

NYSBA

Committee on Children and the Law

Standards for Attorneys Representing Children in Adoption Proceedings

2015

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**NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON CHILDREN & THE LAW**

**STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN
NEW YORK ADOPTION PROCEEDINGS**

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**NEW YORK STATE BAR ASSOCIATION
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**STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK
ADOPTION PROCEEDINGS (2014)**

PREFACE

These Standards apply to all attorneys representing children in adoption proceedings, whether in surrogate's court or family court. They apply equally to attorneys representing children in adoption proceedings arising out of foster care and private placement adoptions.

The **Standards for Attorneys Representing Children in New York Adoption Proceedings** are intended to define what constitutes effective representation.

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

STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK ADOPTION PROCEEDINGS (2014)

A. THE CHILD'S ATTORNEY

A-1. The Attorney-Client Relationship

Whether retained or assigned, and whether called “counsel” or “law guardian,”¹ the attorney for the child shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences, and shall advocate the child’s position. In determining the child’s position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child’s capacities, and have a thorough knowledge of the child’s circumstances. Ethics rules require an attorney “to abide by a client’s decisions concerning the objectives of representation and ... consult with the client as to the means by which they are to be pursued.” (NY Rules of Professional Conduct [22 NYCRR 1200.0], rule 1.2[a]). In addition, the attorney must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Rule 1.4(a)(2). In 2007 the Chief Judge of the New York State Court of Appeals made it clear that unless a child is not capable of expressing a preference, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child’s articulated position would place the child at imminent risk of serious harm, the attorney must not “substitute judgment” in determining and advocating the child’s position, even if the attorney believes that what the child wants is not in the child’s best interests. Rules of the Chief Judge, § 7.2.

Maintaining a traditional attorney-client relationship is particularly important in adoption proceedings because participants in the adoption process often treat adoptions purely as a collaborative process. An attorney for the child is not an arm of the court providing reports but an advocate for the child client.

Commentary

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

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

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

¹ “Law Guardian” is an outdated term for the child’s legal advocate. It has been replaced in the relevant statutes by the term “Attorney for the Child.”

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

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

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

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

A-2. Counseling and Advising the Child

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

The attorney's duties as counselor and advisor include:

- (1) Developing a thorough knowledge of the child's circumstances and needs;
- (2) Informing the child of the relevant facts and applicable laws – particularly with respect to the relationship rights that will be gained and lost through an adoption, as well as the rights of a child over the age of 14 to withhold consent to an adoption;
- (3) Explaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings;

- (4) Expressing an opinion concerning the likelihood that the court will accept particular arguments;
- (5) Providing an assessment of the case and the best position for the child to take, and the reasons for such assessment;
- (6) Counseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position;
- (7) Evaluating the need for post-adoption services and treatment, explaining any such services and treatment options to the child and ascertaining and advocating the child's position regarding such services or treatment.

Commentary

The attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when, at the end of the day, the attorney and the child disagree. However, representation is also "attorney-directed" in the sense that, particularly when representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions.

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

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

A-3. Overcoming the Presumption of Adherence to the Client's Directions

An attorney must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences, except in the following circumstances:

- (1) The attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision; or
- (2) The attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions.

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

Commentary

When considering whether the child has "capacity to perceive and comprehend the consequences of his or her decisions," the attorney should not make judgments that turn on the level of maturity, sophistication, or "good judgment" reflected in the child's decision-making. All that is required is that the child have a basic understanding of issues and consequences. The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, each child should be assessed individually to determine if he or she has the capacity to make decisions that bind the attorney with respect to fundamental issues such as whether the child wishes to be adopted. In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child's developmental status and capability (see A-5).

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

The Rules of the Chief Judge properly contemplate that extraordinary circumstances must be present before the child's attorney overrides a child's expressed position. Rules of the Chief Judge, § 7.2 (2007); see Merrill Sobie, Representing Child Clients: Role of Counsel or Law Guardian, NYLJ, 10/6/92, p. 1, col. 1 (while opining that a law guardian may refuse to argue for

a result that would place child in “imminent danger”, author notes that those words “connote a grave immediate danger”); American Bar Association Standard B-4(3), NY Rules of Professional Conduct, Rule 1.14(b). The language of § 7.2 is consistent with the prevailing view that the attorney for the child should only consider overriding the child’s expressed position when a substantial risk of imminent serious physical harm is present. Therefore, although it is conceivable that there might be circumstances where an attorney would consider overriding the child’s expressed position due to the imminent risk of serious emotional harm, such situations should be extremely rare.

