

**OVERVIEW OF THE STAGES OF A JUVENILE DELINQUENCY CASE AND
THE RESPONSIBILITIES OF THE ATTORNEY FOR THE CHILD**

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I.	Family Court Jurisdiction in Juvenile Delinquency Cases After “Raise the Age”	1
A.	Extension of Family Court Jurisdiction to Age 17 (as of Oct. 1, 2018) and then to Age 18 (as of Oct. 1, 2019)	1
B.	Continuing Applicability of the Juvenile Offender (JO) Law	1
C.	“Raise the Age” legislation’s provisions for misdemeanors	1
D.	“Raise the Age” legislation’s provisions for felonies	2
II.	Introduction to the Role of Counsel in Juvenile Delinquency Cases	3
A.	The role of the attorney for the child	3
B.	Division of authority between client and counsel	4
C.	Responsibilities of the attorney for the child	4
III.	The Commencement of a Delinquency Case: The Arrest	5
A.	Standard for arrest	5
B.	Police interrogation of juvenile	5
C.	Fingerprinting and arrest photographs	6
D.	Role and responsibilities of the attorney for the child	6
IV.	The Initial Interview of the Client and Parent/Guardian	7
A.	Explaining the nature of the attorney-client relationship	7
B.	Interviewing the client to obtain information needed to prepare for trial and to begin preparing for disposition in the event of a finding	7
C.	General explanations and advice to the client	9
D.	Obtaining additional information from the client’s parent or guardian	9
E.	Forms to sign	9

V.	Developing an Initial Plan to Guide Counsel’s Preparation for Pretrial Hearings, the Fact-Finding Hearing, and Disposition.	9
A.	Developing a defense “theory of the case” to guide counsel in preparing for and conducting pretrial hearings and the Fact-Finding Hearing.	9
B.	Developing a plan to guide preparation for disposition.	10
C.	Developing a plan to address other relevant legal needs of the client and/or his or her family.	10
VI.	Adjustment by Probation Service.	11
A.	Availability of adjustment.	11
B.	Standards for adjustment.	11
C.	Timeline.	11
D.	Role and responsibilities of the attorney for the child.	11
VII.	Pre-Petition Hearing.	12
A.	Circumstances under which a pre-petition hearing may be held.	12
B.	Scope and purpose of the hearing.	13
C.	Findings that must be made to authorize detention.	13
D.	Applicability of rules of evidence.	14
E.	Role and responsibilities of the attorney for the child.	14
VIII.	Initial Appearance.	14
A.	Timing requirements.	14
B.	Presence of parent at Initial Appearance.	16
C.	Appointment of counsel.	16
D.	Arrest on the petition.	17

E.	Parole/remand determination.....	18
F.	Availability of option of referring case for probation adjustment.....	19
G.	Role and responsibilities of the attorney for the child.....	19
IX.	Investigation.....	20
A.	Counsel’s Duty to Investigate.....	20
B.	Interviewing Prosecution Witnesses.....	20
C.	Defense Witnesses.....	21
D.	Visiting the scene of the crime.....	22
X.	Probable Cause Hearing.....	22
A.	Function of probable cause hearing; applicable standard.....	22
B.	Types of cases in which probable cause hearings are required.....	23
C.	Timing.....	23
D.	Presentment Agency’s burden at probable cause hearing.....	24
E.	Respondent’s right to present evidence at probable cause hearing.....	25
F.	Waiver of respondent’s appearance.....	25
G.	Effect of court’s ruling on probable cause.....	26
H.	Role and responsibilities of the attorney for the child.....	26
XI.	Discovery.....	26
A.	Voluntary Disclosure Form (VDF).....	26
B.	Pretrial discovery mechanisms under the FCA.....	28
C.	Discovery at the suppression hearing and trial: Disclosure of prior statements and criminal history of a witness.....	29

XII.	Subpoenaing Witnesses and Documents.	30
	A. Witness subpoenas.	30
	B. Subpoenas <i>duces tecum</i>	31
XIII.	Expert Witnesses.	32
	A. Retaining expert witnesses.	32
	B. Interviewing adverse expert witnesses.	32
XIV.	Filing Motions.	33
	A. Duty of attorney for the child.	33
	B. Types of motions to consider filing.	33
	C. Deadlines for filing motions.	34
	D. Requirements for legal and factual sufficiency of suppression motions.	35
XV.	Admissions.	37
	A. Rules governing the respondent’s ability to enter an admission to a single count of a multi-count petition or a lesser included offense.	37
	B. Plea negotiations.	37
	C. Procedures for allocution.	38
	D. Withdrawal of an admission.	38
XVI.	Suppression Hearing.	38
	A. Right to a separate suppression hearing prior to fact-finding.	38
	B. Respondent’s right to waive his or her presence at a suppression hearing.	38
	C. Production of <i>Rosario</i> material.	38
	D. Burdens at the suppression hearing.	38

E.	Substantive rules of suppression law that are based on the youth of the accused.....	41
XVII.	Fact-Finding Hearing.....	46
A.	Timing.....	46
B.	Presence in the courtroom: Accused’s and parent/guardian’s right to presence; rule on witnesses.....	47
C.	Limitations on the role of a judge in a bench trial.....	48
D.	Production of <i>Rosario</i> material.....	49
E.	Right to present opening statement and summations.....	49
F.	Rules governing the burdens of proof and persuasion; special requirements of corroboration.....	49
G.	Resurfacing of suppression-related issues at the Fact-Finding stage.....	50
XVIII.	Disposition.....	52
A.	Issues to be determined at dispositional hearing.....	52
B.	Timing of dispositional hearing.....	53
C.	Probation investigation and Mental Health Services’ diagnostic assessment....	54
D.	Dispositional options.....	54
E.	Procedures at the dispositional hearing.....	56
F.	Responsibilities of the attorney for the child.....	56
XIX.	Responsibilities of the Attorney for the Child After Disposition.....	58
A.	Preserving Appellate Remedies.....	58
B.	Arranging for Sealing, Destruction, and/or Expungement of Records.....	58
C.	Other Post-Dispositional Advocacy.....	58

*Overview of the Stages of a Juvenile Delinquency Case
and the Role of the Attorney for the Child*

I. Family Court Jurisdiction in Juvenile Delinquency Cases After “Raise the Age”

- A. Extension of Family Court Jurisdiction to Age 17 (as of Oct. 1, 2018) and then to Age 18 (as of Oct. 1, 2019)
- (1) The definition of “infancy” in P.L. § 30.00(1) has been amended to extend its presumptive exemption of youth from criminal responsibility to the age of 17 (as of Oct. 1, 2018) and then to age 18 (as of Oct. 1, 2019). This presumptive across-the-board exemption from criminal court prosecution is qualified by the longstanding Juvenile Offender Law (as set forth in P.L. § 30.00(2)) and new “raise the age” provisions for “adolescent offenders” (as set forth in P.L. § 30.00(3)).
 - (2) The definition of “juvenile delinquent” in FCA § 301.2(1) has been amended to include 16-year-olds (as of Oct. 1, 2018) and 17-year-olds (as of Oct. 1, 2019) who have been removed to Family Court from criminal court pursuant to either the longstanding Juvenile Offender Law or the “Raise the Age” legislation.
- B. Continuing Applicability of the Juvenile Offender (JO) Law: The longstanding Juvenile Offender Law (which was enacted in 1978) remains in effect and continues to require that juveniles who are 13, 14, or 15, and who are charged with certain enumerated felonies (set forth in P.L. § 10.00(18); P.L. § 30.00(2); and C.P.L. § 1.20(42)) be charged initially in criminal court and that the case remain in criminal court unless it is removed to Family Court (pursuant to C.P.L. §§ 722.20 and 722.22 and C.P.L. art. 725). As a result of the “Raise the Age” legislation, JO cases will be initiated in the new Youth Parts of Superior Court which will be presided over by Family Court judges (C.P.L. § 722.10). A JO case must be removed to Family Court if (i) the District Attorney requests removal and the Youth Part judge determines that this would be in the interest of justice and, for certain felonies, that specified prerequisites are satisfied (C.P.L. § 722.20(4)), or (ii) a felony complaint hearing is held and results in a determination that there is reasonable cause only for an act of juvenile delinquency, not for a JO-eligible felony (C.P.L. § 722.20(3)(b)). (If a felony hearing shows that there is not “reasonable cause to believe that the defendant committed any criminal act,” the felony complaint must be dismissed and the defendant released from custody or bail. C.P.L. § 722.20(3)(c)).
- C. “Raise the Age” legislation’s provisions for misdemeanors: All misdemeanor cases brought against a 16-year-old (as Oct. 1, 2018) or a 17-year-old (as of Oct.

1, 2019) must be brought in Family Court as juvenile delinquency cases. The longstanding Family Court Article 3 provisions for processing, adjustment, detention, pretrial proceedings, fact-finding, disposition, and post-disposition proceedings apply to these cases.

D. “Raise the Age” legislation’s provisions for felonies:

- (1) 16-year-olds and 17-year-olds who come within the “Raise the Age” legislation (based upon the applicable dates of the legislation) and who are charged with a felony are classified as “adolescent offenders.” See C.P.L. § 1.20(44).
- (2) Procedures for Determining Whether to Remove an Adolescent Offender’s Felony to Family Court:
 - (a) The determination is made by the Youth Part of Superior Court, which is presided over by a Family Court judge (C.P.L. § 722.10).
 - (b) An Adolescent Offender’s felony case must be removed to Family Court if the District Attorney requests removal (assuming that the Youth Part judge determines that this would be in the interest of justice and, for certain felonies, that specified prerequisites are satisfied). C.P.L. § 722.21(5).
 - (c) Cases in which the District Attorney’s Office is not requesting or consenting to removal to Family Court:
 - (i) If an Adolescent Offender is charged with a non-violent felony (*i.e.*, a felony other than non-drug-related Class A felonies; violent felonies as defined in P.L. § 70.02; and J.O. felonies defined in C.P.L. §§ 1.20(42)(subparts (1) and (2)), a presumption in favor of removal to Family Court applies. C.P.L. § 722.23(1)(a). The District Attorney has up to 30 days to file a motion to prevent removal (*id.*), which must be in writing and “contain allegations of sworn fact based upon personal knowledge of the affiant” (C.P.L. § 722.23(1)(b)). The defendant must be given “an opportunity to reply” (C.P.L. § 722.23(1)(c)), and “[e]ither party may request a hearing on the facts,” which “shall be held expeditiously” (*id.*). The court must deny the District Attorney’s motion unless the court finds that “extraordinary circumstances exist that should prevent the transfer of the action to family court.” C.P.L. § 722.23(1)(d).

- (ii) If an Adolescent Offender is charged with a violent felony and thus does not have the benefit of the above-described presumption in favor of removal to Family Court (*i.e.*, Adolescent Offenders who are charged with non-drug-related Class A felonies or violent felonies as defined in P.L. § 70.02), and the District Attorney is seeking to retain the case in criminal court, the District Attorney must show by a preponderance of the evidence that “(i) the defendant caused significant physical injury to a person other than a participant in the offense; or (ii) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense; or (iii) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the penal law.” C.P.L. § 722.23(2)(c). If the District Attorney fails to meet that burden or if the charges are reduced to a non-violent felony, then a presumption in favor of removal to Family Court applies (as described in the preceding subparagraph).
 - (iii) In a case that is retained in criminal court and thereafter proceeds to a felony complaint hearing, removal to Family Court is required if the court finds at the hearing that there is reasonable cause only for an act of juvenile delinquency. C.P.L. § 722.21(3)(b). (If a felony complaint hearing shows that there is not “reasonable cause to believe that the defendant committed any criminal act,” the felony complaint must be dismissed and the defendant released from custody or bail, C.P.L. § 722.21(3)(c).)
- (3) For Adolescent Offender felonies removed to Family Court, the longstanding Family Court Article 3 provisions for processing, adjustment, detention, pretrial proceedings, fact-finding, disposition, and post-disposition proceedings apply to these cases, except that, for crimes committed after a youth’s 16th birthday, the possible maximum duration of a restrictive placement for a Designated Felony is up to age 23 (rather than age 21). FCA § 353.5(4)(d).

II. Introduction to the Role of the Attorney for the Child in Juvenile Delinquency Cases

- A. The role of the attorney for the child: Because a delinquency proceeding can result in the respondent’s “loss of his liberty for years [which] is comparable in seriousness to a felony prosecution,” a juvenile accused of a delinquency offense

is entitled to “the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceeding, and to ascertain whether he has a defense to prepare and submit it.” *In re Gault*, 387 U.S. 1, 36 (1967). *See generally* NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009).

- B. Division of authority between client and counsel: The traditional contours of an attorney-client relationship – in which the client defines the “objectives” of the representation and the lawyer is obliged to zealously seek to attain those objectives (*see* N.Y. RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a); *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (“counsel must take all reasonable lawful means to attain the objectives of the client”) – prevails in delinquency cases as well. *See* N.Y. RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (even if “a client’s capacity to make adequately considered decisions in connection with the representation is diminished ... because of minority, ... the lawyer shall, as far as reasonably possible, maintain a conventional client-lawyer relationship with the client”); Comment to Rule 1.14 of ABA MODEL RULES OF PROFESSIONAL CONDUCT (recognizing that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being” and that, “[f]or example, children as young as five or six years of age, and certainly those ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody”); N.Y. RULES OF THE CHIEF JUDGE § 7.2(c) (Oct. 17, 2007) (“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.”). *See also* *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[i]t is ... recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or taken an appeal”); *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).
- C. Responsibilities of the attorney for the child: Well-established standards for effectiveness of counsel in criminal and juvenile delinquency cases recognize that counsel is obliged to engage in adequate investigation and preparation for not only the trial but also the sentencing/dispositional hearing. *See generally* NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009); ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION. *See also, e.g.,* *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (recognizing that 6th Amendment guarantee of effective assistance of counsel encompasses “duty to make reasonable investigations,” including investigation of mitigating evidence to present at sentencing in support of favorable sentence); RANDY HERTZ & JAMES S.

LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2c (7th ed. 2015 & Supp.) (listing numerous cases in which a writ of habeas corpus was granted by a federal court on the ground that defense counsel failed to provide constitutionally adequate representation in preparing for trial or sentencing or in handling a trial, negotiating a guilty plea and counseling the client about it, or handling the sentencing stage or appeal). Counsel should learn about and seek to rectify any educational, social, mental health or other problems of the client that may have caused or contributed to the client's involvement in the delinquency system; in doing so, counsel should seek both to ensure a favorable outcome at disposition in the pending delinquency case and to prevent the child from coming back into the juvenile or criminal justice system on a future date.

III. The Commencement of a Delinquency Case: The Arrest

- A. Standard for arrest: Police or peace officer “may take a child . . . into custody without a warrant in cases in which he may arrest a person for a crime under [CPL article 140]” (FCA § 305.2(2)), namely when the officer “has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise” (CPL § 140.10(1)(b)).
- B. Police interrogation of juvenile: FCA § 305.2 sets forth special procedures for interrogation of children “who may be subject to the provisions” of Family Court Act Article III, and violations of these procedures can result in suppression of a statement. The statutory requirements include:
 - (1) immediate notification of parent or guardian (FCA § 305.2(3));
 - (2) use of juvenile interrogation room for questioning (FCA § 305.2(4));
 - (3) administration of *Miranda* warnings to parent or guardian, “if present,” in addition to child (FCA 305.2(7)); *see also In the Matter of Carlos P.*, 178 Misc.2d 143, 681 N.Y.S.2d 724 (Fam. Ct., Bronx Co. 1998) (Hunt, J.) (suppressing statement because Presentment Agency failed to prove beyond a reasonable doubt that respondent’s grandmother, who did not speak or understand English, “sufficiently understood the respondent’s *Miranda* warnings so as to be able to provide the respondent with the adult assistance that he needed at the time” and that F.C.A. § 305.2(7) contemplates);
 - (4) consideration of child’s age, presence or absence of parent/guardian, and other factors in determining “suitability of questioning and ... the reasonable period of time for questioning such a child” (FCA 305.2(8)).

