms the child can understand, with the child. If placement is deemed appropriate, the AFC should form an opinion whether the specific proposed placement is appropriate, including whether it is the least restrictive appropriate placement, whether the proposed duration of the placement is appropriate, and whether the proposed service and access plans are appropriate. Inquiry should be made to local alternate resources through relatives or other natural supports.

9. If the child is capable of knowing, voluntary and considered judgment, the AFC must, after consultation with the child, advocate for the child's position and goals, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.

#### H. The Hearing

1. If appropriate, the AFC should submit motions, such as a motion to produce records or a motion for a mental health evaluation of the child or any other party.
2. If there was a parental waiver of the hearing, the AFC should question the agency worker under oath concerning the facts surrounding the waiver and efforts to encourage the parent to attend the hearing.
3. If parental presence is deemed necessary, the AFC should request an adjournment and the issuance of process.
4. The AFC should consider whether an Article 10 proceeding (abuse or neglect) would be appropriate; if so, the AFC should either request that the court direct that such a proceeding be commenced or for permission to file.
5. The AFC should present independent evidence to support the child's position and, when necessary, call relevant witnesses such as school officials or the foster care parents.
6. The AFC should advise the court of the child's wishes and desires.
7. The AFC should assist in determining whether reasonable efforts were made by the agency to prevent or eliminate the need for placement or whether there were good reasons why such efforts were not made.
8. The AFC should advocate a complete appropriate plan. If any aspect of the agency plan appears to be inappropriate, including the decision to place, the proposed duration and level of placement, access, services to the child and the family, or the specific placement (the suitability of the foster home, distance from the child's prior residence, school, etc.) the AFC should present evidence and advocate appropriate alternatives.

9. If the court intends to speak to the child in chambers, the AFC must be present; all questions should be posed only by the court and the AFC, and attorneys may submit written questions to the court prior to the interview. The AFC must prepare the child for the meeting with the court and question the child in an age appropriate manner. The AFC should inform the court of any disabilities, developmental delays or other impediments that may impact the ability of the court to interact with the child.
10. The AFC should advocate for inclusion of appropriate specific conditions in the court's order approving placement that require the agency to implement a specific plan of action toward returning the child home.

#### I. Post Hearing

1. The AFC must explain to the child, in terms the child can understand, the disposition and its consequences, the child's rights, future permanency hearings, and the responsibilities of each of the parties, including the agency and the parents.
2. The AFC must examine the dispositional order to ensure that the order conforms with the dispositional findings.
3. If the AFC believes that the court's determination is contrary to the child's wishes or interests and grounds exists upon which to base an appeal, after considering the wishes of the child, a notice of appeal should be filed. If there is an appeal, the AFC must comply with the appeals section of these guidelines. If the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes with regard to the filing of an appeal, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
4. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (*see Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.
5. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.

6. The AFC must provide the child with a phone number or other method of contacting the AFC in the event that problems arise with regard to the disposition.

**PERMANENCY PROCEEDINGS**  
**Family Court Act § 1086 *et seq.***

A. The Function of the AFC

The AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation...the AFC must zealously advocate the child's position.

1. In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a trauma informed manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
2. If the child is capable of knowing, voluntary and considered judgment, the AFC should be directed by the wishes of the child, even if the AFC believes that what the child wants is not in the child's best interests. The AFC should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's wishes and interests.
3. When the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the AFC would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients the AFC seeks to establish their clients' sense of safety through acts of transparency, trustworthiness,

collaboration, choice, and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

D. Client-Directed Representation and Responsibilities

The AFC is required to engage in client-directed representation, adhering to the child's expressed interests and wishes, unless the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child. The AFC should assist the child to identify their interests and litigation goals and to evaluate alternative case strategies and outcomes. The AFC should keep the child fully informed and provide them with ongoing consultation and advice. The AFC should explain the practical effects of taking a position and may express an opinion on the likelihood of the court adopting that position. Where the AFC believes that the child's directions will not achieve an outcome consistent with the child's interests, the AFC should discuss these concerns with the child, provide the child with additional information as needed, and present alternatives. Communication with the child should be conducted in terms the child can understand and be informed by current adolescent brain science, effective child and adolescent interviewing techniques and trauma informed strategies.

E. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

F. Preparation for the Initial Appearance of the AFC

1. The AFC should obtain and examine all pleadings and supporting documents, including the placement instrument.
2. If the permanency report omits the name and address of the foster parents or the name and address of the biological parents, the AFC should obtain

this information from the caseworker who has signed the report or from the agency attorney.

3. The AFC must obtain the current address and phone number of the child and information regarding the present welfare of the child and services the child may need the foster care worker to secure.
4. Absent extraordinary circumstances, the AFC must arrange through the foster care worker, foster parent or relative to visit and interview the child in a manner and environment appropriate to the child's age and maturity to ascertain more particular facts concerning the child's and family's situation and to determine the child's wishes and needs regarding access, services and placement.
5. Absent extraordinary circumstances, if the child is unable to provide meaningful information, the AFC must obtain from the child's caretaker information regarding the level and quality of care and services the child is currently receiving and services the child may need and visit the child in the caretaker's home and make observations of the child and the child's interactions.
6. The AFC should obtain from caretakers and caseworkers names and addresses of hospital personnel, physicians, teachers, and other persons who have had significant contact with the child and may have pertinent information regarding the child. When representing an older child, the AFC should attempt to obtain information directly from the child. If the older child does not have the information, then secondary sources should be contacted. When representing an older child, the AFC should request permission from the child before obtaining confidential information from the child's service providers.
7. Relevant court records pertaining to the child's initial placement in foster care should be reviewed and any AFC who previously represented the child should be consulted.

#### G. Preparation for the Hearing

1. The AFC should obtain a copy of the Family Assessment and Service Plan (F.A.S.P.) (by subpoena if necessary), and the permanency hearing report, and review them in detail with the child, focusing on permanency plans, child and family services, permanency goals, amendments to the initial F.A.S.P., progress notes, the comprehensive service plan, and the goal and objective review sections of the permanency hearing report. The extent of compliance with plans and the time frames for meeting the plans should be carefully scrutinized and any discrepancies noted.
2. The AFC should specifically determine in what manner the agency intends to comply with the relevant time periods set forth in Family Court Act § 1089.



3. Any necessary and relevant medical, psychological, and school records should be obtained (by subpoena if necessary) and reviewed.
4. The AFC should determine whether all necessary parties have been served with notice of the proceeding, including the agency having custody of the child, the agency supervising the child's foster care, the foster parents in whose home the child has resided for a continuous period of twelve months, and the child's parent or guardian or other person who transferred care of the child to the agency.
5. The AFC should ensure that the hearing is scheduled so that it will take place before the expiration of the relevant time periods set forth in Family Court Act § 1089.
6. After a review of the relevant documents, and with the agency's attorney's consent, the caseworker should be interviewed and asked about the child protective agency's effort to reunite the family. The parents' attorneys may be asked for permission to interview the parents. When permission is granted, the AFC may interview the parents in certain circumstances being mindful of avoiding situations and conversations that would make the AFC a potential witness in the proceedings and disqualifying the AFC from the case. If the parents oppose continued placement, their plan concerning the child should be considered by the AFC. The parents should also be asked about the nature of the child protective agency's efforts to reunite the family.
7. If existing reports are insufficient or for any other valid reason, the AFC should request services such as an independent mental health evaluation under § 722-c of the County Law.
8. If the child has siblings in foster care, the siblings' caseworker should be interviewed regarding the family situation and the case plan for the siblings and parents. If siblings are not placed together, the reasons for the separation should be examined to determine the ongoing validity of the separation and the caseworker should be advised as to the child's wishes regarding placement with siblings.
9. Absent extraordinary circumstances, the AFC must interview the child to ascertain the child's desires concerning placement and services. The child should also be questioned concerning possible neglect or abuse in the foster care placement or in the home. The child should be advised, in terms the child can understand, of the nature of the proceeding, the child's rights, the role and responsibilities of the AFC, the child protective agency, the court and the parents, the attorney-client privilege, and the possible dispositional alternatives available to the court.
10. Children age 10 and over must be advised of their right to participate in their permanency hearing whether in person or through some virtual platform as set forth in Family Court Act § 1090-a.