A-4. The Use of Substituted Judgment

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

- (1) Must conduct a thorough investigation, including interviewing the child, reviewing the evidence and applying it against the legal standard applicable to the particular stage of the proceeding; and
- (2) Should consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child’s articulated position and/or to assist the attorney in formulating a legal position on behalf of a child who is not competent (see A-3).

Commentary

In those cases in which the attorney has properly decided to make decisions for the child, the attorney should be guided by his/her objective analysis of the legal issues governing the proceeding. The attorney has no right to make “best interests” determinations and act upon them when the law clearly states that a different standard applies. The attorney properly advances the client’s interests only by ensuring that the child’s legal interests are protected and that the legal position advanced by the child’s attorney conforms to the applicable legal standard governing each stage of the proceeding.

Some controversies, such as whether an adoption should be finalized, or whether the court should accept the revocation of a consent to adoption, or whether a post-adoption contract should be approved, require the court, and thus the child’s attorney (when using substituted judgment), to consider the child’s best interests. In those instances, the attorney’s formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney. The attorney should take into account the full context in which the client lives, including the importance of the child’s family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law. When using substituted

judgment and formulating a best interests position, the attorney may wish to consult a social worker or other mental health professional for assistance.

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

A-5. Confidentiality of the Attorney-Client Relationship

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

- (1) The child consents to disclosure;
- (2) The attorney is required by law to disclose;
- (3) The attorney has determined pursuant to Standard A-3 that the use of substituted judgment is required, and that disclosure advances the child's legal interests; or
- (4) The attorney has determined that disclosure is necessary to protect the child from an imminent risk of physical abuse or death.

Commentary

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

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

The exceptions to confidentiality find support in City Bar Ethics Opinion 1997-2, which concluded that the child's attorney may disclose confidential information concerning abuse or mistreatment if the attorney is required by law to do so or disclosure is necessary to keep the client from being maimed or killed or the client lacks capacity and the attorney believes disclosure is in the client's best interest. See also State Bar Ethics Opinion 486 (1978) (attorney

must balance protection of human life against professional standards when deciding whether to reveal client's contemplation of suicide). Support can also be found in NY Rules of Professional Conduct, Rule 1.6(b), which states that disclosure of a confidence is permitted (but not required) when necessary to prevent reasonably certain death or substantial bodily harm. In determining whether to make disclosure, the attorney should always take the child's desires into account and consider the effect disclosure would have on the attorney-client relationship.

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

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

B. GENERAL AUTHORITY AND DUTIES

B-1. Basic Obligations

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

- (1) Obtain copies of all pleadings and relevant notices and demand ongoing discovery;
- (2) Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the role of all participants (e.g., judge, parties and their advocates, intervenors, case workers, child's attorney), and what to expect in the legal process;

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

- (3) Determine if a conflict of interest exists and observe ethical rules related to conflicts, when the attorney is representing multiple siblings;
- (4) Develop a theory and strategy of the case, including ultimate outcomes and goals to implement at hearings and including factual and legal issues;
- (5) Inform other parties and their representatives that he or she is representing the child and expects reasonable notification *prior* to case conferences, changes of placement, child interviews, and any changes of circumstances affecting the child and the child's family;
- (6) Participate in depositions, negotiations, discovery, pre-trial conferences and hearings;
- (7) Obtain evaluations and retain expert services if deemed necessary to effectively present the child's position;
- (8) Review any Post-Adoption Contact Agreement with the child and advocate the child's position with respect to the terms;
- (9) Obtain and review all court and agency records concerning the child's placement history and consult with all attorneys who had previously represented the child; and
- (10) If the attorney is required, for any reason, to terminate representation of the child, the attorney must insure that the new attorney for the child receives all relevant court papers as well as other documents and information necessary to insure the least possible disruption in the case and/or trauma to the child.

Commentary

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

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

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

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

A situation may arise in which the child does not wish to take a position. In this situation, a child has the right to instruct the attorney not to take a position, and such a request must be articulated to the court.