- C. Fingerprinting and arrest photographs: Fingerprints “shall” be taken (FCA § 306.1(1)) and palmprint and arrest photograph “may also be taken” (FCA § 306.1(2)) if:
- (1) Child is 11 or older and the crime for which the child is arrested or which is charged in the petition is an A or B felony (FCA § 306.1(1)(a));
 - (2) Child is 13 or older and the crime for which the child is arrested or which is charged in the petition is a C, D, or E felony (FCA § 306.1(1)(b)).
- D. Role and responsibilities of the attorney for the child: Although counsel commonly enters the case at Initial Appearance, counsel may be involved in the case even earlier than that because, for example, counsel was retained by a family member or has previously represented the child. If counsel is already involved in the case at the arrest stage, the most important tasks are to:
- (1) Prevent police interrogation of the respondent: Under the New York State Constitution, unlike the federal Constitution, the state constitutional right to counsel attaches – and “interrogation is prohibited unless the right is waived in the presence of counsel” – if an attorney (either in person or by telephone) or “the attorney’s professional associate” informs the police “of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant.” *People v. Grice*, 100 N.Y.2d 318, 322, 763 N.Y.S.2d 227, 230 (2003). Although “a third party [who, in *Grice*, was the defendant’s father] cannot invoke counsel on behalf of an adult defendant,” the Court of Appeals has established a more protective rule for Juvenile Offender and juvenile delinquency cases and has held that “the parent of a juvenile offender can invoke the right to counsel on the child’s behalf” as long as the parent makes an adequately “unequivocal” assertion of the right to counsel for his or her child. *People v. Mitchell*, 2 N.Y.3d 272, 778 N.Y.S.2d 427 (2004). If counsel learns that a client is at a police station, counsel (or his or her “professional associate”) should immediately contact the police station in the precinct of arrest and inform the police (ideally, the arresting officer, but otherwise the most senior officer on duty whom counsel can reach) that the child is represented and that the police should not interrogate the child.
 - (2) Facilitate the release of the child: Counsel should do what is needed to facilitate police release of the child to a parent or guardian (e.g., making efforts to persuade the police to release the child; ensuring that a parent or guardian is available to pick up the child at the station if the police are willing to release the child) or, if these efforts prove unavailing, to

persuade the Department of Juvenile Justice (DJJ) to release the child to a parent or guardian. If the child will not be released, counsel should communicate with the client's family to ensure that a parent or guardian is present in court at Initial Appearance and to gather favorable information that counsel can cite in arguing for release in court.

IV. The Initial Interview of the Client and Parent/Guardian

- A. Explaining the nature of the attorney-client relationship: Counsel should inform the client and his or her parent and guardian that counsel is the attorney for the child and not for the parent or guardian. Counsel should explain the nature of the attorney-client relationship, the functions of an attorney for the child in a delinquency case, and the attorney-client privilege.

- B. Interviewing the client to obtain information needed to prepare for trial and to begin preparing for disposition in the event of a finding: In a separate interview of the client (outside the presence of the client's parent or guardian so as to ensure that the client will be candid with counsel), counsel should obtain the following information:
 - (1) Client's account of the incident;

 - (2) Information needed for suppression motions, including:
 - (a) Circumstances of any police interrogation and statements;

 - (b) Circumstances of any searches or seizures;

 - (c) Circumstances of any identification procedures;

 - (3) Witnesses (names, addresses, phone numbers, other identifying information), including:
 - (a) Witnesses for the Fact-Finding Hearing (including alibi witnesses and character witnesses);

 - (b) Witnesses for the suppression hearings; and

 - (c) Witnesses who have favorable things to say about the client that could be used in a motion to Dismiss in the Furtherance of Justice, in plea bargaining to obtain a favorable plea offer, and/or at disposition in the event of a finding (*e.g.*, teachers, coaches, counselors in after-school programs or community centers,

neighbors);

- (4) Client's record of delinquency and PINS adjudications, charges, and arrests (including any pending charges, whether the client is presently on probation, and if so, the name of the probation officer);
- (5) Client's relationship with his or her parent or guardian (and, in cases in which the client cannot (or is not willing to) continue living at home, the names and addresses of relatives who could serve as alternative caretakers);
- (6) Information about the client's educational history (including, e.g., names of current and past schools; whether the client is currently in or was previously in special education; regularity of the client's attendance; grades; suspensions or other disciplinary problems; the client's view of the appropriateness of the current school placement and any concerns the client may have about the current placement);
- (7) Other favorable social information that could be useful in a Motion to Dismiss in the Furtherance of Justice, plea bargaining, and/or disposition in the event of a finding: e.g., awards and certificates of commendation at school; after-school activities; summertime or part-time jobs; participation in church activities; other activities;
- (8) Information about any present or prior substance abuse problems (including the form and extent of substance abuse and, in the case of drugs, the type of drug; whether the child is presently in or awaiting treatment, and whether s/he has ever been in treatment in the past; whether the child wishes help and would like counsel to arrange for the client's admission to a suitable program);
- (9) Any significant psychological problems which the client is presently experiencing or has experienced in the past (including information about any prior periods of hospitalization for psychological problems, whether the child is presently taking (or has in the past taken) psychotropic medication, and whether the client is presently in (or has in the past been in) outpatient treatment or therapy);
- (10) If the client is not a U.S. citizen, information necessary to gauge any possible consequences that a finding at trial or an admission could have for the client's immigration status. *See* MANUEL D. VARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE (3d ed. 2003).

- (11) Information about other legal or related problems that the client or his or her parent/guardian may be experiencing (*e.g.*, allegations of parental abuse or neglect; already-existing risks of loss of housing or the possibility of such a loss as a result of the client's charge, already-existing or likely problems with receipt of benefits; pending criminal charges of the parent; and so forth) so that appropriate referrals can be made and the problems addressed long before the delinquency case reaches the dispositional phase, where such problems could prevent or impede the child from remaining in the parent/guardian's home.
- C. General explanations and advice to the client: Counsel should explain the court process (pretrial stage, trial, and disposition), possible dispositions in the case, and the importance of staying out of trouble and attending school.
- D. Obtaining additional information from the client's parent or guardian: In addition to obtaining the foregoing information from the client in a separate interview, counsel should obtain information from the parent/guardian on any relevant issues, including, *e.g.*, the family situation, the child's educational history, problems the child may be experiencing that could bear on the delinquency case, and any legal or related problems that the family may be experiencing that could bear on the delinquency case.
- E. Forms to sign: Counsel should obtain the client's and parent/guardian's signatures on release of information forms (to obtain school records, including any IEPs and special education records; psychological records; and so forth). These releases should be used to obtain relevant records as quickly as possible to identify any existing school problems or other problems and to take immediate steps to arrange appropriate programs to address any such problems.

V. Developing an Initial Plan to Guide Counsel's Preparation for Pretrial Hearings, the Fact-Finding Hearing, and Disposition

- A. Developing a defense "theory of the case" to guide counsel in preparing for and conducting pretrial hearings and the Fact-Finding Hearing: On the basis of the client interview (and, when relevant, the interview of the parent/guardian) and whatever case-related documents are available to counsel, counsel should devise a tentative defense "theory of the case" – a blueprint of the factual and legal defenses that counsel will present at trial and any pretrial hearings. The theory of the case should take into account:
 - (1) The facts and law on which the Presentment Agency will probably rely to prove each of the charges in the Petition;

- (2) Any factual defenses that counsel can assert with regard to the entire Petition or any counts thereof;
- (3) Any legal defenses that counsel can assert with regard to the Petition or any counts thereof, including (a) arguments for pretrial suppression of evidence, (b) arguments for dismissal of counts of the Petition as legally insufficient, and (c) arguments that the Presentment Agency's evidence is not sufficient to make out a *prima facie* case or proof beyond a reasonable doubt with regard to all or some of the counts of the Petition.

As counsel gathers more information (through pretrial discovery, investigation, and subpoenaing of documents), counsel should constantly revise and refine the theory of the case. In addition to guiding counsel's strategy at trial and any pretrial hearings, the theory should also shape each and every aspect of counsel's preparation for trial, including the determinations of which witnesses and documents to subpoena for pretrial hearings and trial; what, if any, expert witnesses to retain for pretrial hearings or trial; and what motions to file.

- B. Developing a plan to guide preparation for disposition: On the basis of the interview of the client and parent/guardian and a review of the client's school records and other pertinent records (which counsel should obtain, as soon after the initial interview as possible, using the releases signed by the client and parent/guardian), counsel should identify any educational, social, mental health or other problems of the client that may have caused or contributed to the client's involvement in the current delinquency proceeding and initiate whatever steps are needed to rectify or ameliorate any such problems before the case reaches the dispositional stage. In doing so, counsel should consider the utility of enlisting the assistance of a social worker, educational advocate, mental health expert, or other expert. As counsel gathers additional social information about the client and the family, counsel should constantly revise and refine the plan as appropriate.
- C. Developing a plan to address other relevant legal needs of the client and/or his or her family: On the basis of the interview of the client and parent/guardian and other information and records that counsel acquires about the client and his or her family, counsel should identify legal problems of the family other than the pending delinquency case that may bear upon the dispositional judge's willingness to allow the child to remain in the community. These may include, for example, allegations of parental abuse or neglect; already-existing risks of loss of housing or the possibility of such a loss as a result of the client's charge, already-existing or likely problems with receipt of governmental benefits; and pending criminal charges of the parent. Counsel should make referrals, as needed, to ensure that the client and his or her family have the requisite legal representation, and counsel should, where appropriate, confer with the other lawyer(s) to coordinate the

representation of the family.

VII. Adjustment by Probation Service

- A. Availability of adjustment: Probation has full power to “adjust” or terminate proceedings in favor of child, either “before a petition has been filed” (FCA § 308.1(2)) or upon court referral of the case to Probation at Initial Appearance (FCA §§ 320.4(2)(b), and whether or not the child is in detention (FCA §§ 307.3(4), 308.1(5)), except in:
- (1) designated felony cases, where the written approval of the court and consent of Presentment Agency are required (FCA §§ 308.1(3), 320.6(2));
 - (2) cases in which the child is charged with an offense enumerated in FCA § 308.1(4) and has “previously had one or more adjustments” on an enumerated offense, in which event adjustment is conditioned upon written approval of court and consent of the Presentment Agency (FCA §§ 308.1(4), 320.6);
 - (3) Juvenile Offender (JO) cases removed to Family Court (*see* FCA § 308.1(13)).
- B. Standards for adjustment: Guidelines are set forth in Uniform Rules for the Family Court, 22 NYCRR §§ 205.22 and 205.23. Factors include: age of child; nature of alleged offense; likelihood of child’s cooperation in adjustment process; likely length of adjustment period; likely behavior of child during adjustment period; existence of other pending charges; and prior record of adjudications, adjustments and ACDs. *See* 22 NYCRR § 205.22(c). Although adjustment conditions can include restitution, the determination of the suitability of adjustment cannot take into account the “inability of the respondent or his or her family to make restitution.” FCA § 308.1(2).
- C. Timeline: Two months and, with leave of court, additional two months. FCA § 308.1(9). Time frame begins to run at initial interview of complainant. *See In the Matter of Joseph S.*, 102 Misc.2d 913, 914, 424 N.Y.S.2d 681, 681-82 (Fam. Ct., Suffolk Co. 1980).
- D. Role and responsibilities of the attorney for the child
- (1) Counsel’s ability to participate in adjustment process: Child does not have right to court-appointed counsel at adjustment (*see In the Matter of David J.*, 70 A.D.2d 276, 279, 421 N.Y.S.2d 411, 412 (3d Dept. 1979)) but “probation service shall permit any participant who is represented by a

lawyer to be accompanied by the lawyer” at adjustment conferences (Uniform Rules for the Family Court, 22 NYCRR §§ 205.22(a), 205.23(a)).

- (2) Advising the client and parent about the degree of confidentiality accorded to statements made during the adjustment process: Statements made to the probation service during adjustment may not “be admitted into evidence at a fact-finding hearing” (FCA § 308.1(7)) and statements of accused cannot be “transmit[ted] or otherwise communicate[d] to the presentment agency” (FCA § 308.1(6)). But these statements may end up in the Probation Service’s Investigation and Report (I&R) at disposition, and they may affect Probation’s view of the case and recommendations throughout the case. Counsel should advise the client and parent about the scope and limitations of confidentiality for statements made during the adjustment process.
- (3) Ensuring that favorable information is brought to the attention of the Probation Service: Counsel should advise the client and parent of the importance of informing the Probation Service of any favorable social information about the client and providing the probation officer with documentation of good performance (*e.g.*, report cards, certificates of merit from school, photographs of trophies won in school sports, letters from teachers or a minister or neighbor, and so forth).
- (4) Counsel’s role during the adjustment meeting: Counsel generally should play a limited role during the meeting because a probation officer is most likely to be persuaded by statements by the client or the parent rather than counsel, but counsel can play an important role in explaining, if appropriate, that the client will not make a statement about the incident that gave rise to the arrest unless there is some real possibility of adjustment. In addition, counsel may be able to advocate gently for adjustment by bringing up positive social information about the child and extenuating aspects of the incident that gave rise to the arrest if this information is not otherwise emerging at the meeting.

VII. Pre-Petition Hearing

- A. Circumstances under which a pre-petition hearing may be held: An arrestee who is not released by the police (*see* FCA § 305.2(4)(a)) or by the agency that operates the detention facility (*see* FCA § 307.3) and whose case is not adjusted by the Probation Service (*see* FCA § 308.1) must be brought to court “within seventy-two hours of the time detention commenced or the next day court is in session, whichever is sooner” (FCA §§307.3(4), 307.4(5)) and either be arraigned on a

Petition (FCA § 320.2(1)) or else receive a pre-petition hearing pursuant to FCA § 307.4 to determine the propriety of continued detention pending the filing of a petition.

- B. Scope and purpose of the hearing: FCA § 307.4(1) defines a pre-petition hearing as “a hearing for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child.” In *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 666, 685 N.Y.S.2d 400, 403 (1999), the Court of Appeals described the hearing as designed to provide a “quick yet careful determination by the Family Court on the detention issue.” If the court orders pre-petition detention, “[a] petition shall be filed and a probable-cause hearing held under section 325.1 within four days of the conclusion of [the prepetition] hearing”; [i]f a petition is not filed within four days the child shall be released.” FCA § 307.4(7). If the deadline for a probable cause hearing (“within four days of the conclusion of” a pre-petition hearing) falls on a weekend or public holiday, this is not a situation in which the deadline can be extended to the next business day under GENERAL CONSTRUCTION LAW § 25-a(1). See *In the Matter of Kevin M.*, 85 A.D.3d 920, 925 N.Y.S.2d 194 (2d Dept. 2011).
- C. Findings that must be made to authorize detention: “After such [pre-petition] hearing, the judge shall order the release of the child to the custody of his parent or other person legally responsible for his care” (FCA § 307.4(4)) unless the court makes the following findings:
- (1) A finding that the Family Court “appear[s] to have jurisdiction” (FCA § 307.4(4)(a)), *i.e.* that:
 - (a) Child is within age range of children who can be the subject of a delinquency petition: “over seven and less than sixteen years of age” (FCA § 301.2(1) on date when allegedly delinquent act took place (FCA § 302.1(2)).
 - (b) The “events occasioning the taking into custody” “appear to involve allegations that the child committed a delinquent act” (FCA § 307.4(4)(b)), *i.e.*, “an act that would constitute a crime if committed by an adult” (FCA § 301.2(1)).
 - (2) “Facts and reasons which would support a detention order pursuant to [FCA] section 320.5” (FCA § 307.4(4)(c)), namely that “there is a substantial probability that [the child] will not appear in court on the return date” (FCA § 320.5(3)(a)) or “there is a serious risk that [the child] may before the return date commit an act which if committed by an adult would constitute a crime” (FCA § 320.5(3)(b)).