11. Children age 10 and over must also be advised that they may waive their right to appear and allow the AFC to make the child's wishes and desires known to the court without the child present.
12. Children age 10 and over should be informed of the details surrounding appearing in court and advised of what they might expect to experience. Children who have not been to court before might be given the opportunity to visit the building, view a courtroom, etc. in preparation for the day they will be required to attend.
13. The AFC shall notify the attorneys for all parties and the court in writing at least ten days in advance of the scheduled hearing whether or not the child is asserting their right to participate, and if so, the manner in which the child has chosen to participate.
14. The AFC should form an opinion as to the appropriateness of the disposition and the dispositional plan proposed by the agency, including any recommendation for continued foster care. If the AFC disagrees with the agency's plan, a comprehensive alternative plan should be prepared for submission to the court. If continued placement is deemed appropriate, the AFC should form an opinion whether the specific placement is appropriate, including whether it is the least restrictive appropriate placement, whether the proposed duration of the placement is appropriate, and whether the proposed service and access plans are appropriate.

#### H. The Hearing

1. The AFC should consider whether to go forward with the hearing if there has not been compliance with the timelines for service of the Permanency Hearing Report. If appropriate, the AFC should submit motions, such as a motion to produce records or a motion for a mental health evaluation of the child or any party.
2. The AFC should present independent evidence to support the child's position and, when necessary, call relevant witnesses such as school officials or the foster parents. If appropriate, the AFC should cross-examine witnesses called by the parties – detailed examination is particularly important when the AFC disagrees with the child protective agency's plan.
3. The AFC should advise the court of the child's wishes and desires. Children age 10 and over may exercise their right to participate in their permanency hearing. If, after consultation with a child who is at least 10 but less than 14 years of age, the AFC determines that the child will attend court and that the proceedings should be bifurcated based on the nature of what the AFC anticipates will be discussed, the AFC must provide

notice of the request to bifurcate proceedings to the court and relevant parties.

4. The AFC should advocate a complete appropriate plan. If any aspect of the agency plan appears to be inappropriate including the decision to continue placement or return home, the proposed duration and level of placement, access, services to the child and family, or the specific placement (the suitability of the foster home, the restrictiveness of the level of care, distance from the child's prior residence, school, etc.), the AFC should present evidence and advocate appropriate alternatives.
5. Where there is a permanency goal of returning the child home, the AFC should ascertain whether the proposed plan provides for this to occur within appropriate time parameters.
6. If the court intends to speak to the child in chambers, the AFC must be present; all questions should be posed only by the court or the AFC, and other attorneys should submit written questions to the court prior to the interview. The AFC must prepare the child for the meeting with the court and should question the child in an age appropriate manner. The AFC should inform the court of any disabilities, developmental delays or other impediments that may impact the ability of the court to interact with the child.
7. The AFC should advocate for inclusion of appropriate specific conditions in the court's order approving continued placement which require the agency to implement a specific plan of action toward returning the child home.

#### I. Post Hearing

1. The AFC must explain to the child, in terms the child can understand, the disposition and its consequences, the child's rights, post hearing motions or hearings (particularly the right to seek review of the placement at any time), and the responsibilities of each of the parties, including the child protective agency and the parents.
2. If the AFC believes that the court's determination is contrary to the child's wishes or interests and grounds exist upon which to base an appeal, after considering the wishes of the child, a notice of appeal should be filed. If there is an appeal, the AFC must comply with the appeals section of these guidelines. If the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes with regard to the filing of an appeal, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
3. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that

their brief raises contentions not raised by the appellant, those contentions will not be considered (see *Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.

4. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.
5. If a proceeding to terminate parental rights has been ordered, or if a placement for adoption has been ordered, the AFC should closely monitor the agency to ensure that a timely termination petition is filed or adoptive placement is made and should return the matter to the court if necessary to protect the interests of the child.
6. To effectuate post-disposition review, the AFC must request that the order of disposition contain the provision that the AFC remain the AFC for the duration of the order.
7. The AFC must examine the dispositional order to ensure that the order conforms with the findings and the disposition.
8. The AFC must provide the child with a phone number or other method of contacting the AFC in the event that problems arise with regard to the disposition.

**TERMINATION OF PARENTAL RIGHTS PROCEEDINGS**  
**Social Services Law § 384-b**

A. The Function of the AFC

The AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation...the AFC must zealously advocate the child's position.

1. In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a trauma informed manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
2. If the child is capable of knowing, voluntary and considered judgment, the AFC should be directed by the wishes of the child, even if the AFC believes that what the child wants is not in the child's best interests. The AFC should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would be promote the child's wishes and interests.
3. When the AFC is convinced either than the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the AFC would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients the AFC seeks to establish their clients' sense of safety through acts of transparency, trustworthiness,

collaboration, choice, and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

D. Client-Directed Representation and Responsibilities

The AFC is required to engage in client-directed representation, adhering to the child's expressed interests and wishes, unless the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child. The AFC should assist the child to identify their interests and litigation goals and to evaluate alternative case strategies and outcomes. The AFC should keep the child fully informed and provide them with ongoing consultation and advice. The AFC should explain the practical effects of taking a position and may express an opinion on the likelihood of the court adopting that position. Where the AFC believes that the child's directions will not achieve an outcome consistent with the child's interests, the AFC should discuss these concerns with the child, provide the child with additional information as needed, and present alternatives. Communication with the child should be conducted in terms the child can understand and be informed by current adolescent brain science, effective child and adolescent interviewing techniques and trauma informed strategies.

E. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

F. Upon Appointment and Prior to the Initial Appearance of the AFC

1. The AFC must obtain and examine all pleadings and supporting documents.
2. The AFC must determine whether the agency has served all necessary parties, including adjudicated fathers and other statutorily included individuals.

3. The AFC should review all prior court records involving the child and family in question. Additionally, the AFC should consult with any AFC who previously represented the child.
4. The AFC should obtain and review the child protective agency case record in order to assess the agency's involvement with the family during the time of placement, services that were made available to the family, the utilization, if any, of those services and the quantity and quality of parental access.
5. Absent extraordinary circumstances, the AFC must arrange through the foster care worker, foster parent or relative to visit and interview the child in a trauma informed manner and environment appropriate to the child's age and maturity to ascertain more particular facts concerning the placement, the foster parents, respondents and the child's wishes and needs concerning placement and adoption.
6. Absent extraordinary circumstances, if the child is unable to provide meaningful information the AFC must visit the child in the caretaker's home and make observations of the child and the child's interactions being mindful of avoiding situations and conversations that would make the AFC a potential witness in the proceedings and disqualifying the AFC from the case.
7. The AFC should obtain from the child's caretakers information regarding the level and quality of care and services the child is currently receiving and services the child may need.
8. The AFC must contact the foster care worker assigned to the case and obtain information regarding the current living situation of the child, the physical and emotional challenges the child may be experiencing and the worker's evaluation of the potential permanency plans available to the child.

#### G. Preparation for the Fact-Finding Hearing

1. The child must be advised, in terms the child can understand, of the nature of the proceedings, the child's rights, the parents' rights, the role and responsibility of the child protective agency, the court, the foster parents and the AFC, the attorney-client privilege, and the possible dispositional alternatives available to the court.
2. The AFC must arrange to be present whenever the child is interviewed by an attorney and must advise all attorneys that interviews should be scheduled only with the permission of the AFC.
3. If appropriate, the parents' attorneys may be consulted for approval to interview respondents; in certain circumstances, the respondents should be interviewed and, if they oppose termination, their plan concerning the child's future should be evaluated being mindful of avoiding situations and

conversations that would make the AFC a potential witness in the proceedings and disqualify the AFC from the case.

4. If appropriate, the AFC should visit the interested parties' homes.
5. If appropriate, services such as mental health evaluations should be requested under § 722-c of the County Law.
6. After a review of the relevant documents and interviews, the caseworker should be interviewed, particularly concerning the permanency decisions involving the child (for example, a possible adoption by foster parents); with the approval of their counsel, if any, the foster parents or the institutional representative also should be interviewed.
7. The AFC must formulate a position whether parental rights should be terminated, after consultation with the child, and in light of other available options, and should prepare for the fact-finding hearing accordingly.
8. The AFC should actively participate in any pre-trial discussion regarding any aspect of the case with the child protective agency and respondents' attorneys, with or without the Judge or the Judge's law clerk present.

#### H. The Fact-Finding Hearing

1. The AFC must take an active role during the fact-finding hearing as the child's advocate; the AFC must not merely endorse the position of another party.
2. The AFC must be familiar with relevant records, reports and evidence and ensure that necessary witnesses testify, and relevant material is introduced into evidence.
3. When appropriate, the AFC must present independent evidence and witnesses, cross-examine witnesses, make opening and closing statements, and make necessary motions.
4. The AFC must be fully involved in any discussion regarding the proposed testimony of the child and, if it is determined that the child should testify, must strongly advocate for that testimony to be taken in a legally acceptable and emotionally neutral setting.
  - a. The AFC should prepare the child for testifying by:
    - 1) Bringing the child to the courtroom shortly before the trial, showing the child the setting, introducing the child to the judge and available attorneys of record, and advising the child in simple terms as to the nature of an oath and the purpose and mechanics of testifying.
    - 2) When appropriate, scheduling an appointment with the child and the attorney who has subpoenaed the child to advise the child (in the presence of the AFC) of questions that may be asked at trial.