B-2. Conflict Situations

If an attorney is appointed to represent siblings, the attorney should determine if there is a conflict of interest, which could require that the attorney decline representation or withdraw from representing some or all of the children. This *may* be true where:

- (1) Siblings wish to be placed with and adopted by different families;
- (2) Children have particular needs which cannot be met by the same adoptive family;
- (3) The desire for or appropriateness of post-adoption contact differs among the siblings;
- (4) The desire to be adopted or have a different permanency goal differs among the siblings;
- (5) Siblings have been abused by other siblings.

Commentary

An attorney should not accept assignment for siblings or any other multiple client group if the exercise of independent professional judgment on behalf of one would be or is likely to be adversely affected by the attorney's representation of the other or if so doing would be likely to involve the attorney in representing differing interests. If such a conflict arises during the course of representation, the attorney may not be able to continue to represent any or all of the siblings. NY Rules of Professional Conduct, Rule 1.7(a).

When an attorney represents multiple clients (most often sibling groups) in a single proceeding or related proceedings, the attorney should be careful to explain the limits of confidentiality, including that the attorney may need to share information with the other represented children. NY Rules of Professional Conduct, Rule 1.7, comments 30-31. See also, C-1 below (separate interviews).

C. ACTIONS TO BE TAKEN

C-1. Meet With the Child

Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the attorney should meet with the child prior to court hearings and when apprised of emergencies or significant events impacting the child. Additionally, if appropriate, the attorney should maintain telephone contact with the child. The

attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child's ethnicity, culture, gender, gender identity and sexual orientation.

Commentary

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

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

An attorney who represents multiple clients in a proceeding should conduct separate interviews of each child.

The attorney should ascertain the detailed facts concerning the adoptive home, the adoptive parents, any birth parent whose rights have not, yet been terminated, and the child's wishes concerning placement and adoption. It is crucial to explore the relationship between the child and the prospective adoptive parents. Of equal significance is the relationship between the child and the birth parents as well as the child's relationship with siblings. Adoption can result in a total severance of the parent-child relationship so the attorney must carefully discuss these issues with the child.

Particularly if the adoptive parent is an older relative, such as a grandparent, the attorney for the child should explore with the child what relative might be a potential backup resource if the adoptive parent should die or become infirm. The attorney should make an effort to meet with that backup resource and ascertain his or her commitment to the child and the frequency with which he or she sees the child. Judges often rely on a backup resource for finalizing a case with an older adoptive parent. The attorney for the child must assure that the promise of a backup resource is not illusory and that someone will step forward to care for the child if the adoptive parent's health declines.

The attorney should also discuss proposed Post-Adoption Contact Agreement (PACA) terms with the child. The child may have a particular desire to see or not see the parents. This position should be determined and communicated to the appropriate parties. If the child is opposed to visits this must be communicated promptly.

C-2. Investigate

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

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

Commentary

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

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

Commentary

Another key aspect of representing children is the review of all prior court proceedings regarding the child. Relevant documents that should be reviewed may include agency case files, files concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and education. These records can provide a more complete context for the functioning of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate potential placements and services.

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

Commentary

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

- (5) Contacting and meeting with any birth parent whose rights have not been terminated and the proposed adoptive parents, with the permission of their attorneys;

Commentary

Such contact should include visiting the child's place of residence, which can give the attorney additional information about the child's adoptive home. However, the attorney should never put him/herself in the position of becoming a witness, and should make every effort not to create this expectation on the part of the adoptive parent or the adoptive parent's attorney.

The adoptive parents' attorney should be solicited for approval to interview the petitioner. If the adoption is contested, approval should be sought from the attorney for all other parties to interview those parties regarding their plan concerning the child's future.

- (6) Obtaining necessary authorizations for the release of information, or, where a release cannot be obtained, serving subpoenas for necessary records, such as school reports, medical records and case records;
- (7) Interviewing individuals involved with the child who may be relevant to the case, including school personnel, foster care/adoption case workers, adoptive parents, and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary

In some jurisdictions the attorney is permitted free access to foster care/adoption case workers. In others, contact with the caseworker must be arranged through the agency's attorney.