- (3) ASFA determination that: (a) “continuation of the child in the child’s home would be contrary to the best interests of the child”; and (b) “where appropriate and consistent with the need for protection of the community, ... reasonable efforts were made prior to the date of the court hearing ... to prevent or eliminate the need for removal of the child from his or her home or, if the child had [already] been removed from his or her home ..., where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made to make it possible for the child to safely return home.” FCA § 307.4(8)(a), (b).
- D. Applicability of rules of evidence: FCA § 307.4 does not address the standards for the taking of evidence at a pre-petition hearing. Apparently hearsay evidence is permissible. *See Gerstein v. Pugh*, 420 U.S. 103, 114, 120 (1975) (in absence of statutory provisions affording additional protections, “a judicial determination of probable-cause as prerequisite to extended restraint of liberty following arrest” may be made “on hearsay ... testimony”); *cf.* FCA § 325.2(3) (specifying that, at post-petition probable cause hearing, generally “[o]nly non-hearsay evidence shall be admissible to demonstrate reasonable cause to believe that the respondent committed a crime”). *But cf. People ex rel. Guggenheim v. Mucci*, 46 A.D.2d 683, 683, 360 N.Y.S.2d 71, 72 (2d Dept. 1974) (Appellate Division, in decision issued at time when Family Court proceedings were governed by FCA article 7, holds that notwithstanding admissibility of hearsay at probable cause hearing, “due process requires something more than uncorroborated hearsay be presented before a finding of probable cause may be made”).
 - E. Role and responsibilities of the attorney for the child: Counsel’s primary goal naturally must be to secure the release of the child by winning the pre-petition hearing, but counsel should be alert to the possibilities of using the hearing to gain discovery for trial and to obtain statements under oath that can be used at trial for impeachment (of the witness if s/he testifies at trial or of a complainant or eyewitness whose statement the witness recounts at the pre-petition hearing). *See* GARY SOLOMON, REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (Legal Aid Society’s Juvenile Rights Division Manual) 39-43 (2003) (discussing “strategies and goals at [a probable cause] hearing”).

VIII. Initial Appearance

- A. Timing requirements
 - (1) Speedy filing of petition: “Although article 3 of the Family Court Act ... [does not establish a] statutory time limitation ... [for] filing a petition[,] ... an unreasonable delay in prosecuting a [criminal] defendant following an arrest can constitute a violation of the Due Process Clause of our [state]

Constitution ... [and the] concerns [underlying this guarantee] are even more compelling in the juvenile context.” *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 666-67, 685 N.Y.S.2d 400, 403-04 (1999). In *Benjamin L.*, the Court of Appeals held that the state constitutional standards governing the speedy filing of charges – defined in *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975) – apply with particular force and stringency in the juvenile delinquency context because of unique aspects of the Family Court process and psychological/behavioral aspects of adolescence. See *Benjamin L.*, *supra*, 92 N.Y.2d at 667-71, 685 N.Y.S.2d at 403-06.

(2) Speedy arraignment

(a) Standard: If the respondent is detained, Initial Appearance must take place “no later than” 72 hours after the filing of the petition or “the next day the court is in session, whichever is sooner.” FCA § 320.2(1). If the respondent is paroled, Initial Appearance must take place “as soon as practicable and, absent good cause shown, within ten days after a petition is filed.” *Id.* The Initial Appearance may be adjourned “for no longer than seventy-two hours or until the next court day, whichever is sooner, to enable an appointed law guardian or other counsel to appear before the court.” FCA § 320.2(3).

(b) Procedures in warrant cases: If a respondent fails to appear for “an initial appearance of which he or she had notice” (FCA § 320.2(1)) and the court issues a warrant for arrest (under the procedures set forth in FCA § 312.2), then the speedy arraignment period excludes “the period extending from the date the court issues the warrant to the date the respondent is returned pursuant to the warrant or appears voluntarily” (FCA § 320.2(1)) but:

(i) The preconditions for excluding such periods of time are that (A) “the respondent’s location cannot be determined by the exercise of due diligence”; or (B) “if the respondent’s location is known, his or her presence in court cannot be obtained by the exercise of due diligence.” FCA § 320.2(1).

(ii) The assessment of “due diligence” must take into account, *inter alia*, “the report presented to the court pursuant to [FCA § 312.2].” FCA § 320.2(1).

(3) Prosecutorial rescheduling notices: In the class action lawsuit in *Carlos T.*

et al. v. Reinharz et al., Index No. 401514/98 (Sup. Ct., N.Y. Co.) (Gangel-Jacob, J.), the parties – the N.Y.C. Office of the Corporation Counsel and the Legal Aid Society’s Juvenile Rights Division – entered into a court-approved Stipulation and Order of Settlement and Conditional Discontinuance on June 8, 1999, that provided for the Presentment Agency’s termination of the pre-existing practice of issuing mandatory, multiple rescheduling notices and the adoption of the following new practices: (a) Prosecutorial rescheduling notices are limited to a single, voluntary request that the child and his or her parent or guardian appear in the courthouse before a petition has been filed (with language in the Reschedule Notice clearly declaring that the request “is not a summons or a subpoena”); (b) If the Presentment Agency decides not to file a Petition, the agency must send a letter to the child stating that it has decided not to prosecute and that the matter will be sealed; (c) If the Presentment Agency decides to file a Petition in a case in which the child is not remanded, the agency must send the child a letter of intent to file a petition, with a copy of the proposed petition enclosed; (d) The Reschedule Notice and letters cannot bear a legal caption, must refrain from referring to uncharged children as “respondents,” and must clearly inform the child that the Office of the Corporation Counsel acts as the prosecutor in juvenile delinquency cases.

- B. Presence of parent at Initial Appearance: FCA § 320.3 states that, “[a]t the time the respondent first appears before the court,” the court shall provide “notice of the [respondent’s] rights” to both the respondent and “his parent or other person legally responsible for his care.” The statute provides for the Initial Appearance to go forward without the parent or guardian – and for appointment in such circumstances of an attorney for the child – if “reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance.” FCA § 320.3. *See, e.g., In the Matter of Jason SS.*, 301 A.D.2d 900, 901, 755 N.Y.S.2d 734, 735 (3d Dept. 2003) (Family Court did not err in proceeding with Initial Appearance notwithstanding absence of parent because respondent’s mother had received actual notice of the hearing, was unable to attend due to illness, and no adjournment was requested by the parent, respondent, or attorney for the child).
- C. Appointment of counsel
 - (1) General standard for appointment of counsel: “At the initial appearance the court must appoint a law guardian to represent the respondent pursuant to [FCA § 249] if independent legal representation is not available to such respondent.” FCA § 320.3(2). *See also* FCA § 249(a) (court must appoint attorney for the child in a delinquency proceeding “if independent legal

representation is not available to [the] minor”). In cases that are removed to Family Court, the court “shall, wherever practicable, appoint the counsel representing the juvenile offender in the criminal proceedings as law guardian.” FCA § 249(b).

(2) Timing of appointment: If the respondent appears without counsel at Initial Appearance and if s/he is not eligible for court-appointed counsel, the court may adjourn the Initial Appearance “for no longer than seventy-two hours or until the next day, whichever is sooner” in order to enable the retained attorney to appear in court or for the respondent to arrange for the appearance of counsel. FCA § 320.2(3). Similarly, in JO cases removed to Family Court, the court can adjourn the Initial Appearance in order “to enable ... [the] appointed law guardian ... to appear before the court.” FCA § 320.2(3).

(3) *Pro se* representation: In adult criminal cases, the accused has a 6th Amendment right to waive counsel and proceed *pro se* as long as the accused has been “made aware of the dangers and disadvantages of self-representation” and chooses self-representation voluntarily, knowingly and intelligently.” *Faretta v. California*, 422 U.S. 806, 835 (1975). *See also People v. Arroyo*, 98 N.Y.2d 101, 104, 745 N.Y.S.2d 796, 798 (2002) (trial court must warn accused of “‘risks inherent in proceeding *pro se*’ and ... apprise him of the ‘importance of the lawyer in the adversarial system of adjudication’”). The Family Court Act establishes a rebuttable presumption that “[a] minor who is a subject of a juvenile delinquency or [PINS] proceeding ... lack[s] the requisite knowledge and maturity to waive the appointment of a law guardian,” and specifies that “[t]his presumption may be rebutted only after an attorney for the child has been appointed and the court determines after a hearing at which the law guardian appears and participates and upon clear and convincing evidence that (a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charges, (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his own defense, and (c) waiver is in the best interest of the minor.” FCA § 249-a.

D. Arraignment on the petition: *See* FCA § 321.1 (requiring that respondent “admit or deny each charge contained in the petition” and providing for court-entered denial if respondent refuses to admit or deny). *See also infra* Part XIV (admissions).

E. Parole/remand determination

- (1) Criteria for pretrial detention:
 - (a) Finding, with explicit statement of “facts and reasons,” of either:
 - (i) Risk of flight under FCA § 320.5(3)(a): “[T]here is a substantial probability that [the child] will not appear in court on the return date”; or
 - (ii) Risk of future dangerousness under FCA § 320.5(3)(b): “[T]here is a serious risk that [the child] may before the return date commit an act which if committed by an adult would constitute a crime.”
 - (b) ASFA determination that: (i) “continuation of the child in the child’s home would be contrary to the best interests of the child”; and (ii) “where appropriate and consistent with the need for protection of the community, ... reasonable efforts were made prior to the date of the court appearance ... to prevent or eliminate the need for removal of the respondent from his or her home prior to the initial appearance or, if the child had been removed from his or her home prior to the initial appearance, where appropriate and consistent with the need for protection of the community, whether reasonable efforts were made to make it possible for the respondent to safely return home.” FCA § 320.5(5)(a), (b).
 - (c) Existence of a valid charging instrument that provides the requisite jurisdiction for ordering pretrial detention: In *Schall v. Martin*, 467 U.S. 253, 275-76 (1984), the U.S. Supreme Court stated that the New York Family Court Act’s provisions on sufficiency of a petition provide a statutory basis for “the juvenile ... [to] oppose any recommended detention” at Initial Appearance by arguing that the petition should be dismissed as jurisdictionally defective on the ground that “[t]he nonhearsay allegations in the delinquency petition and supporting depositions ... [fail to] establish probable cause to believe the juvenile committed the offense.”
- (2) Court-imposed conditions of release: When paroling a respondent, the court may impose appropriate terms and conditions. *See* FCA § 320.5(2); Uniform Rules for the Family Court, 22 NYCRR § 205.25(a) (conditions of release can include regular school attendance, compliance with curfew that is “reasonable in relation to the ends sought to be achieved and narrowly drawn,” and participation in alternative to detention program). *See also* FCA § 304.2(1) (temporary order of protection can be issued

upon application of Presentment Agency, upon showing of “good cause”).

- (3) Secure v. non-secure remand:
 - (a) The court has the power to order non-secure detention. *See In the Matter of Anthony N.*, 106 Misc.2d 213, 216-17, 430 N.Y.S.2d 1012, 1014-15 (Fam. Ct., Richmond Co. 1980).
 - (b) Statutory prohibition of secure remand for children who are under 10: *See* FCA § 304.1(3): “The detention of a child under ten years of age in a secure detention facility shall not be directed under any of the provisions of this article.”

F. Availability of option of referring case for probation adjustment: The adjustment process described in section V *supra*, which ordinarily takes place prior to the filing of the petition, can be triggered by the court at the Initial Appearance by means of a referral of the case to the probation service for adjustment services. In non-DF cases, the referral requires “the consent of the victim or complainant and the respondent” (FCA § 320.6(2)) although the victim/complainant’s consent can be waived for non-appearance (*In the Matter of Vincent F.*, 121 Misc.2d 992, 993-94, 469 N.Y.S.2d 563, 565 (Fam. Ct., Richmond Co. 1983)). In DF cases, the consent of the Presentment Agency is required. FCA § 320.6(2).

G. Role and responsibilities of the attorney for the child: As recognized in Standard C-1 of NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009), an attorney, “[w]hen preparing for and advocating on behalf of the child at the initial appearance,” should:

- “(1) Determine whether there is a risk that the court will order pre-trial detention, gather all relevant information and otherwise prepare to address the detention issue, disclose and explain to the child the risk and likelihood of detention, and describe to the child the conditions at any detention facility to which the child might be remanded.
- (2) When appropriate, specifically discuss the statutory standards in FCA § 320.5 that govern pre-trial detention.
- (3) Insure that the court’s selection of a trial date complies with statutory speedy trial rules, unless, after consultation with the child, the attorney has determined that there is good reason to waive compliance.
- (4) If the court orders detention, request that a probable cause hearing be held

within three days unless, after consultation with the child, the attorney determines that there is good reason to waive the hearing or agree to a delay.

- (5) Determine whether dismissal should be sought due to a violation of the child's right to a timely initial appearance.
- (6) Determine whether an application for a court-ordered referral for further efforts at adjustment pursuant to FCA § 320.6, or an application for an adjournment in contemplation of dismissal pursuant to FCA § 315.3, would be appropriate, and whether the petition appears to be jurisdictionally defective."

IX. Investigation

- A. Counsel's Duty to Investigate: *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (recognizing that 6th Amendment guarantee of effective assistance of counsel encompasses "'duty to make reasonable investigations,'" including investigation of mitigating evidence to present at sentencing in support of favorable sentence); NYS BAR ASS'N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-5 (2009) ("In order to develop a theory of defense, prepare for effective cross-examination of the Presentment Agency's witnesses, and identify witnesses and obtain physical and documentary evidence supporting the theory of defense, the attorney should conduct and/or direct an independent investigation which may include a visit to the crime scene, witness interviews, the preparation of photographs and diagrams, and conversations with the prosecutor. The attorney should discuss the investigation with the child, elicit the child's assistance when appropriate, and keep the child up to date on the progress of the investigation."); *id.*, Standard E-1 ("Prior to any Probation investigation or mental health evaluation, the attorney should, together with the child, begin developing a dispositional recommendation and plan. In doing so, the attorney should review relevant records, including mental health, drug/alcohol treatment, medical, school, and social service agency and other service provider records, and interview potential witnesses.").
- B. Interviewing Prosecution Witnesses:
 - (1) Right to interview prosecution witnesses: *See, e.g., AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS*, Canon 39 ("[a] lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party"); NEW YORK STATE BAR ASSOCIATION,

OPINION No. 245 (4/28/72) (“It is not improper for an attorney or defendant in a criminal case to interview a witness for the prosecution without the knowledge, or over the objection of, the District Attorney. Failure to thoroughly investigate and marshal the facts by defense counsel could be considered a dereliction of duty.”); NEW YORK COUNTY LAWYERS’ ETHICS OPINION 711, N.Y.L.J., 8/21/96, at 2, col. 3 (“Witnesses in a criminal proceeding, even complaining witnesses, are not represented by the prosecutor; subject to the caveat that any witness may refuse to speak with defense counsel if he or she chooses, there is no ethical or legal restriction on defense counsel contacting a witness without getting permission from the prosecutor.”); Brad Rubin & Betsy Hutchings, *Blockading Witnesses: Ethical Pitfalls for Prosecutors*, N.Y. LAW J., Dec. 6, 2006, at 4, col. 4. See also AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.1(c) (“[a] prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel”; any such discouragement or obstruction constitutes “unprofessional conduct”).