## I. Post Fact-Finding Hearing

1. At the conclusions of a termination proceeding based on abandonment or mental disability, the AFC should request that the court hold a dispositional hearing unless the AFC concurs with the child protective agency's plan to have the parental rights terminated and the child adopted. (Because a dispositional hearing is required in permanent neglect and severe or repeated abuse proceedings, such request is not necessary in those proceedings).
2. The child must be consulted and apprised, in terms that child can understand, of the specific dispositional plans proposed. When the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes with regard to the specific disposition that the AFC intends to present and argue, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
3. If appropriate for a dispositional hearing, services, such as a mental health evaluation, should be requested under § 722-c of the County Law.
4. The AFC should request the court order reports that may be helpful and submit appropriate motions to produce relevant reports, such as relevant records pertaining to the parents of the child.

## J. The Dispositional Hearing

1. The AFC must present and advocate a specific dispositional plan to the court and inform the court of the child's wishes. If the AFC believes that specific services are necessary for the child or family, the AFC should request that the court order those services.
2. The AFC should ensure that all relevant reports, witnesses and recommendations are presented to the court.
3. Witnesses should be cross-examined to elicit relevant information to support the AFC's plan; the AFC should also present evidence to support the plan, particularly when it conflicts with a party's recommendations (the child protective agency or the parents).
4. If the court intends to speak to the child in chambers, the AFC must be present; all questions should be posed only by the court and the AFC and other attorneys may submit written questions to the court prior to the interview. The AFC must prepare the child for the meeting with the court and should question the child in an age-appropriate manner. The AFC should inform the court of any disabilities, developmental delays or other impediments that may impact the ability of the court to interact with the child.

## K. Post Disposition

1. The AFC must explain to the child, in terms the child can understand, the disposition and its consequences, the child's rights and the possibility of post-hearing motions or hearings, and the responsibilities of each of the parties, including the child protective agency, the parents and the foster parents.
2. If the AFC believes that the court's determination is contrary to the child's wishes or interests and grounds exist upon which to base an appeal, after considering the wishes of the child, a notice of appeal should be filed. If there is an appeal, the AFC must comply with the appeals section of these guidelines. The AFC must periodically discuss with the child the status of the appeal and be apprised of any changes in the child's wishes. If the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes with regard to filing of an appeal, unless to do so would likely result in a substantial risk of imminent, serious harm to the child.
3. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (*see Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.
4. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.
5. The AFC must examine the dispositional order to ensure that the order conforms with the findings of disposition.
  - a. In the event that the proceedings result in a suspended judgment, the AFC should review petitioner's reports regarding respondent's compliance with the terms of the suspended judgment and make any appropriate motion to further the child's wishes and interests.
  - b. In the event the proceedings result in an order of commitment of guardianship and custody to the authorized agency and if adoption is the goal for the child, and if after the AFC has consulted with the child, the AFC takes the position that adoption is the goal for the child, the AFC must attend the next permanency hearing with the child if they are over 10 years of age and wish to participate, review

the agency report regarding facilitation of the adoption and monitor the services and assistance to be provided to the child and the prospective adoptive parents to expedite the adoption.

6. To effectuate post-disposition review:
  - a. In appropriate cases, the AFC, in monitoring the provision of dispositional services, must return the matter to court if necessary, to protect the interests of the child.
  - b. The AFC must provide the child with a phone number or other method of contacting the AFC in the event that problems arise with regard to the disposition.

**PINS PROCEEDINGS**  
**Article 7, Family Court Act**

A. The Function of the AFC

The AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation...in person in need of supervision proceedings, where the child is the respondent, the AFC child must zealously defend the child.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients the AFC seeks to establish their clients' sense of safety through acts of transparency, trustworthiness, collaboration, choice and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

D. Client-Directed Representation and Responsibilities

The AFC is required to engage in client-directed representation, adhering to the child's expressed interests and wishes. The AFC should assist the child to identify their interests and litigation goals and to evaluate alternative case strategies and outcomes. The AFC should encourage the child to participate actively in their own defense. The AFC should keep the child fully informed and provide them with ongoing consultation and advice. Where the AFC believes that the child's directions will not achieve an outcome consistent with the child's interests, the AFC should discuss these concerns with the child, provide the child with additional information as needed, and present alternatives. Communication with the child should be conducted in terms the child can understand and be

informed by current adolescent brain science, effective child and adolescent interviewing techniques and trauma-informed strategies.

E. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

F. The Role of the Parent or Custodian

The AFC should ascertain whether the petitioner is the parent or custodian and represent the expressed interests and preferences of the child only. If the parents or custodians are not the petitioner, the AFC should ascertain whether the petitioner is a party with whom the parent may be aligned. When the opinions or desired outcomes of the child and parent or custodian diverge, the AFC is required to represent the child's expressed wishes and adhere to the decisions of the child. The AFC should be respectful of the child's family and social connections and conduct the defense with sensitivity to: the child's status as a minor; the rights and responsibilities of the parent or custodian; and the child's right to have the parent or custodian participate in the defense and serve as a support to the child. If the child presents as an unaccompanied minor or is not able to identify a parent or custodian, the AFC should ascertain if there is an adult the child wishes to identify and include as a support or resource in the proceedings. The AFC should not share information with the parent or custodian unless disclosure of such information is in keeping with the child's wishes.

G. Preparation for the Initial Appearance

1. The AFC should interview the child to ascertain detailed facts and circumstances concerning the allegations in the petition. The child should be interviewed outside the presence of the parents or custodians. If the AFC is not assigned until the initial appearance, sufficient time or a brief adjournment should be requested to enable the AFC to meet with the child.

2. The AFC should obtain the names of all persons involved in the acts alleged, including all witnesses. The AFC should determine whether any statements or admissions were made and the circumstances under which they were made. Possible affirmative defenses should be explored.
3. The AFC should examine whether the designated lead agency made diligent pre-petition attempts to provide appropriate diversion services to the youth and the family required by Family Court Act § 735; the scope of diversion services offered; and whether the parents and child engaged in services. Where appropriate, the AFC should explore making a request for further diversion attempts or services.
4. Where the petitioner is a school district or local educational agency (LEA) or when the allegations are related to truancy or school conduct, the AFC should examine the pre-petition attempts of the designated lead agency to engage the school district or LEA in diversion and school efforts made to resolve the truancy or school behavioral problems or remediate education-related allegations. Where appropriate, the AFC should explore making a request for further diversion attempts or services.
5. The AFC should be aware that the court may not place the child in a PINS proceeding in a non-secure or secure detention facility. At the initial appearance, the court may, however, under limited circumstances consider detaining the child in a pre-dispositional placement. The AFC should be informed regarding the narrow scope of possible pre-dispositional placement options delineated in Family Court Act § 720 and ensure that the order reflects the court's findings. The AFC should be versed in the legal standards governing pre-dispositional placement of the child and the written findings that must be set forth in the court order, including:
  - a. That there is no substantial likelihood that the youth and their family will continue to benefit from diversion services, including but not limited to, any available respite services; and
  - b. That all available alternatives to detention have been exhausted; and
  - c. That pre-dispositional placement of the respondent is in the best interest of the respondent; and
  - d. That it would be contrary to the welfare of the respondent to continue in their own home.

The AFC should be aware that the child may not be detained if the sole basis for the PINS petition is an allegation that the child does not attend school in accordance with Article 65 of the NYS Education Law.

6. The AFC should be prepared to address pre-dispositional placement in a manner consistent with the child's wishes and, with all available evidence, advocate for the child's preferences. The AFC should be familiar with community-based alternatives to pre-disposition placement, including

crisis intervention and respite services. The AFC should also raise any factors permitted by the child, such as medical, psychological, or educational, that may be adversely affected by a pre-dispositional placement. If the child is at risk of removal or expresses a wish to be removed from the home, the AFC should explore temporary placement with a relative, friend or other resource and advocate for the child's wishes.