- (8) Reviewing relevant evidence provided by the other parties;
- (9) Considering whether the child should be examined by a physician, a psychologist, or a social worker;

Commentary

When considering a request for the child to be examined by a physician, psychologist or social worker pursuant to F.C.A. § 1038, the attorney must consider not just the usefulness of the examination as a fact-finding tool but must also consider the effect of the examination on the child. In determining whether to support or oppose a motion made by another party for an examination, or whether to make a motion seeking an examination, the attorney must balance the need for the information against the effect that the examination would have upon the child. The attorney should consider whether the scope of the examination could be limited and move for such a limit, if appropriate. For example, a psychological examination may be less distressing for a child than a physical or complete psychiatric examination. The child's attorney should always conduct proper discovery to obtain the names, qualifications, and summaries of expected testimony of any expert witness.

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

Commentary

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

C-3. Request Services

Consistent with the child's legal interests, the attorney should seek appropriate services (by court order, if necessary) to protect the child's interests and to implement a service plan. These services may include services for the child or for the adoptive parent(s), as long as the request for services is made in order to advance the child's legal interests.

Commentary

Services might need to be put into place before the court can find that finalizing an adoption is in the child's best interest. Such supportive services might be necessary in order to ensure the stability of the home post-adoption.

C-4. Child With Special Needs

Consistent with the child's wishes, the attorney should assure that a child with special needs receives appropriate services in the adoptive placement to address any physical, mental, or developmental disabilities. These services may include but should not be limited to:

- (1) Special education and related services;
- (2) Supplemental security income (SSI) to help support needed services;
- (3) Bridges to Health (B2H) waiver services;
- (4) Community-based mental health services and, in extreme cases, residential or out-patient psychiatric treatment.

Commentary

The attorney should ensure that the court is aware of the child's needs, so that the court can take those needs into consideration in making decisions regarding whether to approve the adoption. If the child is aware of his or her special needs, the attorney should ascertain whether

or not the child believes the adoptive parent is able to address those needs, and discuss possible outcomes based on that ability.

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

C-5. Negotiate Settlements

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

Commentary

Particularly in contentious cases, the attorney may effectively assist negotiations of the parties and their attorneys by focusing on the needs of the child. If a party has legal representation, it is unethical for the child's attorney to negotiate with that party directly without the consent (preferably written) of the party's attorney. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the attorney for the child is in a pivotal position in negotiation. As developmentally appropriate, the attorney should consult the child prior to any settlement becoming binding.

C-6. Pre-Trial Reports

The child's attorney should not submit any pre-trial report to the court, but may submit legal papers and argue orally based on the evidence.

Commentary

In some cases, a child's attorney has been requested by the court to submit a separate pre-trial report and recommendations, or the attorney has elected to submit such a report. The preparation and submission of such a report is inconsistent with the purpose and role of an attorney. The child's attorney is not a social worker or a probation investigator. If expert assistance or reports are needed or desirable, the child's attorney should request that the court order the relevant expert evaluation or study. The child's attorney may also independently retain an expert, such as a social worker or psychologist, to conduct a study and prepare a report. Expert reports may be introduced as evidence, and the expert may be called as a witness. However, the attorney should never assume the role of an expert witness. A child's attorney who submits a report and recommendation opens the possibility that he or she will or should be called as a witness. A professional who has submitted a report may be called for testimony and cross-examination by any party, and may be questioned, under oath, concerning the factual basis of the report and the specific reasons for a conclusion, as well as questions based on hypothetical facts. Any party may also try to refute a witness's testimony. Presenting testimony as a witness is thus incompatible with legal representation, and the possibility raises a conflict under the ethics rules. See NY Rules of Professional Conduct, Rule 3.7 (citing also to Rules 1.7

and 1.9). A child's attorney who submits a pre-trial report and recommendations may have no choice but to withdraw as child's attorney, or may be subject to a disqualification motion.