- (2) If counsel discovers that a witness has been advised (by the prosecutor, a police officer, or another government official) not to talk to the defense, counsel should file a motion challenging this action on due process grounds and seeking appropriate relief (including, where appropriate, a court-ordered deposition of the witness). See, e.g., *United States v. Carrigan*, 804 F.2d 599 (10th Cir. 1986); see also *People v. Eanes*, 43 A.D.2d 744, 350 N.Y.S.2d 718 (2d Dept. 1973).
- (3) When interviewing an adverse witness, counsel (or the investigator) should always attempt to take a written statement, which can be used at trial to impeach the witness if s/he changes his or her account. It is essential that counsel (or the investigator) clearly identify himself or herself; the witness's written statement should reflect his or her awareness that counsel is representing (or that the investigator is working on behalf of) the respondent. And if counsel is taking the statement rather than an investigator, it is essential that counsel have an associate present (a fellow attorney, law clerk, etc.) who can give the necessary foundational testimony for introducing the statement at trial.

C. Defense Witnesses

- (1) Interviewing defense witnesses: When interviewing a defense witness, counsel (or the investigator) should ordinarily refrain from taking a written statement because it may constitute discoverable *Rosario* material if the witness is called by the defense at trial or a pretrial suppression hearing

(see FCA § 331.4(2)(a), (3)(a)). (Note: Neither FCA § 331.4 nor the *Rosario* doctrine authorize prosecutorial discovery of a statement of a witness who is *not* called by the defense at trial or a suppression hearing.)

- (2) Alibi witnesses: It is essential to interview potential alibi witnesses as soon as possible, partly because the details needed for an alibi defense often are so innocuous that a witness's memory can easily fade quickly and in part because of the need to gather the information for a Notice of Alibi, which must be filed within 10 days of the Presentment Agency's filing of an Alibi Demand (which is usually contained in the Voluntary Disclosure Form (VDF)). See FCA § 335.2 (setting out substantive and timing rules for alibi notice). See also FCA § 335.2(3) (failure to comply with alibi notice requirements can result in court's "exclud[ing] any testimony of such [unnoticed] witness"). But see *id.* ("The court may in its discretion receive such [unnoticed or inadequately noticed] testimony, but before doing so, it must, upon application of the presentment agency, grant a reasonable adjournment."); *Noble v. Kelly*, 246 F.3d 93 (2d Cir.) (*per curiam*), *cert. denied*, 534 U.S. 886 (2001) (New York State Supreme Court justice violated 6th Amendment's Compulsory Process Clause by excluding defense alibi witness on ground that defense counsel failed to comply with alibi notice rule of C.P.L. § 250.20 (the prototype for the FCA's alibi notice statute) rather than employing "less onerous sanctions (such as an adjournment) to minimize any prejudice to the prosecution").

- D. Visiting the scene of the crime: Counsel should make an effort to visit the scene of the crime (and other relevant locations which may include, for example, the site of a search/seizure or show-up) and, when appropriate, arrange for the taking of photographs and/or the preparation of diagrams of the scene. See NYS BAR ASS'N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-5 (2009) (counsel's investigation "may include a visit to the crime scene ... [and] preparation of photographs and diagrams").

X. Probable Cause Hearing

- A. Function of probable cause hearing; applicable standard: In cases in which "the court determines ["at initial appearance"] that [the respondent] shall be detained for more than three days pending a fact-finding hearing" (FCA § 325.1(1)), the respondent is entitled – upon explicit request at Initial Appearance (see *In the Matter of William U.*, 285 A.D.2d 512, 512, 727 N.Y.S.2d 650, 651 (2d Dept. 2001)) – to a probable cause hearing to determine:

- (1) "whether it is reasonable to believe that a crime was committed" (FCA §

325.3(1)(a) and

(2) “whether it is reasonable to believe that the respondent committed such crime” (FCA § 325.3(1)(b)).

B. Types of cases in which probable cause hearings are required: In *In the Matter of Jeffrey V.*, 82 N.Y.2d 121, 125, 603 N.Y.S.2d 800, 802-03 (1993), the Court of Appeals made clear that probable cause hearings are required even in cases in which the top charge is lower than a C felony, notwithstanding FCA § 340.1(1)’s rule that a trial must ordinarily commence within three days after Initial Appearance in a remand case in which the top charge is lower than a C felony.

C. Timing

(1) The hearing must be held “within three days following the initial appearance or within four days following the filing of a petition, whichever occurs sooner.” FCA § 325.1(2). It appears that these are “calendar days” and that the period therefore includes weekends and holidays. See GENERAL CONSTRUCTION LAW § 20 (“A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of *calendar* days exclusive of the calendar day from which the reckoning is made.” (emphasis added)); *People ex rel. Vrod v. Schall*, 142 Misc.2d 968, 970-71, 539 N.Y.S.2d 262, 263-64 (Sup. Ct., Bronx Co. 1989). If the three-day period ends on a weekend or holiday, this is not a situation in which the deadline can be extended to the next business day under GENERAL CONSTRUCTION LAW § 25-a(1). See *In the Matter of Kevin M.*, 85 A.D.3d 920, 925 N.Y.S.2d 194 (2d Dept. 2011). “For good cause shown, the court may adjourn the hearing for no more than an additional three days.” FCA § 325.1(3).

(2) Effects of party’s inability to proceed on date of probable cause hearing:

(a) If the Presentment Agency is not ready to proceed on the date of the probable cause hearing, “the court may dismiss the petition without prejudice or for good cause shown adjourn the hearing and release the respondent.” FCA § 325.3(4).

(b) If the Presentment Agency announces ready for trial on the date of the probable cause hearing, “the fact that the respondent is not ready for a fact-finding hearing shall not be deemed ... a waiver” of the right to a probable cause hearing. FCA § 325.1(4).

D. Presentment Agency's burden at probable cause hearing

- (1) The "presentment agency must call and examine witnesses and offer evidence in support of the charge" (FCA § 325.2(1)(a)) and must show that "it is reasonable to believe that a crime was committed" and that "it is reasonable to believe that the respondent committed such crime" (FCA § 325.3(1)(a), (b)).
 - (a) Although the FCA does not define the term "reasonable to believe," the FCA specifies that the reasonable cause determination "shall [be] determine[d] in accordance with the evidentiary standards applicable to a hearing on a felony complaint in a criminal court" (FCA § 325.3(1)), and the relevant CPL provision defines "reasonable cause to believe" as follows: "'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." CPL § 70.10(2). *See also* FCA § 303.1 (although CPL generally is not applicable to proceedings under Article 3 of Family Court Act, specific provisions of CPL apply if "such provisions are specifically prescribed by [FCA]").
- (2) Requirement of non-hearsay evidence: Generally, "[o]nly non-hearsay evidence shall be admissible to demonstrate reasonable cause to believe that the respondent committed a crime." FCA § 325.2(3). The FCA provides for the following two exceptions, authorizing the admission of hearsay in these instances "unless the court determines, upon application of the respondent, that such hearsay evidence is, under the particular circumstances of the case, not sufficiently reliable" (FCA § 325.2(3)):
 - (a) "[R]eports of experts and technicians in professional and scientific fields." FCA § 325.2(3). *But see People v. Landon*, 175 Misc.2d 861, 864, 670 N.Y.S.2d 968, 969 (Seneca Co. Ct. 1998) (scientific report cannot be used "to establish facts not related to the scientific study performed").
 - (b) "[S]worn statements of the kinds admissible at a hearing upon a felony complaint in a criminal court." FCA § 325.2(3). *See* CPL § 180.60(8) ("sworn statements" admissible at "hearing upon a felony complaint" are those "specified in subdivisions two and

three of section 190.30 [as] ... admissible ... in a grand jury proceeding”); CPL § 190.30(2) (reports of tests or examinations by “person employed by a public servant or agency who is a physicist, chemist, coroner or medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician or an expert or technician in some comparable scientific or professional field”); CPL § 190.30(3)(a)-(d) (“written or oral statement, under oath” of individual’s “ownership or possessory right” in and defendant’s lack of “licence or privilege” to enter or remain upon premises (subdivision (a)), damage or tamper property (subdivision (b)), possess or operate or exercise control over an automobile or other vehicle (subdivisions (c) and (d)); CPL § 190.30(3)(e) (expert’s appraisal or evaluation of value of certain item); CPL § 190.30(3)(f) (statement of falsity of written instrument, submitted by maker, drafter, drawer, endoser or other signator of instrument).

E. Respondent’s right to present evidence at probable cause hearing

- (1) The respondent has an absolute right to “testify in his own behalf.” FCA § 325.2(1)(b). Such “testimony may not be introduced against [the respondent] in any future proceeding, except to impeach his testimony at such future proceeding as inconsistent prior testimony.” *Id.*
- (2) The respondent is entitled to “call and examine other witnesses or to produce other evidence in his own behalf” unless the court finds that the Presentment Agency has shown “good cause” to exclude such evidence. FCA § 325.2(1)(c).

F. The respondent has “the right to waive his appearance at the [probable cause] hearing” to avoid an “unduly suggestive” encounter with an identifying witness. *People v. Cummings*, 109 A.D.2d 748, 749, 485 N.Y.S.2d 847, 849 (2d Dept. 1985). *See, e.g., In the Matter of Elijah W.*, 13 Misc.3d 382, 822 N.Y.S.2d 412 (Fam. Ct., Bronx Co. 2006) (granting respondent’s motion for “an order allowing the respondent to absence himself from the probable cause hearing where the complaining witness would testify and identify the respondent as the person who stole her property”). Because the guarantee of an accused’s right to “be present at his trial ... or at a [probable cause] hearing ... was enacted for the benefit of the [accused], it may be waived by him.” *People v. James*, 100 A.D.2d 552, 553, 473 N.Y.S.2d 252, 254 (2d Dept. 1984). The respondent may assert that waiver with respect to a specific portion of the hearing, such as the identifying witness’s testimony, while attending the remainder of the hearing. *See People v. Hubener*, 133 A.D.2d 233, 234, 518 N.Y.S.2d 849, 850 (2d Dept. 1987). *See also In re*

Mabelin F., 28 A.D.3d 384, 813 N.Y.S.2d 427 (1st Dept. 2006) (trial judge improperly denied respondent’s “request to waive her presence [at Factfinding Hearing] during medical testimony about the death of her newborn child”: “A criminal defendant or person alleged to be a juvenile delinquent has the right to waive his or her presence at the proceedings, provided that such waiver is knowing, intelligent and voluntary”).

G. Effect of court’s ruling on probable cause

- (1) If the court finds that the Presentment Agency has satisfied its burden of showing reasonable cause (as defined in subpart IX(D) *supra*), then the court must “state on the record the section or sections of the penal law or other law which it is reasonable to believe the respondent violated” (FCA § 325.3(2)) and then conduct a *de novo* determination of whether “detention is necessary pursuant to [FCA] section 320.5.” FCA § 325.3(3) (requiring assessment of need for “continued detention”). *See* Part VII(E) *supra* (explaining standards for parole-remand determination under FCA § 320.5).
- (2) “If the court does not find that there is reasonable cause to believe that a crime was committed and that the respondent committed it, the case shall be adjourned and the respondent released from detention.” FCA § 325.3(4).

H. Role and responsibilities of the attorney for the child: As recognized in Standard C-2 of the NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009), “[t]he attorney should cross-examine witnesses and otherwise challenge the Presentment Agency’s case at the probable cause hearing, make appropriate attempts to obtain discovery, and advocate for the child’s release at the conclusion of the hearing.”

XI. Discovery

A. Voluntary Disclosure Form (VDF):

- (1) VDF’s function as notice of suppressible evidence
 - (a) Requirement of disclosure of suppressible evidence: Under FCA § 330.2(2) (expressly incorporating CPL §§ 710.20(1) and 710.30), the Presentment Agency must provide timely notice of its intent to offer, at the fact-finding hearing, evidence that is potentially the subject of a *Mapp*, *Huntley*, *Wade*, or *Dunaway* motion. *See*

People v. Chase, 85 N.Y.2d 493, 626 N.Y.S.2d 721 (1995) (evidence that is potentially within one of the statutory categories of disclosure must be included in notice even if prosecutor may believe that evidence is not actually suppressible: prosecution was obliged to give notice of statement, notwithstanding prosecutor's view that statement was spontaneous, because "[i]t is for the court and not the parties to determine whether a statement is truly voluntary ... [or was prompted by] the functional equivalent of interrogation"); *People v. Lopez*, 84 N.Y.2d 425, 618 N.Y.S.2d 879 (1994) (statement notice must apprise the accused of the time and place the statements were made and the sum and substance of the statements; notice of identification evidence must apprise the accused of the time, place, and manner in which the identification was made); *People v. McMullin*, 70 N.Y.2d 855, 856-57, 523 N.Y.S.2d 455, 456 (1987) (prosecutor's violation of deadline for disclosure requires preclusion even if accused was not prejudiced by the delay).

- (b) The VDF commonly functions as the statutorily-required notice of suppressible evidence.
 - (c) Requisite timing of disclosure: The notice of potentially suppressible evidence must be served upon the respondent "within fifteen days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first." FCA § 330.2(2).
 - (d) Remedy for failure to serve timely notice: Evidence that should have been disclosed in the notice must be precluded from introduction at trial. *See, e.g., People v. McMullin*, 70 N.Y.2d 855, 856-57, 523 N.Y.S.2d 455, 456 (1987) (failure to provide notice of witnesses' stationhouse identifications of defendant required preclusion of witnesses' in-court identifications of defendant). The preclusion remedy is, however, waived if the respondent "has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied." FCA § 330.2(8). *See People v. Kirkland*, 89 N.Y.2d 903, 904-05, 653 N.Y.S.2d 256, 256 (1996) (defendant waived his claim of insufficient notice of identification evidence by orally moving to suppress and participating in a *Wade* hearing after the trial judge denied a motion for preclusion for lack of notice).
- (2) The VDF also serves as a vehicle for prosecutorial provision of other statutorily-required discovery and for service of reciprocal discovery

demands upon the respondent (*see, e.g.*, FCA § 335.2(1) (Presentment Agency’s service of alibi demand triggers obligation on part of respondent to file alibi notice within 10 days of service of demand)).