7. The AFC should explore whether the child may be a sexually exploited child, ascertain whether the child consents to the filing of the petition in keeping with Family Court Act § 732(b) and discuss with the child pre-dispositional placement in a short-term safe house.
8. The AFC should advise the child, in terms the child can understand, and the child's parents or custodians, if appropriate, of the nature of the proceedings; the child's rights; the role and responsibilities of the AFC; client confidentiality and the attorney-client privilege; the fact-finding and dispositional hearing process; and the possible outcomes and consequences of a finding against the child.
9. The AFC should explore the child's familial, social, developmental, school, medical and mental health history, obtaining information from the child and, as appropriate, the parents or custodians (with permission of their attorneys, if applicable). This includes the child's current living and family arrangements, prior court involvement, incidents of loss and trauma, and physical, emotional, mental or intellectual challenges faced by the child and/or the parents.
10. The AFC should obtain an order of appointment from the court authorizing the attorney to access, education, medical, mental health and other relevant records.

#### H. The Initial Appearance

1. The AFC should examine the petition and supporting papers for sufficiency and other defects, and make appropriate motions, such as a motion to dismiss for unverified petition or lack of jurisdiction.
2. The AFC should conference, as appropriate, with the parties and/or counsel to consider alternatives to a PINS adjudication, such as a dismissal, discharging the child with a warning, adjournment in contemplation of dismissal, or a referral to return to diversion. The AFC should be fully informed of all facts and circumstances before advising the child to admit to allegations in the petition.
3. The AFC should present the court with alternatives to pre-dispositional placement and a pre-trial release plan, as applicable.
4. As appropriate, at any time during the PINS proceedings, the court may, on its own motion, substitute a neglect petition for the PINS petition. The

AFC may request that the court exercise its authority to take such action, request that the court order a Family Court § 1034 investigation, or request permission from the court to commence a Family Court Act Article 10 proceeding.

5. If the court places the child in a pre-dispositional setting, the AFC should discuss with the child whether to request a probable cause hearing, on a case-by-case basis.

#### I. Probable Cause Hearing (Pre-Dispositional Placement)

1. In consultation with the child, the AFC may strategically request or waive a probable cause hearing for a child who the court places in a pre-dispositional setting. The probable cause hearing should be used to determine whether it is reasonable to believe that the child is a person in need of supervision and, if so, whether a continued pre-dispositional placement is necessary, in keeping with applicable legal standards.
2. The AFC should interview the child in preparation for the probable cause hearing and attempt to interview witnesses who may testify at the probable cause hearing.
3. The AFC should gather and present evidence, including school and other records, affidavits, and witnesses to testify.
4. The AFC should identify and advocate for community-based alternatives to pre-dispositional placement, in keeping with the child's expressed interests and wishes.

#### J. Preparation for the Fact-Finding Hearing

1. The AFC should investigate the facts of the case and the allegations, develop a theory of the case and interview the child and the witnesses and conduct discovery. Oral and written statements may be prepared. If necessary, third parties, such as investigators or experts, including mental health experts, should be retained where appropriate and/or to avoid the possibility that the AFC may be called as a witness. Every possible defense should be considered.
2. The AFC should seek relevant records concerning the child's history and needs, including, for example, the child's medical, developmental and mental health status, involvement in the child welfare system, drug and alcohol use or treatment, prior police and court involvement, education, employment, and positive engagement in the community.
3. The AFC should explain, in terms the child can understand, the possible outcomes of the proceeding, and, with the child, develop a defense strategy. The AFC should fully evaluate the strengths and weaknesses of the petitioner's case from the point of view of fact-finding and disposition,



and consider every possible defense. The attorney for the child's position and goals must be agreed to by the child.

4. The AFC should review applicable statutes, case law, and evidentiary rules.
5. The AFC should carefully prepare the scope of any testimony and possible cross-examination with the child and defense witnesses.
6. The AFC should consider the full range of appropriate pre-trial discovery, garnering material such as statements, lab reports, school and medical records, and, where appropriate, the AFC should file motions for discovery on timely basis.
7. The AFC should assess whether the petitioner can prove that the child needs supervision or treatment; if the need for supervision or treatment may not be proven, the AFC should be prepared to mount a defense concerning this element.
8. The AFC should carefully explore possible dispositional outcomes with the child, including discharge without a warning, a suspended judgment, probation, placement in the child's home or out of the home with a suitable relative or other person, or in foster care or a residential placement. The AFC should be aware that the court may not place a child age sixteen or older without a finding that special circumstances exist to warrant the placement.
9. The AFC should carefully explore the range of dispositional alternatives and services for the child, including possible community-based services; placement with an identified relative, friend or other resource, foster care placement, including supervised independent living options, and residential placement settings. The AFC should consult with the child regarding dispositional alternatives and ascertain the child's wishes. A dispositional strategy should be formulated before reaching a negotiated agreement or attending the fact-finding hearing.
10. The AFC may enter an admission on behalf of the child only upon the consent of the child and only after fully advising the child, in terms the child can understand, of the facts, alternatives and consequences of the rights the child is waiving.

#### K. The Fact-Finding Hearing

1. The AFC may present an opening statement.
2. Petitioner's witnesses should be cross-examined (unless cross-examination is waived in accordance with valid defense strategy), and the AFC should make an attempt to impeach such witnesses by using appropriate questioning, inconsistent prior statements, and other evidentiary methods.
3. Appropriate expert witnesses should be called.

4. Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.
5. The AFC should take steps to ensure that there is an accurate and complete record of objections, and take any additional steps necessary to preserve issues for appellate review.
6. The AFC should present a summation using favorable law and facts.
7. Post-trial motions and briefs should be submitted where appropriate.

L. Preparation for the Dispositional Hearing

1. The probation investigation and report and, if applicable, diagnostic assessment, should be reviewed and discussed with the child and may be discussed with the child's parents or custodians (unless the parent or custodian is the petitioner). Care should be taken when revealing undisclosed sensitive information contained in the report. The AFC should be familiar with the risk instruments associated with the investigation report and diagnostic assessment.
2. The AFC should advise and counsel the child regarding compliance with orders or services directed by the court pending the dispositional hearing, and the possible consequences of failing to follow the court's directives.
3. The AFC should again explore the range of dispositional alternatives and services for the child, including possible community-based services; placement with an identified relative, friend, or other resource; foster care placement, including supervised independent living options; and residential placement settings. The AFC should consult with the child regarding dispositional alternatives, ascertain the child's wishes and formulate a dispositional strategy.
4. The AFC should consult with the petitioner and/or petitioner's counsel regarding possible agreement as to dispositional alternatives. If the parents or custodians are not the petitioners, the AFC may advise them, as appropriate, of possible alternatives.
5. The AFC should be prepared to present a specific dispositional plan to the court and gather witnesses and evidence in support of the plan, as appropriate. The AFC must follow the child's expressed interests and wishes with regard to the specific disposition that the AFC intends to present. Witnesses should be prepared as thoroughly for the dispositional hearing as they would be for a fact-finding hearing.

#### M. The Dispositional Hearing

1. The AFC must advocate for the child's expressed interests and wishes regarding the dispositional alternative. All supporting evidence, including school records, mental health reports, prior history, affidavits, and witnesses should be presented. Where appropriate, evidence concerning the absence of a need for treatment or supervision should be presented.
2. All supporting records, documents, reports, and files referred to should be entered into evidence in order to preserve a record for appeal.
3. Witnesses testifying on behalf of the petitioner, including preparers of reports, should be cross-examined concerning their recommendations in order to determine whether less restrictive alternatives have been exhausted. The AFC should determine strategically, however, whether to stipulate to admission of reports, taking into account unfavorable testimony that otherwise may be placed on the record.
4. With the consent of the child, the AFC must present and argue a complete dispositional alternative consistent with the desires of the child, including specific programs or dispositional orders, and, if appropriate, alternative possibilities.

#### N. Post Disposition

1. The AFC must review and explain to the child, as appropriate, and the child's parents or custodians, the detailed terms of the court's order of disposition and the possible consequences of failing to comply with the order, including the filing of a violation petition. The AFC should also discuss the possibility of filing post-trial motions or requests for new hearings and the continuing jurisdiction of the court.
2. The child, and as appropriate, the child's parents and custodians, must be advised of the right to appeal. The AFC should fully examine possible grounds for appeal. To ensure the timely submission of the notice of appeal, the AFC should file a notice of appeal unless the child indicates explicitly and intelligently the child's decision to waive an appeal. A follow-up letter explaining the child's right to appeal is recommended.
3. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (*see Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.

4. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.
5. The AFC should review the dispositional order to ensure that the order conforms to the agreed disposition or finding.
6. If there is an appeal, the AFC handling the appeal must comply with the appeals section of these guidelines.
7. The AFC should remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect.
8. As appointed, the AFC should represent the child after disposition at post-disposition hearings and proceedings. In preparation, the AFC should interview the child and advocate for the child's expressed interests and wishes.
9. Where the disposition is placement in a residential facility, the AFC should maintain regular contact with the child, monitor the child's status during the period of placement, and participate actively, with the child, in permanency hearings. If a petition for extension of the child's placement is filed, the AFC should apprise the child and represent the child's expressed interests and wishes in such proceedings.
10. Where the child is placed by the court in a foster care setting, including a supervised independent living program or group home, the AFC should maintain regular contact with the child, monitor the child's status during the period of placement, assist the child with permanency planning, and participate, with the child, at permanency hearings. The AFC should be familiar with the entitlement of children to remain in foster care until age 21, the legal requirements regarding transition and discharge planning from foster care, and opportunities to receive aftercare services and such supports as education and training vouchers. Where the child exits from foster care after age 18, the AFC should apprise the child of the circumstances in which a child may return to foster care.

**DELINQUENCY PROCEEDINGS**  
**Article 3, Family Court Act**

A. The Function of the AFC

The AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation... in juvenile delinquency proceedings, where the child is the respondent, the AFC must zealously defend the child.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so, the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients the attorney for the child seeks to establish their clients' sense of safety through acts of transparency, trustworthiness, collaboration, choice and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an attorney for the child may appear.

D. Client-Directed Representation and Responsibilities

The AFC is required to engage in client-directed representation, adhering to the child's expressed interests and wishes. The AFC should assist the child to identify their interests and litigation goals and to evaluate alternative case strategies and outcomes. The AFC should encourage the child to participate actively in their own defense. The AFC should keep the child fully informed and provide them with ongoing consultation and advice. Where the AFC believes that the child's directions will not achieve an outcome consistent with the child's interests, the AFC should discuss these concerns with the child, provide the child with additional information as needed, and present alternatives. Communication

with the child should be conducted in terms the child can understand and be informed by current adolescent brain science, effective adolescent interviewing techniques and trauma-informed strategies.

E. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

F. The Role of the Parents or Custodian

When the opinions or desired outcomes of the child and parents or custodians diverge, the AFC is required to represent the child's expressed wishes and adhere to the decisions of the child. The AFC should ascertain whether the complainant on the petition is the parent or custodian or a party with whom the parent may be aligned and discuss this with the child and its implications for representation of the child. The AFC should be respectful of the child's family and social connections and conduct the defense with sensitivity to the child's status as a minor; the rights and responsibilities of the parent or custodian; and the child's right to have the parent or custodian participate in the defense and serve as a support to the child. If the child presents as an unaccompanied minor or is not able to identify a parent or custodian, the AFC should ascertain if there is an adult the child wishes to identify and include as a support or resource in the proceedings. The AFC should not share information with the parents or custodians unless disclosure of such information has been approved by the client.

G. Preparation for the Initial Appearance

1. The AFC should interview the child to ascertain detailed facts and circumstances concerning the act(s) charged and those surrounding the child's arrest and questioning. If the AFC is not assigned until the initial appearance, the AFC should request sufficient time or a brief adjournment to carry out these functions.

2. At the initial interview, the AFC should carefully ascertain the child's involvement, if any, in the act(s) charged; the child's possible involvement should be examined on a confidential basis outside the presence of the parents or custodians.
3. At a pre-petition proceeding or the initial appearance, the court may address whether to place the child in detention. The AFC should be prepared to address this issue in a manner consistent with the wishes of the child and with all available evidence, to advocate for the child's release under conditions most favorable and acceptable to the child. The AFC should be familiar with New York State's Juvenile Detention Risk Assessment Instrument (DRAI), ascertain the child's risk and identify mitigating factors that may affect the child's risk. The AFC should be familiar with alternatives to detention, including community-based intervention and services. The AFC should also raise any factors permitted by the child, such as medical, psychological, or educational, that may be adversely affected by detention. If the child is at risk of removal from home, or expresses a wish to be removed from home, the AFC should explore temporary placement with a relative, friend or other resource, and advocate for the child's wishes.
4. The AFC should advise the child, in terms the child can understand, and the child's parents or custodians, if appropriate, of the nature of the proceedings; the child's rights, including the right to testify and right to remain silent; the role and responsibilities of the AFC; client confidentiality and the attorney-client privilege; the fact-finding and dispositional hearing process; and the possible consequences of a finding against the child.
5. The family situation and relevant social history should be explored with the child and, as appropriate the child's parents or custodians, including family relationships, prior court proceedings, school records, mental health history and any physical, emotional, mental or intellectual challenges.
6. The AFC should obtain the names of all persons involved in the incident, including all witnesses and co-respondents. The AFC should determine whether any statements or admissions were made and the circumstances under which they were made. Possible affirmative defenses should be explored.
7. The AFC should ascertain whether the child received probation adjustment services on the case and, if so, the reason adjustment was not successful. As appropriate, the AFC should request a court referral for an initial or additional probation adjustment period. The AFC should explore whether court issuance of an order of protection may provide a basis for adjustment.

## H. The Initial Appearance

1. The AFC should carefully examine the petition and supporting papers and if any defects are found, file appropriate preliminary motions, e.g., a motion to dismiss.
2. The AFC should present the court with alternatives to detention and a pre-trial release plan, as applicable.
3. The AFC should conference with the presentment agency (and probation, when applicable) to consider alternatives to a finding of delinquency, such as a dismissal, substitution of a PINS petition or an adjournment in contemplation of dismissal, or removal to probation for adjustment. (The timing of this discussion will depend, in part, on local custom.)
4. The AFC should take steps to determine whether a child who is the subject of a petition meets the criteria as a victim of severe form of trafficking and, as applicable and appropriate, file a motion to substitute a PINS petition for a juvenile delinquency petition.
5. As appropriate, at any juncture in the juvenile delinquency proceedings, the AFC may apply for a court order to protect the child by requesting a Family Court Act § 1034 investigation and/or make an application to the court for permission to commence a Family Court Act Article 10 proceeding.
6. The decision whether to request a probable cause hearing, the timing of such hearing, and establishing dates for discovery and fact-finding are issues that the AFC must consider, on a case-by-case basis. Deviation from the statutory standard may be exercised based upon the facts of the case and upon the consent of the child.

## I. The Probable Cause Hearing (Detention Cases)

1. The probable cause hearing should be used to determine whether it is reasonable to believe that a delinquency act was committed, whether it is reasonable to believe that the respondent committed such act, and, if the court finds reasonable cause, whether continued detention is necessary.
2. The AFC should attempt to interview major witnesses, such as the complainant or victim who may testify at the probable cause hearing. The AFC should obtain copies of all relevant statements, lab reports, criminal history reports, etc., from the presentment agency's files.
3. The child should be interviewed again.
4. Evidence that supports the discontinuance of detention should be gathered, including school records, affidavits, and witnesses who could testify concerning the lack of probable cause or present alternatives to detention.
5. The AFC must actively participate at the hearing.



6. The decision regarding filing a demand for a bill of particulars, dates for discovery and fact-finding are issues that the AFC must consider on a case-by-case basis. If the court orders continued remand, deviation from the statutory standard may be made based upon the facts of the case and upon the consent of the child. In absence of any countervailing factors or in the absence of the child's consent, the AFC should demand an expedited fact-finding hearing date, and request the expedited service of discovery materials and response to a bill of particulars.

#### J. Preparation for the Fact-Finding Hearing

1. The AFC should investigate the facts of the case and the allegations, develop a theory of the case, and interview the child and witnesses. Oral and written statements may be prepared. If helpful, the scene of the crime should be visited, and the alleged acts re-enacted. If necessary, third parties, such as investigators or experts, should be retained where appropriate and/or to avoid the possibility that the AFC may be called as a witness.
2. The AFC should seek relevant records concerning the child's history and needs, including, for example, the child's medical, developmental and mental health status, involvement with the child welfare system, prior police and court involvement, education, employment, and positive engagement in the community.
3. The AFC should carefully discuss with the child and investigate the circumstances surrounding the child's confession provided to police and the circumstances of a police interrogation. The AFC should be familiar with research and factors that call into question the confessions of minors.
4. The strength and weaknesses of the presentment agency's case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed in full consultation with the child, in terms the child can understand. The AFC's position and goals must be agreed to by the child.
5. Applicable statutes, case law and evidentiary rules should be reviewed.
6. Every possible defense, including lack of capacity or lack of intent, should be considered. If necessary, experts such as mental health specialists should be retained.
7. The scope of testimony and possible cross-examination must be carefully prepared with the child and major defense witnesses.
8. A full range of appropriate pre-trial requests and motions (e.g., bill of particulars, discovery, suppression such as Wade and Huntley hearings, and inspection) should be considered and, when relevant, filed on a timely basis. Similarly, appropriate pre-trial hearings should be requested. The AFC must be aware of and comply with applicable time limitations

governing service of notice of intent to offer alibi evidence, notice of mental health disease or defect, etc.