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

C-7. Undocumented Children/SIJS

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

Commentary

It is estimated that well over one thousand children who enter foster care in New York State each year do not have legal immigration status. Relief for these children is available in the form of SIJS, a type of visa designated for undocumented children who are the subject of abuse, neglect, voluntary foster care placement, guardianship, adoption, and PINS or delinquency proceedings. While the SIJS application itself is made to the U.S. Citizenship and Immigration Services, a prerequisite for the application is an order from the family court making specific factual findings that the young person:

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

Legally, a SIJS petition does not need to be completed before the adoption. However, practically it can be difficult to get a foster care agency to pay for necessary documents once an adoption is completed. Raising SIJS issues at the time of the adoption will insure the availability of court oversight and may ultimately expedite the SIJS process, but completion of a SIJS filing should not delay the adoption process. See Immigration and Naturalization Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

C-8. Adolescent Clients

The attorney who represents a young person age 14 or older in an adoption proceeding coming out of foster care should be familiar with, among other things, both the federal and state law governing services and discharge resources available to youth aging out of foster care.

Commentary

When counseling an adolescent who is deciding whether to consent to an adoption, the attorney should be able to explain what the child can expect if s/he refuses to consent to the adoption, preferring, instead, to remain in foster care. The attorney should be aware that some children may have a strong bond with a foster family but will still not want to be adopted by that family. Though a child over the age of 14 must consent to an adoption, a child under 14 may still have strong feelings opposing or desiring an adoption that their attorney must be aware of. In some cases, a psychological evaluation to determine if adoption is in the child's best interests may be appropriate.

C-9. Review and Execute Post-Adoption Contact Agreements (PACA)

PACAs have long been a part of private and voluntary agency adoptions. However, until 2005, they were only morally and not legally enforceable. PACAs are now clearly legally enforceable when in the best interest of the child in all agency adoptions. D.R.L. § 112-b. Case law is contradictory in private adoptions as to enforceability as the enabling statute failed to include private adoptions in its coverage.

Commentary

In the case of an infant adoption, the attorney for the child will need to do the appropriate investigations and substitute his or her judgment as to whether the PACA is in the child's best interest.

In all other situations, the attorney for the child will need to review the PACA with the child and advocate for the child's position, including requesting a hearing if the terms of the PACA are not acceptable to the child.

PACAs protect the right of an adoptive child to have access to the birth parents, siblings and under certain circumstances, grandparents.

PACAs in private and voluntary agency adoptions are generally negotiated directly among the parties because the parties have elected to work together to create the adoption.

PACAs in the foster care setting can be more problematic. PACAs are often negotiated as an inducement to the birth parents to surrender the child rather than to proceed to a TPR

hearing.³ Frequently, the foster or future adoptive parents are not included in negotiations. At times, the relationship between the foster and birth parents may be strained, as the birth parents perceive the foster parents as part of the system which is taking away their children. The birth and foster parents will not have the foster care agency to assist them with any issues following the finalization of the adoption.

C-10. Confer With the Attorney Representing the Child in Permanency Hearings

If the attorney representing the child on the adoption has not also been assigned to represent the child on the underlying termination of parental rights proceeding and subsequent permanency hearings, the attorney should confer with the attorney representing the child in the permanency hearings to ensure that both have complete, accurate information regarding the plans for adoption and any services that might be needed to help achieve the child's stated position.

Commentary

The family court retains continuing court jurisdiction and calendaring for all children who have been placed or freed for adoption "until the child is discharged from placement and all orders regarding supervision, protection or services have expired." F.C.A. § 1088. The legislative intent of the permanency legislation was to ensure that children who have been placed in foster care or free for adoption do not languish and that the court oversees the progress of every child on a frequent basis. It is incumbent upon the attorney to make best efforts to ensure that every child achieves his or her permanency goal as soon as possible.

The child often loses most, if not all, of the child's service providers upon adoption. This can be traumatic for the child. The attorney can advocate for certain services to be continued through programs such as Bridges to Health (B2H) or the foster care agency to transition more slowly to new providers.

D. HEARINGS

D-1. Court Appearances

The attorney should attend and fully participate in all hearings and in all telephone or other conferences with the court.

D-2. Client Explanation

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

³ In light of *Matter of Hailey ZZ v. Ricky ZZ*, 19 N.Y.3d 422 (2012), courts can no longer order contact post-adoption without a PACA.

D-3. Motions and Objections

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

D-4. Presentation of Evidence

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

Commentary

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

D-5. The Child's Participation at a Hearing

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

Commentary

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

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

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

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

D-6. Whether Child Should Testify

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

Commentary

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

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

D-7. Child Witness

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

Commentary

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

D-8. Questioning the Child

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

Commentary

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

D-9. Challenges to Child's Testimony or Statements

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

Commentary

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

D-10. Conclusion of Hearing

If appropriate, the attorney should make a closing argument and provide proposed findings of fact and conclusions of law. The attorney should discuss the end of the representation and determine what contacts, if any, the attorney and child will continue to have.