B. Pretrial discovery mechanisms under the FCA

- (1) Responsibilities of the attorney for the child: Counsel for the child “should make appropriate use of all discovery methods authorized by statute or case law, issue or request court-issued subpoenas, and seek sanctions for the violation of discovery requirements.” NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-4 (2009).
- (2) Bill of Particulars
 - (a) Request for a Bill of Particulars
 - (i) Content of Request: FCA § 330.1(1)(a) contains a description of items that may be requested. The Request must “alleg[e] ... that respondent cannot adequately prepare or conduct his [or her] defense without the information requested” (FCA § 330.1(1)(b)).
 - (ii) Timing of Request: Must be filed within 30 days after Initial Appearance (or in detention cases, where the trial is scheduled sooner than that, filed prior to trial). FCA § 330.1(3).
 - (iii) Presentment Agency’s response: Refusal to comply must be filed in writing within 15 days of Request (or “as soon thereafter as practicable”). FCA § 330.1(4).
 - (b) Motion for court-ordered Bill of Particulars or other appropriate sanctions: If the Presentment Agency filed a timely refusal but the requested items are authorized and necessary, the attorney for the child can file a motion for a court-ordered Bill of Particulars (FCA § 332.1). If the Presentment Agency failed to file a timely refusal and cannot show good cause for the failure, the court must either direct compliance or impose sanctions (FCA § 331.6).
- (3) Discovery of items that must be disclosed upon demand:

- (a) Demand to Produce
 - (i) Content of Demand: FCA § 331.2(1) lists the items that may be included in a Demand to Produce. Additional items are authorized by caselaw. This includes the names of prosecution witnesses, where “the evidence to be given by the witness is material to ... guilt or innocence” and the prosecution has not shown “compelling circumstances” justifying nondisclosure (“such as the danger of intimidation”). *People v. Rivera*, 119 A.D.2d 517, 519, 501 N.Y.S.2d 38, 40 (1st Dept. 1986).
 - (ii) Timing of Demand: Must be filed within 15 days after Initial Appearance (FCA § 331.7(2)(a)); in detention cases, must be filed within 7 days after Initial Appearance or prior to trial, whichever occurs sooner (FCA § 331.7(1)(a)).
 - (iii) Presentment Agency’s response: (a) Parole cases: Refusal to comply with Demand must be filed within 10 days of service of Demand; otherwise, Presentment Agency must comply with Demand within 15 days of service of Demand (FCA § 331.7(2)(b)); (b) Remand cases: Refusal to comply with Demand must be filed within 5 days of service of Demand (FCA § 331.7(1)(b)); otherwise, Presentment Agency must comply with Demand within 7 days of service of Demand (FCA § 331.7(1)(c)).
 - (b) Motion for Discovery: The respondent can move for a court order for discovery within 30 days of Initial Appearance (FCA § 331.7(4), 332.2(1)). If the Presentment Agency failed to file a timely, written refusal to comply with the Demand, the court must either order discovery or other appropriate sanctions. FCA § 331.6.
- C. Discovery at the suppression hearing and trial: Disclosure of prior statements and criminal history of a witness:
- (1) *Rosario* material:
 - (a) Statutory requirement of disclosure: At both a pretrial suppression hearing and at trial, the lawyer for each side must turn over “any written or recorded statement” of a witness whom s/he calls to the witness stand which “relates to the subject matter of the witness’s testimony,” but this rule does not authorize disclosure of prior

statements of a respondent who elects to testify. FCA §§ 331.4(1)(1), (2)(a), (3)(a).

- (b) Timing of disclosure:
 - (i) Suppression hearing: At a suppression hearing, the requirement is triggered by a “request” by opposing counsel and the disclosure must be made by no later than “the conclusion of the direct examination” of the witness. FCA § 331.4(3).
 - (ii) Fact-Finding Hearing: At trial, the requirement is self-activating (*see* FCA § 331.4(1)(1), (2)). The Presentment Agency must disclose any *Rosario* material no later than “[a]t the commencement of the fact-finding hearing.” FCA § 331.4(1). The respondent must disclose any *Rosario* material no later than “[a]t the conclusion of the presentment agency’s direct case and before the commencement of the respondent’s direct case.” FCA § 331.4(2).
- (2) Criminal history of a witness: A lawyer who calls a witness at a pretrial suppression hearing or trial must provide opposing counsel with the witness’s “record of judgment[s] of conviction” (FCA § 331.4(1)(b), (2)(b), (3)(b)), and information about the witness’s pending criminal actions (FCA § 331.4(1)(c), (2)(c), (3)(c)). The rules governing the timing of such disclosures are the same as those described in the immediately preceding subsections. Witnesses for the Presentment Agency are also subject to an additional *Brady* requirement that may encompass pending and prior juvenile delinquency charges. *See Davis v. Alaska*, 415 U.S. 308 (1974).

XII. Subpoenaing Witnesses and Documents

- A. Witness subpoenas:
 - (1) The importance of serving subpoenas on all potential defense witnesses:
 - (a) In the event that a witness fails to appear, the respondent has a clear right to an adjournment if the witness was properly under subpoena;
 - (b) If the respondent wishes to proceed to trial without the witness, the

good faith effort to bring the witness to court under subpoena can be cited as a ground for denying the prosecution's request for a missing witness inference.

- (2) Technical aspects of subpoenaing witnesses:
 - (a) Witness subpoenas do not need to be signed by a judge; an attorney's signature is sufficient if s/he is the attorney of record for a party (CPLR § 2302(a));
 - (b) Child witnesses: If a witness is a minor under 14, the subpoena must be served upon the child's parent or guardian; if the witness is between 14 and 18, a subpoena must be served upon both the child and his or her parent or guardian (CPLR § 309(a));
 - (c) Subpoenaed witnesses are entitled to "attendance fees" and "travel expenses." CPLR § 8001(a). "[T]raveling expenses and one day's witness fee" must be "tendered in advance." CPLR § 2303(a).

B. Subpoenas *duces tecum*:

- (1) General considerations: "[T]he statutory subpoena authority is ... broad, and the recipient may be subject to contempt sanctions for failure to comply.... Generally, a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence 'Rather, its purpose is "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.'"" *In the Matter of Terry D.*, 81 N.Y.2d 1042, 1044, 601 N.Y.S.2d 452, 453 (1993).
- (2) Materials to consider subpoenaing in appropriate cases: Complaint Report; Complaint Follow-Up Reports; Arrest Report; SPRINT Report; 911 Tape; police officers' memo book notes; Aided Report; police personnel records; police laboratory reports; hospital and medical records (of complainant; of respondent); school records of respondent; records to support an alibi defense (*e.g.*, school attendance records, TV network log). Note: The fact that the attorney for the child has subpoenaed a document does not relieve the Presentment Agency of its obligations under *Rosario* and the FCA to obtain and disclose the document to the defense.)
- (3) Subpoenas *duces tecum* must be signed by a judge if they seek production of records or documents from an agency or subdivision of the State or the City (CPLR § 2307(a)) or admissible certified copies of records or

documents (CPLR § 2302(b)).

- (4) “A copy of any subpoena *duces tecum* served in a pending action shall also be served ... on each party who has appeared in the action so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things.” CPLR § 2303(a), as amended by Laws of 2003, ch.547, effective January 1, 2004.

XIII. Expert Witnesses

A. Retaining expert witnesses

- (1) Duty to retain expert witnesses where needed: *See* NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-12 (2009) (“The attorney should determine whether expert testimony should be presented. If the child is financially unable to retain an expert, the attorney should make an application pursuant to County Law § 722-c for an order authorizing the attorney to obtain an expert’s services for the child at public expense. When the Presentment Agency will be presenting expert testimony, the attorney should take appropriate steps to prepare to cross-examine the expert and otherwise challenge the evidence.”).
- (2) Right to governmental funding for necessary experts: *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (respondent has due process right to adequate funding for any experts who are necessary to the preparation or presentation of a defense); County Law Art. 18-B, § 722-c (procedures for seeking compensation for necessary “expert ... services,” which can be increased in “extraordinary circumstances”).
- (3) Types of experts to consider retaining: Commonly used expert witnesses include ballistics experts; narcotics and drug experts; mental health experts (psychiatrists, psychologists, and neurologists); fingerprint examiners; serologists; hair and fiber examiners; and polygraph examiners.

- B. Interviewing adverse expert witnesses: Whether the attorney for the child retains a defense expert or not, counsel should attempt to interview any expert witnesses whom the Presentment Agency intends to present at trial and possibly also any other experts who prepared police laboratory reports. Prosecution experts, like any other prosecution witness, may be interviewed by a defense attorney without the knowledge or consent of the prosecutor. N.Y. State Bar Association, Opinion No. 577 (10/29/86).

XIV. Filing Motions

- A. Duty of attorney for the child: *See* NYS BAR ASS'N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-6 (2009) (“The attorney should determine what pretrial motions should be made, and file them in a timely fashion.”); *id.*, Standard C-7 (“As appropriate, the attorney should move for suppression or preclusion of physical evidence, identification testimony and/or the child’s statements, and/or move for preclusion of evidence of the child’s prior crimes and/or bad acts.”); *id.*, Standard C-8 (“As appropriate, the attorney should move for an order dismissing the petition for facial insufficiency pursuant to FCA § 315.1 or in furtherance of justice pursuant to FCA § 315.2, adjourning the matter in contemplation of dismissal pursuant to FCA § 315.3, or substituting a petition alleging that the child is a person in need of supervision pursuant to FCA § 311.4(1).”). *See also, e.g.,* *People v. Cyrus*, 48 A.D.3d 150, 848 N.Y.S.2d 67 (1st Dept. 2007) (defense counsel was ineffective because, *inter alia*, he failed to file *Huntley* motion despite grounds for doing so); *People v. Montgomery*, 293 A.D.2d 773, 742 N.Y.S.2d 126 (3d Dept. 2002), *lv. app. denied*, 98 N.Y.2d 699, 747 N.Y.S.2d 418 (2002) (vacating conviction on grounds of ineffective assistance of counsel because defense counsel failed to file *Mapp/Dunaway* motion, and record shows that motion had merit and that counsel’s omission was not justified by “legitimate strategic or tactical explanation”); *People v. Donovan*, 184 A.D.2d 654, 585 N.Y.S.2d 70 (2d Dept. 1992) (defense counsel was ineffective because, *inter alia*, he failed to file *Mapp* motion).
- B. Types of motions to consider filing: Commonly-filed motions include, *e.g.*:
- (1) Motion to Dismiss the Petition (or counts thereof) for Legal Insufficiency (FCA § 315.1).
 - (2) Motion to Dismiss in the Furtherance of Justice (FCA § 315.2) or for an ACD (FCA § 315.3) or to convert the delinquency petition to a PINS petition (FCA § 311.4(1)).
 - (3) Motion to Dismiss the Petition for violation of speedy hearing guarantees. *See supra* Part VII(A)(1) (delay in filing the Petition); *supra* Part VII(A)(2) (denial of speedy Initial Appearance); *infra* Part XVI(A) (denial of speedy Fact-Finding Hearing).
 - (4) Motion for Discovery (FCA § 331.3(1)) and Motion for a Bill of Particulars (FCA § 330.1(6)). *See supra* Part X.
 - (5) Motion to preclude statements, identification testimony, or tangible

evidence based on failure to provide timely pretrial notice (*see supra* Part X(A)(1)).

- (6) Motions to suppress evidence (*Mapp* motions; *Huntley* motions; *Wade* motions; and *Dunaway* motions), FCA § 330.2). *See infra* Parts XIII(D), XV, XVI(G).
- (7) Motion for Severance of Counts (FCA § 311.6) or of Respondents (FCA § 311.3).
- (8) *Sandoval* motion: *See In the Matter of Joshua P.*, 270 A.D.2d 272, 272, 704 N.Y.S.2d 853, 853-54 (2d Dept. 2000), *lv. app. denied*, 95 N.Y.2d 757, 713 N.Y.S.2d 1 (2000) (*Sandoval* procedure – pretrial hearing at which prosecutor must disclose any prior convictions or bad acts with which s/he intends to impeach the accused and the judge rules on any defense challenges to the existence of or propriety of using any of these priors – applies equally to Family Court, and therefore a Family Court’s “refusal to hold a *Sandoval* hearing” upon an appropriate motion must be deemed to den[y] the [accused] of his right to testify on his own behalf” and, thereby, the right to a fair trial).

C. Deadlines for filing motions:

- (1) Under FCA § 332.2(1), motions must be filed within 30 days after Initial Appearance — except in remand cases, in which they must be filed “before commencement of the fact-finding hearing,” *id.*, which is customarily done by means of an Order to Show Cause. The 30-day deadline for parole cases does not apply to:
 - (a) motions to dismiss in the furtherance of justice, which may be filed “at any time subsequent to the filing of the petition” (FCA § 315.2(1)); motions for an ACD (*see* FCA § 315.3); and motions to convert a delinquency petition to a PINS petition, which may be filed “[a]t any time in the proceedings” (FCA § 311.4(1));
 - (b) speedy trial motions, which can be filed at any time “prior to the commencement of a fact-finding hearing or the entry of an admission” (FCA § 332.2(1)); and
 - (c) motions challenging the court’s jurisdiction (since jurisdictional challenges can be raised at any time), which include motions to dismiss the Petition on the ground that the Supporting Deposition was insufficient (*see In the Matter of Detrece H.*, 78 N.Y.2d 107,

109-10, 571 N.Y.S.2d 899, 900 (1991) (Petition’s “fail[ure] to contain the requisite nonhearsay factual allegations ... constituted a nonwaivable jurisdictional defect”); *In the Matter of Michael M.*, 3 N.Y.3d 441, 788 N.Y.S.2d 299 (2004); *see also In the Matter of Markim Q.*, 7 N.Y.3d 405, 822 N.Y.S.2d 746 (2006); *cf. People v. Casey*, 95 N.Y.2d 354, 367, 717 N.Y.S.2d 88, 95-96 (2000) (although legal sufficiency requirements for an adult court misdemeanor information are non-jurisdictional and waivable, insufficiency of a delinquency petition is a jurisdictional defect: “a legally insufficient juvenile delinquency petition ... cannot be cured by amendment” and therefore “hearsay pleading defects in delinquency petitions need not be preserved”).

- (2) In cases in which the attorney for the child was unable to comply with the 30-day deadline, late-filing must be allowed if the motion is “based upon grounds of which the respondent could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have raised within the [30-day] period.” FCA § 332.2(3). Even where the attorney for the child cannot satisfy this standard, the court nonetheless can exercise its discretion to permit late-filing “in the interest of justice and for good cause shown.” FCA § 332.2(3).

D. Requirements for legal and factual sufficiency of suppression motions:

- (1) *Huntley* and *Wade* motions need only “allege a ground constituting [a] legal basis for the motion.” C.P.L. § 710.60(3)(a) (expressly incorporated by reference in FCA § 330.2(1)). *See People v. Jones*, 95 N.Y.2d 721, 725 n.2, 723 N.Y.S.2d 761, 765 n.2 (2001) (“Sworn allegations of fact are not required in motions for suppression of either involuntarily made statements or identification testimony resulting from improper procedures.”); *People v. Weaver*, 49 N.Y.2d 1012, 1013, 429 N.Y.S.2d 399, 399 (1980) (“there *must* be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim.”).
- (2) *Mapp* and *Dunaway* motions are subject to not only the foregoing requirement of a sufficient legal basis but also a requirement of factual sufficiency. *See* C.P.L. § 710.60(3)(a)-(b) (expressly incorporated by reference in FCA § 330.2(1)). Under *People v. Mendoza*, 82 N.Y.2d 415, 604 N.Y.S.2d 922 (1993) and *People v. Jones*, 95 N.Y.2d 721, 725-26, 723 N.Y.S.2d 761, 765 (2001), factual sufficiency is to be assessed with the following three-pronged standard:

- (a) If the “assertions in defendant’s motion papers are ... ‘merely legal conclusions’” and are not “factual,” the papers are deficient on their face because they fail to “‘raise a factual dispute on a material point’” requiring a hearing for its resolution. *Mendoza*, 82 N.Y.2d at 426, 604 N.Y.S.2d at 926.
- (b) The assessment of factual sufficiency must take into account the circumstances of the search or seizure because the factual context may render a “facially sufficient” motion “inadequate” or, conversely, convert “seemingly barebones allegations” into a pleading “sufficient to require a hearing.” *Mendoza*, 82 N.Y.2d at 427, 604 N.Y.S.2d at 927. *See id.* at 428-29, 604 N.Y.S.2d at 928 (bare-bones allegation that “when the police conducted the search, the defendant was merely standing on the street doing nothing wrong” would be sufficient if the case involves a police “pat-down or search [of] [a] citizen[] based on perceived suspicious or unlawful behavior,” since the defendant’s allegation “that he or she was standing on the street doing nothing wrong when the police approached and searched” would take issue with the officers’ assertions that “defendant was acting ‘suspiciously’ or ‘furtively.’”).
- (c) The assessment of factual sufficiency also must take into account “the information available to the defendant” at the time of the drafting of the motion. *Mendoza*, 82 N.Y.2d at 428-29, 604 N.Y.S.2d at 928. If the “facts necessary to support suppression” are solely in the possession of the police and/or prosecution and are not reasonably available to the accused, the court should excuse a motion’s lack of precision or sparseness of facts. *Id.* *See also* *People v. Hightower*, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant’s factual allegations, although brief, were sufficient to require a hearing “in light of the minimal information available to the defendant at the time of the motion” and in light of prosecution’s failure to set forth specific facts in its “largely conclusory” responding papers). *But cf. People v. Jones*, 95 N.Y.2d 721, 729, 723 N.Y.S.2d 761, 767 (2001) (prosecution’s failure to disclose identification radioed by undercover officer to arresting officer excused defendant’s failure to plead any facts about the description itself to support his claim of the vagueness of the description but the *Mapp* motion was nonetheless insufficient because the defendant failed “to supply the motion court with ... relevant facts he did possess for the court’s consideration on the suppression motion once the People disclosed the communicated

description”).