9. If appropriate, additional conferences with the presentment agency should be requested so that an agreed disposition, including an adjournment in contemplation of dismissal or an admission, can be explored.
10. Dispositional alternatives should be carefully explored, including possible community-based programs or other dispositions that involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching a negotiated agreement or attending the fact-finding hearing.
11. The AFC should not advise a child to make an admission to the petition unless pre-trial discovery and evaluation have revealed no viable legal impediment to a finding.
12. The AFC must not enter an admission on behalf of the child, except upon the consent of the child and only after fully advising the child, in terms the child can understand, of the facts, alternatives and consequences of the rights the child is waiving.

#### K. The Fact-Finding Hearing

1. If appropriate, pre-trial motions that were not heard prior to the fact-finding hearing (e.g., suppression) should be filed.
2. The AFC may present an opening statement.
3. Presentment agency witnesses should be cross-examined (unless cross-examination is waived in accordance with a valid defense strategy) and the AFC should attempt to impeach such witnesses by using appropriate questioning, inconsistent prior statements, and other evidentiary methods.
4. Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.
5. Appropriate expert witnesses should be called.
6. The AFC should take steps to ensure that there is an accurate and complete record of objections.
7. The AFC should present a summation using favorable law and facts.
8. If appropriate, post-trial motions and briefs should be submitted.

#### L. Preparation for the Dispositional Hearing

1. The probation investigation and report and, if applicable, diagnostic assessment must be reviewed and discussed with the child and may be reviewed and discussed with the child's parents or custodians. Care should be taken when revealing undisclosed sensitive information contained in the report. The AFC should be familiar with the risk

instruments associated with the investigation report and diagnostic assessment.

2. Appropriate dispositional alternatives must be explored with the child. The presentment agency or probation officials may be consulted with regard to possible alternatives. The child's wishes must be ascertained and the child and, as appropriate, the child's parents or custodians should be advised of possible alternatives.
3. The AFC should examine whether the child may be the victim of human trafficking or a sexually exploited child and the potential impact on a dispositional outcome. The AFC should be versed in the characteristics of problematic sexualized behaviors and least restrictive community-based programs and interventions to address such behaviors.
4. The AFC should be prepared to present a specific dispositional plan to the court and gather witnesses and evidence in support of the plan where it is likely to be contested. The AFC must follow the child's expressed interests and wishes with regard to the specific disposition that the AFC intends to present. Witnesses should be prepared as thoroughly for the dispositional hearing as the fact-finding hearing.
5. The AFC should ensure, where appropriate, that the dispositional hearing is scheduled within applicable time statutes.

#### M. The Dispositional Hearing

1. The AFC must advocate for the child's expressed interests and wishes regarding the dispositional alternative. All supporting evidence, including school records, mental health reports, prior history, affidavits, and witnesses should be presented. Where appropriate, evidence concerning the absence of a need for treatment or supervision should be presented.
2. All supportive records, documents, reports and files referred to should be entered into evidence to preserve a record for appeal.
3. Witnesses testifying on behalf of the petitioner, including preparers of reports, should be cross-examined concerning their recommendations in order to determine whether less restrictive alternatives have been exhausted.
4. The AFC should present and argue a complete dispositional alternative consistent with the consent and needs of the child, including specific programs or dispositional orders and, if appropriate, alternative possibilities.

#### N. Post-Disposition

1. The AFC must explain to the child and, as appropriate, the child's parents or custodians, in terms the child can understand, the disposition and its

consequences, including the rights to submit post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order, and the continuing jurisdiction of the court.

2. The child, and as appropriate, the child's parents or custodians, must be advised in writing of the right to appeal. The possibilities of appeal should be explored fully, including possible grounds. To ensure the timely submission of the notice of appeal, the AFC should file a notice of appeal unless the child indicates explicitly and intelligently the decision to waive an appeal. A follow-up letter explaining the child's right to appeal is recommended.
3. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (*see Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.
4. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.
5. The AFC must examine the dispositional order to ensure that the order conforms to the agreed disposition or finding.
6. If there is an appeal, the AFC must comply with the appeals section of these guidelines.
7. The AFC should remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect.
8. The AFC should represent the child at all post-disposition hearings and proceedings in Family Court. In preparation, the AFC should interview the child and advocate for the child's expressed interests and wishes.
9. Where the disposition is placement in a residential facility, the AFC must maintain regular contact with the child, monitor the child's status during the period of placement, and participate actively, with the child, in permanency hearings. If a petition for extension of the child's placement is filed, the AFC should apprise the child and represent the child's expressed interests and wishes in such proceedings.

10. Where the child is placed by the court in a foster care setting, including a supervised independent living program or group home, the AFC should maintain regular contact with the child, monitor the child's status during the period of placement, and participate actively, with the child, in permanency hearings. The AFC should be familiar with the entitlement of children to remain in foster care until age 21, the legal requirements regarding transition and discharge planning from foster care, and the opportunities to receive aftercare services and such supports as education and training vouchers. Where the child exits from foster care after age 18, the AFC should apprise the child of the circumstances in which a child may return to foster care.

**CUSTODY, ACCESS AND FAMILY OFFENSE PROCEEDINGS**  
**Article 6 and Article 8 respectively, Family Court Act**

A. The Function of the AFC

The AFC is subject to the ethical requirements applicable to all lawyers, including, but not limited to constraints on: ex-parte communication; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation...the AFC must zealously advocate the child's position.

1. In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a trauma informed manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
2. If the child is capable of knowing, voluntary and considered judgment, the AFC should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
3. When the AFC is convinced that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the AFC would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so, the AFC recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients, the AFC seeks to establish their clients' sense of safety through acts of transparency, trustworthiness, collaboration, choice and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

#### D. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

#### E. Role of the AFC

AFC should define their role and should be responsible for ensuring that their role is understood by the child, litigants and their attorneys, as well as judges. The AFC must participate actively in all proceedings but must not submit any pre-trial report to the court. The AFC may submit appropriate papers, such as trial brief, memorandum of law or written summation, and engage in oral argument. AFC must zealously represent their clients through the appropriate avenues including, but not limited to, motion practice.

#### F. Consultation with Client

1. Absent extraordinary circumstances, the AFC must:
  - a. Arrange an interview with the child outside the presence of the litigants, with the cooperation of the litigants and their attorneys, when the child is of the age and maturity where an interview would be appropriate. If the child is an infant or otherwise unable to communicate due to cognitive or physical limitations a private interview may not be possible; the AFC should arrange for an observation of the child and interact with them based on their individual circumstances and comfort level. If the litigants or their attorneys are not cooperative in arranging the interview or meeting, the AFC should request the help of the court in arranging to meet with the child;
  - b. Interview the child in a manner and environment (the child's home, school, etc.) appropriate to the child's age, maturity and limitations/abilities to determine the child's wishes and needs regarding custody and access;
  - c. If the AFC deems it necessary and appropriate to interview the litigants, obtain permission from the litigants' attorneys to meet the litigants to acquire necessary background and relevant history and

information regarding the child's care and needs. If permission is denied, the AFC should consider applicable discovery under the CPLR to obtain necessary background and relevant history and information regarding the child's care and needs;

- d. Where appropriate, visit the child in the child's home and make observations of the child and the child's relationships;
  - e. Maintain contact with the child and encourage the child to communicate directly with the AFC whenever the child has any concerns, questions or problems relevant to the proceeding. Whenever possible, and where appropriate, the AFC must promptly inform the child of the outcome of any pre-trial conferences or court proceedings;
  - f. Resist efforts to have the child present at proceedings, unless the child's presence is required by the court or the AFC consents.
2. Although ascertaining the child's preferences is important, the AFC should be sensitive to the vulnerable position of the child. The child may love and wish to remain loyal to both custodians. The child may take on responsibilities that are not appropriate, such as responsibility for the litigants' problems or for the ultimate custody and access decision. The child also may be subject to manipulation by the litigants, siblings or other adults. When ascertaining the child's preferences, the AFC must be sensitive to and not compound the child's conflicts and burdens.
  3. The AFC must advise the child, in terms the child can understand, of the nature of the proceedings, the child's rights, the role and responsibilities of the AFC, the attorney-client privilege, the fact-finding process, and the possible outcomes. The AFC's strategy should be developed with full consultation, in terms the child can understand, with the child. If the child is capable of knowing, voluntary and considered judgment, the AFC's position and goals must be discussed with the child, including the extent to which disclosure made by the child to the AFC will be made known to the court and others.