Commentary

The relationship between child and attorney may be one of the more enduring relationships in the child's life. The attorney should make clear how to seek legal assistance if needed after the finalization.

D-11. Fair Hearings

In the event a child is removed by the agency prior to finalization, the adoptive parents are entitled to a fair hearing through OCFS. The child should have representation. If the preadoptive parents are unsuccessful in this hearing, the child will have no further contact with the preadoptive parents. The child's position should be fully represented in such a proceeding.

Commentary

If the adoption attorney is not also representing the child on the underlying foster care proceedings, the adoption attorney should confer with the foster care attorney to determine who will present the child's position at the fair hearing. Although the child is not technically a party to the fair hearing, the child's position may be heard and considered by the hearing officer.

D-12. Best Interest Hearings

A best interest hearing may be required if the birth parents withdraw consent during the revocation period of the consent or surrender. Again, if the preadoptive parents are unsuccessful, the child will be returned to the birth parent. The child will have no further contact with the preadoptive parents. The child's position should be fully represented in such a proceeding. A best interest hearing may also be required if either party alleges that a violation of a PACA has occurred. (See D.R.L. § 112-b)

Commentary

The child's position with respect to these issues is vitally important to the decisions to be made by the court. The attorney should be fully prepared to present that position.

D-13. D.R.L. § 111 Hearings

The hearing is to determine whether the birth parent's consent is required for the adoption to proceed. If the court determines that the birth parent's consent is not required, the child will have no further contact with the birth parent. The child's position should be fully represented in such a hearing.

Commentary

The child may have had no contact from the absent parent for at least 6 months. The child's position may be different from that of the parent, particularly if the child once had a relationship with the absent parent.

The child may also need medical history from the absent parent. The child's attorney may be in a better position than the adopting parent to seek that information.

E. POST-HEARING

E-1. Review of Court's Order

The attorney should review all written orders to ensure that they conform to the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child

The attorney should discuss each order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child.

E-3. Protecting the Child's Rights

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

E-4. Subsequent Proceedings

Whenever possible, the child's attorney should represent the child in any subsequent relevant proceeding, such as a proceeding pursuant to D.R.L. § 112-b for enforcement of a Post-Adoption Contact Agreement.

F. APPEAL

F-1. Decision to Appeal

The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal would not be frivolous, the attorney should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal. If the child is aggrieved by the order, the attorney should take and perfect an appeal even if a party is also appealing.

Commentary

F.C.A. § 1121(2) requires the attorney to advise the child, in writing, of the right to appeal, the time limitations, the manner of initiating the appeal and obtaining a transcript, and the right to a free transcript and representation. The attorney is also statutorily required to explain to the child the consequences of an appeal and the reasons upon which an appeal may be based. The attorney should explain to the child not only the legal possibility of an appeal, but also the ramifications of filing an appeal, including the potential for delaying the implementation of services or placement options. The attorney should also explain whether the trial court's orders will be stayed pending appeal and what the agency and trial court may do pending a final decision. It is important to file a notice of appeal and perfect the appeal rather than relying on the aggrieved party to do so because if the party fails to perfect his or her appeal, the child will have no remedy.

F-2. Withdrawal

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

Commentary

NY Rules of Professional Conduct, Rule 1.1. (b) states that "A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it."

F-3. Participation in Appeal

The attorney should participate in an appeal filed by another party unless relieved by the court.

Commentary

The attorney should take a position in any appeal filed by the parent, or other party. If the child's interests are affected by the issues raised in the appeal, the attorney should represent the child's position in the appeal. The attorney's assignment continues pursuant to F.C.A § 1120(b). Because statewide uniformity is lacking in regards to procedures for the attorney to follow when the child is to be represented on appeal, the attorney should be aware of applicable Appellate Division rules.

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

F-4. Conclusion of Appeal

When the decision is received, the attorney should explain the outcome of the case to the child.

Commentary

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

F-5. Cessation of Representation

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

Commentary

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