XV. Admissions

- A. Rules governing the respondent’s ability to enter an admission to a single count of a multi-count petition or a lesser included offense
- (1) With the consent of the court and the Presentment Agency, the respondent can enter an admission to a lesser included offense in a single-count petition (FCA § 321.2(2)) or to a single count or lesser included offense in a multi-count petition (FCA § 321.2(3)).
 - (2) If the Presentment Agency objects to the admission, the respondent may still “as a matter of right enter an admission to those allegations in the petition which are determinable at the fact-finding hearing” (FCA § 321.2(1)) but apparently cannot enter an admission to a lesser included offense of a single-count Petition or to a single count of a multi-count Petition. *See* Douglas J. Besharov & Merrill Sobie, *Practice Commentaries to FCA § 321.2*, MCKINNEY’S CONSOL. LAWS OF N.Y., Family Court Article 3, at 198-201 (1999) (although “[g]ranted the presentment agency a veto power [over respondent’s ability to enter admission] is inconsistent with Family Court philosophy and policy, which focus on the needs of the juvenile,” the legislative history of FCA § 321.2 suggests that “the respondent cannot admit to a lesser included crime or one count of a multicount petition unless the presentment agency consents”; if the court wishes to accept an admission to a lesser count or a single count of a multi-count petition but the Presentment Agency objects, the court can consider alternatives such as the substitution of a PINS finding or an ACD or dismissal of some counts in the furtherance of justice).
- B. Plea negotiations
- (1) Responsibilities of attorney for the child: *See* NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-9 (2009) (“The attorney should be active in initiating and participating in plea bargaining discussions with the Presentment Agency. The attorney must communicate to the child any benefit offered by the Presentment Agency, and provide the child with information, guidance and advice that will assist the child in deciding whether to make an admission. The attorney should discuss with the child the direct and collateral consequences of the admission, including possible dispositional and post-dispositional orders.”); *id.*, Standard C-10 (“Before the child makes

an admission in court, the attorney should explain to the child in detail the constitutional and statutory rights the child will be waiving.”).

- (2) Strategies and techniques in plea negotiations: *See* GARY SOLOMON, REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (Legal Aid Society’s Juvenile Rights Division Manual) (2009).
- C. Procedures for “allocation of the respondent and his parent or other person legally responsible for his care, if present”: *See* FCA § 321.3(1)(a)-(c).
- D. Withdrawal of an admission: Permissible within discretion of court “[a]t any time prior to the entry of a finding” at the conclusion of a dispositional hearing that the “respondent requires supervision, treatment or confinement” and has been found to be “a juvenile delinquent.” FCA §§ 321.4(2), 352.1(1)).

XVI. Suppression Hearing

- A. The Respondent is entitled to have the suppression hearing held prior to fact-finding as a separate hearing. *See, e.g., In the Matter of Jamal S.*, 25 A.D.3d 711, 711, 809 N.Y.S.2d 512, 513 (2d Dept. 2006) (“The Family Court erred in refusing to conduct a separate *Mapp* hearing ... prior to the commencement of the fact-finding hearing in light of the [respondent’s] objection to simultaneous hearings”).
- B. Respondent’s right to waive his or her presence at a suppression hearing: The respondent has an absolute right to waive his or her presence if, for example, s/he wishes to avoid a suggestive in-court pretrial encounter with an identifying witness who is testifying at a *Wade* hearing. *See, e.g., People v. Hubener*, 133 A.D.2d 233, 518 N.Y.S.2d 849 (2d Dept. 1987); *People v. Huggler*, 50 A.D.2d 471, 473-74, 378 N.Y.S.2d 493, 496-97 (3d Dept. 1976). Moreover, the respondent may assert that waiver with respect to specific portions of the hearing (such as the prosecution witnesses’ testimony) and attend the remainder of the hearing. *See People v. Hubener*, 133 A.D.2d at 234, 518 N.Y.S.2d at 850. *See also In re Mabelin F.*, 28 A.D.3d 384, 813 N.Y.S.2d 427 (1st Dept. 2006) (trial court improperly denied respondent’s “request to waive her presence [at Factfinding Hearing] during medical testimony about the death of her newborn child”: “A criminal defendant or person alleged to be a juvenile delinquent has the right to waive his or her presence at the proceedings, provided that such waiver is knowing, intelligent and voluntary”).
- C. Production of *Rosario* material: *See* Part X(C)(1) *supra*.
- D. Burdens at the suppression hearing

- (1) *Huntley* motions: The Presentment Agency has the “burden to establish beyond a reasonable doubt, that ... [the] statements were voluntarily made.” *People v. Witherspoon*, 66 N.Y.2d 973, 974, 498 N.Y.S.2d 789, 790 (1985)). *Accord In the Matter of Jimmy D.*, 15 N.Y.3d 417, 424, 912 N.Y.S.2d 537, 542 (2010). Because the definition of an “involuntary statement” includes any statement obtained from the accused “in violation of such rights as the [accused] may derive from the constitution of this state or of the United States” (C.P.L. § 60.45(2)(b)(ii); F.C.A. § 344.2(2)(b)(ii) or in violation of FCA § 305.2’s statutory requirements for interrogation of juveniles (*see* FCA § 344.2(2)(b)(iii)), the Presentment Agency’s burden includes proof beyond a reasonable doubt of compliance with these constitutional and statutory guarantees. *See, e.g., People v. Barnes*, 84 A.D.2d 501, 443 N.Y.S.2d 68 (1st Dept. 1981); *People v. Campbell*, 81 A.D.2d 300, 309, 440 N.Y.S.2d 336, 341 (2d Dept. 1981).
- (2) *Wade* motions:
 - (a) Due process claims of suggestiveness: The Presentment Agency has the burden of going forward by “producing some evidence relating to the [identification procedure] ... in order to demonstrate the procedure was not unduly suggestive.” *People v. Ortiz*, 90 N.Y.2d 533, 537, 664 N.Y.S.2d 243, 245 (1997). The respondent has the “burden to show suggestiveness by a preponderance of the evidence.” *Id.* If these burdens are satisfied, the burden shifts to the Presentment Agency to prove by clear and convincing evidence that there is an independent source for an in-court identification. *See, e.g., People v. Rahming*, 26 N.Y.2d 411, 311 N.Y.S.2d 456 (1970).
 - (b) Claims that the police violated the right to counsel at a line-up:
 - (i) The Presentment Agency bears the burden of showing that the police complied with constitutionally mandated procedures for arranging the presence of counsel at a lineup. *See People v. Blake*, 35 N.Y.2d 331, 340, 361 N.Y.S.2d 881, 891 (1974). If a violation of the right to counsel is shown, the Presentment Agency bears the burden of proving by clear and convincing evidence that there is an independent source for an in-court identification. *See, e.g., People v. Burwell*, 26 N.Y.2d 331, 336, 310 N.Y.S.2d 308, 311 (1970).
 - (ii) For lineups that take place after the commencement of

“formal proceedings” in a delinquency case, the respondent has an unwaivable right to have counsel present, and “a lineup conducted ‘without notice to and in the absence of his counsel’ will be held to violate that right.” *People v. Hawkins*, 55 N.Y.2d 474, 487, 450 N.Y.S.2d 159, 166 (1982).

- (iii) “Even before the commencement of formal proceedings, ... the right to counsel at an investigatory lineup will attach” if (a) “counsel has actually entered the matter under investigation” or (b) “a defendant in custody, already represented by counsel on an unrelated case, invokes the right by requesting his or her attorney” or, in a juvenile offender or juvenile delinquency case, the parent has “unequivocally” “invoke[d] the right to counsel on the child’s behalf.” *People v. Mitchell*, 2 N.Y.3d 272, 778 N.Y.S.2d 427 (2004). In such cases, “[o]nce the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant’s lawyer of the situation and affording the lawyer a reasonable opportunity to appear.” *Id.* See also *People v. Hawkins*, 55 N.Y.2d at 487, 450 N.Y.S.2d at 166 (if the accused already has an attorney and the police fail to notify that attorney of the lineup or fail to delay the lineup until the attorney arrives, the prosecution must justify that failure by showing that “suspend[ing] the lineup in anticipation of the arrival of counsel ... would [have] cause[d] unreasonable delay[,] ... would [have] result[ed] in significant inconvenience to the witnesses or would [have] undermine[d] the substantial advantages of a prompt identification confrontation”).

(3) *Mapp* motions:

- (a) The respondent bears the burden of establishing that s/he has “standing” to challenge the search or seizure, in that s/he had the requisite privacy interest in the area searched or the item seized. *People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 108, 643 N.Y.S.2d 502, 506 (1996).
- (b) The Presentment Agency has the “burden of coming forward with sufficient evidence.” *People v. Berrios*, 28 N.Y.2d 361, 369, 321 N.Y.S.2d 884, 890 (1971).

- (c) If the search or seizure at issue was warrantless, the Presentment Agency bears the burden of proving that the police conduct is justified by one of the exceptions to the warrant requirement. *See, e.g., People v. Pettinato*, 69 N.Y.2d 653, 654, 511 N.Y.S.2d 828, 828 (1986) (“Because a warrantless intrusion by a government official is presumptively unreasonable, it is the People’s burden in the first instance to establish justification.”). The Presentment Agency’s burden to justify a warrantless search is particularly high in the following circumstances:
 - (i) A warrantless search of an individual’s home: Because “our Constitutions accord special protection to a person’s expectation of privacy in his own home,” the Presentment Agency has “the burden of proving the existence of ... exceptional circumstances” that are “sufficient[.]” to justify encroachment upon the “special protections” shielding the home (*id.*) and “[a]ll the more is this so when there is ample opportunity to obtain a warrant.” *People v. Knapp*, 52 N.Y.2d 689, 694, 439 N.Y.S.2d 871, 874 (1981).
 - (ii) Allegedly consensual search: “It has been consistently held that when the People rely on consent to justify an otherwise unlawful police intrusion, they bear the ‘heavy burden’ of establishing that such consent was freely and voluntarily given.” *People v. Zimmerman*, 101 A.D.2d 294, 295, 475 N.Y.S.2d 127, 128 (2d Dept. 1984). *See, e.g., In re Daijah D.*, 86 A.D.3d 521, 521, 927 N.Y.S.2d 342, 343 (1st Dept. 2011); *People v. Gonzalez*, 39 N.Y.2d 122, 128, 383 N.Y.S.2d 215, 219 (1976); *People v. Kuhn*, 33 N.Y.2d 203, 208, 351 N.Y.S.2d 649, 652 (1973).
 - (d) If the search or seizure was conducted pursuant to a warrant, the prosecution bears the initial burden of showing that the warrant was valid. *People v. Berrios*, 28 N.Y.2d 361, 368, 321 N.Y.S.2d 884, 889 (1971).
- E. Substantive rules of suppression law that take into account the youth of the accused:
- (1) Involuntariness under the Due Process Clause:
 - (a) During the years prior to the announcement of *Miranda v. Arizona*, when the central basis for suppressing confessions was the due

process doctrine of involuntariness, the U.S. Supreme Court customarily applied a stricter standard in gauging the voluntariness of confessions by youths. *See, e.g., Haley v. Ohio*, 332 U.S. 596 (1948) (“What transpired here would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child -- and easy victim of the law -- is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.”); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (“a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police He cannot be compared with an adult in full possession of his senses and knowledge of the consequences of his admissions.”).

- (b) Later, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court made clear that some form of “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause” (*id.* at 167) and that the young age of an accused and the accused’s consequent vulnerability are not sufficient to render a confession involuntary under the Due Process Clause of the U.S. Constitution. But the Court nonetheless recognized in *Connelly* that “mental condition” and other relevant physical characteristics of the accused are “surely relevant to an individual’s susceptibility to police coercion.” *Id.* at 165. Accordingly, it still may be said that a suspect’s youth is relevant to the Due Process analysis in that “youth ... [can impair] [the suspect’s] ... powers of resistance to overbearing police tactics.” *Reck v. Pate*, 367 U.S. 433, 442 (1961).
- (c) The Supreme Court reaffirmed this point in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), stating that “we do consider a suspect’s age and experience” when gauging, for purposes of assessing the “voluntariness of a statement,” whether “‘the defendant’s will was overborne,’ ... a question that logically can depend on the ‘the characteristics of the accused.’” *Id.* at 667-68. The Court explained that the “characteristics of the accused” relevant to this assessment “can include the suspect’s age, education, and intelligence, ... as well as a suspect’s prior experience with law enforcement.” *Id.* at 668.

(2) *Miranda*:

- (a) Assessing whether the suspect was in “custody” for purposes of *Miranda*: The test of whether a suspect was in “custody” for *Miranda* purposes (and thus whether there was “custodial interrogation” necessitating *Miranda* warnings) – which turns upon whether “a reasonable person have felt he or she was at liberty to terminate the interrogation and leave” – must be framed in terms of “the age of the child” in juvenile cases as long as “the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.” *J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 270, 272-73, 277 (2011). *See, e.g., In the Matter of Delroy S.*, 25 N.Y.3d 1064, 1066, 12 N.Y.S.3d 19, 21 (2015) (11-year-old juvenile respondent was in “custody” for purposes of *Miranda* when police officers went into his family’s apartment, at the invitation of his older sister, and asked him “what happened?”; ““a reasonable 11 year old would not have felt free to leave””).
- (b) Assessing whether “interrogation” took place: The term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). In any case in which the accused is a youth, the age of the suspect is relevant in determining whether the police should have known that a certain statement or action was likely to evoke an incriminating response. *See id.* at 302 n.8 (“unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known”); *In the Matter of Ronald C.*, 107 A.D.2d 1053, 486 N.Y.S.2d 575 (4th Dept. 1985) (because the respondent was only thirteen years old and was unaccompanied by a parent or counsel, the police should have known that placing the alleged burglar's tools in front of him was likely to elicit an incriminating response); *In the Matter of Nickisha B.*, 21 Misc.3d 1101(A), 2008 WL 4291155, 2008 N.Y. Slip Op. 51903(U) (N.Y. Fam. Ct., Queens Co. 2008) (Hunt, J.) (police officer “should have known” that an incriminating response was “likely” when he entered the juvenile interrogation room, “stood ten to twelve feet away from the handcuffed juveniles,” stated that another youth had inculcated them and had said that they knew where the stolen cell

phone was, and “then stood in place and . . . ‘just looked at them’ . . . for about a minute,” causing the respondent to “incriminate[] herself by stating that she knew where the cell phone was”).