#### G. Investigation

1. Upon being appointed, the AFC must arrange to obtain and review the relevant court files, including pleadings, reports and prior orders, if any. If there was a prior AFC, the AFC should contact them to obtain additional insight, where possible. The AFC should examine the order of appointment to ensure that it includes a judicial authorization allowing the AFC to obtain information directly from service providers involved with the child without obtaining permission from the litigants. If it does not, the AFC should ask for an amended order of appointment allowing such access.
2. Where appropriate, the AFC should ask litigants to sign release forms allowing the AFC to obtain information directly from service providers involved with the child to supplement the order of the court. When representing an older child, the AFC should request permission from the



- child before obtaining confidential information from the child's service providers.
3. Where appropriate, the AFC should obtain information regarding any involvement of Child Protective Services (CPS) with the family.
  4. The AFC should become familiar with factors that the court considers important in determining the child's best interests.
  5. The AFC should obtain names and addresses of, and contact where appropriate, teachers and other persons who have had significant contact with the child and may have pertinent information regarding the child. The AFC also should obtain and review copies of any records, reports or documents that may have relevant information regarding the child.
  6. The AFC should determine the quality of the relationship of the child with the custodial figure(s) and siblings and should try to ensure that the child's desire to maintain important relationships is met.
  7. The AFC should advise all attorneys, in writing, at the outset of proceedings, that the child should not be interviewed or examined by attorneys for, or experts retained by or on behalf of, the litigants, without the prior written consent of the AFC. The AFC should be present at any such interviews, but should not attend interviews conducted by neutral evaluators or experts if it would be inappropriate to do so.
  8. The AFC should request that the court order any services that would be helpful, such as mental health studies or other evaluations, and review any reports resulting from such services.
  9. The AFC should consider whether domestic violence may have occurred and, if so, the impact on the child. If appropriate, the AFC should apply for court orders to protect the child, request a Family Court Act §1034 investigation, request a home study, and/or make an application to the court for permission to commence an Article 10 proceeding. The AFC should understand that the Article 10 proceeding may result in consequences contrary to the client's position. The AFC should consider interviewing law enforcement, obtaining and reviewing police reports, contacting witnesses, etc.
  10. The AFC should seek protective orders when other litigants attempt to access, by subpoena or otherwise, privileged, and confidential communications made by the child.
  11. The AFC should ascertain information regarding siblings with whom the child wishes to enjoy access and should bring the necessary applications and work with other AFC to facilitate same.
  12. The AFC shall determine whether mental health, substance abuse, home study, and/or custodial evaluations would provide pertinent information relative to their case. In the event same is/are desired over the objection of a party, the requisite motion practice should be commenced. In the event a party seeks an application for an evaluation, the AFC should take a position relative to said application.
  13. The AFC should participate in settlement negotiations and/or mediation to expedite resolution of the case.

14. The AFC should review the rules of evidence, particularly those regarding relevance and hearsay, as well as relevant case law and statutes.
15. The AFC should prepare evidence for trial. If necessary, the AFC should subpoena the records and reports of physicians, therapists, schools and teachers, and other relevant records. The AFC should subpoena witnesses and prepare them for testifying at trial.

#### H. Pre-Trial Proceedings/Activities

1. The AFC is not neutral and should take a position unless the child does not want the AFC to do so. When the child is an infant or otherwise unable to meaningfully communicate a position, the AFC must take a position using their best judgment considering all facts and circumstances of which the AFC is aware at the time, bearing in mind that the child would want a safe and appropriate relationship with both parents or caregivers.
2. The AFC must actively participate in pre-trial conferences and/or alternative dispute resolution (ADR) conferences (formal or informal), as an advocate, in order to facilitate an acceptable resolution of the case.
3. The AFC should, as would any attorney representing a party, assist in resolving issues of access, communication, etc.
4. The AFC should seek temporary relief on behalf of the child to enable the child to retain a relationship with the litigants and avoid undue pressure.

#### I. The Trial

1. The AFC must be present and take an active role during all hearings.
2. The AFC must preserve client confidences.
3. The AFC must avoid, where possible, attributing any statements or positions regarding custody or access directly to the child, unless the AFC believes that the child has specifically authorized the AFC to do so and the child understands the possible implications.
4. When appropriate, the AFC must present independent evidence and witnesses, cross-examine witnesses, make opening and closing statements, make necessary motions and take steps necessary to preserve issues for appellate review.
5. The AFC must be familiar with the relevant pleadings, records, reports, and evidence, and ensure that necessary witnesses testify and that relevant material is introduced into evidence.
6. The AFC:
  - a. Must be fully involved in any discussion regarding the proposed testimony of the child. If it is determined that the child should testify, the AFC should strongly advocate for that testimony to be taken in a legally acceptable and emotionally neutral setting such as a *Lincoln* hearing with only the AFC, child, judge and court reporter present.

- b. Should prepare the child for the *Lincoln* hearing and be familiar with the style of the judge conducting the hearing. If the child is to testify in open court, the AFC must prepare the child to testify and should ask for the appropriate accommodations under the Family Court Act, and should ensure that the questioning of the child at the hearing by litigants' counsel or a pro se litigant, is conducted in an age-appropriate manner.
7. The AFC should not be a witness.
8. The AFC must not make written or oral recommendations but rather should take a position on behalf of the child.

#### J. Post-Trial

1. The AFC must review proposed orders and make necessary objections.

#### K. Appeals

1. If there is an appeal, the AFC must comply with the appeals section of these guidelines.
2. Before appealing from an order in an article 6 matter, read *Matter of Lawrence v Lawrence*, 151 AD3d 1879 (4th Dept 2017).
3. If the child wishes to appeal, it is the responsibility of the trial court AFC to file and serve the notice of appeal (*see generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (*see Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]). If a client indicates that they do not want to appeal, the better practice would be to file and serve a notice of appeal if there is any doubt about the client changing their position.
4. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. See the appeals section of these guidelines for further information. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.

**APPEALS**  
**Article 11, Family Court Act**

A. The Function of the AFC

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

In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the AFC must zealously defend the child.

In other types of proceedings, where the child is the subject, the attorney must zealously advocate the child's position.

1. In ascertaining the child's position, the AFC must consult with and advise the child to the extent and in a trauma informed manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances.
2. If the child is capable of knowing, voluntary and considered judgment, the AFC should be directed by the wishes of the child, even if the AFC believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
3. When the AFC is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the AFC would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the AFC must inform the court of the child's articulated wishes if the child wants the attorney do to so, notwithstanding the attorney's position.

B. Diversity and Inclusion

It is the responsibility of the AFC to provide child clients with equal and culturally sensitive legal representation that is respectful of the child and the child's identity, in order to promote racial and cultural equity, diversity and inclusion. The Diversity and Inclusion Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

C. Trauma Informed Practice

It is the responsibility of the AFC to maintain an awareness of the signs of complex, chronic and acute trauma in their clients. In doing so the AFC

recognizes the prevalence of trauma and the manner in which their clients have been affected. In dealing with traumatized clients the AFC seeks to establish their clients' sense of safety through acts of transparency, trustworthiness, collaboration, choice and empowerment. The Trauma Informed Practice Statement appearing on page two of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

D. The Child's Communication Needs and Accommodations

It is the responsibility of the AFC to inquire whether the child has any characteristics, conditions or disabilities that affect the child's ability to participate in or understand the activities and discussions pertaining to their proceeding. If the child is not able to adequately speak and understand English, the AFC should request interpreter services for the child. The AFC should inquire whether the child has been referred, evaluated or identified in school as a student with a disability, whether the child receives an Individualized Education Program (IEP) or Section 504 Accommodation Plan, and the scope of services that the child receives. The Child's Communication Needs and Accommodations statement appearing on page three of these guidelines provides additional guidance applicable to all proceedings in which an AFC may appear.

E. Ethical Responsibilities of the AFC

Every attorney must be guided by the Rules of Professional Conduct when representing children (*see generally* 22 NYCRR 1200). AFC must represent children zealously within the bounds of the law and must seek any lawful objective of the child through reasonable available means (*see* rule 1.1 [c][1] of the Rules of Professional Conduct [22 NYCRR 1200]). The AFC, therefore, has an ethical responsibility to zealously pursue an appeal when the child is adversely affected, and the child wants to appeal. When the child is not capable of making a knowing, voluntary and considered judgment or where following the child's wishes would likely result in a substantial risk of imminent, serious harm to the child, the child's attorney has the additional responsibility to determine and implement decisions on behalf of the child.

F. Appointment Continues on Appeal

1. By statute, the AFC's representation continues without further court order through any appeal unless the Appellate Division grants the application of the AFC for substitution of appellate counsel and appoints another AFC (*see* Family Court Act § 1120). If the AFC cannot represent the child on the appeal, the AFC must immediately, and in no case more than 30 days after service of the notice of appeal, request that the Appellate Division substitute another attorney.
2. An AFC must request substitution if they do not have adequate experience with appeals or they do not have adequate time to devote to the appeal or

for any other reason that would impede their zealous and thorough representation of the child on appeal.

3. AFC are subject to discipline if they fail to prosecute an appeal, including possible removal from the AFC panel by the Appellate Division.

#### G. The Right to Appeal

“An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act” (Family Court Act § 1112 [a]). Interlocutory appeals, i.e., appeals from interim or temporary orders, require the permission of the Appellate Division. To obtain the necessary permission the AFC must file a motion or an order to show cause and must be prepared to show compelling circumstances.

The statutory exception to the requirement that a non-final order may be appealed only with permission is in abuse or neglect cases. In such cases, “an appeal from an immediate or final order or decision in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court” (Family Court Act § 1112 [a]). Not only are such orders appealable as of right, but if the effect of an order is to discharge the child, the order shall be stayed if the Family Court or the Appellate Division finds that a stay is necessary to avoid imminent risk to the child’s life or health.

A preference in accordance with CPLR 5521 is automatically afforded, without the necessity of a motion, for appeals under article 3, parts one and two of article 6 and article 7, 10 and 10-A of the Family Court Act; and §§ 358-a, 383-c, 384 and 384-b of the Social Services Law (see Family Court Act § 1112).

#### H. Obligation to Advise the Child of the Right to Appeal

Upon the filing of orders issued pursuant to articles 3, 7, 10 and 10-A, and parts of one and two of article 6 of the Family Court Act; and pursuant to §§ 358-a, 383-c, 384 and 384-b of the Social Services Law, the AFC must promptly advise the child – and in JD and PINS proceedings – the parent or other person responsible (unless the parent or person responsible was the complainant in a JD proceeding or the petitioner in the PINS proceeding) in writing of the right to appeal to the Appellate Division of the Supreme Court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript, the possible reasons upon which an appeal may be based, and the nature and possible consequences of the appellate process. It is also the duty of the AFC at the trial level to ascertain whether the child wishes to appeal and, if so, to serve and file the necessary notice of appeal (see Family Court Act § 1121 [1], [2], [3]; § 354.2; § 760).

Before an appeal is considered, the AFC must explain to the child (and when appropriate, the child’s parent or other person responsible) in language the child

can understand, the disposition and its consequences, including the right to and possibility of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order, and the continuing jurisdiction of the court. As stated above, the child, and when appropriate, the child's parent or other person responsible, must be advised of the right to appeal. The possibility of appeal should be explored fully, including possible grounds. Where the child wants to appeal, after the AFC files the notice of appeal, the AFC, among other things, should order the transcripts (see paragraph K [2], [3] below), obtain interim relief if appropriate and, unless another AFC has been appointed by the Appellate Division, assemble the record and perfect the appeal.

I. Filing a Notice of Appeal

If the child wishes to appeal, it is the responsibility of the trial court AFC to serve and file the notice of appeal (see *generally* Family Court Act §§ 1113, 1121). If the AFC does not file a notice of appeal, to the extent that their brief raises contentions not raised by the appellant, those contentions will not be considered (see *Matter of Noble v Gigon*, 165 AD3d 1640 [4th Dept 2018]; *Matter of Wojciulewicz v McCauley*, 166 AD3d 1489 [4th Dept 2018]).

J. Requesting Substitution on Appeal

1. To request substitution on an appeal, an AFC must submit a letter to the AFC Program. All counsel and any pro se parties must be "cc'ed," and the AFC must sign the letter themselves (no secretary's signature, stamped signature, etc.). Copies of the following must be enclosed with the letter: notice(s) of appeal, affidavit of service if the AFC served a notice of appeal, order(s) appealed from, and the decision, if there was one. If the application is granted, a member of the AFC appeal panel will be substituted by the Appellate Division.
2. An AFC should request substitution within 30 days of service of the notice of appeal, to ensure that the child is timely and appropriately represented on appeal.

K. Statutory Obligations and Best Practices

1. Before appealing from an order in an article 6 matter, read *Matter of Lawrence v Lawrence*, 151 AD3d 1879 (4<sup>th</sup> Dept 2017).
2. If the child is the appellant, the AFC must order the transcripts as soon as possible using a minute order form. Transcripts must be completed within thirty days from receipt of the request. The AFC must be aware of time limits imposed on production of transcripts and take appropriate action when necessary (see Family Court Act § 1121 [7]).
3. If the child and a party are taking appeals, the AFC must make arrangements with the attorney for the other appellant(s) to split the cost of the transcript (see 22 NYCRR 1250.9). Refer to the AFC Program's

Reimbursement Guidelines and Appeal Voucher Q&A posted on the AFC Program's website for additional information, including limitations on transcript costs.

4. When appropriate, the AFC should consider making an application for a stay. Seeking a stay can be particularly important at the onset of the appeal.
5. An AFC who is substituted on appeal must become fully familiar with all prior proceedings in the case, including any in camera proceedings. In such cases, travel to the Appellate Division in order to review the in camera transcript is ordinarily required. If the AFC on appeal was not the attorney for the child during the proceeding, appellate counsel must meet with the child, and should establish a relationship with the child and advise the child of the role of appellate counsel. Where the child is capable of knowing, voluntary and considered judgment, the AFC must follow the child's wishes regarding the child's position on appeal, unless to do so would likely result in a substantial risk of imminent, serious harm to the child. Substituted appellate counsel should consult with the attorney who represented the child in the underlying proceeding to determine the position of the prior attorney for the child, why that position was taken, and to gain as much insight as possible into the case.
6. The AFC should ensure that the appeal is heard in a timely fashion. If the child is an appellant, the AFC should perfect the appeal as soon as possible, generally within 60 days of receipt of the transcripts (see Family Court Act § 1121[7]). When the child is not the appellant, and the appellant fails to comply with the statutory time requirements for perfecting the appeal, the AFC may consider a motion to dismiss. The AFC should cooperate with counsel for the appellant in certifying or stipulating to the record on appeal, making certain that all necessary materials are included. The AFC should respond in a timely and appropriate fashion to all motions served by either party, e.g., motion for an extension of time.
7. The AFC must prepare and file a brief on behalf of the child in a timely fashion. Letters in lieu of brief are not authorized by Appellate Division rules and should not be used. "Joining" another party's brief would appear to be inconsistent with the absolute independence representation of the child requires.
8. When appropriate, new developments and matters outside the record may be incorporated into the AFC's brief (see *Matter of Michael B.*, 80 NY2d 299 [1992]).
9. Particularly where the child is the appellant, the AFC should be mindful of the court's calendar and the duration of the order appealed from and must not allow an appeal to be mooted by the passage of time.
10. If an appeal will not be perfected – in cases, for example, where the child does not want to pursue the appeal or where the appeal has been rendered moot by a subsequent order – the AFC must file the child's signed consent to withdraw the appeal or move to be relieved and to have the appeal dismissed as moot or abandoned. Please note that Appellate



Division rules require attorneys to notify the Court immediately when there is a settlement of any appeal or proceeding or issue therein or if any appeal, proceeding or issue therein has been rendered moot (see 22 NYCRR 1250.2 [c]).

11. In general, the AFC is expected to attend oral argument. If the AFC does not attend oral argument, for example if the appellant's attorney has submitted and the attorney for the child believes attendance is unnecessary under the circumstances, the AFC will be required to attach an explanatory affirmation to the voucher.
12. Where the child is of sufficient maturity, the AFC must inform the child of the outcome of the appeal. The AFC should carefully explain the practical effect of the decision on the child.
13. The AFC must prepare an appropriate response to any motion for reargument or where another party requests post-appeal relief. The AFC must file, where appropriate, an application for leave to appeal to the Court of Appeals.
14. The AFC must be aware of and comply with the "special procedures" found in § 1121 of the Family Court Act and with the Statewide Rules (22 NYCRR 1250), the Fourth Department Rules (22 NYCRR 1000) and the Court of Appeals Rules (22 NYCRR 500).