- (c) Waiver of *Miranda* rights: The New York courts have indicated in some decisions that the young age of the accused may require a different standard for gauging whether a waiver of *Miranda* rights was “knowing and intelligent.” See, e.g., *In the Matter of Chad L.*, 131 A.D.2d 760, 760, 517 N.Y.S.2d 58, 60 (2d Dept. 1987) (police officers may be constitutionally required in particular circumstances to make “an extra effort to assure that the rights are explained in language comprehensible to the minor suspect”); *In the Matter of Julian B.*, 125 A.D.2d 666, 670, 671-72 n.3, 510 N.Y.S.2d 613, 617 & n.3 (2d Dept. 1986) (Kooper, J., concurring) (discussing the need for simplified language in particular circumstances in juvenile cases and quoting a “juvenile version” of *Miranda* warnings suggested by the Iowa Supreme Court).
- (3) Suppression for violation of the right to counsel in *Huntley* or *Wade* cases: In *People v. Mitchell*, 2 N.Y.3d 272, 778 N.Y.S.2d 427 (2004), the Court of Appeals declared that juvenile offender cases and juvenile delinquency cases are subject to a more protective standard than adult cases in determining whether suppression of a confession or identification must be granted due to violation of the accused’s right to counsel. Distinguishing its previous ruling in *People v. Grice*, 100 N.Y.2d 318, 763 N.Y.S.2d 227 (2003), which had held that “a third party [who, in *Grice*, was the defendant’s father] cannot invoke counsel on behalf of an adult defendant,” the Court of Appeals held in *Mitchell* that “the parent of a juvenile offender can invoke the right to counsel on the child’s behalf.” The Court of Appeals explained that a different rule applies to juveniles because “[c]hildren of tender years lack an adult’s knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests” and “[t]hey may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel.” Given the applicability of this reasoning to gauging juveniles’ waivers in the *Miranda* and *Mapp* contexts, the *Mitchell* decision may lead to application of stricter constitutional standards in these other contexts as well.
- (4) Statutory restrictions upon interrogation of juveniles: F.C.A. § 305.2 imposes the following special requirements for police interrogation of juveniles:

- (a) Prompt notification of parent or guardian that the child has been arrested: The police must “immediately notify the parent or other person legally responsible for the child’s care, or if such legally responsible person is unavailable the person with whom the child resides, that the child has been taken into custody.” F.C.A. § 305.2(3).
- (b) Use of juvenile interrogation room: The interrogation must take place in “a facility designated by the chief administrator of the courts as a suitable place for the questioning of children.” F.C.A. § 305.2(4)(b).
- (c) Administration of *Miranda* warnings to the parent or guardian: “[I]f present” during the interrogation, the child’s parent or guardian must be advised of the child’s *Miranda* rights. F.C.A. § 305.2(7).

The statute also sets forth the requisite content of the *Miranda* warnings to be administered to the child and parent or guardian (F.C.A. § 305.2(7)) and some of the factors that the courts should consider in assessing whether to suppress a statement (which include, *inter alia*, “the presence or absence of [the child’s] parents or other persons legally responsible for his [or her] care” (F.C.A. § 305.2(8)).

- (5) State common law rule that “when a parent is present at the location in which a child under the age of 16 is being held in custody, the parent must not be denied ‘an opportunity to attend [the] custodial interrogation.’” *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 422, 912 N.Y.S.2d 537, 540 (2010). “In practical terms, this means that the parent of the child has the right to attend the child’s interrogation by a police officer, and should not be discouraged, directly or indirectly, from doing so. The better practice for the interviewing officer or detective is to inform the parent that the parent may attend the interview if he or she wishes. Of course, a parent may choose not to be present when a child is being interviewed, but the police should always ensure that the parent is aware of the right of access to his or her child during questioning. If a parent is asked to leave, the parent should be made aware that he or she is not required to leave.” *Id.* This common law rule “[r]ecogniz[es] that special care must be taken to protect the rights of minors in the criminal justice system” and that accordingly “New York courts [must] carefully scrutinize confessions by youthful suspects who are separated from their parents while being interviewed.” *Id.* at 421, 912 N.Y.S.2d at 540.

- (6) The “consent” exception to the warrant requirement in *Mapp* cases: The consent exception to the warrant requirement will justify a warrantless search or seizure only if the consent was voluntary and was not “coerced, by explicit or implicit means, by implied threat or covert force ... no matter how subtly ... applied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *see also People v. Gonzalez*, 39 N.Y.2d 122, 128, 383 N.Y.S.2d 215, 219 (1976). In determining the voluntariness of an individual’s consent to a police search, the courts must consider the “totality of all surrounding circumstances,” and “account must be taken of ... the possibly vulnerable subjective state of the person who consents.” *Schneckloth v. Bustamonte*, 412 U.S. at 226, 229; *cf. United States v. Watson*, 423 U.S. 411, 424-25 (1976). Accordingly, in finding in *People v. Gonzalez*, *supra*, that the defendants’ purported consent was not voluntary, the Court of Appeals relied in part on “the youth of the Gonzaleses,” *id.* at 130, 383 N.Y.S.2d at 221, who “were both under 20 years of age.” *Id.* at 129, 383 N.Y.S.2d at 220. *Accord In re Daijah D.*, 86 A.D.3d 521, 927 N.Y.S.2d 342 (1st Dept. 2011) (Presentment Agency “failed to sustain their heavy burden of establishing” that 14-year-old youth’s “consent to a search of her purse was voluntary,” given that, *inter alia*, “[a]ppellant is 14 years old, and no evidence was presented at the suppression hearing to demonstrate that she had prior experience with he law” and no evidence was presented that “appellant was told that she did not have to consent”); *People v. Evans*, 147 Misc.2d 811, 812, 556 N.Y.S.2d 794, 795 (Sup. Ct., N.Y. Co. 1990) (prosecution failed to “meet their heavy burden of demonstrating that [19-year-old] defendant consented to the search”; court emphasizes, *inter alia*, that “the nineteen-year-old defendant had no previous experience with the criminal law”); *In the Matter of Mark A.*, 145 Misc.2d 955, 960-61, 549 N.Y.S.2d 325, 329 (Fam. Ct., N.Y. Co. 1989) (finding that respondent’s consent to search was not voluntary because, *inter alia*, “respondent is a 15 year old youth”).

XVII. Fact-Finding Hearing

A. Timing:

- (1) General nature of FCA’s speedy trial provision: “Unlike CPL 30.30, Family Court Act § 340.1 is a true ‘speedy trial’ provision in that both its language and its underlying purpose are directed towards bringing the accused juvenile to trial within a specified [time] ... period.” *In the Matter of Frank C.*, 70 N.Y.2d 408, 413, 522 N.Y.S.2d 89, 92 (1987).
- (2) Remand cases: Cases in which the top count is less than a C felony must commence within 3 days after the Initial Appearance; cases in which the

top count is an A, B or C felony must commence within 14 days after the Initial Appearance. FCA § 340.1(1). On a showing of “good cause,” the fact-finding hearing may be adjourned upon motion of the presentment agency or by the court *sua sponte* for up to 3 days (FCA § 340.1(4)(a)) or on motion of the respondent for up to 30 days (FCA § 340.1(4)(b)).

- (3) Parole cases: FCA § 340.1(2) establishes a presumptive deadline of 60 days after the Initial Appearance. Prior to reaching that date, the Presentment Agency’s inability to commence the trial is not a basis for dismissal under the speedy trial statute (*see In the Matter of Nakia L.*, 81 N.Y.2d 898, 900-01, 597 N.Y.S.2d 638, 639 (1993)) but the trial court has an inherent power to deny a prosecutorial request for adjournment if good cause is not shown and the court can dismiss the Petition if the Presentment Agency is unable to present a sufficient *prima facie* case (*see In the Matter of Hynes v. George*, 76 N.Y.2d 500, 506, 561 N.Y.S.2d 538, 541 (1990) (upholding trial court’s power to deny People’s request for adjournment and proceed to trial even though prosecution’s “time to prepare their case under CPL 30.30 had not yet lapsed”: “a trial court is not ‘obligated to grant every adjournment requested by a prosecutor simply because statutory or constitutional time limitations have not expired’”). Once the 60-day deadline has been reached, an adjournment requires “good cause” and the case can be adjourned for up to 30 days. *See* FCA § 340.1(4)(a)-(b). Successive motions for an adjournment require a showing of “special circumstances.” FCA § 340.1(6).

B. Presence in the courtroom: Accused’s and parent/guardian’s right to presence; rule on witnesses

- (1) Respondent’s right to be present: The accused “has a constitutional as well as a statutory right to be present at all material stages of a trial and at all ancillary proceedings when he or she may have something valuable to contribute or when his or her presence would have a substantial effect on defendant’s ability to defend against the charges.” *People v. Casiano*, 294 A.D.2d 277, 277, 743 N.Y.S.2d 405, 406 (1st Dept. 2002), *lv. app. denied*, 98 N.Y.2d 767, 752 N.Y.S.2d 7 (2002). *See also* FCA § 341.2(1). But the accused is entitled to waive this right. *See People v. Williams*, 92 N.Y.2d 993, 684 N.Y.S.2d 163 (1998) (trial court committed reversible error by refusing to permit defendant to waive his right to be present during the *voir dire* of prospective jurors; trial court abused its discretion by intruding into the defense’s “trial strategy”).
- (2) Parent/guardian’s right to be present: FCA § 341.2(3) expressly provides that “[t]he respondent’s parent or other person responsible for his care

shall be present at any hearing under this article.” See *In the Matter of John D.*, 104 A.D.2d 885, 480 N.Y.S.2d 390 (2d Dept. 1984). Arguably, this statutory guarantee exempts the parent/guardian from the “rule on witnesses,” just as does the respondent’s right to be present at all proceedings.

- (3) “Rule on witnesses”: “A motion for the exclusion of witnesses is addressed to the discretion of the Trial Judge ... [but] [i]f the request is made in good faith, ... there is ordinarily no reason why it should be denied.” PRINCE, RICHARDSON ON EVIDENCE § 6-203, at 353 (11th ed., Farrell 1995). But see *People v. Brown*, 274 A.D.2d 609, 710 N.Y.S.2d 194 (3d Dept. 2000) (although defense alibi witness violated “rule on witnesses” by being present in courtroom throughout much of the prosecution’s case despite parties’ specific invocation of rule at commencement of the trial, judge’s preclusion of witness’s testimony violated accused’s 6th Amendment right to present a defense and therefore judge should have employed a lesser sanction such as an adverse witness charge).

- C. Limitations on the role of a judge in a bench trial: Although judges can, in appropriate circumstances, “take a more active role in the presentation of evidence in order to clarify a confusing issue or to avoid misleading the trier of fact,” the Court of Appeals has stated that this prerogative should be exercised “sparingly” and should be used “[t]ypically ... in the context of jury trials.” *People v. Arnold*, 98 N.Y.2d 63, 67-68, 745 N.Y.S.2d 782, 785-86 (2002). See also *In the Matter of Jacquelin M.*, 83 A.D.3d 844, 922 N.Y.S.2d 111 (2d Dept. 2011) (reversing finding in delinquency case because judge’s “excessive intervention [in the factfinding hearing] deprived the [respondent] of her right to a fair fact-finding hearing”); *In re Yadiel Roque C.*, 17 A.D.3d 1168, 793 N.Y.S.2d 857 (4th Dept. 2005) (reversing a delinquency finding on the ground that the Family Court unduly intervened in the “examination of certain witnesses”; reversal is ordered even though the claim was not preserved for appeal; Appellate Division emphasizes that the principle that the judge’s “function is to protect the record, not to make it” ... applies in bench trials ... including juvenile delinquency proceedings”); *People v. Zamorano*, 301 A.D.2d 544, 754 N.Y.S.2d 645 (2d Dept. 2003) (trial judge in bench trial abused discretion in various ways, including taking “on the function and appearance of an advocate when, after the People’s cross examination, [the judge] asked the defendant numerous questions about the attack and tried to point out the inconsistencies and unbelievability of his theory of defense”); *People v. Reid*, 296 A.D.2d 335, 744 N.Y.S.2d 405 (1st Dept. 2002), *lv. app. denied*, 98 N.Y.2d 731, 749 N.Y.S.2d 482 (2002) (although defendant’s challenge to trial judge’s questioning of prosecution’s witnesses was unpreserved, Appellate Division comments that “the better course would have been for the

court to restrain itself from trying to clarify ambiguities in the People’s documentation regarding the distinction in time between the defendant’s apprehension and arrest”).

- D. Production of *Rosario* material: *See supra* Part XI(C)(1).
- E. Right to present opening statement and summation: The parties are entitled to present opening statements as well as summations. *See* FCA § 342.1(1) (“The court shall permit the parties to deliver opening addresses.”); FCA §§ 342.5, 342.6 (parties’ “right to deliver a summation”).
- F. Rules governing the burdens of proof and persuasion; special requirements of corroboration
 - (1) Prosecution’s burden of proof:
 - (a) Standard for consideration of *prima facie* motion at the conclusion of Presentment Agency’s direct case: “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See also* CPL § 290.10(1) (defining standard at *prima facie* stage as whether evidence in people’s case is “legally sufficient”); CPL § 70.10(1) (defining “[l]egally sufficient evidence” as “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent.”).
 - (b) Prosecution’s ultimate burden: “proof beyond a reasonable doubt.” FCA § 342.2(2); *In re Winship*, 397 U.S. 358, 365-68 (1970).
 - (c) Circumstantial evidence cases: In cases in which the Presentment Agency’s case rests on circumstantial evidence, dismissal of the charges is required if “the record of circumstantial evidence does not exclude to a ‘moral certainty’ the hypothesis of a defendant’s innocence.” *People v. LaBelle*, 18 N.Y.2d 405, 411, 276 N.Y.S.2d 105, 111 (1966). This standard applies even at the *prima facie* stage. *See id.* at 411, 276 N.Y.S.2d at 111 (in absence of satisfaction of foregoing standard, “a *prima facie* case has not been made out”).
 - (2) Burdens governing defenses:

- (a) Ordinary defenses (such as, *e.g.*, justification; infancy; agency; temporary and innocent possession): When such a defense “is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.” P.L. § 25.00(1).
 - (b) “Affirmative defenses” (such as, *e.g.*, mental disease or defect; duress; entrapment; renunciation): the accused “has the burden of establishing such defense by a preponderance of the evidence.” P.L. § 25.00(2).
- (3) Special rules of corroboration:
- (a) *Corpus delicti* principle: “A child may not be found to be delinquent ... solely upon evidence of a confession or admission made by him without additional proof that the crime charged has been committed.” FCA § 344.2(3).
 - (b) Accomplice testimony: “A respondent may not be found to be delinquent upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the respondent with the commission of the crime or crimes charged in the petition.” FCA § 343.2(1).
 - (c) A delinquency finding cannot be predicated “solely upon the unsworn evidence” of a child less than 9 years old or of an older witness suffering from a “mental disease or defect” who has been deemed incapable of testifying under oath because s/he does not “understand the nature of an oath” but who has “nevertheless be[en] permitted to give unsworn evidence [because] the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.” FCA § 343.1(2)-(3) (as amended, effective Nov. 1, 2003).

G. Resurfacing of suppression-related issues at the Fact-Finding stage

- (1) Motion for re-opening the suppression hearing based upon newly discovered evidence
 - (a) Motions made prior to trial: Respondent must show that the new “pertinent facts ... could not have been discovered by the respondent with reasonable diligence before determination of the motion.” F.C.A. § 330.2(4).

- (b) Motions made after trial has commenced: Request to re-open must be based upon “facts [which] were discovered during the fact-finding hearing.” *Id.*
- (2) Counsel can move for leave under CPLR § 2221(e) to renew or re-argue a suppression motion, “based upon new facts not offered on the prior motion that would change the prior determination” or based upon “a change in the law that would change the prior determination.” *See In the Matter of Christopher M.*, N.Y.L.J., 1/22/02, at 24, col. 2 (Fam. Ct., Kings Co.) (Hepner, J.) (C.P.L.R. § 2221 remedies for renewal or reargument of motion are available in delinquency proceedings because “[j]uvenile delinquency proceedings ‘under Article 3 of the Family Court are essentially civil in nature although they have been described as ‘quasi-criminal’”).
- (3) Prosecutor’s use of suppressed statement to impeach respondent at trial: If a statement was suppressed on *Miranda* grounds, the statement nonetheless is available to the Presentment Agency to use in impeaching the Respondent at trial. *See Harris v. New York*, 401 U.S. 222 (1971); *People v. Washington*, 51 N.Y.2d 214, 433 N.Y.S.2d 745 (1980). But suppressed statements are not available for use in impeachment if the basis for suppression was a violation of the due process doctrine of involuntariness (*see Mincey v. Arizona*, 437 U.S. 385, 398, 402 (1978); *People v. Washington*, 51 N.Y.2d at 320, 433 N.Y.S.2d at 747), or the Fifth Amendment’s protections against compelled testimony (*see New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979)).
- (4) Respondent’s right to present testimony at trial concerning police procedures notwithstanding prior denial of a suppression motion: *See Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (even after denial of a pretrial motion to suppress statements, the accused’s constitutional right to “‘a meaningful opportunity to present a complete defense’” requires that the accused be allowed to present evidence at trial to show that his or her confession should be disbelieved because it was coerced by the police); *People v. Pagan*, 211 A.D.2d 532, 534, 622 N.Y.S.2d 9, 11 (1st Dept. 1995), *app. denied*, 85 N.Y.2d 978, 629 N.Y.S.2d 738 (1995) (“In addition to his pre-trial *Huntley* rights, a defendant has the ‘traditional prerogative’ to contest an incriminating statement’s ‘reliability during the course of the trial’”); *People v. Ruffino*, 110 A.D.2d 198, 203, 494 N.Y.S.2d 8, 12 (2d Dept. 1985) (even when the judge “has already denied a [*Wade*] motion to suppress and determined that the pretrial [identification] procedure was not constitutionally defective,” the accused is nonetheless entitled at trial “to attempt to establish that the pretrial procedure was itself so suggestive

as to create a reasonable doubt regarding the accuracy of that identification and of any subsequent in-court identification”). When re-litigating such issues at trial, counsel often will find it useful to argue that previous rulings at the suppression hearing must now be wholly reassessed, because the trial context (i) requires a focus on different legal issues and different dimensions of the facts; (ii) opens the door to consideration of facts other than those that were considered at the suppression hearing; (iii) forecloses reliance on hearsay on which the prosecution relied at the suppression hearing; and (iv) requires that the facts be judged under the higher prosecutorial standard of proof beyond a reasonable doubt.

XVIII. Disposition

- A. Issues to be determined at dispositional hearing
- (1) Whether “the respondent requires supervision, treatment or confinement” (FCA § 352.1(1)). If the respondent does not require “supervision, treatment or confinement,” then “the petition shall be dismissed.” FCA § 352.1(2).
 - (2) If the respondent does require “supervision, treatment or confinement,” then:
 - (a) Non-DF cases: What is “the least restrictive available alternative ... which is consistent with the needs and best interests of the respondent and the need for protection of the community”? FCA § 352.2(2)(a).
 - (b) DF cases: What is the “appropriate disposition” (FCA § 353.3(2)(a)) consistent with, *inter alia*, the “needs and best interests of the respondent” and “the need for protection of the community” (FCA § 353.5(2)) and does the respondent “require a restrictive placement”? FCA § 353.5(1). A restrictive placement is mandatory only if “the respondent inflicted serious physical injury [as defined in P.L. § 10.000] ... upon another person who is 62 years of age or more”; in all other cases, the court has discretion as to whether to order a restrictive placement and should do so only “as a last resort” after “consideration of less onerous dispositions” and “explor[ation of] the other suitable options at its disposal” (*In the Matter of Cecil L.*, 71 A.D.2d 917, 917-18, 419 N.Y.S.2d 740, 741 (2d Dept. 1979), *lv. app. dismissed*, 48 N.Y.2d 755 (1979)).
 - (3) ASFA requirements (FCA § 352.2(2)(b)): “In an order of disposition

entered pursuant to section 353.3 or 353.4 ..., or where the court has determined pursuant to section 353.5 ... that restrictive placement is not required, ... the court in its order shall determine”:

- (a) “that continuation in the respondent’s home would be contrary to the best interests of the respondent; or in the case of a respondent for whom the court has determined that continuation in his or her home would not be contrary to the best interests of the respondent, that continuation in the respondent’s home would be contrary to the need for protection of the community;”
- (b) “that where appropriate, and where consistent with the need for protection of the community, reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his or her home, or if the child was removed from his or her home prior to the dispositional hearing, where appropriate and where consistent with the need for safety of the community, whether reasonable efforts were made to make it possible for the child to safely return home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, or consistent with the need for protection of the community, or both, the court order shall include such a finding; and”
- (c) “in the case of a child who has attained the age of sixteen, the services needed, if any, to assist the child to make the transition from foster care to independent living.”

B. Timing of dispositional hearing

- (1) Remand cases: Within 10 days of fact-finding determination (within 20 days in DF cases), but hearing can be adjourned on court’s own motion or Presentment Agency’s motion for up to 10 days for “good cause” (up to 30 days on respondent’s motion) and thereafter based on “special circumstances.” *See* FCA §§ 350.1(1), 350.1(3), 353.5(1).
- (2) Parole cases: Within 50 days of fact-finding determination, but hearing can be adjourned on court’s own motion or Presentment Agency’s motion for up to 10 days for “good cause” (up to 30 days on respondent’s motion) and thereafter based on “special circumstances.” *See* FCA §§ 350.1(1), 350.1(3), 353.5(1).

- (3) Remedy for violation of speedy disposition requirements: Because the speedy hearing guarantees “governing fact finding and disposition serve different purposes and focus on functionally distinct stages of the juvenile delinquency proceeding[,] ... the dismissal remedy should not be the *per se* solution for delay in the juvenile delinquency dispositional context” and “Family Court Judges ... should fully utilize their appropriate adjournment and monitoring powers,” but “[i]n unusual circumstances where the juvenile is not solely responsible for the delay, the Family Court retains the authority to dismiss” for violations of the speedy disposition guarantees. *In the Matter of Jose R.*, 83 N.Y.2d 388, 394-95, 610 N.Y.S.2d 937, 940-41 (1994).

C. Probation investigation and Mental Health Services’ diagnostic assessment

- (1) Timing of reports: The Probation Department’s Investigation & Report (I&R) and the Mental Health Services’ diagnostic assessment (MHS) must be “made available by the court for inspection and copying by the presentment agency and the respondent at least five days prior to the commencement of the dispositional hearing.” FCA § 351.1(5)(a).
- (2) The I&R cannot include information regarding prior delinquency “cases terminated in the juvenile’s favor.” *In the Matter of Alonzo M. v. New York City Dep’t of Probation*, 72 N.Y.2d 662, 665, 536 N.Y.S.2d 26, 28 (1988). However, “the background facts to such matters, if relevant and material, may be disclosed in an I & R ... if derived from sources other than sealed records and materials.” *Id.*

D. Dispositional options (in order of increasing degree of severity):

- (1) Dismissal, if respondent “does not require supervision, treatment or confinement” (FCA § 352.1(2));
- (2) ACD (adjournment in contemplation of dismissal) for up to 6 months (FCA § 315.3), with conditions set by the court (which can include, *e.g.*, restitution, FCA § 353.6);
- (3) Conditional Discharge for up to one year (FCA § 353.1), with conditions set by the court;
- (4) Probation, with conditions set by the court, for up to 2 years, which can be extended for an additional year upon a showing of “exceptional circumstances” (FCA § 353.2);

- (5) Placement:
- (a) Duration:
- (i) Misdemeanors: Up to 12 months, but this period can be extended in yearly increments up to age 18 for “acts committed before the respondent’s sixteenth birthday” or up to age 21 for acts committed after that time (FCA §§ 353.3(5), 355.3(6));
- (ii) Non-DF felonies: Up to 18 months (FCA § 353.3(5)), which can include a minimum residential placement of up to 6 months (FCA § 353.5(9)). The 18-month period of placement can be extended in yearly increments up to age 18 for “acts committed before the respondent’s sixteenth birthday” or up to age 21 for acts committed after that time. FCA § 355.3(6).
- (iii) Designated felonies other than a Class A designated felony act: Up to 3 years (secure facility for 6-12 months; residential facility for 6-12 months; intensive aftercare), which can be extended up to age 21 (FCA § 353.5(5)).
- (iv) Class A designated felony acts: Up to 5 years (12-18 months in secure facility; 12-18 months in residential facility; intensive aftercare thereafter), which can be extended up to age 21 or, in cases in which the act was committed when the respondent was sixteen years of age or older,” age 23 (FCA § 353.5(4)).
- (b) Credit for time spent in detention must be awarded unless the court concludes that awarding all or part of such credit would not serve the needs and best interests of the respondent or the protection of the community. *See* FCA § 353.3(5) (non-DF felonies and misdemeanors); FCA § 353.5(5)(a)(i) (class A designated felony acts); FCA § 353.5(4)(a)(i) (other designated felonies).
- (c) Types of placements:
- (i) Commissioner of Social Services (FCA § 353.3(2));
- (ii) Private residential placements (FCA 353.3(4));

- (iii) Transfer to Office of Mental Health or Office of Mental Retardation (FCA § 353.4);
- (iv) Office of Children & Family Services (OCFS): “non-secure”; “limited secure”; “secure” (FCA § 353.3(3)(a)-(c)).

E. Procedures at the dispositional hearing:

(1) Order of procedure

- (a) The court has the discretion to call witnesses, including the preparers of the I&R and MHS, who are subject to cross-examination by the Presentment Agency and the respondent. FCA § 350.4(2). “[W]ith the consent of the parties,” the court can “direct the probation service to summarize” the I&R. FCA § 350.4(1).
- (b) The Presentment Agency can call witnesses. FCA § 350.4(3).
- (c) The respondent can call witnesses. FCA § 350.4(4).
- (d) The court can permit rebuttal evidence by the Presentment Agency and surrebuttal evidence by the respondent. FCA § 350.4(5).
- (e) At the conclusion of the presentation of evidence, summations can be presented by the Presentment Agency and then the respondent, and the parties are entitled to present rebuttal statements. FCA §§ 350.4(6)-(8).

(2) Rules of evidence: “Only evidence that is material and relevant may be admitted during a dispositional hearing.” FCA § 350.3(1).

(3) Quantum of proof: The court’s adjudication must be based on a preponderance of the evidence. FCA § 350.3(2).

F. Responsibilities of the attorney for the child:

- (1) Preparing for the dispositional hearing: As recognized in NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009), Section E, the “actions to be taken before the dispositional hearing” include, *inter alia*:

- (a) *“Prepare a Dispositional Recommendation and Plan.* Prior to any Probation investigation or mental health evaluation, the attorney should, together with the child, begin developing a dispositional recommendation and plan. In doing so, the attorney should review relevant records, including mental health, drug/alcohol treatment, medical, school, and social service agency and other service provider records, and interview potential witnesses.” *Id.*, Standard E-1.
 - (b) *“Prepare the Child for Probation and Mental Health Interviews.* The attorney should prepare the child and family members for interviews with Probation officers or mental health professionals during the dispositional process.” *Id.*, Standard E-2.
 - (c) *“Contacts With Probation and Mental Health Examiner.* The attorney should engage in contacts with Probation, and with any mental health examiner, that are designed to influence the dispositional recommendations.” *Id.*, Standard E-3.
 - (d) *“Prepare to Challenge Dispositional Reports and Recommendations.* The attorney should review the Probation investigation report and any mental health evaluation ordered by the court, as well as notes and other documents prepared or utilized by Probation or the mental health examiner.” *Id.*, Standard E-4.
 - (e) *“Protect the Child’s Right to a Speedy Dispositional Hearing.* The attorney should monitor and, when appropriate, attempt to enforce, compliance with statutory speedy disposition requirements.” *Id.*, Standard E-5.
- (2) Advocacy at the dispositional hearing: As recognized in NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS (2009), Section F, the “actions to be taken at the dispositional hearing” include, *inter alia*:
- (a) *“Cross-Examine and Present Witnesses at the Dispositional Hearing.* At the dispositional hearing, the attorney should, as appropriate, call and cross-examine witnesses.” *Id.*, Standard F-1.
 - (b) *“Advocate for the Least Restrictive Alternative.* At the dispositional hearing, the attorney should argue in support of a dispositional order that constitutes the least restrictive alternative.”

Id., Standard F-2.

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

(3) At the conclusion of the hearing, counsel should explain to the client the nature of the disposition ordered by the court and its implications for the client’s record and future: “The attorney should discuss the [dispositional] order and its consequences with the child” *Id.*, Standard G-1.

XIX. Responsibilities of the Attorney for the Child After Disposition

- A. Preserving Appellate Remedies: “The attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If, after such consultation, the child wishes to appeal the order and the appeal would not be frivolous, the attorney should take all steps necessary to perfect the appeal and seek interim relief necessary to protect the interests of the child during the pendency of the appeal. If the attorney determines that he/she cannot or is unwilling to handle the appeal, the attorney should notify the court and seek to be discharged and replaced as soon as possible.” NYS BAR ASS’N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard G-2 (2009).
- B. Arranging for Sealing, Destruction, and/or Expungement of Records: “The child’s attorney should seek to ensure compliance with statutory provisions requiring sealing or destruction of records, and consider moving for post-adjudication sealing or expungement.” *Id.*, Standard G-3.
- C. Other Post-Dispositional Advocacy:
- (1) “*Motion for New Dispositional Hearing or Termination of Placement.* When appropriate, the attorney should make a motion for a new dispositional hearing, or for a change in or termination of placement, based on a substantial change of circumstances or the court’s inherent power to vacate its order.” *Id.*, Standard G-5.
- (2) “*Protect Child’s Right to Permanency Planning Prior to Release From Placement.* The child’s attorney should ensure that the placement agency prepares, prior to the child’s release from placement, the report required by

FCA § 353.3(7).” *Id.*, Standard G-6.

- (3) “*Advocate for the Child at Violation Proceedings.* When a petition is filed alleging that the child violated a dispositional order, the attorney should determine whether the filing and the petition satisfy statutory requirements, attempt to negotiate a resolution, and, if there is a hearing, zealously advocate the child’s position.” *Id.*, Standard G-7.
- (4) “*Advocate for the Child at Extension/Permanency Proceedings.* When a petition is filed requesting an extension of placement, the attorney should determine whether the filing and the petition satisfy statutory requirements, attempt to negotiate a resolution, and, if there is a hearing, zealously advocate the child’s position. The attorney also should zealously advocate the child’s position at a permanency hearing.” *Id.*, Standard G-8.